



**UNIVERSITAS INDONESIA**

**TANGGUNG JAWAB *NORTH ATLANTIC TREATY*  
*ORGANIZATION* DAN NEGARA ANGGOTA DALAM  
PELAKSANAAN *OPERATION UNIFIED PROTECTOR* DI  
LIBYA PADA TAHUN 2011**

**SKRIPSI**

**Diajukan sebagai salah satu syarat untuk memperoleh gelar Sarjana Hukum**

**I Gusti Agung Putra Trisnajaya  
0806317054**

**FAKULTAS HUKUM  
PROGRAM STUDI ILMU HUKUM  
KEKHUSUSAN HUKUM TENTANG HUBUNGAN TRANSNASIONAL  
DEPOK  
JULI 2012**

## HALAMAN PERNYATAAN ORISINALITAS

**Skripsi ini adalah hasil karya sendiri,  
dan semua sumber baik yang dikutip maupun dirujuk  
telah saya nyatakan dengan benar.**

**Nama : I Gusti Agung Putra Trisnajaya**

**NPM : 0806317054**

**Tanda Tangan :**

**Tanggal**



## HALAMAN PENGESAHAN

Skripsi ini diajukan oleh :  
Nama : I Gusti Agung Putra Trisnajaya  
NPM : 0806317054  
Program Studi : Ilmu Hukum  
Judul Skripsi : Tanggung Jawab *North Atlantic Treaty Organization* dan Negara Anggota dalam Pelaksanaan *Operation Unified Protector* di Libya pada Tahun 2011.

Telah berhasil dipertahankan di hadapan Dewan Penguji dan diterima sebagai bagian persyaratan yang diperlukan untuk memperoleh gelar Sarjana Hukum pada Program Studi Ilmu Hukum, Fakultas Hukum, Universitas Indonesia.

### DEWAN PENGUJI

Pembimbing	: Adijaya Yusuf, S.H., LL.M.	(.....)
Pembimbing	: Hadi Rahmat Purnama, S.H., LL.M.	(.....)
Penguji	: Prof. Dr. R D. Sidik Suraputra, S.H.	(.....)
Penguji	: Prof. Dr. Sri Setianingsih Suwardi, S.H., M.H.	(.....)
Penguji	: Prof. A. Zen Umar Purba, S.H., LL.M.	(.....)
Penguji	: Prof. Hikmahanto Juwana, S.H., LL.M., Ph.D.	(.....)
Penguji	: Adolf Warouw, S.H., LL.M.	(.....)
Penguji	: Emmy Juhassarie Ruru, S.H., LL.M.	(.....)
Penguji	: Melda Kamil Ariadno, S.H., LL.M, Ph.D.	(.....)

Ditetapkan di : Depok

Tanggal : 9 Juli 2012

## KATA PENGANTAR

Puji syukur penulis panjatkan kepada Ida Shang Hyang Widhi Wasa (Tuhan Yang Maha Esa) atas segala rahmat, kehidupan, ilmu pengetahuan yang telah diberikan kepada penulis sehingga penulis dapat menyelesaikan penulisan skripsi berjudul **“Tanggung Jawab North Atlantic Treaty Organization dan Negara Anggota dalam Pelaksanaan Operation Unified Protector di Libya pada Tahun 2011”**. Penulisan skripsi ini dilakukan dalam rangka memenuhi salah satu syarat untuk mendapatkan gelar Sarjana Hukum pada Fakultas Hukum Universitas Indonesia Program Kekhususan VI (Hukum Tentang Hubungan Transnasional).

Penulis ingin menghaturkan rasa terima kasih sedalam-dalamnya kepada orang-orang yang telah memberikan dorongan, bimbingan, pencerahan dan telah membantu penulis dalam penyusunan skripsi ini maupun yang telah membentuk penulis untuk menjadi seorang yang terpelajar.

1. Bapak Adijaya Yusuf, S.H., LL.M., selaku Pembimbing I dan Bapak Hadi Rahmat Purnama, S.H., LL.M., selaku Pembimbing II atas segala diskusi, saran, kritik, bimbingan dan arahan yang telah diberikan kepada penulis dalam setiap sesi bimbingan dan pengajaran yang telah diberikan.
2. Seluruh dosen Fakultas Hukum Universitas Indonesia atas pengabdianya untuk menciptakan lulusan Sarjana Hukum yang berintegritas dan berpendidikan. Kepada Bapak Kurnia Toha sebagai Pembimbing Akademis penulis selama penempuhan masa studi empat tahun. Kepada seluruh dosen Program Kekhususan VI Hukum tentang Hubungan Transnasional yang telah mendorong penulis menjadi manusia terpelajar selama masa pembelajaran dan memberikan pengalaman yang sangat berkesan selama penulis menempuh studi pada Program Kekhususan VI.
3. Gusti Ketut Oka dan Ida Ayu Nengah Kertiarningsih, kedua orangtua penulis yang telah memberikan segala daya upaya dalam mendukung setiap pilihan dan usaha penulis dalam menempuh pendidikan tinggi, menjadikan penulis sebagai bagian dari masyarakat dan menyemangati penulis dalam setiap kesusahan. Kepada I Gusti Agung Putu Trisnasari,

kakak penulis yang cuek tapi sangat pengertian kepada penulis dan Ida Bagus Wid Dwipayana, kakak ipar, yang telah membantu penulis selama ini serta kedua keponakan penulis Aurelia dan Sasha yang selalu menemani penulis di rumah di Bali.

4. Keluarga besar PK VI 2008 yang telah berjuang selama dua tahun penuh melewati penderitaan bersama, menonton film horor bersama, berbagi suka duka dan bahagia bersama, yang tak akan terlupakan bagi penulis.
5. Astrie Sekarlaranti Lestari, Desiana Christmasari Putri, S.H., Luh Putu Sri Anggrayani, S.H., teman seperjuangan matrikulasi dan teman-teman pertama penulis dalam menempuh studi di Fakultas Hukum Universitas Indonesia.
6. Nirmalasari Ajeng, Ayudhia Utami, Roma Rita “Owpy”, Getri Permatasari, S.H., Mediana Adhika “Jupe”, Maria Jayanti Ginting, Margaretha Quina, Marry Margaretha Saragi, S.H., Elizabeth Taruli Lubis, S.H., teman-teman seperjuangan penulis yang telah memberikan warna berbeda dalam setiap langkah.
7. Putra Aditya, Supriyanto Ginting, Agung Sudrajat, Maryam Az Zahra, Widia Dwita Utami teman-teman sepenanggungan dan teman-teman labil penulis dalam penulisan skripsi yang telah dapat memberikan dorongan, ejekan, serta pendapat kepada penulis dalam setiap langkah penulisan skripsi dan warna dalam hidup perkuliahan penulis.
8. Sasha Izni Subagio dan Syarifa Aya Savirra, dua senior penulis angkatan 2007 yang telah memberikan masukan dalam pembelajaran dan penulisan skripsi penulis, yang selalu memberikan pendapat yang sangat berarti bagi penulis. Terima kasih pula atas percakapan-percakapan tidak jelas yang telah diberikan, terima kasih atas bagian yang diberikan dalam masa-masa akhir studi penulis.
9. Teman-teman “Akuarium”: Priscilla Manurung, Wuri Prastiti, Aldamayo Pandjaitan, Tami Justisia, Anggara Hamami, Sari Hadiwinoto, Reza Fahriadi, Valdano Ruru, Titano BSD, Prakerti Wicaksono, Muhammad Reza Rizky. Tempat penulisan skripsi yang paling nyaman di kampus, yang tak akan terlupakan walaupun belum sempat untuk dapat berpisah.

10. Destya Lukitasari Pahnael teman keluh kesah penulis yang selalu setiap saat menerima *whatsaap* penulis dengan energi positif, dan dapat menyalurkan energi yang positif pula kepada penulis dalam setiap energi negatif yang penulis curahkan.
11. Kepada semua keluarga besar Fakultas Hukum Universitas Indonesia Angkatan 2008 sebagai angkatan yang sangat beragam, yang memberikan pengalaman yang luar biasa dalam perantauan penulis selama empat tahun. Terima kasih atas momen yang diberikan. Penulis bangga untuk dapat menjadi bagian dari FHUI 2008!
12. *Merci beaucoup a Miss Yeuk Yeu Poon et Mr Dimitry pour la grande voyage en ile de France, merci beaucoup pour le joie!*
13. Katerina Lykoudh, Agata Ziedlaczek, Raluca Drob, Tatiana Kurgan, Ihne Audrey, Won Il, Alessio Bodiglio, and *others from ArtLife Project, thank you all for the amazing summer experience.*
14. Anak-anak “KOST” (*Kingdom of Social Teenagers*) SMA Negeri 4 Denpasar: Surya, Agung, Maria, Nadia, Cynthya, Biska, Rani, Dodik, Rita, Adied, Novi, dan lainnya yang selalu setia menemani penulis dalam berliburan di Bali, dalam mencari pantai-pantai indah untuk dikunjungi.

Akhir kata, penulis menyadari bahwa penelitian dan penyusunan skripsi ini masih jauh dari kesempurnaan. Oleh karena itu, penulis dengan senang hati menerima segala kritik dan saran demi perbaikan di masa yang akan datang. Semoga skripsi ini dapat memberikan manfaat bagi pengembangan ilmu pengetahuan pada umumnya dan ilmu hukum pada khususnya.

Depok, Juli 2012

Penulis

**HALAMAN PERNYATAAAN PERSETUJUAN PUBLIKASI  
TUGAS AKHIR UNTUK KEPENTINGAN AKADEMIS**

---

---

Sebagai sivitas akademik Universitas Indonesia, saya yang bertanda tangan di bawah ini:

Nama : I Gusti Agung Putra Trisnajaya  
NPM : 0806317054  
Program Studi : Ilmu Hukum  
Fakultas : Hukum  
Jenis Karya : Skripsi

demi pengembangan ilmu pengetahuan, menyetujui untuk memberikan kepada Universitas Indonesia **Hak Bebas Royalti Noneksklusif (*Non-exclusive Royalty-Free Right*)** atas karya ilmiah saya yang berjudul :

**Tanggung Jawab *North Atlantic Treaty Organization* dan Negara Anggota dalam Pelaksanaan *Operation Unified Protector* di Libya Pada Tahun 2011**

beserta perangkat yang ada (jika diperlukan). Dengan Hak Bebas Royalti Noneksklusif ini Universitas Indonesia berhak menyimpan, mengalihmedia/formatkan, mengelola dalam bentuk pangkalan data (*database*), merawat, dan memublikasikan tugas akhir saya selama tetap mencantumkan nama saya sebagai penulis/pencipta dan sebagai pemilik Hak Cipta.

Demikian pernyataan ini saya buat dengan sebenarnya.

Dibuat di : Depok  
Pada tanggal : 9 Juli 2012  
Yang Menyatakan



(I Gusti Agung Putra Trisnajaya)

## ABSTRAK

Nama : I Gusti Agung Putra Trisnajaya  
Program Studi : Ilmu Hukum  
Judul : Tanggung Jawab *North Atlantic Treaty Organization* dan Negara Anggota dalam Pelaksanaan *Operation Unified Protector* di Libya Pada Tahun 2011

Pembahasan dalam skripsi ini didasarkan pada tiga pokok permasalahan sebagai berikut: (1) Bagaimanakah konsep tanggung jawab organisasi internasional di dalam hukum internasional?; (2) Bagaimanakah peran organisasi internasional dalam sistem keamanan kolektif (*collective security system*) Perserikatan Bangsa Bangsa?; (3) Bagaimanakah tanggung jawab negara anggota dan *North Atlantic Treaty Organization* (NATO) atas pelanggaran hukum dalam pelaksanaan *Operation Unified Protector* di Libya pada tahun 2011?.

Konsep tanggung jawab organisasi internasional merupakan konsep yang sedang berkembang dalam hukum internasional, yang diperlihatkan dengan adanya usaha dari *International Law Commission* dalam pembentukan *Drafts Articles on the Responsibility of International Organization*. Tanggung jawab organisasi internasional juga dapat dilihat memiliki kesamaan dengan tanggung jawab negara yang didasarkan kepada kemampuan suatu entitas sebagai subyek hukum yang memiliki personalitas hukum internasional.

Sistem keamanan kolektif Perserikatan Bangsa Bangsa merupakan sistem yang dibentuk oleh negara negara anggota dalam upaya penjagaan keamanan dan perdamaian dunia. Dalam sistem tersebut dibentuk adanya kewenangan bagi negara untuk melaksanakan sanksi terhadap negara lain yang merusak keamanan dan perdamaian dunia.

Dua konsep tanggung jawab organisasi internasional dan sistem keamanan kolektif merupakan konsep yang sejajar berjalan secara berdampingan, namun dapat memiliki sisi temu dalam suatu pelaksanaan sistem keamanan kolektif oleh suatu organisasi internasional. NATO dalam *Operation Unified Protector* merupakan salah satu contoh upaya pelaksanaan sistem keamanan kolektif oleh organisasi internasional yang pula memperlihatkan adanya tanggung jawab organisasi internasional. Dalam operasi tersebut terlihat adanya *international wrongful act* yang terjadi akibat adanya (1) pelanggaran kewajiban internasional dan (2) dapatnya tindakan tersebut diatribusikan kepada NATO.

Maka dapat disimpulkan bahwa tanggung jawab organisasi internasional dapat terlihat dengan adanya *international wrongful act* yang dilakukan oleh organisasi internasional dengan dipenuhi unsur-unsur: (1) pelanggaran kewajiban internasional dan (2) atribusi tindakan kepada organisasi internasional. Dalam *Operation Unified Protector*, *international wrongful act* dari NATO dapat dilihat dengan (1) dilanggarnya kewajiban hukum humaniter internasional dan hukum laut internasional dan (2) dapat diatribusikannya tindakan tersebut kepada NATO sebagai pemegang *effective command and control*.

Kata Kunci:

Organisasi Internasional, *North Atlantic Treaty Organization*, Tanggung Jawab, Sistem Keamanan Kolektif.



## ABSTRACT

Name : I Gusti Agung Putra Trisnajaya  
Study Program : Law  
Title : Responsibility of North Atlantic Treaty Organization and Its Member States on the Operation Unified Protector in Libya 2011

The point of discussion of this undergraduate thesis starts from the three basic questions, which are: (1) how is the concept of responsibility of international organization in international law? (2) how is the role of international organization in United Nations collective security system? (3) how is the responsibility of North Atlantic Treaty Organization (NATO) upon its wrongful acts on the Operation Unified Protector in Libya on 2011?

The concept of responsibility of international organization is a progressive development of international law, which is shown by the development of International Law Commission Drafts Articles on the Responsibility of International Organization. Responsibility of International Organization is similar to the responsibility of states which derives from the ability of such entities as subject of international law and possessed legal personality in international law.

United Nations collective security system is such a system made by the member states in order to preserve the world's peace and security. In the collective security system there is a right of member states to take such measures upon other member states which endanger the peace and security.

The two concept, responsibility of international and collective security system are two parallel concept in which they collide when the operation of collective security measures carried by international organization. Operation Unified Protector by NATO in Libya on 2011 is one example of collective security measures carried by such international organization and there also an issue of responsibility of international organization. Where in the operations there is international wrongful act shown by (1) the breach of international obligation and (2) attribution of the acts to NATO.

In conclusions, responsibility of international organization is related to the international wrongful act carried by the organization itself. Such international wrongful act happened in the fulfillment of (1) the breach of international obligation and (2) attribution of conducts to the international organization. In the Operation Unified Protector, international wrongful act of NATO was shown by (1) the breach of international obligations, which are: humanitarian law and obligations under the law of the sea and (2) the attribution of conduct to NATO which possessed the effective command and control of the operation.

Keywords:

International Organization, North Atlantic Treaty Organization, Responsibility, Collective Security.

## DAFTAR ISI

HALAMAN JUDUL .....	i
LEMBAR PERNYATAAN ORISINALITAS .....	ii
HALAMAN PENGESAHAN .....	iii
KATA PENGANTAR .....	iv
LEMBAR PERSETUJUAN PUBLIKASI KARYA ILMIAH .....	vii
ABSTRAK .....	viii
ABSTRACT .....	ix
DAFTAR ISI .....	x
DAFTAR TABEL .....	xii
DAFTAR LAMPIRAN .....	xiii
<b>BAB 1 PENDAHULUAN.....</b>	<b>1</b>
1.1 Latar Belakang Permasalahan.....	1
1.2 Pokok-Pokok Permasalahan .....	8
1.3 Tujuan Penelitian .....	9
1.4 Definisi Konsepsional .....	9
1.5 Metode Penelitian.....	14
1.6 Sistematika Penulisan.....	16
<b>BAB 2 TANGGUNG JAWAB ORGANISASI INTERNASIONAL DALAM HUKUM INTERNASIONAL.....</b>	<b>19</b>
2.1 Organisasi Internasional dalam Hukum Internasional .....	22
2.1.1 Personalitas Hukum Organisasi Internasional.....	23
2.1.2 Hubungan Negara dengan Organisasi Internasional .....	27
2.2 Tanggung Jawab dalam Hukum Internasional .....	29
2.2.1 Tanggung Jawab Negara.....	32
2.2.1.1 Sifat Dasar Tanggung Jawab Negara .....	34
2.2.1.2 Unsur-Unsur Tanggung Jawab Negara .....	36
2.2.2 Tanggung Jawab Organisasi Internasional .....	39
2.2.2.1 Unsur-Unsur Tanggung Jawab Organisasi Internasional.....	41
2.2.2.2 Konsep Tanggung Jawab Organisasi Internasional dalam Praktik .....	44
2.3 Hubungan Tanggung Jawab Negara Anggota dengan Tanggung Jawab Organisasi Internasional .....	46
2.3.1 <i>Direction and Control</i> .....	48
2.3.2 <i>Coercion</i> .....	50
2.3.3 <i>Accepting Responsibility</i> .....	51
2.3.4 <i>Aid or Assistance</i> .....	51
<b>BAB 3 ORGANISASI INTERNASIONAL DAN SISTEM KEAMANAN KOLEKTIF (COLLECTIVE SECURITY) .....</b>	<b>53</b>
3.1 Sistem Keamanan Kolektif Perserikatan Bangsa Bangsa.....	56
3.1.1 Mekanisme dalam Bab VI Piagam Perserikatan Bangsa Bangsa...	59
3.1.2 Mekanisme dalam Bab VII Piagam Perserikatan Bangsa Bangsa ..	62
3.2 Organisasi Pertahanan Regional dalam Sistem Keamanan Kolektif .....	69
3.2.1 Sistem Keamanan Kolektif Perserikatan Bangsa Bangsa dan Organisasi Pertahanan Regional.....	73

3.2.2	Kewenangan Organisasi Pertahanan Regional dalam Operasi Pelaksanaan Sistem Keamanan Kolektif .....	77
3.2.3	Perlindungan Terhadap Pasukan Organisasi Pertahanan Regional dalam Pelaksanaan Sistem Keamanan Kolektif .....	81
3.3	<i>North Atlantic Treaty Organization</i> dalam Pelaksanaan Sistem Keamanan Kolektif .....	83
3.3.1	Tujuan dan Fungsi <i>North Atlantic Treaty Organization</i> .....	86
3.3.2	Keanggotaan <i>North Atlantic Treaty Organization</i> .....	88
3.3.3	Struktur Organisasi <i>North Atlantic Treaty Organization</i> .....	90
3.3.4	Status <i>North Atlantic Treaty Organization</i> dalam Hukum Internasional .....	92
3.3.5	Pelaksanaan Sistem Keamanan Kolektif oleh <i>North Atlantic Treaty Organization</i> .....	96
<b>BAB 4 TANGGUNG JAWAB NORTH ATLANTIC TREATY ORGANIZATION DAN NEGARA ANGGOTA DALAM PELAKSANAAN OPERATION UNIFIED PROTECTOR DI LIBYA PADA TAHUN 2011 ...</b>		
4.1	Kerangka Hukum Pelaksanaan <i>Operation Unified Protector</i> .....	104
4.1.1	Dasar Hukum Pelaksanaan <i>Operation Unified Protector</i> .....	105
4.1.1.1	Resolusi Dewan Keamanan 1970 .....	107
4.1.1.2	Resolusi Dewan Keamanan 1973 .....	109
4.1.2	Struktur <i>Command and Control Operation Unified Protector</i> .....	113
4.1.3	Kewajiban dalam Hukum Internasional .....	116
4.1.3.1	<i>The Law of Use of Force (Ius ad Bellum)</i> .....	116
4.1.3.2	<i>International Humanitarian Law</i> .....	118
4.1.3.3	<i>International Human Rights Law</i> .....	122
4.1.3.4	Peraturan Hukum Internasional Lainnya .....	123
4.2	Tanggung Jawab <i>North Atlantic Treaty Organization</i> dan Negara Anggota dalam Pelaksanaan <i>Operation Unified Protector</i> di Libya pada Tahun 2011 .....	124
4.2.1	<i>International Wrongful Act</i> dalam Pelaksanaan <i>Operation Unified Protector</i> .....	127
4.2.1.1	Pelanggaran Kewajiban Internasional .....	129
4.2.2.2	Prinsip Atribusi .....	134
<b>BAB 5 PENUTUP</b> .....		
5.1	Kesimpulan .....	140
5.1.1	Konsep Tanggung Jawab Organisasi Internasional dalam Hukum Internasional .....	140
5.1.2	Peran Organisasi Internasional dalam Sistem Keamanan Kolektif ( <i>Collective Security</i> ) .....	141
5.1.3	Tanggung Jawab Negara Anggota dan <i>North Atlantic Treaty Organization</i> atas Pelanggaran Hukum dalam Pelaksanaan <i>Operation Unified Protector</i> di Libya pada Tahun 2011 .....	143
5.2	Saran .....	144
<b>DAFTAR PUSTAKA</b> .....		
		146

## DAFTAR TABEL

Tabel 3.1 Negara Anggota <i>North Atlantic Treaty Organization</i> .....	89
Tabel 3.2 <i>Regional, Sub-regional and Inter-regional Organization/Arrangements Cooperating with the United Nations in Peacekeeping and Peace Related Activities</i> .....	101
Tabel 4.1 <i>Command and Control Operation Unified Protector</i> .....	114
Tabel 4.2 <i>Operation Contributing Nations (as of 5 April)</i> .....	115



## DAFTAR LAMPIRAN

- Lampiran 1. *International Law Commission's Drafts Articles on Responsibility of International Organization.*
- Lampiran 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", A/HRC/17/44.*
- Lampiran 3. *Amnesty International Report, "Libya: the Forgotten Victims of NATO Strikes".*
- Lampiran 4. *Human Rights Watch Report, "Unacknowledged Deaths: Civilian Casualties in NATO's Air Campaign in Libya".*
- Lampiran 5. *Council of Europe Report, "Lives Lost in the Mediterranean Sea: Who is Responsible?".*



# BAB 1

## PENDAHULUAN

### 1.1 Latar Belakang

Pertumbuhan organisasi internasional dalam lalu lintas hukum internasional dengan peran dan fungsinya masing-masing memberikan suatu perkembangan yang penting dalam hukum internasional. Salah satunya adalah mengenai tanggung jawab organisasi internasional sebagai subyek hukum internasional atas tindakannya yang dapat berdampak tak hanya kepada negara tapi pula masyarakat internasional<sup>1</sup> secara keseluruhan. Sehingga pada tahun 2011, *International Law Commission* (selanjutnya disebut sebagai “ILC”) mengadopsi *Drafts Articles on the Responsibility of International Organization*<sup>2</sup> (untuk selanjutnya disebut sebagai “DARIO”) sebagai suatu kodifikasi atas perkembangan progresif hukum internasional dan membentuk suatu konsep baru dalam tanggung jawab internasional.

Tanggung jawab organisasi internasional merupakan suatu konsekuensi dari adanya personalitas hukum internasional sebagai suatu subyek hukum dalam lalu lintas hukum internasional. Dalam perkembangannya organisasi internasional telah menjadi suatu bagian yang utama dalam sistem hukum internasional.<sup>3</sup> Anggapan bahwa negara sebagai satu-satunya subyek hukum internasional atas dasar konsep kedaulatan<sup>4</sup> negara yang absolut telah usang, tidak lagi dianggap

---

<sup>1</sup> Masyarakat internasional merupakan landasan sosiologis adanya bidang hukum internasional, yang dapat diartikan sebagai kehidupan bersama dari negara-negara (masyarakat) yang merdeka dan sederajat. (Mochtar Kusumaatmadja dan Etty R Agoes, *Pengantar Hukum Internasional*, ed. 2, cet. Ke-1, (Bandung:PT Alumni, 2003), hal. 12).

<sup>2</sup> International Law Commission, “Draft Articles on the Responsibility of International Organization”, *Yearbook of International Law Commission*, vol. II, Part Two, (2011).

<sup>3</sup> William E Holder, “International Organization: Accountability and Responsibility”, *Proceeding of the Annual Meeting (American Society of International Law)*, vol. 97, (April, 2003), hal. 231.

<sup>4</sup> Kedaulatan merupakan suatu sifat atau ciri hakiki negara, yang dalam bahasa Inggris dikenal dengan istilah *sovereignty* berasal dari kata Latin *superanus* berarti “yang teratas”. Bila dikatakan bahwa negara itu memiliki kedaulatan, dimaksudkan bahwa negara itu mempunyai kekuasaan tertinggi yang terbatas pada wilayah negara itu sendiri (Mochtar Kusumaatmadja dan Etty R Agoes, *Pengantar Hukum Internasional*, hal. 16).

sebagai suatu hal yang utama dalam hukum internasional. Hal ini terlihat dari alasan pembentukan organisasi internasional yang didasarkan atas realitas dalam hubungan internasional yakni negara akan mendapatkan hasil yang lebih baik dengan bertindak secara bersama-sama, secara kolektif, dari pada bertindak secara individu.<sup>5</sup> Sehingga negara membentuk organisasi internasional sebagai entitas dalam hukum internasional atas dasar kepentingan dan mencapai tujuan bersama tersebut.<sup>6</sup> Maka dapat disimpulkan bahwa suatu organisasi internasional merupakan suatu persekutuan negara-negara yang dibentuk dengan persetujuan antara para anggotanya yang bertujuan untuk mencapai suatu kepentingan bersama.

Untuk mencapai tujuan dan melaksanakan fungsi organisasi internasional tersebut, personalitas hukum dalam hukum internasional diberikan oleh negara kepada organisasi. Organisasi internasional tidak dapat melaksanakan tugas dan fungsinya dengan baik apabila ia harus masih terikat dengan kehendak negara anggotanya. Maka dengan adanya personalitas hukum, suatu organisasi internasional dapat bertindak secara independen, terpisah dari negara anggotanya, dan mampu bertindak dengan sendirinya dalam hukum internasional selayaknya negara.<sup>7</sup>

Dalam melihat personalitas hukum organisasi internasional tersebut dapat dilihat tiga pandangan yang menjadi landasan adanya personalitas hukum organisasi internasional. Pandangan pertama menyatakan bahwa organisasi internasional memiliki personalitas hukum hanya apabila diatur secara tegas dalam dasar pembentuk organisasi tersebut.<sup>8</sup> Pandangan kedua mengembangkan adanya ide personalitas hukum objektif (*objective legal personality*), yakni personalitas hukum dilihat sebagai suatu hal yang “objektif” yang keberadaannya

---

<sup>5</sup> William E. Holder, *International Organization : Accountability and Responsibility*, hal. 231.

<sup>6</sup> *Ibid.*

<sup>7</sup> G Schermers dan Niels M Blokker, *International Institutional Law: Unity Within Diversity*, ed. 4, (Leiden:Koninklijke Brill NV, 2003), hal. 987.

<sup>8</sup> *Ibid.*, hal. 989.

tidak terikat atas keinginan “subjektif” negara anggota.<sup>9</sup> Personalitas hukum ada secara *ipso facto*<sup>10</sup> pada suatu organisasi internasional apabila salah satu organ pelengkap dari suatu organisasi internasional mempunyai kehendak yang berbeda dengan negara anggotanya.<sup>11</sup> Pandangan ketiga menyatakan bahwa organisasi internasional merupakan subyek hukum internasional bukanlah *ipso facto*, tetapi kepribadian itu ada karena diberikan kepada organisasi internasional baik secara tegas tertuang dalam dasar pembentukannya ataupun secara tersirat.<sup>12</sup> Pandangan ketiga merupakan pandangan yang paling luas diterima dalam hukum internasional dalam melihat permasalahan tersebut.

Masalah personalitas hukum organisasi internasional dapat juga dilihat dalam praktek hukum internasional. Mahkamah Internasional (*International Court of Justice* dalam *Reparation Case of Injuries Suffered in the Service of the United Nations* mendukung pandangan ketiga dalam pemberian personalitas hukum terhadap organisasi internasional dan hubungannya dengan negara anggota. Pendapat Mahkamah Internasional tersebut didasarkan atas empat landasan dasar, yakni:

1. Untuk mencapai tujuan daripada Perserikatan Bangsa Bangsa (yang selanjutnya disebut “PBB”) atribusi personalitas hukum terhadap organisasi internasional sangatlah diperlukan.
2. PBB sebagai sebuah organisasi dibentuk dengan organ-organ pelengkap yang memiliki tugas-tugas tersendiri.
3. Hubungan antara negara anggota dan PBB telah secara jelas dirumuskan dalam piagam pembentukannya, yakni di antaranya memberikan personalitas hukum, hak-hak istimewa dan kekebalan dalam wilayah negara anggota.

---

<sup>9</sup> *Ibid.*

<sup>10</sup> *Ipsa Facto* berasal dari bahasa Latin yang berarti “*by the fact itself*”, dalam Black’s Law dictionary *ipso facto* diartikan “*by the very nature of the situation*”. Maka dalam hal ini organisasi internasional atas dasar sifat sebagai organisasi internasional tersebut memiliki personalitas hukum dalam lalu lintas hukum internasional. (Bryan E Garner, Ed., *Black’s Law Dictionary*, Ed. 9, (United State of America: West Publishing Co., 2009), hal. 905.)

<sup>11</sup> Schermers dan Niels M Blokker, *International Institutional Law*, hal. 990..

<sup>12</sup> *Ibid.*



4. Personalitas hukum organisasi internasional merupakan suatu karakter yang telah terbukti dalam praktek yang memegang peranan dalam pemisahan organisasi dengan negara anggotanya.<sup>13</sup>

Sehingga dalam hal ini Mahkamah Internasional menyimpulkan bahwa PBB sebagai suatu organisasi internasional memiliki personalitas hukum bukan secara objektif, tepatnya personalitas hukum tersebut ada atas implikasi maksud negara anggota PBB terlepas dari kehendak mereka.<sup>14</sup>

Organisasi internasional dengan personalitas hukum pada dirinya tidak kemudian memberikan suatu kesamaan bahwa organisasi internasional tersebut merupakan subyek hukum yang sama seperti negara. Kesimpulan Mahkamah Internasional tersebut bukanlah suatu dasar pengakuan (i) bahwa organisasi internasional merupakan *super-state*; (ii) bahwa organisasi internasional adalah negara; (iii) bahwa organisasi internasional memiliki hak, kewajiban, kapasitas yang sama dengan sebuah negara.<sup>15</sup> Mahkamah Internasional dalam hal ini menyatakan:

*is not the same thing as saying that it is a State, which it certainly is not, or that its legal personality and rights and duties are the same as those of a State. Still less is it the same thing as saying that it is 'a super-State', whatever that expression may mean. It does not even imply that all its rights and duties must be upon the international plane, any more than all the rights and duties of a state must be upon that plane. What it does mean is that it is a subject of international law and capable of possessing international rights and duties.*<sup>16</sup>

Perbedaan antara suatu subyek hukum dengan subyek hukum yang lainnya dapat dilihat dari hak dan kewajiban yang diemban oleh subyek tersebut. Mahkamah Internasional menyatakan bahwa:

---

<sup>13</sup> International Court of Justice, *Reparation Case of Injuries Suffered in the Service of the United Nations*, Advisory Opinion, ICJ Report 1949, hal. 178-179.

<sup>14</sup> *Ibid.*, hal. 179.

<sup>15</sup> C F Amerasinghe, *Principles of the Institutional Law of International Organization*, ed. 2, (Cambridge:Cambridge University Press, 2005), hal. 92.

<sup>16</sup> International Court of Justice, Report 1949, hal. 179.

*The subjects of law in any legal system are not necessarily identical in nature or in the extent of their rights, and their nature depends upon the needs of the community.*<sup>17</sup>

Sehingga walaupun organisasi internasional merupakan suatu subyek hukum internasional, tak dapat dinyatakan bahwa ia identik dengan negara anggotanya yang membentuk organisasi internasional tersebut.

Dengan terbentuknya personalitas hukum suatu organisasi internasional, maka lahirlah adanya tanggung jawab dari organisasi tersebut. Prinsip yang penting dalam melihat adanya tanggung jawab organisasi internasional tersebut antara lain: (i) organisasi internasional sebagai pribadi hukum merupakan subjek hukum internasional dan tunduk kepada hukum internasional; dan (ii) pelanggaran hukum internasional yang dilakukan oleh subyek hukum internasional, baik melalui tindakan secara aktif (*commission*) atau pasif (*omission*), berakibat pada munculnya tanggung jawab dalam hukum internasional.<sup>18</sup> Sebagai dua subyek hukum yang berbeda, organisasi internasional dan negara anggotanya dalam hal ini dapat memiliki tanggung jawab yang berbeda.

Hubungan tanggung jawab antara organisasi internasional dan negara anggotanya menjadi hal yang sangat berkaitan. Apabila kita melihat tanggung jawab negara suatu organisasi internasional sebagai suatu subyek hukum tak dapat pula dipisahkan tanggung jawab negara anggota organisasi tersebut. Lebih jauh hubungan ini dapat dilihat dalam pasal 57 *Draft Articles on Responsibility of States for Internationally Wrongful Acts*<sup>19</sup> (yang selanjutnya disebut sebagai "DASR"). Disebutkan bahwa tanggung jawab negara dalam hal tersebut adalah tidak dengan mengurangi adanya tanggung jawab organisasi internasional.

Kaitan tanggung jawab organisasi internasional ini dapat dilihat banyak terjadi dalam tindakan sistem keamanan kolektif (*collective security*) yang

<sup>17</sup> *Ibid.*, hal. 178.

<sup>18</sup> C F Amerasinghe, *Principles of the Institutional Law of International Organization*, hal. 386.

<sup>19</sup> *Articles 57: These articles are without prejudice to any question of the responsibility under international law of an international organization, or of any State for the conduct of an international organization.* (International Law Commission, "Draft Articles on the Responsibility of States for Internationally Wrongful Acts", *Yearbook of International Law Commission*, vol. II, Part Two, (2001)).

dilaksanakan oleh organisasi internasional. Sistem kolektif berkembang dengan dibentuknya PBB sebagai upaya pemenuhan tujuannya. Dalam Pasal 1 Piagam PBB disebutkan bahwa PBB didirikan untuk menjaga keamanan dan perdamaian dunia<sup>20</sup>; dan untuk mencapai kerja sama internasional dalam berbagai bidang.<sup>21</sup> Sistem keamanan kolektif tersebut merupakan satu sistem yang tiap-tiap negara di dalamnya bersepakat untuk menghindari penggunaan kekuatan (*use of force*) dalam penyelesaian masalah, dan secara kolektif bertindak melawan negara yang memulai penggunaan kekuatan.<sup>22</sup> Sebelum adanya tindakan kolektif melawan negara lain, maka diperlukan adanya mekanisme yang di dalamnya ditentukan apakah yang dimaksud dengan ancaman terhadap keamanan internasional terlebih dahulu. Dalam hal ini, PBB, terutama Dewan Keamanan PBB merupakan organ yang menentukan adanya pelanggaran terhadap keamanan internasional tersebut. Maka terlihat peranan yang dominan PBB dalam permasalahan sistem keamanan kolektif dalam hukum internasional ini.

Sistem keamanan kolektif pula berkembang dalam hal penanggulangan permasalahan konflik bersenjata yang terjadi dalam suatu negara yang dapat berdampak terhadap keamanan dan perdamaian dunia.<sup>23</sup> Dalam hal ini PBB berperan untuk menentukan adanya ancaman terhadap keamanan internasional tersebut, kemudian organisasi lainnya, seperti *North Atlantic Treaty Organization* (selanjutnya disebut sebagai “NATO”), atas dasar otorisasi tersebut dapat ikut dalam upaya pelaksanaan sistem keamanan kolektif. Beberapa upaya tersebut

<sup>20</sup> *Article 1 (1): To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace.* (United Nations, *Charter of the United Nations*, 24 Oktober 1945, 1 UNTS XVI, <<http://www.un.org/en/documents/charter/chapter1.shtml>>, diakses pada 15 Maret 2012.)

<sup>21</sup> *Article 1 (3): To achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion. (Ibid.)*

<sup>22</sup> J Samuel Barkin, *International Organization: Theories and Institutions*, Ed. 1, (New York:Palgrave Macmillan, 2006), hal. 65.

<sup>23</sup> Erika de Wet dan Michael Wood, “Collective Security”, *Max Planck Encyclopedia of Public International Law*, <[http://www.mpepil.com/sample\\_article?id=epil/entries/law-9780199231690-e270&recno=2&](http://www.mpepil.com/sample_article?id=epil/entries/law-9780199231690-e270&recno=2&)>, Par. 7, diakses pada 7 Maret 2012.

dapat dilihat dalam konflik-konflik yang di antaranya: konflik Yugoslavia (atas dasar Resolusi Dewan Keamanan PBB 842 Tahun 1993); konflik Kosovo ( atas dasar Resolusi Dewan Keamanan PBB 1244 tahun 1999).<sup>24</sup>

Salah satu perkembangan terbaru dalam pelaksanaan sistem keamanan kolektif adalah pada konflik yang terjadi di Libya pada tahun 2011, yakni pada saat PBB dan NATO ikut dalam pelaksanaan penjagaan keamanan dan perdamaian dunia. Konflik di Libya terjadi antara pemerintahan yang dipimpin Moammar Gadhafi dengan penduduk sipil, salah satunya adalah adanya penyerangan Pemerintahan Libya di Benghazi.<sup>25</sup> Adanya pembunuhan terhadap penduduk sipil merupakan dasar otorisasi Dewan Keamanan PBB terhadap pelaksanaan sistem keamanan kolektif untuk melindungi penduduk sipil di Libya melalui Resolusi Dewan Keamanan PBB 1970 dan 1973.<sup>26</sup> Resolusi tersebut memberikan dasar atas penggunaan segala macam upaya yang dimungkinkan secara kolektif.<sup>27</sup> NATO dalam hal ini mengimplementasikan mandat tersebut dengan melaksanakan *Operation Unified Protector*, salah satunya dengan pengiriman kapal perang dan pesawat tempur menuju wilayah perairan teritorial Libya.<sup>28</sup>

Mengikuti prinsip umum tanggung jawab yang telah disebutkan di atas, dalam sistem keamanan kolektif ini, apabila terjadi pelanggaran hukum internasional akibat pelaksanaan tersebut maka lahirlah tanggung jawab dari organisasi internasional. Dapat kita lihat dalam contoh kasus *Behrami and Behrami v France* dan *Saramati v France, Germany & Norway* pada *European Court of Human Rights* (selanjutnya disebut “EHCR”)<sup>29</sup> yang menggambarkan

---

<sup>24</sup> *Ibid.*

<sup>25</sup> Mehrdad Payandeh, “The United Nations, Military Intervention, and Regime Change in Libya”, *Virginia Journal of International Law*, Vol. 52, 355, hal. 378.

<sup>26</sup> Kristen E Boon, “Regime Conflicts and the UN Security Council: Applying the Law of Responsibility”, *George Washington International Law Review*, hal. 1.

<sup>27</sup> *Ibid.*

<sup>28</sup> North Atlantic Treaty Organization, “NATO Arms Embargo Against Libya Operation Unified Protector”, <[http://www.nato.int/nato\\_static/assets/pdf/pdf\\_2011\\_03/20110325\\_110325-unified-protector-factsheet.pdf](http://www.nato.int/nato_static/assets/pdf/pdf_2011_03/20110325_110325-unified-protector-factsheet.pdf)>, diakses pada 15 Maret 2012.

munculnya tanggung jawab organisasi internasional dalam pelaksanaan sistem keamanan kolektif.

Secara singkat, dalam kasus *Behrami and Behrami v. France* dinyatakan bahwa telah terjadi kelalaian dari pasukan *Kosovo Force* (KFOR) dalam menjinakkan bom di daerah Republik Yugoslavia pada saat konflik terjadi sehingga mengakibatkan meninggalnya seorang anak dan mengakibatkan seorang lainnya menderita cacat dan buta.<sup>30</sup> Dalam kasus *Saramati v France, Germany & Norway* telah terjadi pelanggaran hak dari Saramati sebagai warga sipil yang ditahan tanpa alasan oleh United Nations Interim Administration Mission di Kosovo.<sup>31</sup> Berdasarkan prinsip umum tanggung jawab internasional, telah jelas bahwa PBB dan NATO sebagai subyek hukum internasional yang melaksanakan operasi tersebutlah seharusnya bertanggung jawab atas pelanggaran hukum yang terjadi. Namun, dalam kasus tersebut terlihat bahwa pertanggungjawaban hukum negara anggota dalam pelaksanaan operasi pula menjadi suatu hal yang berkaitan, bilamana negara anggota memiliki andil dalam pelaksanaan operasi yang ada.

Maka dengan demikian telah dilihat bahwa terdapat adanya perkembangan dalam konsep tanggung jawab internasional yang dalam hal ini berhubungan dengan tanggung jawab organisasi internasional. Secara praktek hal tersebut banyak dapat dilihat dalam permasalahan pelaksanaan sistem keamanan kolektif. Untuk itu penelitian ini perlu ditulis dalam memperlihatkan perkembangan dalam hukum internasional tersebut.

## 1.2 Pokok-Pokok Permasalahan

Berdasarkan uraian permasalahan yang telah disebutkan di atas, maka yang menjadi pokok permasalahan dalam penelitian ini adalah:

1. Bagaimanakah konsep tanggung jawab organisasi internasional di dalam hukum internasional?

---

<sup>29</sup> European Court of Human Rights Grand Chamber, *Behrami and Behrami v. France and Saramati v. France, Germany and Norway*, Decision on Admissibility (31 Mei 2007).

<sup>30</sup> Stephanie Fariior, "Introductory Note to *Behrami and Behrami v France and Saramati v France, Germany & Norway*, European Court of Human Rights (31 May 2007)", *Vermont Law School Legal Studies Research Paper Series*, <<http://ssrn.com/abstract=1417982>>, diakses pada 30 September 2011, hal. 3.

<sup>31</sup> *Ibid.*

2. Bagaimanakah peran organisasi internasional dalam sistem keamanan kolektif (*collective security system*) Perserikatan Bangsa Bangsa?
3. Bagaimanakah tanggung jawab negara anggota dan *North Atlantic Treaty Organization* atas pelanggaran hukum dalam pelaksanaan *Operation Unified Protector* di Libya pada tahun 2011?

### 1.3 Tujuan Penelitian

Tujuan umum dari penelitian ini adalah untuk dapat menjelaskan perkembangan konsepsi tanggung jawab organisasi internasional dalam pelaksanaan sistem keamanan kolektif, dan memperlihatkan hubungan tanggung jawab antara organisasi internasional tersebut dengan negara anggotanya.

Tujuan khusus penelitian ini adalah:

1. Menjelaskan konsep tanggung jawab organisasi internasional di dalam hukum internasional.
2. Menjelaskan peran organisasi internasional dalam sistem keamanan kolektif (*collective security system*) Perserikatan Bangsa Bangsa.
3. Menggambarkan dan menjelaskan tanggung jawab negara anggota dan *North Atlantic Treaty Organization* atas pelanggaran hukum dalam pelaksanaan *Operation Unified Protector* di Libya pada tahun 2011.

### 1.4 Definisi Konsepsional

Definisi konsepsional merupakan kerangka yang menggambarkan hubungan antara konsep-konsep khusus yang ingin atau akan ditulis.<sup>32</sup> Sehingga dalam penulisan penelitian ini perlu dijelaskan beberapa konsep-konsep dalam hukum internasional dan istilah-istilah yang digunakan dalam organisasi internasional untuk dapat memberikan gambaran dan pemahaman yang sama bagi pembaca. Berikut adalah konsep-konsep yang digunakan:

---

<sup>32</sup> Soerjono Soekanto, *Pengantar Penelitian Hukum*, Cet. 3, (Jakarta:Universitas Indonesia (UI-Press), 1986), hal. 132.

## 1. Organisasi Internasional

Organisasi internasional secara luas merupakan organisasi internasional publik yang dibentuk oleh pemerintah, yakni kerja sama antar negara dalam suatu hal tertentu, ataupun organisasi internasional privat yang dibentuk oleh entitas bukan pemerintah. Namun, pada umumnya istilah organisasi internasional merujuk pada organisasi internasional publik yang dibentuk antar pemerintah, yang juga disebut sebagai *intergovernmental organization*.<sup>33</sup> Dalam penulisan penelitian ini, akan lebih ditekankan pada *intergovernmental organization* yang beranggotakan negara. Organisasi internasional itu sendiri dapat diartikan sebagai wadah negara-negara dalam menjalankan tugas bersama, baik dalam bentuk kerja sama yang sifatnya koordinatif maupun subordinatif.<sup>34</sup> Maka organisasi internasional dalam hal ini merupakan suatu persekutuan negara-negara yang dibentuk dengan persetujuan antara para anggotanya dan mempunyai suatu sistem yang tetap atau perangkat badan-badan yang tugasnya adalah untuk mencapai tujuan kepentingan bersama dengan cara mengadakan kerja sama antara para anggotanya.<sup>35</sup>

## 2. Tanggung Jawab

Konsep tanggung jawab dengan mudah dapat ditemukan dalam sistem hukum nasional yang menyatakan bahwa tanggung jawab muncul akibat adanya pelanggaran terhadap sistem hukum yang ada, baik yang bersifat perdata maupun publik. Dalam hukum internasional, tanggung jawab secara internasional muncul dari adanya pelanggaran terhadap hukum internasional, yang mana berbeda dengan sistem hukum nasional.<sup>36</sup> Dapat

---

<sup>33</sup> Sri Setianingsih Suwardi, *Pengantar Hukum Organisasi Internasional*, (Jakarta:Penerbit Universitas Indonesia (UI-Press), 2004), hal. 4.

<sup>34</sup> *Ibid.*, hal. 5.

<sup>35</sup> Sumaryo Suryokusumo, *Pengantar Hukum Organisasi Internasional*, (Jakarta:PT Tatanusa, 2007), hal. 1.

<sup>36</sup> C F Amerasinghe, "The Essence of the Structure of International Responsibility" dalam Maurizia Ragazzi, ed., *International Responsibility Today: Essay in Memory of Oscar Schachter*, (Leiden:Koninklijke Brill NV, 2005), hal. 4.

dikatakan pula bahwa tanggung jawab adalah konsekuensi atas tindakan oleh subjek hukum internasional dalam lalu lintas hukum internasional yang melanggar hukum internasional.

### 3. *International Wrongful Act*

Suatu *international wrongful act* dapat terdiri dari satu atau lebih tindakan yang secara aktif (*actions/commission*) dan yang secara pasif dilakukan (*omission*) atau gabungan dari kedua tindakan tersebut. Untuk menentukan telah terjadinya *international wrongful act* bergantung kepada dua kondisi yang harus dipenuhi, yakni: (1) adanya suatu kewajiban yang mana telah dilanggar dan (2) dapatnya suatu pelanggaran tersebut diasosiasikan kepada subyek hukum yang melanggar suatu perbuatan tersebut.<sup>37</sup> Hal ini dapat dilihat pula dalam praktek negara yakni dalam kasus-kasus yang ditangani Mahkamah Internasional antara lain: *Corfu Channel Case*<sup>38</sup>, *Military and Paramilitary Activities in and against Nicaragua Case*<sup>39</sup>, dan dalam *Gabcikovo-Nagymaros Project Case*<sup>40</sup>. Pada intinya bahwa *international wrongful act* merupakan tindakan subjek hukum internasional, dapat berupa tindakan aktif maupun pasif, yang melanggar ketentuan hukum internasional dan memunculkan suatu kerugian terhadap pihak lain.

### 4. Kewajiban Internasional

Kewajiban internasional yang dimaksud dalam penelitian ini adalah kewajiban negara dan organisasi internasional yang dimandatkan dari

---

<sup>37</sup> International Law Commission, "Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries", Pasal 1, Par. 1, hal. 32.

<sup>38</sup> International Court of Justice, *Corfu Channel, Merits, Judgement*, ICJ Reports 1949, hal. 4 dan hal. 23.

<sup>39</sup> International Court of Justice, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment*, ICJ Reports 1986, hal. 14 dan hal. 142, par. 238, dan hal. 149, par. 292.

<sup>40</sup> International Court of Justice, *Gabcikovo-Nagymaros, Merits, Judgment*, ICJ Report 1997, hal. 38, par. 47.



suatu perjanjian internasional atau hukum kebiasaan internasional atau dapat pula terbentuk dari tidak terlaksananya keputusan yudisial yang mengikat.<sup>41</sup>

#### 5. Sistem Keamanan Kolektif (*Collective Security*)

Sistem keamanan kolektif (*Collective Security*) merupakan sebuah sistem, baik regional maupun global, yang keamanan internasional menjadi perhatian utama negara-negara, dan untuk hal itu mencapai hal tersebut sepakat untuk bersama-sama memberikan reaksi terhadap ancaman dan pelanggaran terhadap perdamaian dunia.<sup>42</sup> Pada intinya sistem keamanan kolektif berusaha untuk menjaga keamanan dan perdamaian dunia sebagai tujuan bersama masyarakat internasional.

#### 6. *Use of Force*

Pelaksanaan *use of force* (penggunaan kekuatan) terhadap negara lain merupakan suatu hal yang dilarang dalam hukum internasional. Larangan *use of force* ini dapat dilihat dalam hukum kebiasaan internasional dan pula secara tertulis dalam Pasal 2 (4) Piagam PBB yang berbunyi:

*All members shall refrain in their international relation from the threat or the 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.*<sup>43</sup>

Pasal tersebut membentuk suatu pengertian *threat* atau *use of force* secara umum. *Force* sebagai suatu ancaman atau paksaan terhadap kesatuan wilayah (*territorial integrity*) dan kemandirian politik (*political independence*) suatu negara yang tidak sesuai dengan tujuan perdamaian

---

<sup>41</sup> Martin Dixon, *Textbook on International Law*, ed. 2, (London:Blackstone Press Limited, 1993), hal. 197.

<sup>42</sup> Erika de Wet dan Michael Wood, "Collective Security", Par. 1, diakses pada 7 Maret 2012.

<sup>43</sup> United Nations, *Charter of the United Nations*, Pasal 2 (4).

dan keamanan dunia.<sup>44</sup> Hal tersebut dapat berupa: embargo ekonomi, propaganda anti pemerintahan atau bentuk-bentuk lainnya. *Use of force* dapat pula diartikan sebagai penggunaan kekuatan militer yang disengaja oleh satu negara terhadap negara lain, baik secara langsung, yakni pengiriman pasukan bersenjata resmi suatu negara ke dalam wilayah negara lain, maupun secara tidak langsung, yakni pasukan bersenjata yang bertindak di bawah atas nama suatu negara.<sup>45</sup> Walaupun demikian dalam kerangka Piagam PBB tersebut, terdapat empat pengecualian terhadap *use of force* yang berupa: (1) *force used in self-defense* (Pasal 51 Piagam PBB); (2) *force authorized by the United Nations Security Council* (Bab 7 Piagam PBB); (3) *force undertaken by the five major powers before the Security Council is functional* (Pasal 106 Piagam PBB); dan (4) *force undertaken against the 'enemy' states of the Second World War* (Pasal 107 dan 53 Piagam PBB).<sup>46</sup>

#### 7. *North Atlantic Treaty Organization* (NATO)

NATO merupakan aliansi politik dan militer yang dibentuk atas dasar pelaksanaan pertahanan kolektif negara anggotanya dan untuk memelihara kedamaian demokratis di wilayah Atlantik Utara.<sup>47</sup> NATO memiliki 28 negara anggota yang berkedudukan sejajar, yang dalam pengambilan keputusannya NATO diambil secara suara bulat dan konsensus. Nilai dasar aliansi yang dihormati dan dijunjung tinggi oleh setiap negara anggota adalah demokrasi, kebebasan individual dan kepastian hukum.

---

<sup>44</sup> Anthony Clark Arend dan Robert J. Beck, *International Law and the Use of Force : Beyond the UN Charter Paradigm*, (New York:Routledge, 1995), hal. 31.

<sup>45</sup> Martin Dixon, *Textbook on International Law*, hal. 248.

<sup>46</sup> Anthony Clark Arend dan Robert J. Beck, *International Law and the Use of Force*, hal. 31.

<sup>47</sup> North Atlantic Treaty Organization, "What is NATO:An Introduction to the Transatlantic Alliance", <[http://www.nato.int/welcome/brochure\\_WhatIsNATO\\_en.pdf](http://www.nato.int/welcome/brochure_WhatIsNATO_en.pdf)>, diakses pada 3 Maret 2012.

## 1.5 Metode Penelitian

Penelitian hukum merupakan suatu kegiatan ilmiah yang didasarkan pada metode, sistematika dan pemikiran tertentu, yang bertujuan untuk mempelajari satu atau beberapa gejala hukum tertentu dengan jalan menganalisisnya.<sup>48</sup> Dengan demikian untuk dapat menggambarkan permasalahan dalam penelitian ini, penulis menggunakan bentuk penelitian yuridis normatif yang menggunakan metode penelitian hukum kepustakaan. Penelitian yuridis normatif adalah penelitian yang dilakukan terhadap hukum positif tertulis maupun tidak tertulis.<sup>49</sup> Studi pustaka digunakan sebagai alat pengumpulan data.<sup>50</sup>

Tipe penelitian yang digunakan ditinjau dari segi sifatnya adalah penelitian deskriptif, yaitu penelitian yang bertujuan menggambarkan secara tepat sifat suatu individu, keadaan, gejala atau kelompok tertentu, atau untuk menentukan frekuensi suatu gejala.<sup>51</sup> Penulis berusaha untuk menggambarkan konsepsi tanggung jawab sebuah organisasi internasional secara tepat dan jelas. Ditinjau dari tujuannya, penelitian ini merupakan *problem identification*<sup>52</sup> yang mana bertujuan untuk mencari, menemukan dan mendapatkan fakta yang ada mengenai perbuatan pelanggaran hukum internasional sebuah organisasi internasional dalam pelaksanaan sistem keamanan kolektif dan menguraikan tanggung jawab organisasi internasional yang muncul serta hubungannya dengan negara anggota organisasi. *Case study*<sup>53</sup> pula diterapkan penulis dalam penulisan penelitian ini,

---

<sup>48</sup> Soerjono Soekanto, *Pengantar Penelitian Hukum*, hal. 43.

<sup>49</sup> Sri Mamudji, et al., *Metode Penelitian dan Penulisan Hukum*, (Jakarta:Badan Penerbit Fakultas Hukum Universitas Indonesia, 2005), hal. 9-10.

<sup>50</sup> Studi pustaka adalah penelitian yang dilakukan dengan mempelajari dokumen-dokumen yang ada seperti buku, artikel ilmiah, peraturan-peraturan, dan sebagainya. Studi Pustaka adalah langkah awal dari seorang peneliti dalam melakukan penelitian. Studi pustaka bisa dilakukan dengan melakukan analisa terhadap isi dari dokumen. Di dalam penelitian hukum, dimungkinkan untuk melakukan studi pustaka saja tanpa penelitian lapangan karena kebanyakan penelitian hukum meneliti perkembangan hukum dari dokumen-dokumen. Penelitian hukum yang dilakukan dengan pengamatan lapangan biasanya merupakan penelitian yang bersifat sosiologis hukum, yang menitikberatkan pada keberlakuan atau keefektifan hukum itu sendiri di dalam masyarakat. (*Ibid.*, hal. 29).

<sup>51</sup> *Ibid.*, hal. 4.

<sup>52</sup> Dalam penelitian ini permasalahan yang ada diklasifikasi sehingga memudahkan dalam proses analisa dan pengambilan kesimpulan. (*Ibid.*, hal. 5).

yang bertujuan untuk menggambarkan secara lengkap mengenai konsepsi tanggung jawab organisasi internasional, dalam hal ini penulis memilih untuk membahas NATO sebagai organisasi internasional yang memiliki peran penting dalam sistem keamanan kolektif, terutama dalam permasalahan *Operation Unified Protector* di Libya pada tahun 2011.

Adapun data yang digunakan dalam penulisan penelitian ini adalah berupa data sekunder yang diperoleh dari kepustakaan. Sumber data sekunder, yakni pustaka hukum yang digunakan adalah sebagai berikut:

1. Bahan hukum primer, yakni bahan-bahan yang isinya mempunyai kekuatan mengikat kepada masyarakat.<sup>54</sup> Bahan hukum primer yang digunakan yakni *the United Nations Charter* (Piagam PBB); *the North Atlantic Treaty 1994* yang merupakan dasar pembentukan NATO dan peraturan-peraturan lainnya; *United Nations Security Council Resolution*, terutama resolusi 1970 dan 1973 yang diadopsi pada tanggal 17 Februari dan 17 Maret 2011 mengenai perang sipil di Libya dan sebagai dasar pelaksanaan *Operation Unified Protector*.
2. Bahan hukum sekunder, yakni bahan-bahan yang memberikan informasi atau hal-hal yang berkaitan dengan isi sumber primer serta implementasinya.<sup>55</sup> Bahan hukum sekunder yang digunakan yakni DASR yang membahas permasalahan tanggung jawab negara dan DARIO yang membahas permasalahan tanggung jawab suatu organisasi internasional; buku-buku mengenai hukum internasional pada umumnya dan organisasi internasional pada khususnya; artikel-artikel dalam jurnal hukum internasional.
3. Bahan hukum tersier, yakni bahan-bahan yang memberikan petunjuk maupun penjelasan terhadap sumber primer atau sumber sekunder.<sup>56</sup>

---

<sup>53</sup> *Case Study* dapat diterapkan sebagai tipe perencanaan penelitian, apabila tujuan penelitian adalah penggambaran secara lengkap mengenai ciri-ciri dari suatu keadaan, perilaku pribadi, maupun perilaku kelompok. Dengan demikian, generalisasi yang diperoleh juga sangat terbatas, yakni hanya pada ruang lingkup obyek penelitian yang bersangkutan. (Soerjono Soekanto, *Pengantar Penelitian Hukum*, hal 55).

<sup>54</sup> Sri Mamudji, et al., *Metode Penelitian dan Penulisan Hukum*, hal. 30.

<sup>55</sup> *Ibid.*, hal. 31.

Bahan hukum tersier yang digunakan yakni kamus bahasa Indonesia dan kamus istilah hukum *Black's Law Dictionary*.

Dalam penyajian analitis terhadap data yang telah didapatkan, penulis menggunakan pendekatan kualitatif yang menghasilkan data deskriptif analitis, yaitu apa yang dinyatakan oleh sasaran penelitian yang bersangkutan secara tertulis atau lisan, dan perilaku nyata.<sup>57</sup> Hasil penelitian akan disajikan secara tertulis dalam bentuk skripsi berjudul “TANGGUNG JAWAB *NORTH ATLANTIC TRATY ORGANIZATION* DAN NEGARA ANGGOTA DALAM PELAKSANAAN *OPERATION UNIFIED PROTECTOR* DI LIBYA PADA TAHUN 2011”

## 1.6 Sistematika Penulisan

Pembahasan penelitian ini akan disajikan dengan sistematika yang terdiri dari lima bab. Adapun pembagian bab dalam penulisan penelitian ini sebagai berikut:

### **BAB 1 PENDAHULUAN**

Bab 1 membahas secara keseluruhan mengenai latar belakang dari penelitian, pokok-pokok permasalahan yang akan dibahas, tujuan umum dan khusus dari diadakannya penelitian, kerangka konseptual yang digunakan, metode penelitian, dan sistematika penulisan dari keseluruhan penelitian ini.

### **BAB 2 TANGGUNG JAWAB ORGANISASI INTERNASIONAL DALAM HUKUM INTERNASIONAL**

Bab 2 terdiri atas tiga bagian yang berusaha untuk memperlihatkan konsepsi tanggung jawab dalam hukum internasional. Bagian pertama memperlihatkan dasar pembentukan organisasi internasional yang memperlihatkan personalitas organisasi internasional yang kemudian membentuk organisasi tersebut sebagai subyek hukum internasional. Bagian pertama juga berusaha untuk memperlihatkan hubungan negara dengan organisasi internasional

---

<sup>56</sup> *Ibid.*

<sup>57</sup> *Ibid.*, hal. 67.

yang dibentuknya. Selanjutnya dalam bagian kedua dibahas mengenai tanggung jawab internasional yang diawali dengan adanya konsep tanggung jawab negara sebagai suatu konsep klasik karena negara dianggap sebagai subyek hukum utama dalam hukum internasional, namun dalam bagian ini juga dibahas munculnya konsep tanggung jawab organisasi internasional sebagai akibat dari personalitas hukum organisasi internasional tersebut. Bagian ketiga memperlihatkan bagaimana hubungan antara tanggung jawab negara, sebagai negara anggota, dan tanggung jawab organisasi internasional karena keduanya sebagai subyek hukum dapat mengemban tanggung jawab internasional.

### **BAB 3 ORGANISASI INTERNASIONAL DAN SISTEM KEAMANAN INTERNASIONAL (*COLLECTIVE SECURITY*)**

Bab 3 terdiri atas tiga bagian. Bagian pertama dalam bab ini memperlihatkan mekanisme sistem keamanan PBB sebagai organisasi yang tugas utamanya menjaga keamanan dan perdamaian dunia, yang terdapat dalam Piagam PBB tersebut. Bagian kedua berusaha untuk menggambarkan organisasi pertahanan regional dalam sistem keamanan kolektif PBB tersebut, dengan menjabarkan peranan organisasi internasional dalam pelaksanaan sistem keamanan kolektif PBB, kewenangan organisasi, dan perlindungan terhadap pasukan dari organisasi internasional dalam pelaksanaan sistem keamanan kolektif. Bagian terakhir dalam bab ini menggambarkan salah satu organisasi pertahanan regional, yakni NATO dalam pelaksanaan sistem keamanan kolektif PBB dengan terlebih dahulu memberikan gambaran mengenai NATO sebagai suatu organisasi internasional.

### **BAB 4 TANGGUNG JAWAB *NORTH ATLANTIC TREATY ORGANIZATION* DAN NEGARA ANGGOTA DALAM PELAKSANAAN *OPERATION UNIFIED PROTECTOR* DI LIBYA PADA TAHUN 2011**

Bab 4 terdiri atas dua bagian, dalam bab ini secara spesifik akan membahas *Operation Unified Protector* sebagai salah satu upaya pelaksanaan sistem keamanan kolektif dari segi tanggung jawab NATO sebagai organisasi internasional. Bagian pertama menjelaskan mengenai kerangka hukum

pelaksanaan operasi terutama dalam melihat adanya otorisasi dari Dewan Keamanan PBB. Dalam bagian tersebut dijelaskan pula mengenai struktur *command and control* pasukan dan kewajiban-kewajiban hukum internasional yang harus dipenuhi oleh pasukan dalam pelaksanaan *Operation Unified Protector*. Bagian kedua menggambarkan dan menjelaskan mengenai tanggung jawab internasional yang timbul dalam pelaksanaan *Operation Unified Protector* dan berusaha untuk melihat subyek hukum internasional mana yang bertanggung jawab atas *international wrongful act* yang terjadi.

## **BAB 5 PENUTUP**

Pada Bab 5 merupakan bagian yang menyajikan simpulan dan saran dalam penelitian ini. Simpulan tersebut diambil dari pemaparan yang telah dijabarkan dalam bab-bab sebelumnya yang berusaha untuk menjawab pokok-pokok permasalahan penelitian. Serta menyajikan saran dari penulis mengenai topik penelitian.

## BAB 2

### TANGGUNG JAWAB ORGANISASI INTERNASIONAL DALAM HUKUM INTERNASIONAL

Adanya suatu hukum dapat dilihat dengan adanya suatu masyarakat di mana hukum itu berkembang dan berlaku mengikat entitas-entitas di dalam masyarakat tersebut, yang merupakan pandangan sosiologis terhadap keberlakuan hukum. Hukum internasional selayaknya bidang hukum lainnya berlaku karena adanya masyarakat internasional sebagai entitas yang diatur oleh tertib hukum internasional.<sup>58</sup> Masyarakat internasional yang dimaksud merupakan kehidupan bersama dari negara-negara yang merdeka dan sederajat.<sup>59</sup> Hukum internasional kemudian muncul karena adanya hubungan antar negara dalam berbagai aspek, seperti dalam bidang perniagaan, kebudayaan, ilmu pengetahuan, keagamaan, sosial dan olahraga, yang menunjukkan adanya kepentingan bersama dari masyarakat internasional untuk memelihara dan mengatur hubungan tersebut.<sup>60</sup>

Negara dalam konteks hukum internasional merupakan suatu entitas yang mempunyai wilayah yang tetap, adanya penduduk, adanya pemerintahan yang berkuasa dan adanya kemampuan untuk melakukan hubungan dengan entitas lainnya.<sup>61</sup> Keempat kriteria tersebut dapat dilihat dalam Pasal 1 *Montevideo Convention on Rights and Duties of States* Tahun 1933:

*“The State as a person of international law should possess the following qualifications:*

- a) a permanent population;*
- b) defined territory;*
- c) government; and*
- d) capacity to enter into relations with other States.”<sup>62</sup>*

---

<sup>58</sup> Mochtar Kusumaatmadja dan Ety R Agoes, *Pengantar Hukum Internasional*, hal. 11.

<sup>59</sup> *Ibid.*, hal. 12.

<sup>60</sup> *Ibid.*, hal. 13.

<sup>61</sup> Rebecca M M Wallace, *International Law*, Ed. 2, (London: Sweet & Maxwell, 1992), hal. 60.



Terpenuhinya komponen-komponen di atas membentuk adanya negara yang mempunyai suatu personalitas hukum (*legal personality*) dalam hukum internasional.

Adanya personalitas hukum berarti bahwa negara merupakan subyek hukum internasional, dan mampu untuk mengemban hak dan kewajiban serta mampu untuk mengajukan klaim untuk menjaga haknya dalam lalu lintas hukum internasional.<sup>63</sup> Personalitas hukum merupakan suatu kapasitas yang dimiliki oleh entitas yang menunjukkan kemampuannya untuk dapat mengemban hak dan kewajiban. Adanya personalitas hukum memperlihatkan bahwa kemudian suatu entitas dianggap sebagai subyek hukum internasional. Negara dalam hal ini memiliki personalitas hukum yang penuh atas dasar sifat kenegaraannya dalam hubungan internasional, yang merupakan personalitas hukum yang “original” berasal dari kemampuan negara itu sendiri.<sup>64</sup>

Negara kemudian dianggap sebagai satu-satunya subyek hukum dalam hukum internasional. L. Oppenheim, seperti yang dikutip oleh Peter Malanczuk, dalam tulisannya “*treatise on international law*” pada tahun 1912 mendukung pernyataan tersebut dengan mengemukakan bahwa: “*Since the law of nations is based on the common consent of individual States, and not of individual human beings, States solely and exclusively are subjects of international law.*”<sup>65</sup> Oppenheim memperlihatkan bahwa hukum internasional merupakan hasil dari adanya hubungan masyarakat internasional, yakni negara dalam hubungannya dengan yang lainnya, oleh karena itu hanya negara yang dapat bertindak dalam pelaksanaan hubungan tersebut dan dalam hukum internasional sebagai subyek hukum internasional.

Namun kemudian dengan berkembangnya masyarakat, ikut pula berkembang hukum internasional. Dalam hal ini, perkembangan yang penting

---

<sup>62</sup> *Montevideo Convention on Rights and Duties of States*, Ditandatangani pada 26 Desember 1933, Mulai berlaku pada 26 Desember 1934, Pasal 1.

<sup>63</sup> Rebecca M M Wallace, *International Law*, hal. 58.

<sup>64</sup> *Ibid.*, hal. 59.

<sup>65</sup> L Oppenheim, *International Law A Treatise*, ed. 2, vol. I, (1912), hal. 19. Seperti yang dikutip oleh Peter Malanczuk, *Akehurst's Modern Introduction to International Law*, Ed. 7, (London:Routledge, 1997), hal. 91.

perlu diperhatikan yakni negara tidak lagi menjadi subyek utama dalam konsep masyarakat internasional. Perkembangan yang penting dalam golongan ini ialah timbulnya berbagai organisasi atau lembaga internasional yang mempunyai eksistensi terlepas dari negara-negara.<sup>66</sup> Perkembangan lainnya pula memperlihatkan adanya pemberian kompetensi hukum kepada para individu dalam beberapa hal tertentu.<sup>67</sup>

Pertambahan subyek hukum internasional ini dapat memperlihatkan perkembangan personalitas hukum dari entitas-entitas yang terdapat dalam masyarakat dalam lalu lintas hukum internasional. Personalitas hukum tersebut secara umum memberikan kemampuan kepada suatu entitas untuk dapat mengemban hak dan kewajiban dalam lalu lintas hukum.<sup>68</sup> Personalitas hukum yang dimiliki oleh organisasi internasional adalah terbatas kepada ketentuan yang telah dibentuk dalam piagam pembentukannya oleh negara untuk suatu tujuan tertentu.<sup>69</sup> Kemampuan yang dimiliki oleh individu dalam hukum internasional dapat dilihat sejalan dengan perkembangan hak asasi manusia, namun pula terbatas terhadap suatu hal tertentu.<sup>70</sup> Sehingga dapat dikatakan personalitas hukum yang dimiliki oleh entitas-entitas lainnya selain negara merupakan suatu kepribadian yang bersifat turunan (*derivatives*).<sup>71</sup> Hukum Internasional yang pada akhirnya dapat menentukan entitas mana yang merupakan subjek hukum internasional dan sebatas mana personalitas hukum yang mereka miliki untuk dapat bertindak dalam hukum internasional.

ILC berusaha untuk memformulasikan perkembangan konsep tanggung jawab organisasi internasional dalam suatu bentuk instrumen tertulis yang disebut dengan *Drafts Articles on the Responsibility of International Organization*<sup>72</sup>

---

<sup>66</sup> Mochtar Kusumaatmadja dan Etty R Agoes, *Pengantar Hukum Internasional*, hal. 22.

<sup>67</sup> *Ibid.*

<sup>68</sup> Peter Malanczuk, *Akehurst's Modern Introduction to International Law*, hal. 91.

<sup>69</sup> *Ibid.*, hal. 92.

<sup>70</sup> *Ibid.*

<sup>71</sup> Rebecca M M Wallace, *International Law*, hal. 59.

(untuk selanjutnya disebut sebagai “DARIO”). ILC dalam DARIO berusaha untuk merumuskan perkembangan progresif hukum internasional (*progressive development of international law*). Perkembangan progresif hukum internasional dalam hal ini diartikan sebagai persiapan suatu rancangan konvensi internasional dalam ruang lingkup subjek yang belum dibahas dalam hukum internasional atau dalam bidang hukum yang belum berkembang dengan cukup baik yang dilihat pula dalam praktek-praktek negara.<sup>73</sup> Dengan demikian DARIO berusaha untuk memberikan perumusan dan pembentukan sistem atas prinsip-prinsip dasar tanggung jawab organisasi internasional.

Perumusan DARIO dimulai pada tahun 2000, pada sidang ke-52 Majelis Umum PBB yang memutuskan untuk memasukan topik “*responsibility of international organization*” dalam pelaksanaan tugas dan fungsi ILC.<sup>74</sup> Usaha tersebut didasarkan pada kenyataan bahwa organisasi internasional telah menjadi subyek hukum yang penting dalam pelaksanaan hubungan internasional dan dapat mempengaruhi perkembangan hukum internasional.

## 2.1 Organisasi Internasional dalam Hukum Internasional

Organisasi internasional sebagai entitas dalam hukum internasional, dan pula bagian dari masyarakat internasional, merupakan perkembangan yang terlihat pada akhir abad ke-19. Organisasi internasional dalam konsep hukum internasional, merupakan suatu entitas yang dibentuk berdasarkan suatu perjanjian antar negara untuk pelaksanaan tugas dan fungsi tertentu.<sup>75</sup> Organisasi internasional pertama dan tertua dalam sejarah perkembangan organisasi internasional adalah *Rhine Commission* pada tahun 1815, yang berbentuk sebagai suatu komisi bersama negara-negara di wilayah sungai Rhine untuk mengatur

---

<sup>72</sup> International Law Commission, “Draft Articles on the Responsibility of International Organization”, *Yearbook of International Law Commission*, vol. II, Part Two, (2011).

<sup>73</sup> Thomas M Franck dan Mohamed ElBaradei, “The Codification and Progressive Development of International Law: A Unitar Study of the Role and Use of the International Law Commission”, *American Journal of International Law*, (July, 1982), hal. 1.

<sup>74</sup> United Nations, *Report of the International Law Commission: Fifty-fourth Session*, Supplement No. 10 (A/57/10), (New York, 2002), hal. 228, par. 458.

<sup>75</sup> Rebecca M M Wallace, *International Law*, hal. 67.

kegiatan negara-negara tersebut di daerah sungai.<sup>76</sup> *Rhine Commission* kemudian diubah menjadi *Central Commission for Navigation on the Rhine* yang didasarkan pada *Mannheim Document* tertanggal 17 Oktober 1868 sebagai dasar pembentukannya.<sup>77</sup>

Sampai saat ini telah terbentuk lebih dari 1700 organisasi internasional di dunia dengan berbagai tujuan dan fungsi yang beragam.<sup>78</sup> Organisasi-Organisasi tersebut merupakan wadah negara-negara dalam menjalankan tugas bersama, baik dalam bentuk kerja sama yang sifatnya koordinatif maupun subordinatif.<sup>79</sup> Organisasi internasional tersebut merupakan bentuk kerja sama negara-negara dalam hubungan internasional yang dibentuk dalam suatu sistem terorganisir untuk fungsi dan tujuan tertentu. Munculnya organisasi internasional sebagai suatu entitas dalam masyarakat internasional mempengaruhi perkembangan dari konsep masyarakat internasional itu sendiri. Masyarakat internasional kini tak hanya didominasi oleh negara sebagai satu-satunya aktor dalam pelaksanaan hubungan internasional. Dalam hubungannya tersebut kemudian negara membentuk organisasi internasional untuk kepentingan bersama. Organisasi internasional ini adalah sebagai salah satu anggota dari masyarakat internasional.<sup>80</sup>

### 2.1.1 Personalitas Hukum Organisasi Internasional

Organisasi internasional merupakan bagian dari masyarakat internasional, sehingga dapat dikatakan bahwa organisasi internasional memiliki peran dalam hukum internasional. Peran organisasi internasional tersebut terlihat dengan adanya anggapan bahwa organisasi internasional merupakan subyek hukum

---

<sup>76</sup> J Samuel Barkin, *International Organization: Theories and Institution*, hal. 5.

<sup>77</sup> Central Commission for the Navigation of the Rhine, "Organisation", <<http://www.ccr-zkr.org/11000000-en.html>>, diakses pada 13 Maret 2012.

<sup>78</sup> Kristen E Boon, "New Directions in Responsibility: Assessing the International Law Commission's Draft Articles on the Responsibility of International Organization", *Yale Journal of International Law Online*, (Spring, 2012), hal.2.

<sup>79</sup> Sri Setianingsih Suwardi, *Pengantar Hukum Organisasi Internasional*, hal. 5.

<sup>80</sup> *Ibid.*, hal. 7.

internasional, yang mempunyai personalitas hukum dalam hukum internasional. Personalitas hukum organisasi internasional pertama kali dibahas dan dinyatakan ada dalam suatu organisasi internasional pada kasus *Reparation for Injuries* yang dibahas oleh Mahkamah Internasional. Kasus ini berawal dari pembentukan negara Israel yang menciptakan kerusuhan, konflik di daerah Timur Tengah sehingga PBB pada waktu itu mengirimkan Pangeran Folke Bernadotte dari Swedia sebagai mediator.<sup>81</sup> Namun, usaha mediasi tersebut mengakibatkan meninggalnya Pangeran Bernadotte dan beberapa koleganya dan oleh karena itu PBB mempertanyakan kemampuannya sebagai organisasi internasional untuk mengajukan klaim atas peristiwa tersebut kepada entitas yang berwenang kepada Mahkamah Internasional.<sup>82</sup>

Dalam menjawab pertanyaan dari PBB, Mahkamah internasional terlebih dahulu melihat adanya suatu personalitas hukum dari organisasi internasional. Mahkamah Internasional menyatakan:

*“In order to answer this question, the Court must first enquire whether the Charter has given the organization such a position that it possesses, in regard to its Members, rights which it is entitled to ask them to respect. In other words, does the organization possess international personality?”*<sup>83</sup>

Kemudian, yang dimaksud dengan personalitas hukum organisasi internasional oleh Mahkamah Internasional adalah:

*“it will be used here to mean that if the organization is recognized as having that personality, it is an entity capable of availing itself of obligations incumbent upon its Members.”*<sup>84</sup>

---

<sup>81</sup> Jan Klabbbers, *An Introduction to International Institutional Law*, (Cambridge:Cambridge University Press, 2002), hal. 52.

<sup>82</sup> *Ibid.*

<sup>83</sup> International Court of Justice, *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, ICJ Reports 1949, hal. 178.

<sup>84</sup> *Ibid.*

Mahkamah Internasional dalam kasus tersebut memberikan jawaban yang afirmatif terhadap pertanyaan yang diajukan oleh PBB, dan melihat bahwa PBB sebagai Organisasi Internasional memiliki personalitas hukum dalam hukum internasional. Mahkamah Internasional menyatakan:

*“Accordingly, the Court has come to the conclusion that the Organization is an international person. ... What it does mean is that it is a subject of international law and capable of possessing international rights and duties, and that it has capacity to maintain its rights by bringing international claims.”*<sup>85</sup>

Dari kasus tersebut, dapat dilihat adanya dua cara yang digunakan oleh Mahkamah Internasional untuk melihat adanya suatu personalitas hukum atas suatu organisasi internasional. Pertama, personalitas hukum diidentifikasi melalui piagam pembentukan suatu organisasi yang melihat adanya hak-hak, kewajiban dan kewenangan tertentu yang diberikan kepada organisasi internasional.<sup>86</sup> Hal ini sesuai dengan ketentuan *“will theory”* (teori kehendak) yang menunjukkan bahwa personalitas hukum diberikan kepada suatu organisasi internasional atas dasar kehendak daripada pendiri organisasi itu sendiri, yakni negara.<sup>87</sup>

Namun, dalam beberapa organisasi personalitas hukum tidak secara eksplisit ditentukan dalam piagam pembentukannya, sehingga kita dapat melihat cara yang kedua dalam penentuan adanya personalitas hukum atas suatu organisasi internasional tersebut. Dalam hal ini, personalitas hukum suatu organisasi internasional didasarkan atas beberapa kriteria sesuai dengan ketentuan hukum internasional.<sup>88</sup> Hal ini sesuai dengan *“objective theory”* (teori objektif) yang menyatakan bahwa personalitas hukum suatu organisasi internasional mengikuti suatu pola yang sama dengan adanya personalitas hukum terhadap

---

<sup>85</sup> *Ibid.*, hal. 179.

<sup>86</sup> C F Amerasinghe, *Principles of the Institutional Law of International Organization*, hal. 79.

<sup>87</sup> Jan Klabbbers, *An Introduction to International Institutional Law*, hal. 53.

<sup>88</sup> C F Amerasinghe, *Principles of the Institutional Law of International Organization*, hal. 79.

negara, yakni dengan dipenuhinya ketentuan-ketentuan dalam hukum internasional dalam pembentukannya, maka suatu entitas dapat memiliki personalitas hukum.<sup>89</sup> Kriteria utama dalam melihat adanya personalitas hukum suatu organisasi internasional dalam hal ini adalah adanya kehendak yang berbeda yang dimiliki organisasi internasional dengan negara pembentuknya.<sup>90</sup>

Sehingga dalam melihat suatu personalitas hukum atas suatu organisasi internasional tidak semudah melihat adanya personalitas hukum atas negara. Mahkamah Internasional melihat adanya personalitas hukum organisasi internasional atas dasar (1) adanya personalitas hukum merupakan suatu hal yang tak dapat dipisahkan dengan upaya pencapaian tujuan pembentukan organisasi internasional tersebut; (2) adanya personalitas hukum merupakan dasar pemberian fungsi dan hak dari organisasi internasional tersebut.<sup>91</sup> Maka, dengan adanya personalitas hukum atas suatu organisasi internasional berarti bahwa organisasi internasional tersebut memiliki hak-hak, kewajiban-kewajiban, kewenangan dan tanggung jawab yang terpisah dari negara anggota yang merupakan pembentuk organisasi internasional tersebut dalam hukum internasional.<sup>92</sup> Tanpa adanya personalitas hukum suatu organisasi tidak akan dapat bertindak secara sendiri untuk mempertahankan hak-haknya dalam hukum internasional, dan tidak akan dianggap sebagai suatu subyek hukum internasional.

Dari uraian di atas, dapat kemudian diambil kesimpulan bahwa: organisasi internasional yang memiliki personalitas hukum dalam hukum internasional pada hakikatnya dapat menciptakan berbagai hak dan kewajiban seperti kemampuan untuk membuat perjanjian internasional, kemampuan untuk mengajukan tuntutan dan serta kewajiban dalam arti adanya tanggung jawab dari organisasi internasional atas tindakan-tindakannya tersebut.

---

<sup>89</sup> Jan Klabbbers, *An Introduction to International Institutional Law*, hal. 55.

<sup>90</sup> *Ibid.*

<sup>91</sup> C F Amerasinghe, *Principles of the Institutional Law of International Organization*, hal. 81.

<sup>92</sup> *Ibid.*, hal. 78.

### 2.1.2 Hubungan Negara dengan Organisasi Internasional

Organisasi internasional merupakan suatu entitas yang diciptakan oleh negara untuk tujuan dan fungsi tertentu atas dasar perjanjian di antara dua atau lebih negara.<sup>93</sup> Sehingga dapat dilihat bahwa negara secara formal merupakan unsur yang esensial dari adanya suatu organisasi internasional. Negara dalam hal ini berkehendak dalam pelaksanaan kerja sama internasional dalam suatu perjanjian internasional untuk membentuk institusi dalam pelaksanaan kerja sama tersebut maka dengan demikian terbentuklah adanya kehendak negara untuk membentuk organisasi internasional dengan fungsi dan tujuan serta wewenang tertentu.<sup>94</sup>

Dalam hubungan antara negara dan organisasi internasional hal terpenting yang perlu dilihat adalah keduanya merupakan suatu subyek hukum yang memiliki personalitas yang diakui dalam hukum internasional. Personalitas hukum organisasi memperlihatkan bahwa organisasi internasional tersebut merupakan entitas yang memiliki kemampuan yang terpisah dari negara anggotanya, hal tersebut terbentuk dalam pembentukannya atau ditafsirkan atas ketentuan hukum internasional secara umum seperti yang telah dijelaskan sebelumnya. Pemberian suatu personalitas hukum kepada suatu organisasi internasional itu pada hakikatnya merupakan *sine qua non* untuk mencapai tujuan organisasi internasional yang telah dibentuk.<sup>95</sup>

Personalitas hukum suatu organisasi yang membentuk organisasi internasional sebagai suatu entitas yang terpisah dari negara pembentuknya merupakan hal yang penting dalam upaya pelaksanaan fungsi dan tujuan daripada organisasi internasional. Hal ini dapat dilihat dalam pada konsep *functional necessity theory* yang memperlihatkan dasar adanya suatu organisasi internasional dan membentuk pendapat bahwa kemudian organisasi internasional merupakan bagian yang terpisah dari negara. *Functional necessity theory* tersebut didasarkan pada konsep dan ide bahwa hukum internasional tidak secara otomatis

---

<sup>93</sup> Peter Malanczuk, *Akehurst's Modern Introduction to International Law*, hal. 92.

<sup>94</sup> G Schermers dan Niels M Blokker, *International Institutional Law*, hal. 1202.

<sup>95</sup> Sumaryo Suryokusumo, *Pengantar Hukum Organisasi Internasional*, hal. 16.



memberikan hak-hak substantif maupun kewajiban kepada suatu organisasi internasional yang berbeda dengan negara pembentuknya.<sup>96</sup> Teori ini menyatakan bahwa organisasi internasional mendapatkan hak dan kewajiban serta hak-hak istimewa lainnya yang dapat memungkinkan mereka untuk dapat berfungsi secara efektif dari negara pembentuknya.<sup>97</sup>

Negara oleh karena itu memberikan kemampuan bertindak kepada organisasi internasional dalam tujuan untuk dapat menjalankan fungsi dan tujuannya dengan efektif tanpa lagi harus mengkhawatirkan adanya persetujuan dari negara. Sehingga organisasi internasional tidaklah bergantung sepenuhnya kepada negara pembentuknya. Organisasi internasional dalam hal ini memiliki *volonté distincte* (kehendaknya sendiri) yang membedakannya dari negara pembentuknya tersebut, organisasi pula mempunyai identitas yang berbeda dan terpisah dari negara pembentuknya.<sup>98</sup> Kehendak tersebut merupakan salah satu elemen dari suatu organisasi internasional yang membentuk organisasi internasional tersebut menjadi salah satu subyek hukum internasional.

Setelah terbentuknya organisasi internasional, yakni setelah terbentuknya piagam dasar suatu organisasi internasional dan berlakunya piagam tersebut negara pembentuk suatu organisasi internasional kemudian pula mengambil peranan sebagai negara anggota organisasi internasional tersebut. Negara selain negara pembentuk organisasi internasional dapat pula menjadi negara anggota organisasi internasional dengan cara tertentu yang telah ditentukan dalam piagam pembentukan organisasi internasional.<sup>99</sup> Namun, pembedaan tersebut tidak kemudian membedakan negara pembentuk dan negara anggota yang masuk setelah terbentuknya organisasi internasional dalam pelaksanaan hubungan negara dengan organisasi internasional tersebut.

Negara anggota, baik negara pembentuk ataupun negara anggota yang baru masuk setelah terbentuknya organisasi internasional, secara umum harus

---

<sup>96</sup> Jan Klabbbers, *An Introduction to International Institutional Law*, hal. 36.

<sup>97</sup> *Ibid.*

<sup>98</sup> G Schermers dan Niels M Blokker, *International Institutional Law*, hal. 35.

<sup>99</sup> *Ibid.*, hal. 67.

melaksanakan kewajibannya terhadap organisasi internasional dengan itikad baik.<sup>100</sup> Kewajiban tersebut merupakan suatu tindakan yang harus dilaksanakan terhadap organisasi internasional yang diatur dalam piagam organisasi. Contohnya dapat dilihat dalam melaksanakan rekomendasi ataupun arahan yang dikeluarkan oleh organisasi tersebut.

Maka dapat disimpulkan bahwa negara dalam hal ini merupakan bagian yang esensial dari adanya organisasi internasional dan tak dapat dipisahkan dari organisasi itu sendiri, yakni negara bertindak sebagai negara anggota organisasi internasional. Namun, hal tersebut tidak lantas melihat bahwa negara dan organisasi internasional merupakan satu kesatuan entitas, negara sendiri memiliki personalitas hukum dalam hukum internasional, begitu pula organisasi internasional yang personalitas hukumnya merupakan hal yang penting guna pelaksanaan fungsi dan tujuannya secara efektif. Sehingga kemudian dapat dilihat bahwa negara dan organisasi internasional merupakan dua subyek hukum yang terpisah dalam hukum internasional.

## 2.2 Tanggung Jawab dalam Hukum Internasional

Tanggung jawab dalam hukum internasional dapat dikonotasikan dengan “*responsibility*” ataupun “*liability*”, yang keduanya berkaitan dengan hak dan kewajiban yang dimiliki oleh suatu subyek hukum. Walaupun demikian, kedua istilah tersebut memiliki perbedaan yang signifikan antara yang satu dengan yang lainnya. *Liability* dapat diartikan sebagai suatu kewajiban dari subyek hukum yang timbul dari kerusakan atau kerugian yang timbul dari tindakan negara yang tidak melanggar hukum.<sup>101</sup> Suatu subyek hukum dalam pengertian *liability* tersebut berkewajiban untuk memberikan ganti kerugian terhadap subyek hukum lainnya atas tindakannya walaupun tidak adanya *international wrongful act*, atau dapat dikatakan walaupun tindakannya adalah tindakan yang sah dalam hukum internasional.<sup>102</sup> Sehingga *liability* muncul dalam hal adanya kerugian atau

---

<sup>100</sup> *Ibid.*, hal. 1202.

<sup>101</sup> Peter Malanczuk, *Akehurst's Modern Introduction to International Law*, hal. 254.

kerusakan yang diakibatkan oleh tindakan yang dilakukan suatu subyek hukum terhadap subyek lainnya. Kerugian atau kerusakan tersebut menjadi elemen utama adanya *liability*. *Responsibility* sama halnya dengan *liability* merupakan kewajiban yang timbul atas tindakan yang dilakukan oleh suatu subyek hukum, namun perbedaannya adalah tindakan subyek hukum tersebut terlebih dahulu harus dibuktikan sebagai suatu tindakan yang melanggar hukum untuk dapat muncul adanya suatu *responsibility* dari subyek hukum.<sup>103</sup> Dalam hal ini, tanggung jawab yang dimaksud adalah “*responsibility*” dari suatu subyek hukum yang akan dibahas dalam pemaparan selanjutnya.

Tanggung jawab merupakan bagian yang penting dalam hukum internasional dan merupakan bagian yang esensial dari masyarakat internasional. Terdapat pandangan yang menyatakan bahwa adanya sistem hukum internasional memperlihatkan bahwa apabila subyek hukum gagal dalam pelaksanaan pemenuhan kewajibannya haruslah bertanggung jawab atas hal tersebut.<sup>104</sup> Tanggung jawab dalam hal ini dilihat sebagai suatu konsekuensi dari adanya kewajiban yang harus dilaksanakan oleh suatu subyek hukum dalam hukum internasional, dan tidak dipenuhinya kewajiban tersebut dapat membentuk suatu *international wrongful act*.

Pada awalnya tanggung jawab internasional lebih sering diasosiasikan kepada tanggung jawab negara, karena negara pada saat itu merupakan subyek hukum yang utama dan satu-satunya dalam hukum internasional. Sehingga pengertian tanggung jawab pada awalnya diartikan sebagai:

*“The wrongful act, that is to say, generally speaking, the violation of an international obligation, is thus accompanied by the appearance of a new legal relationship between State to which the act is imputable, which is*

---

<sup>102</sup> Sompong Sucharitkul, “State Responsibility and International Liability under International Law, *Loyola of Los Angeles International and Comparative Law Review*, vol. 18, (1996), <<http://digitalcommons.lmu.edu/ilr/vol18/iss4/6>>, diakses pada 19 April 2012, hal. 822.

<sup>103</sup> Peter Malanczuk, *Akehurst’s Modern Introduction to International Law*, hal. 254.

<sup>104</sup> Allain Pellet, “The Definition of Responsibility in International Law”, dalam James Crawford, Allain Pellet dan Simon Olleson, Ed., *The Law of International Responsibility*, (Oxford:Oxford University Press, 2010), hal. 4.

*obliged to make reparation, and the State with respect to which the unfulfilled obligation existed, which can demand reparation.*”<sup>105</sup>

Tanggung jawab merupakan *international wrongful act* dari negara yang merupakan pelanggaran atas kewajiban internasional negara tersebut. Tindakan tersebut kemudian memunculkan hak bagi negara yang dirugikan untuk meminta ganti rugi dan kewajiban negara yang telah melaksanakan *international wrongful act* untuk memberikan ganti rugi.

Dapat dilihat adanya beberapa prinsip dasar tanggung jawab internasional, yaitu:<sup>106</sup>

1. Tanggung jawab internasional dari subyek hukum internasional timbul dengan adanya *international wrongful act* yang dilakukan oleh subyek hukum.
2. Siapa dan apa yang dapat dikategorikan sebagai suatu subyek hukum internasional ditentukan sesuai dengan prinsip-prinsip yang berlaku dalam penentuan subyek hukum internasional.
3. Terjadinya *international wrongful act* oleh subyek hukum internasional ditentukan dalam ruang lingkup dan sesuai dengan ketentuan yang berlaku dalam hukum internasional.

Sehingga dengan munculnya subyek hukum lain selain negara dalam hukum internasional, tanggung jawab internasional tidak hanya berarti sebagai tanggung jawab negara namun secara luas sebagai tanggung jawab setiap subyek hukum. Tanggung jawab merupakan pertanda dan pula merupakan konsekuensi dari adanya personalitas hukum suatu entitas, maka hanya subyek hukum internasional yang dapat bertanggung jawab secara internasional.<sup>107</sup> Apabila kemudian suatu entitas dapat dinyatakan bertanggung jawab dalam hukum internasional hal

---

<sup>105</sup> *Ibid.*, hal. 5.

<sup>106</sup> C F Amerasinghe, “The Essence of the Structure of International Responsibility”, hal. 6.

<sup>107</sup> C de Visscher, *La Responsabilite de Etats*, (Leiden: Bibliotheca Visseriana, 1924), hal. 90. Seperti yang dikutip oleh Allain Pellet, “The Definition of Responsibility in International Law”, hal. 6.

tersebut merupakan manifestasi dan bukti adanya personalitas hukum dari entitas tersebut, bahwa entitas tersebut merupakan subyek dalam hukum internasional.<sup>108</sup>

Dengan demikian, organisasi internasional yang telah dianggap memiliki personalitas hukum dalam hukum internasional dan merupakan subyek hukum internasional dapat dinyatakan pula bertanggung jawab dalam hukum internasional. Konsep tanggung jawab organisasi internasional tersebut tentulah merupakan konsep yang terpisah dari tanggung jawab negara anggotanya, yang terlihat dari fakta bahwa organisasi internasional tersebut dengan adanya personalitas hukum merupakan subyek hukum yang terpisah dari negara anggotanya yang dapat mengemban hak dan kewajibannya sendiri tanpa bergantung pada kehendak daripada negara anggotanya.

### 2.2.1 Tanggung Jawab Negara

Negara sebagai suatu subyek hukum internasional sudah merupakan anggapan yang diterima dengan baik dalam hukum internasional, bahkan negara merupakan subyek hukum utama dan satu-satunya dalam hukum internasional pada awal perkembangannya. Tanggung jawab negara kemudian merupakan salah satu konsekuensi dari kemampuan negara dalam pelaksanaan kegiatannya dalam hukum internasional. Konsep tanggung jawab negara sendiri merupakan prinsip yang fundamental dalam hukum internasional yang lahir dari sifat dasar sistem hukum internasional yang ada dan doktrin kedaulatan negara dan kesetaraan antara negara-negara.<sup>109</sup> Charles de Visscher, seperti yang dikutip oleh Allain Pellet, menggambarkan bahwa tanggung jawab negara merupakan “*necessary corollary*” dari prinsip kesetaraan negara tersebut.<sup>110</sup> Doktrin kesetaraan negara menyatakan bahwa: “*all states are equally responsible under international law for their illegal acts*”.<sup>111</sup> Sehingga dalam pelaksanaan tindakannya apabila terjadi pelanggaran yang dilakukan oleh suatu negara terhadap negara lainnya, negara

---

<sup>108</sup> *Ibid.*

<sup>109</sup> Malcom N Shaw, *International Law*, hal. 778.

<sup>110</sup> Allain Pellet, “The Definition of Responsibility in International Law”, hal. 4.

<sup>111</sup> Rebecca M M Wallace, *International Law*, hal. 166.

tersebut memiliki kedudukan yang setara untuk menuntut tanggung jawab dari negara yang telah melakukan pelanggaran tersebut.

Tanggung jawab negara dalam hal ini didasarkan atas adanya tindakan pelanggaran, yakni pada saat negara melakukan *international wrongful act* terhadap negara lain maka kemudian hal ini memunculkan adanya tanggung jawab internasional di antara kedua negara tersebut.<sup>112</sup> Perkembangan tanggung jawab negara dalam hukum internasional dapat dilihat secara nyata dalam praktek-praktek negara yang membentuk adanya *customary international law*<sup>113</sup>. Tanggung jawab negara secara nyata telah dapat dilihat dalam praktek-praktek negara dalam hubungan antar negara, dan pula telah dianggap sebagai satu ketentuan yang mengikat negara untuk dilakukan dalam hukum internasional. Kedua hal tersebut telah membentuk elemen material dan elemen psikologis<sup>114</sup> dari adanya suatu *customary international law*, sehingga konsep tanggung jawab negara ini berlaku dan mengikat kepada negara.

Konsep tanggung jawab negara dalam hukum internasional dapat pula dilihat pada *Draft Articles on Responsibility of States for Internationally Wrongful Acts* (yang selanjutnya disebut “DASR”), yang merupakan upaya kodifikasi terhadap prinsip-prinsip tanggung jawab negara yang ada dan memperlihatkan perkembangan hukum internasional. ILC membentuk DASR sejak tahun 1953 atas dasar Resolusi 799 (VIII) Majelis Umum PBB tertanggal 7 Desember 1953, yang meminta ILC untuk melaksanakan kodifikasi atas prinsip-prinsip tanggung jawab negara. DASR yang dibentuk oleh ILC merupakan bentuk kodifikasi dalam hukum internasional. Kodifikasi dalam hal ini dimaksudkan adalah perumusan

---

<sup>112</sup> Malcom N Shaw, *International Law*, hal. 778.

<sup>113</sup> *Customary International Law* atau Hukum Kebiasaan Internasional adalah kebiasaan internasional yang merupakan kebiasaan umum yang diterima sebagai hukum, seperti yang tertuang dalam Pasal 38 ayat 1 sub b Piagam Mahkamah Internasional, yang berbunyi: “*International customs, as evidence of a general practice accepted as law*”. Untuk terbentuknya hukum kebiasaan internasional tersebut, harus dipenuhi dua unsur yang ada, yakni: (1) harus terdapat suatu kebiasaan yang bersifat umum; dan (2) kebiasaan itu harus diterima sebagai hukum. (Mochtar Kusumaatmadja dan Ety R Agoes, *Pengantar Hukum Internasional*, hal. 143-144).

<sup>114</sup> *A rule of customary international law derives its law hallmark through the possession of two elements: (i) a material and (ii) a psychological element. The material element refers to the behavior and practices of states, whereas the psychological element is the subjective conviction held by states that the behavior in question is compulsory and not discretionary.* (Rebecca M M Wallace, *International Law*, hal. 9).

dan sistemisasi yang tepat atas aturan-aturan hukum internasional yang berkembang dalam praktek negara, putusan-putusan pengadilan internasional dan doktrin.<sup>115</sup>

Pemaparan konsep tanggung jawab negara dalam DASR ini berfokus kepada aturan sekunder (*secondary rules*) dari tanggung jawab negara, yakni ketentuan umum dalam hukum internasional yang menentukan kondisi-kondisi yang menimbulkan adanya tanggung jawab negara atas tindakannya dan akibat hukum yang timbul dari adanya tanggung jawab tersebut.<sup>116</sup> Sedangkan permasalahan aturan primer (*primary rules*) dari tanggung jawab negara yang mengatur mengenai penjabaran kewajiban organisasi internasional, pelanggaran yang memunculkan tanggung jawab, tidak diatur dalam DASR.<sup>117</sup>

#### 2.2.1.1 Sifat Dasar Tanggung Jawab Negara

Karakteristik dasar tanggung jawab negara bergantung pada faktor-faktor: (1) keberadaan kewajiban hukum internasional yang berlaku di antara dua negara tertentu; (2) telah terjadi tindakan secara aktif maupun pasif yang melanggar kewajiban internasional yang dapat diatribusikan kepada negara; dan (3) adanya kehilangan atau kerugian yang disebabkan oleh tindakan tersebut.<sup>118</sup> Faktor-faktor tersebut dapat dilihat telah diterima dalam praktek negara, yakni pada kasus *Spanish Zone of Morroco Claims*, Hakim Huber dalam putusannya menyatakan:

*“Responsibility is the necessary corollary of a right. All rights of an international character involve international responsibility. Responsibility results in the duty to make reparation if the obligation in question is not met.”*<sup>119</sup>

---

<sup>115</sup> Thomas M Franck dan Mohamed ElBaradei, “The Codification and Progressive Development of International Law, hal. 1.

<sup>116</sup> International Law Commission, “Drafts Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries 2001”, *Yearbook of International Law Commission*, vol. II, Part Two, (2001), hal. 31, par 1.

<sup>117</sup> *Ibid.*

<sup>118</sup> Malcom N Shaw, *International Law*, hal. 781.

<sup>119</sup> Reports of International Arbitration Award, *Spanish Zone of Morocco (Great Britain v. Spain)*, (1924), 2 R.I.A.A., hal. 641.

Pembahasan yang serupa dapat pula ditemukan dalam kasus *Chorzow Factory*, yang mana *Permanent Court of International Justice* (selanjutnya disebut sebagai “PCIJ”) menyatakan bahwa:

*“It is a principle of international law and even a greater of law, that any breach of an engagement involves an obligation to make reparation in an adequate form”*<sup>120</sup>

Maka dapat dilihat bahwa adanya kewajiban terlebih dahulu merupakan awal mula adanya tanggung jawab negara. Apabila kemudian terjadi tindakan secara aktif maupun pasif yang melanggar kewajiban internasional oleh suatu negara, maka kemudian tanggung jawab negara atas akibat adanya pelanggaran tersebut.

ILC memformulasikan adanya aturan dasar tanggung jawab negara dalam Pasal 1 DASR, yang berbunyi:

*”Article 1: Responsibility of a State for its internationally wrongful act: Every internationally wrongful act of a State entails the international responsibility of that state.”*<sup>121</sup>

Pasal 1 DASR didasarkan pada prinsip-prinsip yang paling banyak ditemukan dalam praktek negara-negara dan keputusan hakim serta prinsip yang paling mendasar dalam hukum internasional.<sup>122</sup> Dalam kasus *phosphates in Morocco*, PCIJ mendukung prinsip yang tertuang dalam Pasal 1 DASR dengan menyatakan bahwa pada saat negara melakukan *international wrongful act* terhadap negara lain, pada saat itu pula tanggung jawab internasional muncul di antara kedua negara tersebut.<sup>123</sup> Dalam kasus *the Interpretation of Peace Treaties (Second Phase)* disebutkan pula bahwa penolakan terhadap pemenuhan kewajiban

---

<sup>120</sup> Permanent Court of International Justice, *Factory at Chorzow (Germany v. Poland)*, 1928 PCIJ (ser. A) No. 17, (Sept. 13), hal. 21.

<sup>121</sup> International Law Commission, “Draft Articles on the Responsibility of States for Internationally Wrongful Acts”, Pasal 1.

<sup>122</sup> D J Harris, *Cases and Materials on International Law*, Ed. 5, (London: Sweet & Maxwell, 1998), hal. 486.

<sup>123</sup> International Law Commission, “Drafts Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries 2001”, hal. 31, par. 2.



kontraktual (kewajiban dalam perjanjian internasional) melahirkan adanya tanggung jawab negara.<sup>124</sup>

Dapat disimpulkan bahwa tanggung jawab negara merupakan konsekuensi yang timbul dari adanya tindakan negara dalam lalu lintas hukum internasional. Tindakan tersebut dapat berupa suatu tindakan yang aktif maupun pasif yang mengakibatkan kehilangan dan kerugian terhadap negara ketiga. Pada saat itu pula negara ketiga berhak meminta adanya pengembalian kerugian dan kehilangan yang terjadi, yang merupakan tanggung jawab negara.

### 2.2.1.2 Unsur-Unsur Tanggung Jawab Negara

Unsur utama dari adanya tanggung jawab negara dalam hukum internasional adalah adanya *international wrongful act* dalam tindakan yang dilakukan oleh negara. Dalam Pasal 2 DASR disebutkan bahwa:

*“Article 2. Elements of an internationally wrongful act of a state: there is an internationally wrongful act of a state when conduct consisting of an action or omission: (a) is attributable to the State under international law; and (b) constitutes a breach of an international obligation of the State.”*<sup>125</sup>

Dari penjelasan di atas dapat ditemukan bahwa terdapat dua elemen dari *international wrongful act*, yakni (1) bahwa tindakan tersebut dapat diatribusikan kepada negara berdasarkan hukum internasional dan (2) tindakan tersebut merupakan sebuah pelanggaran terhadap kewajiban internasional negara yang mengikat pada saat itu. Dua elemen dari *international wrongful act* tersebut dapat ditemukan dalam kasus *Phospates in Morroco*, yang mana PCIJ secara eksplisit menghubungkan lahirnya tanggung jawab internasional dengan adanya *“an act being attributable to the State and described as contrary to the treaty right[s] of another State.”*<sup>126</sup>

---

<sup>124</sup> *Ibid.*

<sup>125</sup> International Law Commission, “Draft Articles on the Responsibility of States for Internationally Wrongful Acts”, Pasal 2.

<sup>126</sup> Permanent Court of International Justice, *Phospates in Morroco, Judgment*, 1938, PCIJ Series A/B, No. 74, hal. 10 dan hal. 28.

Mahkamah Internasional juga memberikan dukungan terhadap adanya dua elemen dari *international wrongful act* dalam putusannya pada kasus *United States Diplomatic and Consular Staff in Tehran Case*. Dalam putusannya, mahkamah internasional menyatakan bahwa untuk melihat adanya tanggung jawab dari Iran sebagai negara maka:

*“[f]irst, it must determine how far, legally the acts in question may be regarded as imputable to the Iranian State. Secondly it must consider their compatibility or incapability with the obligations of Iran under treaties in force or under any other rules of international law that may be applicable.”*<sup>127</sup>

Terlihat bahwa penyanderaan yang terjadi terhadap kedutaan besar dan diplomat Amerika Serikat oleh *revolutionaries militant* di Iran, dapat dinyatakan sebagai tanggung jawab Iran apabila tindakan tersebut “*imputable*” kepada Iran sebagai negara. Istilah “*imputable*” dalam hal ini memiliki makna yang sama dengan kata atribusi (“*attribution*”), yakni berarti “*to denote the operation of attaching a given action or omission to a state*”.<sup>128</sup> Bahwa kemudian apabila tindakan penyanderaan tersebut dapat dikaitkan dengan Iran sebagai negara dan terdapat adanya kewajiban yang harus dipenuhi Iran dalam hukum internasional, maka dalam kasus tersebut telah terbentuk suatu *international wrongful act* yang memunculkan adanya tanggung jawab Iran sebagai negara.

Elemen atribusi, yang merupakan elemen pertama pada pasal tersebut, sering digambarkan sebagai elemen “subjektif”, sedangkan elemen pelanggaran kewajiban internasional, yang merupakan elemen kedua pada pasal tersebut, sering digambarkan sebagai elemen “objektif”.<sup>129</sup> Keduanya memperlihatkan adanya hubungan antara negara dengan tindakannya serta hukum internasional, yang dapat memberikan pengaruh secara langsung maupun tidak langsung kepada negara lain.

---

<sup>127</sup> International Court of Justice, *United States Diplomatic and Consular Staff in Tehran*, Judgment, ICJ Report 1980, hal 29, par. 56.

<sup>128</sup> International Law Commission, “Drafts Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries 2001”, hal. 36, par. 12.

<sup>129</sup> D J Harris, *Cases and Materials on International Law*, hal. 486.

Negara merupakan subjek hukum yang memiliki hak dan kewajiban dalam lalu lintas hukum internasional. Namun, negara itu sendiri merupakan bentuk abstrak yang tidak dapat dilihat secara nyata. Negara dalam melaksanakan tindakannya dilakukan melalui organ-organ negara, agen ataupun perwakilannya. Untuk itu dalam atribusi tindakan negara sekiranya perlu dilihat bahwa organ, agen atau perwakilan yang melakukan tindakan tersebut merupakan entitas yang memiliki legitimasi hukum untuk melaksanakan tindakan atas nama negara tersebut.<sup>130</sup> Apabila kemudian hal ini dapat dipenuhi maka tindakan tersebut dapat dikatakan merupakan tindakan yang dapat diatribusikan kepada negara, yang membentuk adanya tanggung jawab negara. Dapat dinyatakan bahwa konsep tanggung jawab negara bergantung pada hubungan yang terdapat di antara negara dan entitas yang secara nyata melaksanakan tindakan pelanggaran.

Elemen kedua dalam *international wrongful act* merupakan pelanggaran terhadap kewajiban internasional yang ada dan mengikat negara pada saat itu. Kewajiban internasional yang dimaksud dalam hal ini dapat berasal dari kewajiban yang dalam suatu perjanjian internasional ataupun kewajiban di luar perjanjian internasional.<sup>131</sup> Hukum internasional tidak membedakan adanya tanggung jawab yang muncul atas dasar kewajiban kontraktual dan atas dasar kesalahan, sehingga setiap pelanggaran kewajiban internasional yang dilakukan oleh negara melahirkan tanggung jawab internasional. Pada dasarnya setiap tindakan negara, baik yang berupa (1) tindakan aktif (*a comission*) atau tindakan pasif (*an omission*), yang membentuk adanya kesalahan atau kerugian terhadap negara lain memunculkan adanya tanggung jawab dari negara tersebut.<sup>132</sup> Sehingga adanya pelanggaran yang muncul atas pelanggaran kewajiban kontraktual (perjanjian internasional) maupun pelaksanaan tindakan kesalahan terhadap suatu negara secara aktif maupun pasif, dapat melahirkan tanggung jawab terhadap negara yang melakukan tindakan tersebut.

---

<sup>130</sup> International Law Commission, "Drafts Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries 2001", hal. 35, par. 5.

<sup>131</sup> *Ibid.*, par. 7.

<sup>132</sup> J G Starke, *An Introduction to International Law*, Ed. 4, (London:Butterworth & CO. LTD., 1958), hal 215.

Kewajiban internasional memperlihatkan adanya suatu keharusan terhadap negara dalam melaksanakan atau tidak melaksanakan suatu tindakan. Hal ini pula memperlihatkan adanya larangan terhadap adanya tindakan negara yang tidak sesuai dengan hukum internasional, dapat dikatakan bahwa kewajiban internasional juga mengakomodir adanya tanggung jawab negara terhadap tindakan secara keseluruhan terhadap masyarakat internasional. Maka dapat disimpulkan bahwa tanggung jawab negara diatur dalam suatu standar internasional, dan hukum internasional yang menentukan tindakan apa dan sejauh apa tindakan yang dilakukan oleh negara dapat dianggap sebagai tindakan yang sesuai dengan hukum internasional ataupun merupakan suatu *international wrongful act*.<sup>133</sup>

### 2.2.2 Tanggung Jawab Organisasi Internasional

Pembentukan dan perkembangan organisasi internasional didasarkan pada kenyataan dalam hubungan internasional dan adanya anggapan bahwa negara bekerja sama untuk mendapatkan hasil dan tujuan lebih baik daripada negara bertindak secara sendiri dalam pencapaian tujuan tersebut.<sup>134</sup> Maka terbentuklah berbagai macam organisasi internasional yang bertindak dalam berbagai bidang hukum internasional. Untuk dapat mendukung fungsi dan tujuan dari pembentukan organisasi internasional, maka negara memberikan kewenangan kepada organisasi internasional untuk bertindak, yakni memberikan personalitas hukum kepada organisasi internasional. Adanya personalitas hukum organisasi internasional telah diterima secara luas dalam hukum internasional dan pula telah mendapatkan pengakuan dalam praktek hukum internasional. Hal tersebut dapat dilihat dalam pernyataan Mahkamah Internasional pada kasus *Reparation for Injuries* yang mengakui adanya kemampuan PBB sebagai organisasi internasional untuk dapat mengajukan klaim dalam hukum internasional, dan mengakui adanya kepribadian hukum dari organisasi tersebut.<sup>135</sup>

---

<sup>133</sup> *Ibid.*

<sup>134</sup> William E Holder, "International Organization: Accountability and Responsibility", hal. 231.

Dengan adanya personalitas hukum, organisasi internasional memiliki status dalam hukum internasional yang memungkinkan bagi organisasi internasional untuk dapat mengemban hak dan kewajiban dan menjadi subyek hukum internasional. Konsekuensi dari adanya pengakuan bahwa organisasi internasional adalah subyek hukum internasional mengakibatkan kemudian organisasi internasional tersebut dapat bertanggung jawab secara hukum internasional. Dalam prinsip dasar tanggung jawab internasional telah dinyatakan bahwa: “tanggung jawab internasional dari subyek hukum internasional muncul dengan adanya *international wrongful act* yang dilakukan oleh subyek hukum tersebut”.<sup>136</sup> Pengertian subyek hukum internasional didasarkan pada hukum internasional. Dalam hukum internasional itu sendiri, organisasi internasional telah diterima sebagai salah satu subyek hukum internasional.

Dikatakan bahwa tanggung jawab internasional tidak hanya terbatas secara *ratione personae*<sup>137</sup> kepada negara, sehingga organisasi internasional yang juga merupakan subyek hukum internasional dalam hal ini dapat mengemban tanggung jawab atas pelaksanaan tindakan mereka.<sup>138</sup> Tanggung jawab internasional (*responsibility*) dalam hal ini juga perlu dilihat terpisah secara *rationa materiae*<sup>139</sup> dengan tanggung jawab (*liability*) yang timbul akibat tindakan suatu subyek hukum yang tidak melanggar kewajiban atau hukum internasional.<sup>140</sup>

---

<sup>135</sup> Dalam Putusan Mahkamah Internasional menyatakan bahwa “*competence to bring an international claim is, for those possessing it, the capacity to resort to the customary methods recognized by international law for the establishment, the presentation and the settlement of claims. Among these methods may be mentioned protest, request for an enquiry, negotiation, and request for submission to an arbitral tribunal court ...*”. (International Court of Justice, *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, ICJ Reports 1949, hal. 177).

<sup>136</sup> C F Amerasinghe, “The Essence of the Structure of International Responsibility”, hal. 6.

<sup>137</sup> *Ratione Personae* secara harfiah berarti “*by reason of the person concerned*”, yang dalam hal ini dapat diartikan bahwa tanggung jawab tidak hanya mengikat negara karena negara itu sendiri sebagai suatu subyek hukum dalam hukum internasional. (Bryan E Garner, Ed., *Black’s Law Dictionary*, hal. 3960).

<sup>138</sup> Allain Pellet, “The Definition of Responsibility in International Law”, hal. 5.

<sup>139</sup> *Ratione Materiae* secara harfiah berarti “*by the the matter involved*”, yang dalam hal ini dapat diartikan bahwa *responsibility* haruslah dibedakan dari *liability* berdasarkan atas materi muatannya itu sendiri. (Bryan E Garner, Ed., *Black’s Law Dictionary*, hal. 3960).

<sup>140</sup> Allain Pellet, “The Definition of Responsibility in International Law”, hal. 5.

Sehingga dapat disimpulkan bahwa organisasi internasional selayaknya negara sebagai subyek hukum internasional dapat mengemban tanggung jawab atas *international wrongful act* yang dilakukannya. Tanggung jawab tersebut pula terpisah antara tanggung jawab negara anggota dengan tanggung jawab organisasi internasional yang didasarkan kepada anggapan bahwa negara anggota dan organisasi internasional merupakan entitas yang memiliki personalitas hukum dalam hukum internasional secara sendiri dan merupakan subyek hukum yang terpisah satu sama lainnya.

### 2.2.2.1 Unsur-Unsur Tanggung Jawab Organisasi Internasional

Konsep tanggung jawab (*responsibility*) dari organisasi internasional sering dikaitkan dengan konsep akuntabilitas (*accountability*) dari organisasi internasional, walaupun keduanya merupakan dua konsep yang berbeda. Akuntabilitas terkadang dapat dilihat sebagai suatu konsep yang tumpang tindih dengan konsep tanggung jawab organisasi internasional, akan tetapi keduanya memiliki pengertian yang berbeda. Akuntabilitas menunjukkan pengertian bahwa suatu organisasi internasional mempunyai kewajiban untuk bertindak dalam ruang lingkup tindakan yang sesuai dengan standar ketentuan yang telah diterima yakni atas dasar kewenangan yang telah diberikan kepadanya dan apabila adanya kegagalan untuk bertindak sesuai dengan ketentuan itu maka akan menimbulkan sanksi yang dikenakan pada organisasi tersebut.<sup>141</sup> Akuntabilitas juga dihubungkan dengan kewenangan dan kekuasaan organisasi internasional, yakni kewajiban untuk mempertanggungjawabkan pelaksanaan kewenangan dan kekuasaan daripada organisasi.<sup>142</sup>

Sehingga dapat dinyatakan bahwa akuntabilitas merupakan tolak ukur daripada pelaksanaan kewenangan dan kekuasaan organisasi internasional, yang didasarkan atas kewenangan dan kekuasaan yang telah diberikan kepada organisasi oleh negara pembentuknya. Akuntabilitas merupakan sarana

---

<sup>141</sup> Aurel Sari, *Autonomy, Attribution and Accountability: Reflections on the Behrami Case*, < <http://ssrn.com/abstract=1635803>>, diakses pada 30 September 2011, hal. 4.

<sup>142</sup> Gerard Hafner, "Accountability of International Organization", *American Society of International Law*, (April, 2003), hal. 4.

pengendalian atas kewenangan dan kekuasaan organisasi internasional tersebut. Akuntabilitas organisasi internasional berbeda dengan tanggung jawab organisasi internasional yang dinyatakan sebagai salah satu bentuk spesifik dari akuntabilitas secara hukum.<sup>143</sup> Tanggung jawab lebih spesifik melihat aspek hukum dari tindakan suatu organisasi internasional, sedangkan akuntabilitas dalam hal ini melihat apakah adanya kewenangan dan kekuasaan dari suatu organisasi internasional dalam melaksanakan suatu tindakan.<sup>144</sup>

Tanggung jawab organisasi internasional merupakan konsep yang menekankan pada *wrongful act* suatu organisasi internasional.<sup>145</sup> Tanggung jawab organisasi internasional memperlihatkan adanya konsekuensi dari tindakan yang merupakan suatu *international wrongful act* dan menimbulkan adanya tanggung jawab organisasi terhadapnya. Tanggung jawab dapat memperlihatkan konsekuensi dari adanya kemampuan bertindak organisasi internasional sebagai subyek hukum internasional.

Sama halnya dengan tanggung jawab negara, *international wrongful act* dari organisasi internasional merupakan unsur utama adanya tanggung jawab organisasi internasional tersebut. Sekretaris Jenderal PBB dalam laporannya mengenai *peacekeeping operation* menyatakan bahwa:

*“it is also a reflection of the principle of State responsibility – widely accepted to be applicable to international organization – that damage caused in breach of an international obligation and which is attributable to the State (or to the Organization), entails the international responsibility for the State (or of the Organization and its liability in compensation.”*<sup>146</sup>

ILC kemudian merumuskan pendapat tersebut ke dalam ketentuan yang serupa dalam Pasal 3 DARIO yang menyatakan bahwa: *“every international wrongful act of an international organization entails the international responsibility of that*

<sup>143</sup> Aurel Sari, *Autonomy, Attribution and Accountability*, hal. 4.

<sup>144</sup> *Ibid.*

<sup>145</sup> United Nations, *Report of the International Law Commission: Fifty-fourth Session*, hal. 228, par. 465.

<sup>146</sup> United Nations, *General Assembly Fifty-first Session: Report of the Secretary-General, A/51/389*, (20 September 1996), hal. 4, par. 6.

*organization*”<sup>147</sup>. Perumusan tersebut pula dapat ditemukan dengan konsep yang sama dalam DASR. Sehingga memperlihatkan adanya dasar yang sama dari konsep tanggung jawab yang ada yakni menekankan kepada *international wrongful act* dari subyek hukum.

Dapat kemudian dilihat dari laporan Sekretaris Jenderal PBB tersebut bahwa terdapat beberapa unsur dalam menentukan adanya *international wrongful act* dari suatu organisasi internasional, yakni: (1) adanya pelanggaran terhadap kewajiban internasional dari organisasi dan (2) dapatnya tindakan pelanggaran tersebut untuk diatribusikan kepada organisasi internasional. Tindakan yang dimaksud adalah tindakan yang aktif (*commission*) ataupun tindakan yang bersifat pasif (*omission*). Kewajiban yang dimaksud dapat berupa kewajiban yang mengikat organisasi internasional dari perjanjian internasional dan kewajiban dari sumber hukum lainnya yang mengikat organisasi tersebut. Hal ini sejalan dengan Putusan Mahkamah Internasional dalam *Advisory Opinion on the Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, yang menyatakan bahwa organisasi internasional:

*“are bound by any obligations incumbent upon them under general rules of international law, under their constitutions or under international agreements to which they are parties.”*<sup>148</sup>

ILC kemudian memformulasikan DARIO atas dasar pendapat tersebut ke dalam Pasal 4 yang berbunyi:

*“There is an internationally wrongful act of an international organization when conduct consisting of an action or omission:*

- a. is attributable to that organization under international law, and*
- b. constitutes a breach of an international obligation of that organization”*<sup>149</sup>

---

<sup>147</sup> International Law Commission, “Draft Articles on the Responsibility of International Organization”, Pasal 3.

<sup>148</sup> International Court of Justice, *Advisory Opinion on the Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, ICJ Reports 1980, hal. 89-90, par. 37.

<sup>149</sup> International Law Commission, “Draft Articles on the Responsibility of International Organization”, Pasal 4.



Sehingga, dengan dipenuhinya kedua unsur tersebut, maka telah dapat dikatakan suatu organisasi telah melakukan *international wrongful act*, yang oleh karenanya ia bertanggung jawab atas tindakannya tersebut.

### 2.2.2.2 Konsep Tanggung Jawab Organisasi Internasional dalam Praktik

Dalam praktek dapat dilihat dalam beberapa kasus telah muncul adanya konsep tanggung jawab internasional yang perlu diperhatikan. Kasus *Al-Jedda v. Secretary for Defence*<sup>150</sup> memperlihatkan adanya tanggung jawab organisasi internasional, dalam hal ini Dewan Keamanan PBB, atas *international wrongful act* yang dilakukan dalam pelaksanaan penjagaan keamanan dan perdamaian dunia berdasarkan Resolusi Dewan Keamanan PBB 1546 (2004). Al-jedda dalam kasus tersebut ditahan tanpa dasar hukum yang jelas atas tuduhan pelaksanaan perekrutan teroris di luar Irak pada bulan Oktober 2004.<sup>151</sup> Penahanan dilakukan oleh pasukan keamanan, yakni pasukan Inggris yang di kemudian hari tuduhan terhadapnya tidak terbukti. Atas tindakan yang tanpa dasar hukum tersebut, Al-jedda telah mengalami banyak kerugian. Sehingga kemudian Al-jedda menuntut *Secretary of Defense* Inggris atas pelanggaran yang telah terjadi, yakni atas legalitas kewenangan pasukan Inggris dalam pelaksanaan penahanan terhadap individu yang didasarkan atas paragraf 10 Resolusi 1546.<sup>152</sup>

Dalam kasus ini, terlihat bahwa PBB sebagai organisasi internasional bertindak bersama-sama dengan negara anggota untuk menjaga keamanan dan perdamaian dunia. Maka atas *international wrongful act* yang terjadi dapat dikaitkan pada tanggung jawab organisasi internasional ataupun tanggung jawab negara dalam hukum internasional. Pada putusannya, *House of Lords* Inggris memutuskan bahwa *international wrongful act* yang terjadi tersebut seharusnya diatribusikan kepada Dewan Keamanan PBB yang mana pelaksanaan tindakan

---

<sup>150</sup> House of Lords, *R (on the application of Al-Jedda) (FC) v. Secretary of State for Defence*, UKHL 58, (2007), <<http://www.publications.parliament.uk/pa/ld/ldjudgmt.htm>>, diakses pada 4 April 2012.

<sup>151</sup> Alexander Orakhelashvili, "R (on the Application of Al-Jedda) (FC) v. Secretary of State for Defence. [2007] UKHL 58", *The American Journal of Intenational Law*, Vol. 102, No. 2 (April, 2008), hal. 338.

<sup>152</sup> *Ibid.*

tersebut didasarkan atas kewenangan Dewan Keamanan PBB yakni atas dasar Resolusi 1546 (2004).<sup>153</sup>

Kasus lain yang cukup dapat memperlihatkan adanya pengakuan atas tanggung jawab organisasi internasional dalam hukum internasional dapat dilihat pada kasus Behrami dan Saramati yang diajukan pada EHCR. Dalam kasus ini terdapat pelanggaran terhadap Pasal 2 *European Convention on Human Rights*, yakni terutama berkaitan dengan kematian anak dari Behrami yang disebabkan oleh ledakan bom yang merupakan sisa-sisa invasi NATO pada tahun 2009 dan Pasal 5 *European Convention on Human Rights* berkaitan dengan penahanan terhadap Saramati oleh *Kosovo Force* (KFOR).<sup>154</sup> *The European Court* menyatakan pandangannya bahwa pelanggaran tersebut dapat diatribusikan kepada PBB daripada negara anggota atau negara pelaksana dalam operasi dalam peristiwa tersebut yakni UNMIK dan KFOR yang merupakan pelaksanaan operasi delegasi kewenangan PBB atas dasar secara khusus dalam Resolusi Dewan Keamanan PBB 1244 (1999).<sup>155</sup>

Pandangan yang serupa sebelumnya telah pula diberikan oleh Sekretariat PBB dalam pertemuan ILC sesi ke-57 dalam komentar dan observasi yang diterima dari organisasi internasional atas DARIO. Dalam laporan tersebut Sekretariat PBB menyatakan bahwa:

*“As subsidiary organ of the United Nations, an act of a peacekeeping force is, in principle, imputable to the Organization, and if committed in violation of an international obligation entails the international responsibility of the Organization and its liability in compensation. The fact that any such act may have been performed by members of a national military contingent forming part of the peacekeeping operation does not affect the international responsibility of the United Nations vis-à-vis third states or individuals.”*<sup>156</sup>

---

<sup>153</sup> *Ibid.*, hal. 339.

<sup>154</sup> *Ibid.*

<sup>155</sup> *Ibid.*

<sup>156</sup> United Nations, *Responsibility of International Organization: Comments and Observations Received from International Organization*, UN Doc. A/CN.4/545, (25 Juni 2004), hal. 17-18.

Maka dapat disimpulkan bahwa konsep tanggung jawab organisasi internasional merupakan suatu perkembangan progresif dalam hukum internasional, yang mana hal ini dapat dilihat dalam praktek-praktek negara yang diterima dalam hukum internasional. Organisasi sebagai subyek hukum internasional memiliki hak dan kewajiban dalam lalu lintas hukum internasional, organisasi pula dengan demikian bertanggung jawab atas tindakannya apabila hal tersebut merupakan *international wrongful act*. Kewajiban ini diemban oleh organisasi internasional dengan sendirinya yang merupakan entitas yang terpisah dari negara anggotanya.

### **2.3 Hubungan Tanggung Jawab Negara Anggota dengan Tanggung Jawab Organisasi Internasional**

Organisasi internasional dengan negara telah dianggap sebagai subyek hukum yang memiliki personalitas dalam hukum internasional dan merupakan entitas yang terpisah antara yang satu dan yang lainnya. Walaupun negara merupakan bagian yang terpenting dalam pembentukan suatu organisasi internasional, namun hal ini tidak mempengaruhi independensi organisasi internasional dari negara anggotanya tersebut. Maka dengan menyatakan bahwa organisasi internasional tersebut memiliki personalitas hukum yang dimaksud dengan pernyataan tersebut adalah personalitas hukum yang terpisah dari negara anggotanya, organisasi tidak hanya merupakan kumpulan dari negara anggotanya, ia merupakan subyek hukum yang mandiri dan oleh karena itu organisasi secara individu dapat bertanggung jawab.<sup>157</sup>

Keanggotaan negara dalam organisasi internasional dalam hal ini tidak dapat menjadi suatu dasar bagi adanya tanggung jawab negara anggota atas *international wrongful act* yang dilakukan oleh organisasi internasional. Pada saat pembentukan organisasi internasional tersebut, para negara anggota telah berkehendak untuk memberikan organisasi suatu kemampuan untuk bertindak sendiri yakni mewujudkan adanya *volonté distincte* dari organisasi internasional

---

<sup>157</sup> Cedric Ryngaert dan Holly Buchanan, "Member State Responsibility for the Acts of International Organization", *Utrecht Law Review*, vol. 7, Issue 1, (January, 2011), hal. 134.

sehingga organisasi tersebut merupakan suatu subyek hukum internasional.<sup>158</sup> Maka hanya organisasi internasional yang memiliki personalitas hukum tersebutlah yang dapat mengemban hak dan kewajiban dalam hukum internasional.<sup>159</sup> Negara atas dasar keanggotaannya saja tidak dapat dianggap bertanggung jawab atas tindakan organisasi internasional. Namun, dapat dilihat dalam beberapa kondisi suatu negara dapat bertanggung jawab atas tindakan yang dilakukan oleh suatu organisasi internasional.

ILC dalam hal ini memperlihatkan adanya tanggung jawab negara yang berhubungan dengan tindakan suatu organisasi internasional dalam Bagian Kelima DARIO. Bagian tersebut secara umum didasarkan atas prinsip atribusi, yang memperlihatkan kepada entitas mana, organisasi atau negara, suatu tindakan dapat dipertanggungjawabkan. Prinsip atribusi bergantung pada hubungan antara suatu entitas dengan organ yang telah melaksanakan suatu *international wrongful act*.<sup>160</sup> Dalam hal terdapat tindakan yang mana terlihat adanya hubungan antara tanggung jawab negara dan organisasi internasional, prinsip atribusi memperlihatkan legitimasi tindakan kepada subyek hukum yang ada, yakni negara atau organisasi internasional tersebut.

Prinsip dasar atribusi tindakan negara adalah setiap tindakan organ negara merupakan tindakan negara yang sah. Hal ini dapat dilihat dalam putusan Mahkamah Internasional dalam kasus *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, yakni:

“According to a well-established rule of international law, the conduct of any organ of a State must be regarded as an act of that State. This rule ... is of a customary character.”<sup>161</sup>

---

<sup>158</sup> Jean d’Aspermont, “Abuse of the Legal Personality of International Organization and the Responsibility of Member States”, *International Organization Law Review*, (Leiden:Koninklijke Brill NV, 2007), hal. 93.

<sup>159</sup> *Ibid.*, hal. 94

<sup>160</sup> Malcom N Shaw, *International Law*, hal. 786.

<sup>161</sup> International Court of Justice, *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, Advisory Opinion, ICJ Reports 1999, hal. 87, par. 62.

Prinsip yang sama dapat diaplikasikan pula terhadap atribusi organisasi internasional. Dalam kasus yang sama, *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, Mahkamah Internasional menyatakan:

“[...] damages incurred as result of acts performed by the United Nations or by its agents acting in their official capacity ... [t]he United Nations may be required to bear responsibility for the damage arising from such act.”<sup>162</sup>

Organ organisasi internasional dalam hal ini bertindak atas kewenangan yang telah diberikan dan diatur dalam piagam pembentukan suatu organisasi internasional. Organ tersebut dapat dikatakan telah melaksanakan tujuan dan fungsi daripada dibentuknya organisasi internasional yang ada, sehingga tindakan yang dilaksanakan oleh organ tersebut adalah tindakan dari organisasi internasional.

### 2.3.1 *Direction and Control*

Tanggung jawab negara terhadap tindakan suatu organisasi internasional dapat terjadi apabila adanya unsur “*direction and control*” dalam *international wrongful act* yang dilakukan oleh organisasi internasional tersebut. Hal ini dapat dilihat dalam argumen yang diajukan dalam kasus *the Westland Helicopters Arbitration*, yang walaupun pada akhirnya tidak diterima oleh *the Swiss Federal Tribunal* yang menyatakan:

“*the predominant role played by [the founding member] states and the fact that the supreme authority of the [Arab Organization for Industrialization] is a Higher Committee composed of ministers cannot undermine the independence and personality of the organization.*”<sup>163</sup>

Dapat dilihat bahwa atas dasar independensi dari organisasi internasional yang merupakan subyek hukum mandiri dalam hukum internasional, negara anggota

<sup>162</sup> *Ibid.*, hal. 88-89, par. 66.

<sup>163</sup> Federal Supreme Court, *Arab Organization for Industrialization and others v. Westland Helicopters Ltd.*, putusan pada tanggal 19 Juli 1988, Federal Supreme Court (First Civil Court), 80 ILR 652, hal. 658.

tidaklah dapat melaksanakan *direction and control* atas dasar keanggotaannya saja terhadap organisasi internasional.<sup>164</sup> *Direction and control* terhadap organisasi internasional oleh negara harus secara jelas dapat dilihat tidak hanya didasarkan atas keanggotaan negara saja.

*Directs* dalam hal ini berarti “*actual direction of an operative kind*”, yakni tindakan mengarahkan secara nyata dalam suatu bentuk operasi oleh negara kepada organisasi internasional, sedangkan *control* berarti “*domination over the wrongful conduct rather than oversight*”, yakni adanya dominasi atas tindakan pelanggaran bukan hanya suatu keterlibatan langsung.<sup>165</sup> Dengan adanya unsur-unsur tersebut, maka terbentuklah adanya *direction and control* negara terhadap suatu organisasi internasional yang melahirkan tanggung jawab negara terhadap *international wrongful act* yang dilakukan oleh organisasi.

Dalam DARIO, prinsip ini dituangkan dalam Pasal 59 yang memperlihatkan tanggung jawab negara. Pasal tersebut berbunyi:

- “1) A State which directs and controls an international organization in the commission of an internationally wrongful act by the latter is internationally responsible for that act if:
- a. the State does so with knowledge of the circumstances of the internationally wrongful act; and
  - b. the act would be internationally wrongful if committed by that State.
- 2) An act by a State member of an international organization done in accordance with the rules of the organization does not as such engage the international responsibility of that State under the terms of this article.”<sup>166</sup>

Maka dapat disimpulkan bahwa tindakan suatu organisasi internasional dapat dipertanggungjawabkan oleh negara apabila kemudian negara melaksanakan *direction and control* terhadap organisasi tersebut, namun pada saat unsur *direction and control* tersebut tidak terbukti, tanggung jawab tetap berada pada organisasi internasional sebagai subyek hukum internasional.

<sup>164</sup> Cedric Ryngaert dan Holly Buchanan, “Member State Responsibility for the Acts of International Organization”, hal. 140.

<sup>165</sup> *Ibid.*

<sup>166</sup> International Law Commission, “Draft Articles on the Responsibility of International Organization”, Pasal 59.

### 2.3.2 Coercion

Selain adanya *direction and control* terhadap organisasi internasional, adanya *coercion* (paksaan) oleh negara dapat pula menimbulkan tanggung jawab negara atas *international wrongful act* yang dilakukan oleh organisasi internasional. Secara umum, hubungan organisasi internasional dan negara anggota tidaklah berdasarkan *direction and control* ataupun *coercion* dari negara anggota yang merupakan bertentangan dengan sifat independensi suatu organisasi internasional yang terpisah dari negara anggotanya.<sup>167</sup>

Namun *coercion* dari negara anggota terhadap organisasi internasional masih dapat dilihat dalam tindakan negara anggota terhadap organisasi internasional. Salah satunya dapat dilihat penekanan secara ekonomi oleh negara anggota kepada organisasi internasional yang apabila dilaksanakan dengan *powerfull* sehingga organisasi harus mengikuti kehendak negara tersebut.<sup>168</sup> Penekanan secara ekonomi dapat terjadi apabila negara anggota tidak mau memberikan kontribusi secara finansial kepada organisasi internasional yang sangat bergantung pada kontribusi tersebut dalam pelaksanaan kegiatannya.<sup>169</sup> Maka dalam hal demikian negara yang bertanggung jawab atas *international wrongful act* dari organisasi internasional.

ILC memasukan konsep tersebut dalam Pasal 60 DARIO, yang berbunyi:

“A State which coerces an international organization commit an act is internationally responsible for that act if:

- a. the act would, but for the coercion, be an internationally wrongful act of the coerced international organization; and
- b. the coercing State does so with knowledge of the circumstances of the act.”<sup>170</sup>

---

<sup>167</sup> *Ibid.*, hal. 141.

<sup>168</sup> Jean d’Aspermont, “Abuse of the Legal Personality of International Organization and the Responsibility of Member States”, hal. 100.

<sup>169</sup> Cedric Ryngaert dan Holly Buchanan, “Member State Responsibility for the Acts of International Organization”, hal. 141.

<sup>170</sup> International Law Commission, “Draft Articles on the Responsibility of International Organization”, Pasal 60.

Maka dapat disimpulkan bahwa negara dapat bertanggung jawab atas tindakan *international wrongful act* organisasi internasional apabila terlihat adanya tindakan *coercion* dari negara tersebut.

### 2.3.3 *Accepting Responsibility*

Dalam hal ini negara mengakui dan menyetujui akan adanya tanggung jawab negara atas tindakan yang dilakukan oleh organisasi internasional. Tanggung jawab tersebut muncul sebagai akibat dari adanya penerimaan negara (*acceptance*) akan tanggung jawab yang ada, baik dilakukan secara implisit maupun eksplisit, dan bukan muncul atas dasar keanggotaan organisasi internasional semata.<sup>171</sup>

Dalam DARIO dapat dilihat pada Pasal 62 (1) (a), yang berbunyi:

“(1) *A State member of an international organization is responsible for an internationally wrongful act of that organization if:*  
*a. it has accepted responsibility for the act towards the injured party.*”<sup>172</sup>

Tindakan negara untuk menerima tanggung jawab tersebut merupakan suatu atribusi yang dilaksanakan oleh negara atas tindakan organisasi internasional dan oleh karenanya negara bertanggung jawab atas tindakan organisasi tersebut.

### 2.3.4 *Aid or Assistance*

Negara dalam hal pelaksanaan *aid or assistance* terhadap organisasi internasional yang melaksanakan *international wrongful act* dapat dinyatakan bertanggung jawab atas tindakan tersebut. Sama halnya dalam negara melaksanakan *aid or assistance* terhadap negara lain yang dapat mengakibatkan negara tersebut bertanggung jawab atas tindakan tersebut yang diatur dalam Pasal 16 DASR. Dalam hal ini dapat dilihat dalam pengeboman Tripoli pada April 1986. Libya dalam hal ini menuntun Inggris untuk bertanggung jawab atas

---

<sup>171</sup> Cedric Ryngaert dan Holly Buchanan, “Member State Responsibility for the Acts of International Organization”, hal. 140.

<sup>172</sup> International Law Commission, “Draft Articles on the Responsibility of International Organization”, Pasal 62 (1) (a).



tindakan tersebut berdasarkan fakta bahwa Inggris telah memperbolehkan beberapa pangkalan udaranya digunakan dalam lepas landas beberapa pesawat Amerika Serikat dalam pelaksanaan pengeboman.<sup>173</sup> Inggris dalam hal ini dianggap bertanggung jawab karena “*supported and contributed in direct way*” atas pengeboman tersebut.<sup>174</sup>

Dalam DARIO perumusan konsep tersebut dapat dilihat dalam Pasal 58, yang menyatakan:

“1). *A State which aids or assists an international organization in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if:*

- a. the State does so with knowledge of the circumstances of the internationally wrongful act; and*
- b. the act would be internationally wrongful if committed by the State.*

2). *An act by a State member of an international organization done in accordance with the rules of the organization does not as such engage the international responsibility of that State under the terms of this article.”*<sup>175</sup>

Maka dalam hal demikian, negara yang memberikan *aids and assistances* kepada organisasi internasional tersebut, dapat pula dianggap bertanggung jawab atas tindakan organisasi internasional yang merupakan *international wrongful act*. Namun, pelaksanaan kegiatan organisasi internasional yang secara merupakan kewajiban organisasi internasional atas dasar keanggotaannya tidak menimbulkan tanggung jawab negara terhadap hal tersebut.

---

<sup>173</sup> United States of America, *Department of State Bulletin*, No. 2111 (June 1986), hal. 8.

<sup>174</sup> Pernyataan Duta Besar Hamed Houdreiry, Libyan People’s Bureau, Paris, *the Times*, 16 April 1986, hal. 6.

<sup>175</sup> International Law Commission, “Draft Articles on the Responsibility of International Organization”, Pasal 58.

### BAB 3

## ORGANISASI INTERNASIONAL DAN SISTEM KEAMANAN KOLEKTIF (*COLLECTIVE SECURITY*)

Sejak lama perdamaian merupakan cita-cita yang ingin dicapai oleh masyarakat, begitu pula dengan masyarakat internasional berusaha untuk mencapai adanya keamanan dan perdamaian dunia. Pengalaman atas perang yang terjadi dalam sejarah peradaban manusia, memperlihatkan adanya kenangan yang buruk atas perang itu sendiri. Hal ini memicu adanya perkembangan terhadap sistem keamanan kolektif (*collective security*), yang bertujuan untuk mencapai perdamaian melalui suatu tindakan kolektif. Kawasan Eropa yang mengalami trauma atas adanya *Thirty Years War*, *The French revolutionary* dan *Napoleonic wars* serta Perang Dunia Pertama dan Perang Dunia Kedua mengembangkan sistem keamanan kolektif tersebut sebagai suatu ide dalam upaya untuk menghindari kembali adanya peperangan.<sup>176</sup>

Sistem keamanan kolektif merupakan sebuah sistem, yakni salah satu sistem yang membentuk suatu pengaturan atas pelaksanaan kekuatan dalam hubungan antar negara.<sup>177</sup> Inis L Claude, seperti yang dikutip oleh Michael R Fowler dan Jessica Fryrear, menggambarkan sistem keamanan kolektif sebagai: “*The doctrine of collective security is a prescription for an institutionalized arrangement to maintain the security of all members of a system of states by guaranteeing that an attack by any member against another will engender the combined resistance of all the others whose contribution to the common defense may be needed.*”<sup>178</sup>

---

<sup>176</sup> Peter G Danchin, “Things Fall Apart: the Concept of Collective Security in International Law”, *University of Maryland School of Law Legal Studies Research Paper No. 2010-35*, <<http://ssrn.com/abstract=1662428>>, diakses pada 11 April 2012, hal. 49.

<sup>177</sup> Inis L Claude, *Swords into Plowshares: the Problems and Progress of International Organization*, 4<sup>th</sup> ed., (1971), hal. 51. Seperti yang dikutip dalam Michael R Fowler dan Jessica Fryrear, “Collective Security and the Fighting in the Balkans”, *Northern Kentucky Law Review*, (2003), hal. 8.

<sup>178</sup> *Ibid.*

Sistem keamanan kolektif merupakan suatu sistem yang diarahkan untuk membentuk institusionalisasi pengaturan pelaksanaan *use of force*, yang mengamanatkan untuk terbentuknya suatu organisasi dalam masyarakat internasional yang bertujuan untuk menjaga keamanan bersama.

Secara umum, kita dapat mendefinisikan sistem keamanan kolektif sebagai sebuah persetujuan atau perjanjian antara negara-negara untuk terikat pada norma dan peraturan tertentu untuk menjaga stabilitas dan pada suatu kondisi tertentu, secara bersama melaksanakan tindakan untuk menghentikan agresi yang dapat memengaruhi keamanan dan perdamaian dunia.<sup>179</sup> Atas definisi tersebut dapat dilihat tiga ide yang dihipunkan dalam sistem keamanan kolektif, yakni: (1) suatu tujuan untuk menghentikan adanya tindakan agresi yang dapat memengaruhi keamanan dan perdamaian; (2) adanya norma hukum sebagai dasar penentuan pengertian dari tindakan agresi dan bentuk-bentuk reaksi terhadap tindakan tersebut; dan (3) penolakan adanya pelaksanaan tindakan unilateral yang lebih menekankan pada tindakan kolektif.<sup>180</sup>

Tindakan agresi tersebut dapat pula dilihat dalam lingkup yang lebih luas sebagai suatu penggunaan kekuatan (*use of force*) oleh suatu negara terhadap negara lain dalam satu sistem yang ada. Namun, konsep sistem keamanan kolektif terutama berkenaan dengan tindakan *use of force* secara ilegal dalam kelompok negara yang membentuk sistem keamanan kolektif, bukanlah terhadap suatu ancaman yang berasal dari luar kelompok tersebut.<sup>181</sup>

Sistem keamanan kolektif berjalan atas dasar adanya anggapan bahwa semua negara mempunyai satu tujuan utama yang sama yakni menjaga perdamaian dunia. Untuk dapat berjalannya sistem keamanan kolektif, perdamaian haruslah dianggap sebagai suatu hal yang tidak dapat dipisahkan dari masyarakat internasional dan adanya ancaman terhadap perdamaian di manapun dianggap sebagai permasalahan semua negara anggota dalam sistem

---

<sup>179</sup> Peter G Danchin, "Things Fall Apart: the Concept of Collective Security in International Law", hal. 41.

<sup>180</sup> *Ibid.*

<sup>181</sup> *Ibid.*

internasional.<sup>182</sup> Sehingga kemudian dapat dilihat adanya dua syarat untuk terwujudnya sistem keamanan kolektif, yakni: (1) syarat yang bersifat subyektif, yang berhubungan dengan penerimaan secara umum terhadap konsep tersebut; dan (2) syarat yang bersifat obyektif, yang berhubungan dengan kesesuaian situasi global terhadap pelaksanaan sistem keamanan kolektif.<sup>183</sup>

Syarat sistem keamanan kolektif yang bersifat subyektif (*subjective requirements of collective security*) didasarkan sepenuhnya pada komitmen positif atas perdamaian dunia oleh negara-negara dalam masyarakat internasional, yang menunjukkan bahwa konsep perdamaian yang tidak dapat dipisahkan dalam masyarakat internasional telah terbentuk dalam benak pemerintah dan masyarakat.<sup>184</sup> Sedangkan syarat sistem keamanan kolektif yang bersifat obyektif (*objective requirements of collective security*) menekankan pada suatu kondisi masyarakat, situasi kekuasaan, situasi hukum, dan situasi organisasional.<sup>185</sup> Dalam hal ini, untuk terwujudnya sistem keamanan kolektif secara ideal diperlukan adanya pembagian kekuasaan yang seimbang oleh beberapa negara, yang tidak hanya dimonopoli oleh satu atau dua negara adikuasa.<sup>186</sup> Dengan terpenuhinya kondisi-kondisi tersebut maka sistem keamanan kolektif dapat berjalan sesuai dengan yang seharusnya berlaku dalam pengertiannya secara penuh.

Terlihat bahwa sistem keamanan kolektif menekankan pada adanya institusionalisasi kegiatan penjagaan keamanan dan perdamaian dunia, yang membentuk adanya kerja sama negara. Sistem keamanan kolektif ini dapat dinyatakan sebagai suatu tujuan adanya kerja sama internasional yang membentuk organisasi internasional, yakni organisasi yang bertujuan untuk menjaga keamanan dan perdamaian dunia. Dalam pelaksanaan tindakan sistem keamanan kolektif dapat dilihat sebagai suatu tindakan organisasi internasional dalam hukum internasional, kemudian apabila dalam pelaksanaannya terdapat *international*

---

<sup>182</sup> *Ibid.*, hal. 122.

<sup>183</sup> Inis, L Claude, Jr., *Swords into Plowshares: the Problems and Progress of International Organization*, (New York:Random House, Inc., 1956), hal. 257.

<sup>184</sup> *Ibid.*

<sup>185</sup> *Ibid.*, hal. 264.

<sup>186</sup> *Ibid.*

*wrongful act* maka dapat memunculkan tanggung jawab organisasi internasional dalam pelaksanaan sistem keamanan kolektif dalam hukum internasional.

### 3.1 Sistem Keamanan Kolektif Perserikatan Bangsa Bangsa

Negara-negara membentuk sistem keamanan kolektif setelah berakhirnya perang dunia kedua dalam Piagam PBB, yang kemudian membentuk PBB sebagai institusi pelaksana sistem keamanan kolektif sama halnya dengan Liga Bangsa Bangsa (yang untuk selanjutnya disebut “LBB”). Dari awal pembentukannya, PBB sebagai sebuah organisasi dalam panggung internasional memiliki peran utama dalam pelaksanaan sistem keamanan kolektif secara global, yang dibentuk ke dalam suatu perspektif pendekatan hukum internasional.<sup>187</sup> Hal tersebut terlihat dari adanya ketentuan-ketentuan mekanisme institusional dalam Piagam PBB yang lebih kompleks daripada yang telah dibentuk dalam sistem keamanan kolektif LBB.<sup>188</sup>

Dalam sistem keamanan kolektif PBB ini dapat kita lihat adanya pengertian yang luas mengenai konsep sistem keamanan kolektif. Sistem keamanan kolektif dalam sistem PBB dapat diartikan sebagai upaya proaktif dan reaktif secara kolektif, yang tidak hanya berupa tindakan militer, dalam pembentukan dan penjagaan keamanan dan perdamaian.<sup>189</sup> Upaya PBB tersebut dapat terdiri atas *enforcement measures*, *peace-building* dan *peacekeeping*.<sup>190</sup> *Enforcement measures* merupakan suatu upaya paksa yang dapat dilaksanakan oleh Dewan Keamanan dalam menjaga keamanan dan perdamaian dunia yang dapat dilaksanakan melalui upaya di udara, laut dan darat.<sup>191</sup> *Peace-building* merupakan suatu upaya untuk membantu negara dan wilayah regional dalam

---

<sup>187</sup> Dino Kritsiotis, “When States Use Armed Force”, dalam Christian Reus Smit, *ed.*, *The Politics of International Law*, (Cambridge:Cambridge University Press, 2004), hal. 72.

<sup>188</sup> *Ibid.*

<sup>189</sup> Ademola Abass, *Regional Organizations and the Development of Collective Security: Beyond Chapter VIII of the UN Charter*, (Oxford:Hart Publishing, 2004), hal. 112.

<sup>190</sup> *Ibid.*

<sup>191</sup> Ramesh Thakur, *The United Nations, Peace and Security: From Collective Security to the Responsibility to Protect*, (Cambridge:Cambridge University Press, 2006), hal. 32.

pelaksanaan transisi dari keadaan perang ke keadaan damai, yang di dalamnya termasuk aktivitas dan program-program yang dibentuk untuk menguatkan perubahan ke arah damai.<sup>192</sup> *Peacekeeping* merupakan pengiriman pasukan internasional yang berusaha untuk memajukan keamanan dan perdamaian dalam suatu wilayah negara, yang dilaksanakan atas persetujuan Dewan Keamanan PBB dan negara serta pihak yang berkepentingan.<sup>193</sup>

Dalam hal ini dapat dilihat pengertian sistem keamanan kolektif yang diungkapkan oleh Ernst Haas, seperti yang dikutip oleh Ademola Abass, yang dapat dikatakan sebagai pengertian yang paling tepat digunakan dalam menggambarkan sistem keamanan kolektif dalam konteks Piagam PBB, yakni: *“Technique use by intergovernmental organization to restrain the use of force among the members. It provides the norms and procedures for dealing with acts of aggression; it also includes the norms and procedures for inducing members to delay hostilities, norms and procedures summed up under the labels “pacific settlement of disputes”. Finally [it] also comprises the organization’s own ability to use of force against a member of pacific settlement fails.”*<sup>194</sup> Maka dapat disimpulkan bahwa sistem keamanan kolektif yang diusung oleh PBB tidak hanya merupakan suatu tindakan yang bersifat reaktif, represif terhadap adanya pelanggaran keamanan dan perdamaian akan tetapi pula mencakup segala upaya yang bersifat damai dalam penjagaan keamanan dan perdamaian dunia.

Sistem keamanan kolektif sebagai fungsi utama pembentukan PBB dapat dilihat dalam mukadimah daripada organisasi tersebut yang menyatakan bahwa: *“We the peoples of the United Nations determined to save succeeding generations from the scourge of war”*<sup>195</sup>, dan dapat pula dilihat dalam tujuan pembentukan PBB yang tercantum dalam Pasal 1 (1) PBB, yang berbunyi:

---

<sup>192</sup> Ademola Abass, *Regional Organizations and the Development of Collective Security*, hal. 78.

<sup>193</sup> United Nations, *Basic Facts About the United Nations*, (New York:News and Media Division United Nations Department of Public Information, 2004), hal. 72.

<sup>194</sup> Ernst Haas, “Collective Security and the Future International System”, dalam Falk dan Black, Ed., *The Future of International Legal Order*, (Princeton:Princeton University Press, 1969), hal. 225. Seperti yang dikutip dalam Ademola Abass, *Regional Organizations and the Development of Collective Security*, hal. 113.

*“To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression and other breaches of the peace.”<sup>196</sup>*

Gambaran sistem keamanan kolektif dalam Piagam PBB dapat kita lihat dalam Pasal 24 (1) yang menyatakan bahwa:

*“In order to ensure prompt and effective action by United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf.”<sup>197</sup>*

Pasal tersebut kemudian mewujudkan adanya sistem keamanan kolektif dalam sistem PBB, yang menunjuk Dewan Keamanan PBB sebagai organ yang memiliki tanggung jawab utama dalam upaya penjagaan perdamaian dan keamanan dunia. Dewan Keamanan PBB merupakan organ PBB yang mewakili negara anggota sebagai pelaksana penjagaan keamanan dan perdamaian, tanpa memerlukan adanya otorisasi yang diberikan oleh negara anggota yang didasarkan pada pasal tersebut.<sup>198</sup> Kewenangan tersebut telah dianggap diberikan secara langsung dan membentuk Dewan Keamanan PBB sebagai organ yang berkompetensi untuk melaksanakannya.<sup>199</sup>

Piagam PBB menyediakan dua macam upaya dalam pelaksanaan sistem keamanan kolektif yang keduanya berada di bawah kewenangan Dewan Keamanan PBB. Kedua upaya tersebut tercakup dalam Bab VI dan Bab VII Piagam PBB. Bab VI Piagam PBB yang berjudul *“Pacific Settlement of Dispute”*, memperbolehkan Dewan Keamanan PBB untuk ikut secara langsung dalam

---

<sup>195</sup> J Samuel Barkin, *International Organization: Theories and Institutions*, hal. 66.

<sup>196</sup> United Nations, *Charter of the United Nations*, ditandatangani pada 24 June 1945, berlaku pada 24 Oktober 1945, 1 UNTS XVI, <<http://www.unwebsite.com/charter>>, Pasal 1 (1).

<sup>197</sup> *Ibid.*, Pasal 24 (1).

<sup>198</sup> Ademola Abass, *Regional Organizations and the Development of Collective Security*, hal. 124.

<sup>199</sup> *Ibid.*

permasalahan yang dianggap sebagai suatu ancaman terhadap perdamaian, dan untuk menginvestigasi, melakukan arbitrase, serta memberikan rekomendasi terhadap penyelesaian permasalahan tersebut.<sup>200</sup> Bab VII Piagam PBB yang berjudul “*Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression*”, memberikan kewenangan kepada Dewan Keamanan PBB untuk menentukan arti dari ancaman dan pelanggaran terhadap perdamaian, dan untuk menentukan tanggapan yang sesuai dari masyarakat internasional atas hal tersebut, dalam bentuk tekanan diplomatik, sanksi ekonomi dan *use of force*.<sup>201</sup> Maka secara umum dapat dilihat bahwa sistem keamanan kolektif PBB telah berkembang lebih kompleks daripada yang dibentuk dalam LBB dan Dewan Keamanan PBB diberikan peran utama dalam pelaksanaan sistem tersebut.

### 3.1.1 Mekanisme dalam Bab VI Piagam Perserikatan Bangsa Bangsa

Bab VI Piagam PBB mengatur mekanisme penyelesaian sengketa dengan cara damai atas permasalahan yang dapat membahayakan perdamaian dan keamanan dunia, yang berjudul “*Pacific Settlement of Dispute*”. Leland Goodrich, seperti yang dikutip oleh Edward C Luck, pada awal pendirian PBB menyatakan bahwa: “*The powers of the United Nations organs for the pacific settlement of disputes are substantially the same as those of the principal organs of the League. Under the Charter, as under the Covenant, the functions of the political organs in this connection are limited to discussion, inquiry, mediation and conciliation.*”<sup>202</sup>

Dalam hal tersebut, kewenangan Dewan Keamanan PBB sebagai organ dalam pelaksanaan *pacific settlement of dispute* seperti yang tertuang dalam Bab VI Piagam PBB dapat dikatakan secara substansial sama dengan mekanisme yang terdapat dalam LBB. Dalam kewenangannya, Dewan Keamanan PBB dapat mengupayakan adanya diskusi, penyelidikan, mediasi dan konsiliasi dalam penyelesaian masalah. Penyelesaian masalah dalam *pacific settlement of disputes*

---

<sup>200</sup> J Samuel Barkin, *International Organization: Theories and Institutions*, hal. 66.

<sup>201</sup> *Ibid.*

<sup>202</sup> Leland M Goodrich, “From League of Nations to United Nations,” *International Organization*, 1, no. 1, (Februari, 1974), hal. 15. Seperti yang dikutip pada Edward C Luck, *UN Security Council: Practice and Promise*, (New York:Routledge, 2006), hal. 31.



yang tertuang dalam Bab VI Piagam PBB ini terdiri dari negosiasi bilateral antara negara yang bersengketa sampai dengan penunjukan pihak ketiga yang masuk ke dalam penyelesaian masalah di antara mereka.<sup>203</sup> Prinsip dasar penyelesaian permasalahan dalam *pacific settlement of disputes* ini didasarkan sepenuhnya kepada kehendak para negara yang bersengketa secara sukarela (*voluntary*).<sup>204</sup>

Pasal 33 Piagam PBB menyatakan:

- “1. *The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangement, or other peaceful means of their own choice.*
2. *The Security Council shall, when it deems necessary, call upon the parties to settle their dispute by such means.*”<sup>205</sup>

Dalam pasal tersebut telah terlihat jelas bahwa kewajiban utama negara yang bersengketa adalah untuk melaksanakan penyelesaian permasalahan tersebut secara damai di antara mereka sendiri, atau penyelesaian permasalahan melalui pengaturan organisasi regional.<sup>206</sup> Penyelesaian permasalahan secara damai tersebut oleh negara yang bersengketa dapat dilaksanakan melalui penyelesaian dengan jalan perundingan, penyelidikan, dengan mediasi, konsiliasi, arbitrase atau dengan cara damai lainnya yang dipilih oleh mereka sendiri. Dalam hal ini *voluntarism* dari negara sangat berperan penting dalam penyelesaian permasalahan karena negara sendirilah yang berkomitmen dan memilih cara damai yang akan digunakan. Permintaan penyelesaian masalah atau rekomendasi kepada Dewan Keamanan PBB bukanlah pilihan pertama yang harus dilaksanakan oleh negara, namun Dewan Keamanan PBB dalam hal ini dapat meminta kepada negara bersangkutan untuk menyelesaikan pertikaianya dengan cara-cara yang telah disebutkan.<sup>207</sup>

---

<sup>203</sup> Ramesh Thakur, *The United Nations, Peace and Security*, hal. 31.

<sup>204</sup> *Ibid.*

<sup>205</sup> United Nations, *Charter of the United Nations*, Pasal 33.

<sup>206</sup> Edward C Luck, *UN Security Council: Practice and Promise*, hal. 21.

Apabila kemudian negara yang bersengketa tersebut gagal untuk menyelesaikan permasalahannya melalui mekanisme yang disebutkan dalam Pasal 33 tersebut, maka penyelesaian pertikaian tersebut akan diserahkan kepada Dewan Keamanan PBB atas dasar Pasal 37 Piagam PBB.<sup>208</sup> Pasal 37 tersebut menyatakan bahwa:

- “1. *Should the parties to a dispute of the nature referred to in Article 33 fail to settle it by the means indicated in that Article, they shall refer it to the Security Council.*
2. *If the Security Council deems that the continuance of the disputes is in fact likely to endanger the maintenance of the international peace and security, it shall decide whether to take action under Article 36 or to recommend such terms of settlement as it may consider appropriate.*”<sup>209</sup>

Dapat dilihat dalam pasal ini adanya kewenangan bagi Dewan Keamanan PBB untuk ikut dalam penyelesaian pertikaian antar negara. Dalam kewenangannya tersebut pula Dewan Keamanan dapat memberikan rekomendasi mengenai prosedur-prosedur atau cara-cara penyesuaian pertikaian, namun adalah suatu kewajiban dalam penyelesaian pertikaian yang merupakan pertikaian hukum (permasalahan hukum) dirujuk kepada Mahkamah Internasional.<sup>210</sup>

Pada intinya, mekanisme sistem keamanan kolektif yang dibentuk dalam Bab VI Piagam PBB memberikan kewenangan kepada Dewan Keamanan PBB untuk telah memulai penyelidikan terhadap permasalahan yang potensial dalam memengaruhi keamanan dan perdamaian dunia sebelum permasalahan tersebut berubah menjadi pertikaian antar negara. Namun, Bab VI Piagam PBB ini tidak memberikan kewenangan kepada Dewan Keamanan PBB untuk melaksanakan pemaksaan (*enforcement measures*) kepada negara yang bertikai tersebut.<sup>211</sup> Inti dari upaya yang tertuang dalam Bab VI tersebut adalah upaya penyelesaian permasalahan secara damai di antara negara yang bersengketa atas dasar kemauan

---

<sup>207</sup> *Ibid.*

<sup>208</sup> *Ibid.*

<sup>209</sup> United Nations, *Charter of the United Nations*, Pasal 37.

<sup>210</sup> Edward C Luck, *UN Security Council: Practice and Promise*, hal. 21.

<sup>211</sup> *Ibid.*

negara tersebut tanpa adanya paksaan dari pihak ketiga. Masuknya Dewan Keamanan sebagai penengah didasarkan atas *voluntarism* negara dan kewenangan yang tertuang dalam Bab VI Piagam PBB ini.

### 3.1.2 Mekanisme dalam Bab VII Piagam Perserikatan Bangsa Bangsa

Bab VII Piagam PBB secara keseluruhan memberikan kewenangan kepada Dewan Keamanan PBB dalam penentuan situasi yang mengancam keamanan dan perdamaian dunia, serta mengatur mengenai tindakan-tindakan yang dapat dilaksanakan sebagai suatu reaksi terhadap ancaman tersebut yang di dalamnya termasuk adanya tindakan militer.<sup>212</sup> Dari struktur pengaturan yang tertuang dalam Bab VII Piagam PBB tersebut terlihat adanya suatu sistem keamanan kolektif yang terpusat pada kewenangan Dewan Keamanan PBB.<sup>213</sup> Keputusan-keputusan yang diambil berdasarkan Pasal-Pasal dalam Bab VII Dewan Keamanan PBB ini secara hukum mengikat para negara anggota untuk melaksanakannya sesuai dengan ketentuan Piagam PBB.<sup>214</sup>

Bab VII Piagam PBB dibuka dengan suatu pernyataan dalam Pasal 39 yang memberikan kewenangan kepada Dewan Keamanan PBB untuk dapat menentukan adanya ancaman-ancaman terhadap perdamaian (*threat to the peace*), pelanggaran perdamaian (*breach to the peace*) dan tindakan agresi (*act of aggression*). Pasal 39 tersebut menyatakan:

*“The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with articles 4 and 42, to maintain or restore international peace and security.”*<sup>215</sup>

Pasal ini memberikan kewenangan kepada Dewan Keamanan PBB untuk menentukan terlebih dahulu adanya ancaman-ancaman terhadap perdamaian,

---

<sup>212</sup> Ademola Abass, *Regional Organizations and the Development of Collective Security*, hal. 66.

<sup>213</sup> *Ibid.*

<sup>214</sup> Edward C Luck, *UN Security Council: Practice and Promise*, hal. 21.

<sup>215</sup> United Nations, *Charter of the United Nations*, Pasal 39.

pelanggaran perdamaian dan tindakan agresi sebelum mengambil suatu upaya paksa (*enforcement measures*). Namun, dalam Piagam PBB tidak terdapat adanya pengertian dari istilah “*threat to the peace*”, “*breach of the peace*” or an “*act of aggression*” sehingga merupakan kewenangan sepenuhnya kepada Dewan Keamanan PBB untuk menentukan adanya kondisi-kondisi tersebut sesuai dengan ruang lingkup Piagam PBB.<sup>216</sup> Dalam Bab VII Piagam PBB ini pula tidak dibentuk adanya kewajiban bagi Dewan Keamanan PBB untuk merujuk permasalahan antar negara kepada Mahkamah Internasional.<sup>217</sup>

*Threat to the peace* merupakan konsep yang sangat fleksibel yang dapat melingkupi pengertian yang luas yakni dari adanya sengketa antar negara dan sengketa internal negara.<sup>218</sup> Suatu keadaan pertikaian dapat dinyatakan sebagai *a threat to the peace* adalah suatu pertikaian yang membentuk adanya potensi konflik bersenjata atau adanya *use of force* dalam jangka waktu pendek atau menengah.<sup>219</sup> Dalam hal ini dapat dinyatakan bahwa *threat to peace* merupakan suatu kondisi yang dapat mengancam perdamaian dan keamanan dunia baik yang bersifat konflik internal negara ataupun antar negara yang berpotensi dalam pembentukan penggunaan kekerasan dalam permasalahan tersebut.

*A breach of the peace* dalam konteks hubungan antar negara sangat jarang dapat ditentukan. *An act of aggression* merupakan bentuk spesifik dari adanya *a breach of the peace* sehingga untuk menentukan arti dari istilah ini perlulah diperhatikan adanya perbedaan di antara keduanya.<sup>220</sup> Istilah *breach of the peace* dapat diartikan sebagai timbulnya pertempuran atau adanya penggunaan kekerasan oleh negara, namun hal tersebut tak memenuhi untuk dapat dikategorikan sebagai suatu *act of aggression*.<sup>221</sup> Namun, Dewan Keamanan PBB

---

<sup>216</sup> Erika de Wet, *The Chapter VII Powers of the United Nations Security Council*, (Oxford:Hart Publishing, 2004), hal. 135.

<sup>217</sup> Edward C Luck, *UN Security Council: Practice and Promise*, hal. 23.

<sup>218</sup> N D White, *Keeping the Peace: the United Nations and the Maintenance of International Peace and Security*, (Manchester:Manchester University Press, 1993), hal. 44.

<sup>219</sup> Erika de Wet, *The Chapter VII Powers of the United Nations Security Council*, hal. 138.

<sup>220</sup> N D White, *Keeping the Peace*, hal. 49.

tidak menyatakan bahwa perang sipil atau pertempuran internal dalam satu wilayah negara sebagai *breach of the peace*.<sup>222</sup> Sehingga dapat disimpulkan bahwa *a breach to peace* merupakan suatu keadaan telah terjadinya perang yang dalam hal ini telah terjadinya penggunaan kekuatan namun belum dapat sepenuhnya dikatakan sebagai *act of aggression*.

Sebelumnya telah dijelaskan bahwa *act of aggression* merupakan salah satu bentuk spesifik dari *breach to the peace*, dalam hal ini dinyatakan bahwa *act of aggression* menunjukkan atau memperlihatkan adanya kesalahan dari salah satu negara yang terlibat dalam suatu konflik atas tindakan agresi ke negara lain.<sup>223</sup> Dalam melihat pengertian *act of aggression* dapat dirujuk kepada Pasal 1 Annex Resolusi 3314 (XXIX) Majelis Umum PBB pada Tahun 1974, yang menyatakan bahwa:

*“Aggression is the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations, as set out in this Definition.”*<sup>224</sup>

Dalam hal ini dinyatakan bahwa tindakan agresi merupakan tindakan yang dapat mengancam kedaulatan suatu negara, kesatuan wilayah, atau kebebasan politik yang tidak sesuai dengan ketentuan Piagam PBB. Tindakan agresi dilihat dalam hal ini mencakup juga *use of force* oleh negara baik secara langsung maupun tidak langsung dan pengertian *force* dalam hal ini ditunjukkan untuk penggambaran penggunaan angkatan bersenjata, bukan dalam pengertian yang luas.<sup>225</sup>

Namun demikian pengertian ini bukanlah suatu pengertian yang dipakai secara baku. Dewan Keamanan PBB diberikan kewenangan untuk menentukan

---

<sup>221</sup> Erika de Wet, *The Chapter VII Powers of the United Nations Security Council*, hal. 144.

<sup>222</sup> *Ibid.*, hal. 145.

<sup>223</sup> N D White, *Keeping the Peace*, hal. 52.

<sup>224</sup> United Nations, *Definition of Aggression*, General Assembly Resolution 3314 (XXIX), disahkan pada 14 Desember 1974, Pasal 1 Annex.

<sup>225</sup> Erika de Wet, *The Chapter VII Powers of the United Nations Security Council*, hal. 146.

adanya pengertian tindakan agresi yang dianggap sesuai dengan ketentuan Piagam PBB. Hal tersebut sesuai dengan ketentuan yang terdapat dalam Pasal 4 Annex Resolusi 3314 (XXIX) Majelis Umum PBB, yang berbunyi:

*“The acts enumerated above are not exhaustive and the Security Council may determine that other acts constitute aggression under the provisions of the Charter.”*<sup>226</sup>

Sehingga dapat disimpulkan bahwa dalam pelaksanaan sistem keamanan kolektif dalam Bab VII Piagam PBB ini, sebelumnya Dewan Keamanan PBB harus menentukan adanya kondisi-kondisi yang dapat memberikan ancaman-ancaman terhadap perdamaian, pelanggaran terhadap perdamaian dan tindakan agresi sebelum menentukan upaya paksa yang akan dilakukan sesuai dengan ketentuan Bab VII tersebut dan kewenangan tersebut sepenuhnya diberikan kepada Dewan Keamanan PBB.

Setelah Dewan Keamanan menentukan adanya suatu kondisi yang mengancam keamanan dan perdamaian dunia atas dasar Pasal 39 tersebut, terdapat beberapa tindakan yang dapat dilaksanakan oleh Dewan Keamanan untuk menjaga keamanan dan perdamaian dunia yang tertuang dalam Pasal 40, 41, dan 42 Piagam PBB. Atas dasar Pasal 40 Piagam PBB, Dewan Keamanan PBB dapat meminta kepada pihak-pihak yang bersangkutan dalam suatu konflik untuk menerima tindakan-tindakan sementara (*provisional measures*) demi menghindari perkembangan situasi ke arah yang lebih buruk.<sup>227</sup> Pasal 40 Piagam PBB tersebut menyatakan:

*“In order to prevent an aggravation of the situation, the Security Council may, before making the recommendations or deciding upon the measures provided for in Article 39, call upon the parties concerned to comply with such provisional measures as it deems necessary or desirable. Such provisional measures shall be without prejudice to duly take account of failure to comply with such provisional measures.”*<sup>228</sup>

---

<sup>226</sup> United Nations, *Definition of Aggression*, General Assembly Resolution 3314 (XXIX), Pasal 4 Annex.

<sup>227</sup> Edward C Luck, *UN Security Council: Practice and Promise*, hal. 23.

Tindakan sementara (*provisional measures*) tersebut dicantumkan dalam Piagam PBB sebagai upaya opsional yang bersifat sementara dalam mengatasi permasalahan yang terjadi sebelum dilakukannya upaya paksa (*enforcement measure*) yang terdapat dalam Pasal 41 dan Pasal 42 Piagam PBB.<sup>229</sup>

Pasal 41 Piagam PBB merupakan suatu mekanisme pelaksanaan sistem keamanan kolektif yang berupa pemberian sanksi tanpa adanya *use of force* yang dilaksanakan oleh negara-negara secara kolektif. Pasal 41 Piagam PBB menyatakan:

*“The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.”*<sup>230</sup>

Kewenangan yang tertuang dalam Pasal 41 tersebut adalah dimaksudkan untuk memberikan kewajiban pelaksanaan upaya paksa (*enforcement measure*) atas adanya ancaman-ancaman terhadap perdamaian atau pelanggaran terhadap perdamaian seperti yang tertuang dalam Pasal 39 Piagam PBB.<sup>231</sup> Upaya-upaya yang dilaksanakan oleh Dewan Keamanan PBB dapat berupa sanksi yang diberikan kepada negara anggota dalam bentuk gangguan terhadap hubungan ekonomi dan atas transportasi dan komunikasi serta pemutusan hubungan diplomatik. Dapat dilihat bahwa upaya yang dilaksanakan tersebut lebih tepat untuk digunakan dalam mengatasi ancaman-ancaman terhadap perdamaian (*threats to peace*) secara internal suatu negara, yang ditujukan kepada penguasa negara untuk dapat kemudian mengatasi permasalahan internal.<sup>232</sup> Dampak yang ditimbulkan oleh upaya tersebut sangat berpengaruh terhadap ekonomi suatu

---

<sup>228</sup> United Nations, *Charter of the United Nations*, Pasal 40.

<sup>229</sup> N D White, *Keeping the Peace*, hal. 92.

<sup>230</sup> United Nations, *Charter of the United Nations*, Pasal 41.

<sup>231</sup> N D White, *Keeping the Peace*, hal. 93.

<sup>232</sup> *Ibid.*, hal. 99.

negara dan terhadap pelaksanaan transportasi darat, laut maupun udara serta komunikasi negara tersebut.<sup>233</sup>

Berdasarkan sifatnya mekanisme pelaksanaan sistem keamanan kolektif dalam Pasal 41 ini didasarkan atas dasar pelaksanaan upaya paksa secara damai. Perbedaannya dengan pengaturan dalam Bab VI Piagam PBB, yang telah dijelaskan sebelumnya, terlihat dari kuasa Dewan Keamanan PBB. Dalam Bab VI Piagam PBB, Dewan Keamanan PBB berusaha untuk mendamaikan para pihak dalam suatu sengketa dengan cara damai yang sepenuhnya didasarkan atas kemauan mereka, sedangkan dalam hal ini Pasal 41 memberikan kewenangan bagi Dewan Keamanan PBB untuk memberikan sanksi namun belum memperlihatkan adanya *use of force* yang diterapkan kepada negara.

Apabila upaya mekanisme yang dilakukan atas dasar Pasal 41 tersebut di atas dianggap tidak mencukupi untuk menjaga keamanan dan perdamaian dunia, maka Dewan Keamanan PBB dapat melaksanakan *use of force* yakni penggunaan upaya militer dengan mempergunakan angkatan udara, laut atau darat. Penggunaan kekuatan militer tersebut didasarkan pada Pasal 42 Piagam PBB, yang menyatakan:

*“Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air sea, or land forces of Members of the United Nations.”*<sup>234</sup>

Dalam pasal ini terlihat adanya pemikiran dari pembentuk Piagam PBB akan adanya situasi pada saat upaya pelaksanaan sistem keamanan kolektif tanpa menggunakan kekerasan dianggap tidak dapat menyelesaikan permasalahan yang ada.<sup>235</sup> Sehingga pada saat terjadinya situasi tersebut dirasa perlu adanya pelaksanaan *use of force*. Ketentuan dalam Pasal 42 ini merupakan pula suatu

---

<sup>233</sup> Erika de Wet, *The Chapter VII Powers of the United Nations Security Council*, hal. 182.

<sup>234</sup> United Nations, *Charter of the United Nations*, Pasal 42.

<sup>235</sup> Edward C Luck, *UN Security Council: Practice and Promise*, hal. 25.



upaya paksa yang dapat dilaksanakan Dewan Keamanan PBB kepada negara yang telah mengakibatkan adanya gangguan terhadap pelaksanaan upaya penjagaan keamanan dan perdamaian dunia.<sup>236</sup>

Bahkan atas dasar pelaksanaan Pasal 42 tersebut, Dewan Keamanan PBB dapat memberikan otorisasi (*authorization*) terhadap *use of force* yang dilaksanakan oleh negara-negara anggota terhadap satu negara dalam pelaksanaan sistem keamanan kolektif,<sup>237</sup> sehingga *use of force* dalam hal ini adalah sah dan mempunyai legitimasi dalam pelaksanaannya. Otorisasi tersebut diberikan atas dasar situasi yang terjadi telah memenuhi ketentuan Pasal 39 dan Pasal 42 Piagam PBB.<sup>238</sup> Upaya pengesahan tersebut dituangkan ke dalam bentuk rekomendasi yang dikeluarkan oleh Dewan Keamanan yang mengikat kepada negara yang telah melaksanakan pelanggaran terhadap perdamaian dan keamanan dunia sehingga secara hukum telah menghilangkan haknya atas pelaksanaan *self-defence*<sup>239</sup> sesuai dengan Pasal 51 Piagam PBB.<sup>240</sup> Dalam mekanisme ini pelaksanaan sistem keamanan kolektif dapat dilaksanakan dengan pelaksanaan *use of force* bagi negara yang telah mengancam perdamaian dan keamanan dunia.

Dalam pelaksanaan upaya paksa (*enforcement measures*) sesuai dengan yang telah diatur dalam Bab VII Piagam PBB ini, Dewan Keamanan PBB tidak perlu terlebih dahulu telah melaksanakan semua upaya mekanisme *peacefull settlement of disputes* seperti yang tertuang dalam Bab VI Piagam PBB.<sup>241</sup> Pada saat telah ditentukannya ada suatu permasalahan yang berkaitan dengan ancaman-

---

<sup>236</sup> *Ibid.*

<sup>237</sup> Peter Malanczuk, “*Akehurst’s Modern Introduction to International Law*”, hal. 389.

<sup>238</sup> *Ibid.*, hal. 390.

<sup>239</sup> *Self-defence* merupakan upaya yang diberikan kepada negara yang melegitimasi adanya pelaksanaan *use of force* atas dasar pelaksanaan bela diri atas penyerangan bersenjata ke dalam wilayah negara tersebut. Hal ini diatur dalam Pasal 51 Piagam PBB yang berbunyi: “*Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. ...*”. (United Nations, *Charter of the United Nations*, Pasal 51).

<sup>240</sup> Peter Malanczuk, “*Akehurst’s Modern Introduction to International Law*”, hal. 390.

<sup>241</sup> Erika de Wet, *The Chapter VII Powers of the United Nations Security Council*, hal. 184.

ancaman terhadap perdamaian, pelanggaran terhadap perdamaian dan tindakan agresi, maka sejak saat itu Dewan Keamanan PBB telah dapat melaksanakan upaya paksa yang diberikan dalam Pasal 40, 41 dan 42 Piagam PBB. Upaya-upaya dalam Pasal 40, 41 dan 42 tersebut dapat dilaksanakan oleh Dewan Keamanan PBB tanpa perlu adanya tata urutan pelaksanaan sesuai dengan struktur yang terdapat dalam Piagam PBB.<sup>242</sup> Dewan Keamanan PBB bisa saja langsung menentukan perlunya upaya paksa dengan *use of force* tanpa perlu pelaksanaan *provisional measures* sebelumnya atas dasar pencapaian tujuan dengan efektif, yakni adanya perdamaian dan keamanan dunia dan pula atas pertimbangan terhadap konteks permasalahan yang terjadi.

Sehingga dapat dilihat bahwa sistem keamanan kolektif yang dibentuk dalam organisasi PBB ini telah memperlihatkan mekanisme yang lebih kompleks daripada yang telah dituangkan dalam LBB dengan adanya satu pusat sentral pelaksanaan upaya sistem keamanan kolektif atas kewenangan yang diberikan kepada Dewan Keamanan PBB.

### **3.2 Organisasi Pertahanan Regional dalam Sistem Keamanan Kolektif**

Dalam Bab VI dan Bab VII Piagam PBB terlihat adanya monopoli kewenangan dalam pelaksanaan sistem keamanan kolektif oleh PBB terutama oleh Dewan Keamanan PBB yang memiliki kewenangan utama dalam menjaga perdamaian dan keamanan dunia. Namun, pada masa pasca perang dingin terlihat banyak organisasi internasional yang mulai ikut berperan dalam penanganan konflik dan menjaga keamanan serta perdamaian<sup>243</sup>, di antaranya adalah organisasi regional dan secara spesifik dapat dilihat organisasi pertahanan regional.

Organisasi regional yang dimaksud dalam hal ini adalah suatu institusi yang dibentuk dan beranggotakan oleh negara yang berusaha untuk melaksanakan suatu aturan bersama di antara mereka baik dalam bentuk pelaksanaan pertahanan, ekonomi atau bentuk lainnya.<sup>244</sup> Kata regional dalam hal ini tidak memberikan

---

<sup>242</sup> *Ibid.*

<sup>243</sup> Anthony Clark Arend, "Symposium: The United Nations, Regional Organization, and Military Organization", *Duke Journal of Comparative & International Law*, (Fall, 19960, hal. 1.

suatu pembatasan terhadap pengertian organisasi regional yang hanya didasarkan atas adanya unsur kesamaan wilayah.<sup>245</sup> Keanggotaan organisasi regional ini pada kenyataannya tidak semata-mata didasarkan pada letak geografis dari anggotanya, tetapi kata ‘regional’ di sini lebih ditekankan kepada kepentingan politik daripada letak geografis.<sup>246</sup> Sehingga organisasi regional dalam hal ini merupakan suatu institusi yang dibentuk negara atas dasar kesamaan kepentingan, baik dapat berupa kesamaan wilayah, kesamaan politik, kesamaan ekonomi dan kepentingan lainnya, yang bertujuan untuk pelaksanaan tujuan bersama dalam satu kelompok negara tersebut. Dalam hal ini organisasi pertahanan regional merupakan salah satu bagian dari organisasi regional yang dilihat atas sifat cara kerja organisasi tersebut.<sup>247</sup>

Organisasi pertahanan regional mulai muncul dan berkembang pada masa perang dingin dengan tujuan untuk meningkatkan kerja sama di antara para negara anggota terutama dalam permasalahan pertahanan. Perkembangan organisasi pertahanan regional pada waktu itu didasarkan atas tiga prinsip yang secara umum dapat dilihat yakni: (1) suatu tindakan agresi terhadap salah satu negara anggota organisasi dianggap sebagai tindakan agresi kesemua negara anggota organisasi; (2) negara-negara anggota tidak mendukung adanya *use of force*, terkecuali dalam tindakan bela diri (*self-defense*) dan berkomitmen untuk menyelesaikan permasalahan di antara mereka dengan upaya damai; (3) tidak diperbolehkan adanya intervensi dari satu negara anggota ke dalam urusan internal negara anggota lainnya.<sup>248</sup> Organisasi pertahanan regional tersebut ikut dalam pelaksanaan sistem keamanan kolektif dengan pelaksanaan penggabungan

---

<sup>244</sup> Captain Davis Brown, “The Role of Regional Organization in Stopping Civil Wars”, *Air Force Law Review*, (1997), hal. 1

<sup>245</sup> G Schermers dan Niels M Blokker, *International Institutional Law*, hal. 42.

<sup>246</sup> Sri Setianingsih Suwardi, *Pengantar Hukum Organisasi Internasional*, hal. 31.

<sup>247</sup> Organisasi regional dapat digolongkan menurut sifat cara kerjanya atau keanggotaannya, yakni: (1) Organisasi yang bertujuan kerja sama dalam semua bidang baik bidang ekonomi, politik, sosial, pertahanan, kebudayaan dan lain-lain organisasi regional yang serba guna; (2) organisasi pertahanan; (3) organisasi fungsional yang tujuannya kerja sama dalam bidang tertentu. (*Ibid.*, hal. 32-33).

<sup>248</sup> Captain Davis Brown, “The Role of Regional Organization in Stopping Civil Wars”, hal. 2.

pasukan (*multinational force*) dalam menjaga perdamaian dan keamanan dalam wilayah kawasan organisasi.<sup>249</sup> Dapat dilihat di antara organisasi tersebut adalah *Organization of American State*, *Arab League*, dan *North Atlantic Treaty Organization*. Organisasi-organisasi tersebut pula diberikan suatu kewenangan oleh negara anggota untuk menanggapi suatu keadaan yang mengancam perdamaian dan keamanan.<sup>250</sup>

Dengan demikian kewenangan dari organisasi pertahanan regional secara tidak langsung bersinggungan dengan kewenangan yang dimiliki oleh Dewan Keamanan PBB yang merupakan pusat pelaksanaan sistem keamanan kolektif. Dalam hal ini tercipta adanya hubungan di antara Dewan Keamanan PBB dan organisasi pertahanan regional. Dalam upaya pembentukan Piagam PBB pada konferensi San Fransisco, hubungan antara PBB dengan organisasi regional, yang dalam hal ini secara spesifik dilihat pada organisasi pertahanan regional, telah dilihat sebagai suatu hal yang mungkin akan terjadi dan diperdebatkan.<sup>251</sup>

Perdana Menteri Inggris, Winston Churchill, sehubungan dengan hal tersebut menyatakan bahwa dalam mencapai ketertiban dunia pasca perang perlu dibentuk adanya organisasi internasional yang terpusat dan beberapa organisasi-organisasi regional.<sup>252</sup> Kemudian menurut Winston Churchill, peran utama dalam pelaksanaan penjagaan perdamaian dan keamanan dunia merupakan wewenang daripada organisasi-organisasi regional yang dipimpin oleh negara adidaya dari setiap kawasan yang ada.<sup>253</sup> Ia bersikeras pula menyatakan bahwa organisasi regional sangatlah dibutuhkan, karena hanya negara-negara yang kepentingannya secara langsung dipengaruhi oleh suatu permasalahan saja yang berkehendak

---

<sup>249</sup> *Ibid.*, hal. 1.

<sup>250</sup> Anthony Clark Arend, "Symposium: The United Nations, Regional Organization, and Military Organization", hal. 1.

<sup>251</sup> Christopher J Borgen, "The Theory and Practice of Regional Organization Intervention in Civil Wars", *New York University Journal of International Law & Politics*, (Summer, 1994), hal. 1.

<sup>252</sup> Anthony Clark Arend, "Symposium: The United Nations, Regional Organization, and Military Organization", hal. 2.

<sup>253</sup> *Ibid.*

untuk mengupayakan kekuatan dalam penyelesaian permasalahan tersebut.<sup>254</sup> Maka dapat dinyatakan bahwa organisasi regional ini dapat menjadi alternatif dari pelaksanaan sistem keamanan kolektif dari PBB yang bertujuan untuk penyelesaian permasalahan dan konflik dalam kawasan mereka itu sendiri.

Bertentangan dengan pernyataan Winston Churchill tersebut, Menteri Luar Negeri Amerika Serikat Cordell Hull menyatakan bahwa dimungkinkan adanya organisasi regional namun dalam hal ini kewenangan mereka adalah merupakan subordinasi, berada di bawah kewenangan organisasi terpusat yang lebih kuat.<sup>255</sup> Pendapat Cordell Hull tersebut didasarkan atas dua dasar pemikirannya yakni: (1) dengan adanya sistem organisasi regional yang memiliki peran utama dalam pelaksanaan sistem keamanan kolektif dapat membentuk suatu sistem di mana tiap-tiap organisasi regional akan saling bersaing antara yang satu dan yang lainnya; (2) berdasarkan kepentingan politiknya, ia berpendapat pula bahwa sistem organisasi regional akan mendukung adanya upaya pengasingan terhadap Amerika.<sup>256</sup>

Atas perdebatan tersebut, pendapat Cordell Hull diterima dalam penyusunan Piagam PBB dan memformulasikan Bab VIII Piagam PBB yakni mengenai kesepakatan kawasan.<sup>257</sup> Sehingga dalam melihat pelaksanaan sistem keamanan kolektif oleh organisasi pertahanan regional dalam hal ini sangatlah berhubungan dengan Dewan Keamanan PBB dan Piagam PBB yang di dalamnya terdapat suatu pengaturan terhadap upaya sistem keamanan kolektif yang dilaksanakan oleh organisasi pertahanan regional tersebut.

---

<sup>254</sup> Jane A Meyer, "Collective Self-Defense and Regional Security: Necessary Exceptions to A Globalist Doctrine", *Boston University International Law Journal*, (Fall, 1993), hal. 13.

<sup>255</sup> Christopher J Borgen, "The Theory and Practice of Regional Organization Intervention in Civil Wars", hal. 2.

<sup>256</sup> Anthony Clark Arend, "Symposium: The United Nations, Regional Organization, and Military Organization", hal. 2.

<sup>257</sup> Christopher J Borgen, "The Theory and Practice of Regional Organization Intervention in Civil Wars", hal. 2.

### 3.2.1 Sistem Keamanan Kolektif PBB dan Organisasi Pertahanan Regional

Pengaturan mengenai organisasi pertahanan regional dalam Piagam PBB secara umum dapat dilihat dalam Bab VIII (Pasal 52-54) yang berjudul *Regional Arrangements* (Kesepakatan Kawasan) yang mengatur mengenai kewajiban dan hak-hak istimewa organisasi pertahanan regional dalam menjaga perdamaian dan keamanan dunia dan secara khusus pada Pasal 51 yang mengatur mengenai konsep *collective self-defense* yang dapat dilaksanakan oleh organisasi pertahanan regional.<sup>258</sup> Namun, dalam Piagam PBB tidak ditemukan secara eksplisit pengertian mengenai organisasi pertahanan regional ataupun organisasi regional. Bahkan istilah yang dipakai dalam Bab VIII Piagam PBB bukanlah *regional organization* melainkan *regional arrangement or agencies*.

Piagam PBB hanya menyatakan dalam Pasal 52 (1) bahwa: “... *such arrangements or agencies and their activities are consistent with the purposes and principles of the United Nations*”.<sup>259</sup> Pengertian *regional arrangements* dalam Piagam PBB ini dapat dilihat sebagai suatu pembentukan pengertian yang luas. Organisasi yang dimaksud adalah organisasi yang dibentuk dalam tujuan pelaksanaan penjagaan perdamaian dan keamanan.<sup>260</sup> Negara anggota dari organisasi internasional tersebut haruslah memiliki suatu kesamaan yang didasarkan atas kesamaan tata letak geografis, budaya, tata bahasa, kepentingan sosial, faktor-faktor sejarah, atau atas kesamaan kepentingan lainnya.<sup>261</sup> Dalam hal ini organisasi pertahanan regional dapat dikatakan memenuhi pengertian yang terdapat dalam ketentuan Piagam PBB, yang dapat dilihat dari pembentukannya yang didasarkan atas pelaksanaan pertahanan di suatu wilayah kawasan dan didirikan atas kesamaan kepentingan politik antara negara anggota yakni dalam permasalahan pertahanan.

---

<sup>258</sup> *Ibid.*

<sup>259</sup> United Nations, *Charter of the United Nations*, Pasal 52 (1).

<sup>260</sup> Suyash Paliwal, “The Primacy of Regional Organization in International Peacekeeping: the African Example”, *Virginia Journal of International Law*, Vol. 51, Issue 1, (2010), <<http://ssrn.com/abstract=1536966>>, diakses pada 27 April 2012, hal. 192.

<sup>261</sup> *Ibid.*

Pasal 52 merupakan suatu perumusan mendasar atas peranan organisasi pertahanan regional dalam pelaksanaan sistem keamanan kolektif yakni bentuk *regional arrangement* seperti yang dimaksud dalam Piagam PBB.<sup>262</sup> Pasal 52 Piagam PBB menyatakan bahwa:

*“1. Nothing in the present Charter precludes the existence of regional arrangements or agencies for dealing with such matter relating to the maintenance of international peace and security as are appropriate for regional action, provided that such arrangements or agencies and their activities are consistent with the purposes and principles of the United Nations.*

*2. The Members of the United Nations entering into such arrangements or constituting such agencies shall make every effort to achieve pacific settlement of dispute of local dispute through such regional arrangements or by such regional agencies before referring them to the Security Council.*

*3. The Security Council shall encourage the development of pacific settlement of local disputes through such regional arrangements or by such regional agencies either on the initiative of the states concerned or by reference from the Security Council.*

*4. This Article in no way impairs the application of Articles 34 and 35.”*<sup>263</sup>

Pasal 52 memperlihatkan adanya eksistensi dari organisasi pertahanan regional yang dapat ikut dalam pelaksanaan sistem keamanan kolektif sesuai dengan tujuan dan prinsip dari PBB. Dengan perumusan Pasal 52 ini, memberikan kemungkinan bagi pertahanan regional untuk melaksanakan sistem keamanan kolektif, terutama dalam masalah *pacific settlement of dispute* di antara para anggotanya.<sup>264</sup>

Selanjutnya dalam Pasal 53 disebutkan bahwa:

*“1. The Security Council shall, where appropriate, utilize such regional arrangements or agencies for enforcement action under its authority. But no enforcement action shall be taken under regional arrangements or by regional agencies without the authorization of the Security Council, with the exception of measures against any enemy state, as defined in paragraph 2 of this Article, provided for pursuant to Article 107 or in regional arrangements directed*

---

<sup>262</sup> Christopher J Borgen, “The Theory and Practice of Regional Organization Intervention in Civil Wars”, hal. 2.

<sup>263</sup> United Nations, *Charter of the United Nations*, Pasal 52.

<sup>264</sup> Ademola Abass, *Regional Organizations and the Development of Collective Security*, hal. 31.

*against renewal of aggressive policy on the part of any such state, until such time as the Organization may, on request of the Government concerned, be charged with the responsibility for preventing further aggression by such a state.*

*2. The term enemy state as used in paragraph 1 of this Article applies to any state which during the Second World War has been an enemy of any signatory of the present Charter.”<sup>265</sup>*

Dalam pasal tersebut terlihat adanya peranan organisasi pertahanan regional dalam pelaksanaan sistem keamanan kolektif dalam sistem Piagam PBB, terutama dalam pelaksanaan *enforcement measures* (upaya paksa) yang dapat dilaksanakan dalam penjagaan perdamaian dan keamanan dunia. Pasal 53 memperlihatkan bahwa organisasi pertahanan regional dimaksudkan sebagai suatu alternatif upaya pelaksanaan sistem keamanan kolektif selain dari yang telah diberikan kewenangannya kepada Dewan Keamanan PBB.<sup>266</sup> Namun, organisasi pertahanan regional dalam pengertian Pasal 53 tersebut merupakan subordinat, yang kewenangannya berada di bawah kewenangan Dewan Keamanan PBB dengan pelaksanaan sistem otorisasi yang harus diberikan oleh Dewan Keamanan PBB atas pelaksanaan upaya paksa organisasi.<sup>267</sup>

Sehingga dapat disimpulkan bahwa dalam Bab VIII Piagam PBB tersebut mengakui adanya organisasi pertahanan regional yang dapat melaksanakan kewenangan sistem keamanan kolektif, namun dalam perumusannya organisasi tersebut adalah dianggap sebagai subordinat yang melaksanakan kewenangan di bawah kewenangan Dewan Keamanan PBB. Namun, dalam formulasi Piagam PBB, negara-negara Amerika Latin tidak menyetujui perumusan kedudukan organisasi pertahanan regional yang bersifat subordinasi terhadap Dewan Keamanan PBB dalam penyelesaian suatu permasalahan.<sup>268</sup> Negara-negara

---

<sup>265</sup> United Nations, *Charter of the United Nations*, Pasal 53.

<sup>266</sup> Jane A Meyer, “Collective Self-Defense and Regional Security: Necessary Exceptions to A Globalist Doctrine”, hal. 14.

<sup>267</sup> Ugo Villani, “The Security Council’s Authorization of Enforcement Action by Regional Organizations”, dalam J A Frowein dan R wolfrum, *ed.*, *Max Planck Yearbook of United Nations Law*, Vol. 6, (Netherlands:Kluwer Law International, 2002), hal. 537.

<sup>268</sup> Anthony Clark Arend, “Symposium: The United Nations, Regional Organization, and Military Organization”, hal. 3.



Amerika Latin tersebut memperlmasalahkan adanya situasi pada saat Dewan Keamanan PBB, dengan sistem veto dalam pengambilan keputusannya, tidak dapat mencapai persetujuan atas pemberian otorisasi terhadap pelaksanaan upaya paksa yang dilakukan oleh organisasi pertahanan regional, padahal telah terjadi tindakan agresi di dalam wilayah regional mereka.<sup>269</sup> Sehingga diperlukan adanya suatu pengaturan dalam Piagam PBB yang dapat memberikan legitimasi dalam pelaksanaan tindakan upaya paksa tanpa otorisasi Dewan Keamanan PBB.

Maka daripada itu, Piagam PBB memasukkan Pasal 51 ke dalam Bab VII yang mengatur mengenai upaya *self-defense* yang dapat dilaksanakan oleh negara secara individual atau kolektif untuk menjawab kekhawatiran negara-negara Amerika Latin.<sup>270</sup> Pasal 51 menyatakan:

*“Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such actions as it deems necessary in order to maintain or restore international peace and security.”*<sup>271</sup>

Pasal 51 tersebut menyatakan adanya “*inherent right*” (hak yang melekat) dari setiap negara dalam upaya *self-defense* (bela diri).<sup>272</sup> Hak tersebut dapat dilaksanakan oleh tiap-tiap negara dan merupakan hak yang melekat kepadanya yang tidak dapat dikesampingkan, dapat pula dilaksanakan oleh organisasi pertahanan regional sebagai suatu upaya kolektif negara.<sup>273</sup> Dengan demikian organisasi pertahanan regional dapat melaksanakan suatu upaya bela diri atas penyerangan atau agresi yang dilaksanakan terhadap wilayah negara anggotanya

<sup>269</sup> *Ibid.*

<sup>270</sup> *Ibid.*

<sup>271</sup> United Nations, *Charter of the United Nations*, Pasal 51.

<sup>272</sup> Ademola Abass, *Regional Organizations and the Development of Collective Security*, hal. 31.

<sup>273</sup> *Ibid.*

tanpa harus memenuhi syarat otorisasi Dewan Keamanan PBB. Maka apabila Dewan Keamanan tidak dapat melaksanakan upaya dalam penjagaan perdamaian dan keamanan dunia, atau dalam hal tidak dapat memberikan suatu otorisasi kepada organisasi pertahanan regional karena terbentur sistem veto dalam pengambilan keputusannya, organisasi pertahanan regional tersebut dapat melaksanakan upaya paksa dalam konteks bela diri atas penyerangan terhadapnya.<sup>274</sup>

Dapat disimpulkan bahwa Piagam PBB memberikan suatu kesempatan bagi organisasi pertahanan regional dalam pelaksanaan upaya sistem keamanan kolektif yang dapat dilihat dalam Bab VIII Piagam PBB. Dalam bab tersebut, Dewan Keamanan PBB tetap dianggap sebagai suatu organ yang memiliki peran utama dalam pelaksanaan sistem keamanan kolektif dan organisasi pertahanan regional dianggap sebagai subordinat, berada di bawah Dewan Keamanan PBB tersebut. Namun, hal ini tidak menghapus adanya *inherent right* dari negara dalam pelaksanaan upaya paksa atas dasar bela diri terhadap penyerangan terhadap wilayahnya yang dilakukan secara kolektif melalui organisasi pertahanan regional sesuai dengan ketentuan Pasal 51 Piagam PBB.

### **3.2.2 Kewenangan Organisasi Pertahanan Regional dalam Operasi Pelaksanaan Sistem Keamanan Kolektif**

Sebelumnya telah dijelaskan bahwa organisasi pertahanan regional dapat melaksanakan sistem keamanan kolektif selayaknya yang tertuang dalam Piagam PBB. Dalam hal ini, dapat dilihat kewenangan yang dimiliki organisasi pertahanan regional dalam pelaksanaan sistem keamanan kolektif yang dapat dibagi menjadi kewenangan dalam upaya pelaksanaan sistem keamanan kolektif melalui *peaceful settlement of disputes* dan *enforcement measures* yang di dalamnya terdapat kewenangan *use of force*.

Kewenangan pelaksanaan *peaceful settlement of disputes* dari organisasi pertahanan regional dapat dilihat dari Pasal 52 (2) yang menyatakan: “*The Members ... shall make every effort to achieve peaceful settlement of dispute of local dispute through such regional arrangements or by such regional*

<sup>274</sup> Edward C Luck, *UN Security Council: Practice and Promise*, hal. 27.

*agencies.*<sup>275</sup> Pasal tersebut memperjelas adanya kewenangan pelaksanaan *pacifc settlement of disputes* oleh organisasi pertahanan regional, yang merupakan suatu keharusan bagi negara untuk melaksanakan upaya tersebut sebelum membawa permasalahan ke Dewan Keamanan PBB.<sup>276</sup> Kewenangan *pacifc settlement of disputes* dapat pula dilihat dalam Bab VI Piagam PBB, Pasal 33 (1) yang menyatakan bahwa para pihak dalam suatu permasalahan “*shall, first of all, seek a solution by ... resort to regional agencies or arrangements*”<sup>277</sup>. Sehingga dapat disimpulkan bahwa suatu organisasi pertahanan regional memiliki kewenangan dalam pelaksanaan *pacifc settlement of disputes* sebagai suatu upaya pelaksanaan sistem keamanan kolektif. Namun sesuai dengan prinsip dasar Bab VIII Piagam PBB, kewenangan tersebut tidak kemudian menghilangkan peran utama Dewan Keamanan PBB dalam pelaksanaan sistem keamanan kolektif.

Kewenangan berikutnya yang dimiliki oleh organisasi pertahanan regional adalah adanya *enforcement measures* (upaya paksa) yang dapat dilaksanakan oleh organisasi pertahanan regional. *Enforcement measures* yang dimaksud dalam hal ini adalah sama halnya dengan *enforcement measures* yang dimaksud dalam Bab VII Piagam PBB yakni berupa pemberian sanksi ekonomi, pemutusan hubungan diplomatik atau hubungan perdagangan, atau upaya-upaya lainnya termasuk upaya *use of force*.<sup>278</sup> Kewenangan tersebut dituangkan ke dalam Pasal 53 Piagam PBB, yang memperlihatkan adanya kewenangan organisasi pertahanan regional dengan pemberian otorisasi Dewan Keamanan PBB.

Upaya *enforcement measures* dalam hubungannya dengan otorisasi pelaksanaannya oleh Dewan Keamanan PBB dapat dibagi menjadi dua, yakni (1) upaya yang bukan merupakan *use of force* dan (2) upaya *use of force*. Perbedaan tersebut penting dalam melihat dalam hal mana kewenangan organisasi pertahanan regional memerlukan adanya pengesahan dari Dewan Keamanan PBB.

---

<sup>275</sup> United Nations, *Charter of the United Nations*, Pasal 52 (2).

<sup>276</sup> Jane A Meyer, “Collective Self-Defense and Regional Security: Necessary Exceptions to A Globalist Doctrine”, hal. 13.

<sup>277</sup> United Nations, *Charter of the United Nations*, Pasal 33 (1).

<sup>278</sup> Suyash Paliwal, “The Primacy of Regional Organization in International Peacekeeping: the African Example”, hal. 193.

Otorisasi dari Dewan Keamanan PBB dalam hal ini secara prinsip diperlukan karena dalam pelaksanaan suatu upaya *enforcement measures* merupakan suatu tindakan yang melanggar hukum internasional dengan tidak diberikannya otorisasi tersebut.<sup>279</sup>

Otorisasi Dewan Keamanan PBB merupakan bagian yang penting dalam pemberian kewenangan bagi organisasi regional, khususnya organisasi pertahanan regional dalam pelaksanaan *enforcement measures*, terutama pelaksanaan upaya *use of force* dalam sistem keamanan kolektif PBB. Dewan Keamanan PBB mempunyai kewenangan secara eksplisit yang tertuang dalam Piagam PBB untuk melaksanakan upaya paksa dengan upaya *use of force*.<sup>280</sup> Kemudian dalam pelaksanaannya, Dewan Keamanan PBB dapat memberikan kewenangan tersebut kepada organisasi internasional dengan memberikan otorisasi.<sup>281</sup> Otorisasi memberikan suatu pengecualian terhadap tindakan yang tidak dapat dilaksanakan untuk dapat dilaksanakan.<sup>282</sup> Sehingga dapat dilihat bahwa tujuan dan fungsi dari otorisasi yang diberikan oleh Dewan Keamanan PBB adalah untuk menghilangkan unsur larangan yang menjadikan suatu tindakan dapat dilaksanakan, atau dapat dikatakan sebagai upaya pengesahan suatu tindakan yang dilarang.

Sehingga dalam hal ini upaya *use of force* saja yang memerlukan adanya otorisasi dari Dewan Keamanan PBB, yang didasarkan kepada sifat *use of force* yang merupakan suatu pelanggaran hukum internasional apabila dilakukan tidak sesuai dengan ketentuan dalam Piagam PBB.<sup>283</sup> seperti yang terlihat dalam Pasal 2 (4) Piagam PBB yang tidak memperbolehkan upaya *use of force* dilaksanakan

---

<sup>279</sup> Ugo Villani, "The Security Council's Authorization of Enforcement Action by Regional Organizations", hal. 540.

<sup>280</sup> Niels Blokker, "Is the Authorization Authorized?: Powers and Practice of the UN Security Council to Authorize the Use of Force by 'Coalitions of the Able and Willing'", *European Journal of International Law*, (September, 2000), hal. 4.

<sup>281</sup> *Ibid.*

<sup>282</sup> Ugo Villani, "The Security Council's Authorization of Enforcement Action by Regional Organizations", hal. 539.

<sup>283</sup> *Ibid.*, hal. 540.

oleh negara yang tidak sesuai dengan ketentuan Piagam PBB. Hal ini didukung pula dengan pandangan yang menyatakan:

*“There is nothing to stop a group of states from joining in the framework of a regional organization and to do what they are permitted to do under general international law, such as taking reprisal not involving the use of force.”*<sup>284</sup>

*Enforcement measures* yang dimaksud dalam Bab VIII tersebut adalah:

*“Enforcement measures are coercive, non-consensual, use-of-force measures addressed to a breach of the peace, threat to the peace, or an act of aggression taken in an effort to maintain or restore international peace and security.”*<sup>285</sup>

Kewenangan pelaksanaan *enforcement measures* dalam upaya *use of force* dari organisasi pertahanan regional dapat dilihat dalam Pasal 53 Bab VIII Piagam PBB. Pasal tersebut memberikan kewenangan bagi organisasi pertahanan regional untuk melaksanakan *enforcement measures*. Dalam pasal dapat dilihat terdapat dua kondisi dalam pelaksanaan *enforcement measures*, yakni (1) pelaksanaan *enforcement measures* yang digagas oleh Dewan Keamanan PBB melalui organisasi pertahanan regional sebagai *regional arrangement* yang dimaksud dalam Bab VIII Piagam PBB dan (2) pelaksanaan *enforcement measures* yang digagas dan dilaksanakan oleh organisasi pertahanan regional dengan otorisasi dari Dewan Keamanan PBB.<sup>286</sup>

*Use of force* oleh organisasi pertahanan regional dapat dilaksanakan pula tanpa adanya otorisasi yang sebelumnya telah diberikan oleh Dewan Keamanan PBB, yakni atas dasar *collective self-defense*.<sup>287</sup> Organisasi pertahanan regional

---

<sup>284</sup> *Ibid.*

<sup>285</sup> James E Hickey Jr., “Challenges to Security Council Monopoly Power over the Use of Force in Enforcement Actions: the Case of Regional Organization”, *IUS Gentium*, (Fall, 2004), hal. 3.

<sup>286</sup> Ugo Villani, “The Security Council’s Authorization of Enforcement Action by Regional Organizations”, hal. 537.

<sup>287</sup> James E Hickey Jr., “Challenges to Security Council Monopoly Power over the Use of Force in Enforcement Actions: the Case of Regional Organization”, hal. 2.

dapat juga mengupayakan *use of force* di bawah kewenangan Dewan Keamanan PBB atas dasar Bab VII dan Bab VIII Piagam PBB.<sup>288</sup>

### 3.2.3 Perlindungan Terhadap Pasukan Organisasi Pertahanan Regional dalam Pelaksanaan Sistem Keamanan Kolektif

Dalam pelaksanaan sistem keamanan kolektif oleh organisasi pertahanan regional sesuai dengan kewenangan Dewan Keamanan PBB, dibentuk adanya pasukan yang dapat terdiri dari pasukan negara-negara anggota organisasi pertahanan regional yang bertindak atas *command and control* dari organisasi. Dengan berkembangnya pelaksanaan *enforcement measures* oleh Dewan Keamanan PBB dan organisasi pertahanan regional timbul adanya atensi terhadap perlindungan pasukan dalam pelaksanaan *use of force* atau upaya sistem keamanan kolektif lainnya. Perhatian tersebut akhirnya dijawab dengan dibentuknya *The Convention on the Safety of United Nations and Associated Personnel*<sup>289</sup> pada tahun 1994 (untuk selanjutnya disebut “the Safety Convention”) oleh PBB.

Tujuan dari *the Safety Convention* adalah untuk melindungi personil PBB dan *associated personnel* atas penyerangan yang ditujukan kepada mereka oleh *armed forces* pihak lainnya dalam pelaksanaan sistem keamanan kolektif.<sup>290</sup> Pada intinya, dengan adanya konvensi tersebut, terdapat suatu instrumen yang memberikan perlindungan terhadap serangan yang dilakukan terhadap personil PBB dan *associated personnel* yang dapat berdampak dalam pelaksanaan tugas dan fungsinya. *The Safety Convention* berlaku terhadap personil PBB, termasuk di dalam pengertian tersebut adalah personil yang terlibat dalam pelaksanaan penjagaan keamanan dan perdamaian, atau dalam pemberian pertolongan kemanusiaan.<sup>291</sup> Dalam Pasal 1 (C) *The Safety Conventions*<sup>292</sup> dijelaskan

---

<sup>288</sup> *Ibid.*, hal. 3.

<sup>289</sup> United Nations, *Convention on the Safety of United Nations and Associated Personnel*, ditandatangani pada 9 Desember 1994 di New York, berlaku mulai 15 Januari 1999.

<sup>290</sup> Ray Murphy, “United Nations Military Operations and International Humanitarian Law: What Rules Apply to Peacekeepers?”, *Criminal Law Forum*, (Netherlands:Kluwer Academic Publishers, 2003), hal. 181.

<sup>291</sup> *Ibid.*, hal. 182.

mengenai pengertian “*operation*” yang menunjukkan keberlakuan dan ruang lingkup konvensi ini dalam pelaksanaan operasi, yakni dengan adanya dua persyaratan yang harus dipenuhi. (1) *Operation* yang dimaksud adalah dibentuk oleh organ PBB dengan tujuan untuk menjaga keamanan dan perdamaian dunia, dan (2) berada di bawah *authority* dan *control* PBB.

Pelaksanaan sistem keamanan kolektif oleh organisasi pertahanan regional dibentuk berdasarkan otorisasi Dewan Keamanan PBB yang merupakan organ PBB yang berwenang dan bertujuan untuk menjaga keamanan dan perdamaian dunia. Namun, dalam Pasal 2 (2) *the Safety Convention*<sup>293</sup> dinyatakan pengecualian keberlakuan konvensi tersebut terhadap pelaksanaan *enforcement measures* dalam Bab VII Piagam PBB atas otorisasi Dewan Keamanan PBB, yang menempatkan personel PBB sebagai *combatants* melawan *organized armed forces* dan dalam hal tersebut berlaku *the law of international armed conflicts*. Dalam hal demikian berlaku *International Humanitarian Law* terhadap perlindungan personel PBB dan *associated personnel*.<sup>294</sup>

Selain instrumen tersebut, dalam pelaksanaan sistem keamanan kolektif, terutama dalam upaya *peacekeeping* PBB, dibentuk adanya *Safety of Forces Agreement* (selanjutnya disebut sebagai “SOFA”) di antara PBB dan negara tuan rumah (penerima pasukan PBB) yang berlaku secara bilateral di antara mereka.<sup>295</sup> SOFA berlaku secara teritorial yakni berlaku secara general terbatas dalam wilayah negara penerima dan secara jelas ditentukan dalam pembentukannya.<sup>296</sup>

---

<sup>292</sup> “*United Nations Operation means an operation established by the competent organ of the United Nations in Accordance with the Charter of the United Nations and conducted under United Nations authority and control: ...*”. (United Nations, *Convention on the Safety of United Nations and Associated Personnel*, Pasal 1 (C)).

<sup>293</sup> “*This Convention shall not apply to a United Nations operation authorized by the Security Council as an enforcement action under chapter VII of the charter of the United Nations in which any of the personnel are engaged as combatants against organized armed forces and to which the law of international armed conflict applies*”. (*ibid.*, Pasal 2 (2)).

<sup>294</sup> Ray Murphy, “United Nations Military Operations and International Humanitarian Law: What Rules Apply to Peacekeepers?”, hal. 183.

<sup>295</sup> Ola Engdahl, *Protection of Personnel in Peace Operations: The Role of the ‘Safety Convention’ against the Background of General International Law*, (Leiden:Koninklijke Brill NV, 2007), hal. 131.

<sup>296</sup> *Ibid.*, hal. 160.

SOFA dalam hal ini memperlihatkan suatu pengaturan yang lebih luas dari *the Safety Conventions*, yang memberikan tidak hanya perlindungan terhadap pelaksanaan *peacekeeping* oleh personel PBB, namun juga membentuk adanya *privileges and immunities* (hak-hak istimewa dan kekebalan) dalam pelaksanaan fungsi dan tugas personel tersebut. Namun, adanya SOFA didasarkan atas adanya kesepakatan dari negara penerima dan PBB dalam pelaksanaan operasi, sehingga dalam hal adanya intervensi yang dilakukan oleh PBB, yang bersifat pelaksanaan upaya sepihak untuk masuk ke dalam wilayah suatu negara, akan sulit untuk membentuk SOFA yang menjadi landasan perlindungan terhadap personel.

### **3.3 North Atlantic Treaty Organization dalam Pelaksanaan Sistem Keamanan Kolektif**

Pada tanggal 4 April 1949 di Washington, telah ditandatangani *the North Atlantic Treaty* oleh Belgia, Kanada, Denmark, Prancis, Islandia, Italia, Luxembourg, Belanda, Norwegia, Portugal, Inggris dan Amerika Serikat yang membentuk adanya *North Atlantic Treaty Organization* (yang selanjutnya disebut sebagai “NATO”).<sup>297</sup> NATO kemudian berkembang menjadi suatu *military alliance* (organisasi pertahanan regional) yang pendiriannya memberikan dampak yang sangat besar dalam hubungan di daerah trans-Atlantik.<sup>298</sup> NATO kemudian memperlihatkan suatu kerja sama yang sangat penting dalam hal keamanan dan pertahanan di wilayah tersebut.<sup>299</sup> NATO merupakan suatu produk organisasi yang muncul dalam masa perang dingin dan bertahan dalam pelaksanaan fungsinya yakni keamanan dan pertahanan negara anggotanya. Organisasi tersebut pula memperlihatkan peran yang sangat besar dalam pelaksanaan sistem keamanan kolektif dalam kancah internasional.

Sebelumnya, perlu dilihat perkembangan pembentukan dari NATO itu sendiri sebagai suatu gambaran lahirnya organisasi pertahanan regional tersebut

---

<sup>297</sup> Julian Lindley-French dan Neil Macfarlane, *The North Atlantic Treaty Organization: The Enduring Alliance*, (New York:Routledge, 2007), hal. 21.

<sup>298</sup> Jennifer Medcalf, *NATO: A Beginner's Guide*, (Oxford:Oneworld Publications, 2005), hal. 2.

<sup>299</sup> *Ibid.*



dalam hubungan antar negara. Perlunya suatu kerja sama dan kolaborasi dalam hal keamanan dan pertahanan terhadap integritas teritorial negara telah diterima dan dianggap perlu jauh sebelum masuknya Amerika Serikat dalam perang dunia kedua.<sup>300</sup> Namun, pada tahun 1949 baru terbentuk adanya suatu organisasi pertahanan regional yang meliputi wilayah atlantik utara yakni NATO. Sebelum sampai pada pembentukan NATO dengan Amerika Serikat dan Eropa sebagai dua kekuatan yang bersatu dalam satu kerja sama pertahanan, sebelumnya telah terbentuk beberapa perjanjian internasional yang memperlihatkan adanya konsep-konsep yang akhirnya membentuk NATO sebagai sebuah organisasi.

*The Atlantic Charter* dibentuk oleh Presiden Amerika Serikat Franklin D Roosevelt dan Perdana Menteri Inggris Winston S Churchill memperlihatkan delapan prinsip umum dalam hal keamanan dan pertahanan dalam menghadapi serangan negara lain (pada waktu itu Nazi).<sup>301</sup> Dalam *the Atlantic Charter* dapat dilihat adanya ide awal dari konsep *collective self-defense* yang memperlihatkan upaya pertahanan secara kolektif negara anggota perjanjian. Hal tersebut dapat dilihat dalam prinsip kedelapan yang menyatakan:

*“8.They believes all of the nations of the world, for realistic as well spiritual reasons, must come to the abandonment of the use of force. Since no future peace can be maintained if land, sea, or air armaments continue to be employed by nations which threaten, or may threaten aggression outside of their frontiers, they believe, pending the establishment of a wider and permanent system of general security, that the disarmament of such nations is essential. They will likewise aid and encourage all other practicable measures which will lighten for peace-loving peoples the crushing burden of armament.”*<sup>302</sup>

Namun, pembentukan *the Atlantic Charter* tersebut tidak kemudian memperlihatkan adanya pembentukan suatu kerja sama yang terorganisir.

---

<sup>300</sup> Broderick C Grady, “Article 5 of the North Atlantic Treaty: Past, Present and Uncertain Future”, *Georgia Journal of International and Comparative Law*, (Fall, 2002), hal. 2.

<sup>301</sup> *Ibid.*

<sup>302</sup> North Atlantic Treaty Organization, *The Atlantic Charter (1941)*, <[http://www.nato.int/cps/en/natolive/official\\_texts\\_16912.htm](http://www.nato.int/cps/en/natolive/official_texts_16912.htm)>, diakses pada 1 Mei 2012.

Kemudian, pada bulan Maret 1948, *the Brussels Treaty of Economic, Social and Cultural Collaboration and Collective Self-Defense* telah ditandatangani oleh negara-negara Eropa, yang di dalamnya tidak termasuk Amerika Serikat sebagai anggota.<sup>303</sup> *The Brussels Treaty* tersebut merupakan suatu perkembangan dari *Treaty of Dunkirk* yang sebelumnya pada bulan Februari 1947 telah ditandatangani oleh Inggris dan Prancis.<sup>304</sup> *The Brussels Treaty* tersebut pula telah memberikan suatu dasar konsepsi atas *The North Atlantic Treaty* yang merupakan dasar pembentukan NATO. Perjanjian tersebut memperlihatkan pula adanya konsep *collective self-defense* dan suatu pemahaman bahwa perjanjian ditandatangani di bawah payung PBB sehingga tidak terdapat suatu upaya untuk menghilangkan kewenangan PBB.<sup>305</sup>

Perjanjian berikutnya yang dapat dianggap sebagai suatu perjanjian yang penting dalam perkembangan *the North Atlantic Treaty*, yakni *the Rio Pact* yang ditandatangani pada bulan September 1947. *The Rio Pact* dianggap sebagai perjanjian yang penting dalam perkembangan *the North Atlantic Treaty* karena perjanjian tersebut memperlihatkan partisipasi Amerika Serikat dalam organisasi pertahanan regional dengan tidak memengaruhi kedaulatan negaranya.<sup>306</sup> Pada akhirnya *the North Atlantic Treaty* ditandatangani pada tahun 1949, yang memperlihatkan adanya kerja sama regional oleh dua kekuatan besar yakni Amerika dan Eropa yang memperlihatkan konsep kawasan yang berbeda. Perbedaan itu terlihat secara nyata bahwa negara-negara anggota NATO tidaklah secara geografis berada pada wilayah region yang sama selayaknya negara anggota pada organisasi pertahanan regional lainnya. Hal ini dikarenakan NATO mewujudkan konsep masyarakat trans-Atlantik yang didasarkan pada satu

---

<sup>303</sup> Julian Lindley-French dan Neil Macfarlane, *The North Atlantic Treaty Organization: The Enduring Alliance*, hal. 22.

<sup>304</sup> *Ibid.*

<sup>305</sup> Broderick C Grady, "Article 5 of the North Atlantic Treaty: Past, Present and Uncertain Future", hal. 3.

<sup>306</sup> *Ibid.*

kesamaan nilai dan kepentingan.<sup>307</sup> Atas hal tersebut dapat dilihat pendapat Stanley Sloan yang menyatakan:

*“because NATO included a much narrower, more like-minded, mostly democratic set of nations than did the United Nations, it was possible to see the [transatlantic security] relationship as some sort of community of common values as well as shared interests – more than just an alliance.”*<sup>308</sup>

Maka dapat disimpulkan bahwa NATO merupakan suatu organisasi pertahanan regional yang dibentuk atas dasar kerja sama keamanan dan pertahanan oleh negara anggotanya.

### 3.3.1 Tujuan dan Fungsi *North Atlantic Treaty Organization*

Pasca perang dunia kedua, wilayah Eropa timur dan Eropa barat terpisah atas dua ideologi dan kepentingan politik yang memperlihatkan terjadinya perang dingin dalam hubungan antar negara. Wilayah Eropa timur dikuasai oleh Uni Soviet dengan ideologi komunisme yang mengancam ideologi demokrasi yang diterapkan pada wilayah Barat. Maka untuk mengatasi ancaman perluasan kekuasaan Uni Soviet terhadap wilayah lainnya di Eropa dibentuklah NATO pada tahun 1949.<sup>309</sup> Sehingga sering kali tujuan dan fungsi dibentuknya NATO dikaitkan atas ancaman atas kekuatan Uni Soviet pada masa perang dingin.<sup>310</sup> Namun, selain hal tersebut secara umum dapat dilihat adanya tiga tujuan dibentuknya NATO yakni: (1) mengatasi ancaman perluasan kekuasaan Uni Soviet, (2) melarang adanya pembentukan kekuatan militer nasional yang kuat di wilayah Eropa melalui adanya kehadiran kekuatan Amerika Utara (yakni Amerika Serikat), dan (3) menumbuhkan upaya penyatuan politik di Eropa.<sup>311</sup>

---

<sup>307</sup> Jennifer Medcalf, *NATO: A Beginner's Guide*, hal. 3.

<sup>308</sup> Stanley Sloan, “US Perspectives on NATO’s Future”, *International Affairs* 71, 2 (1995), hal. 220, seperti yang dikutip pada *Ibid.*, hal. 4.

<sup>309</sup> North Atlantic Treaty Organization, *NATO in the 21<sup>st</sup> Century*, <[www.nato.int/docu/21-cent/21st\\_eng.pdf](http://www.nato.int/docu/21-cent/21st_eng.pdf)>, diakses pada 2 Maret 2012, hal. 6.

<sup>310</sup> North Atlantic Treaty Organization, *60 Years of NATO*, (Brussels:NATO Public Diplomacy Division, 2009), hal. 1.

Dapat dilihat pula ketentuan dalam mukadimah *the North Atlantic Treaty* yang memperlihatkan tujuan dibentuknya organisasi tersebut, yang menyatakan:

“... to safeguard the freedom, common heritage and civilization of their peoples, founded on the principles of democracy, individual liberty and the rule of law. They seek to promote stability and well-being in the North Atlantic Area.”<sup>312</sup>

Tujuan dibentuknya NATO dalam hal ini adalah untuk menjaga kebebasan, warisan budaya dan peradaban masyarakat dan berusaha untuk mencapai stabilitas dan keamanan di wilayah Atlantik Utara. Untuk mencapai hal tersebut dibentuk satu komponen utama dan juga merupakan fungsi utama dalam *the North Atlantic Treaty* yakni upaya pelaksanaan pertahanan yang berupa *collective self-defense* dalam Pasal 5 (1), yang menyatakan:

“The Parties agree that an armed attack against one or more of them in Europe or North America shall be considered an attack against them all and consequently they agree that, if such an armed attack occurs, each of them, in exercise of the right of individual or collective self-defense recognized by Article 51 of the Charter of the United Nations, will assist the Party or Parties so attacked by taking forthwith, individually and in concert with the other Parties, such actions as it deems necessary, including the use of armed force, to restore and maintain the security of the North Atlantic area.”<sup>313</sup>

Adanya *collective self-defense* sebagai satu fungsi utama terbentuknya NATO tersebut tak terlepas dari adanya hak atas *collective self-defense* yang tertuang dalam Pasal 51 Bab VII Piagam PBB. Sehingga dapat dikatakan bahwa upaya *collective self-defense* tersebut merupakan ruh dari kerja sama negara-negara dalam wilayah Atlantik Utara yang berupaya untuk menjaga stabilitas dan keamanan dalam wilayah tersebut.

---

<sup>311</sup> *Ibid.*

<sup>312</sup> North Atlantic Treaty Organization, *The North Atlantic Treaty (1949)*, ditandatangani pada 4 April 1949, [http://www.nato.int/cps/en/SID-41426331-6494A785/natolive/topics\\_67656.htm](http://www.nato.int/cps/en/SID-41426331-6494A785/natolive/topics_67656.htm), diakses pada 18 Januari 2011, Mukadimah, par. 3.

<sup>313</sup> *Ibid.*, Pasal 5 (1).

### 3.3.2 Keanggotaan *North Atlantic Treaty Organization*

Pada tahun 1949 terdapat dua belas negara di wilayah Atlantik Utara yang menandatangani *the North Atlantic Treaty* yang kemudian dapat dikatakan menjadi *original members*<sup>314</sup> (atau *founding members*) dari NATO. *Original member* yang dimaksud adalah negara-negara pendiri dari NATO yang telah menyatakan persetujuan mereka untuk masuk menjadi bagian dan tunduk pada ketentuan NATO. Keduabelas *original members* tersebut adalah: Belgia, Kanada, Denmark, Prancis, Islandia, Italia, Luxembourg, Belanda, Norwegia, Portugal, Inggris, dan Amerika Serikat.

NATO merupakan suatu organisasi yang terbuka, yang memberikan kesempatan bagi negara lainnya untuk menjadi anggota organisasi walaupun negara tersebut tidak ikut dalam penandatanganan *the North Atlantic Treaty* atas dasar bahwa negara tersebut kemudian mau dan mampu menjalankan hak dan kewajiban yang tertuang dalam perjanjian. Namun, keterbukaan tersebut dilandasi pula dengan prinsip terbatas (*selective*)<sup>315</sup> atas keanggotaan NATO yang dapat dilihat dalam Pasal 10 yang menyatakan:

*“The Parties may, by unanimous agreement, invite any other European State in a position to further the principles of this Treaty and to contribute to the security of the North Atlantic are to accede to this Treaty. Any State so invited may become a party to the Treaty by depositing its instrument of accession with the Government of the United States of America. The Government of the United States of America will inform each of the Parties of the deposit of each such instrument of accession.”*<sup>316</sup>

---

<sup>314</sup> Yang dimaksud dengan *original members* (atau *founding members*) adalah “*those states that have expressed their consent to be bound by the Organization’s terms before the Organization’s constituent instrument entered into force, or before specific date, or perhaps a combination thereof.*” (Jan Klabbers, *An Introduction to International Institutional Law*, hal. 104).

<sup>315</sup> Prinsip keanggotaan terbatas (*selective*) menekankan syarat-syarat tertentu atas keanggotaan suatu organisasi internasional, antara lain: (1) keanggotaan yang didasarkan pada kedekatan letak geografis; (2) keanggotaan yang didasarkan pada kepentingan yang akan dicapai; (3) keanggotaan yang didasarkan pada sistem pemerintahan tertentu atau pada sistem ekonomi; (4) keanggotaan yang didasarkan pada persamaan kebudayaan, agama, etnis, dan pengalaman sejarah; (5) keanggotaan yang didasarkan pada penerapan hak-hak asasi manusia. (Setianingsih Suwardi, *Pengantar Hukum Organisasi Internasional*, hal. 46-47).

<sup>316</sup> North Atlantic Treaty Organization, *The North Atlantic Treaty (1949)*, Pasal 10.

Dapat dilihat keterbatasan dalam keanggotaan NATO didasarkan atas dua syarat, yakni (1) syarat yang didasarkan pada letak geografis yakni kepada negara-negara di wilayah Eropa, dan (2) syarat yang didasarkan atas kepentingan yang akan dicapai yakni pelaksanaan prinsip yang tertuang dalam perjanjian tersebut dan ikut dalam pelaksanaan upaya keamanan di wilayah Atlantik Utara. Sehingga negara yang memenuhi kedua syarat tersebut kemudian dapat diundang oleh negara anggota untuk masuk menjadi anggota NATO dengan jalan *accession* (aksesi)<sup>317</sup> terhadap *the North Atlantic Treaty*. Kemudian instrumen pengesahan tersebut diserahkan kepada Pemerintah Amerika Serikat untuk disimpan dan untuk memberikan informasi atas aksesinya tersebut kepada negara anggota lainnya.

Sampai saat ini negara anggota NATO adalah berjumlah dua puluh delapan negara. Dalam tabel berikut dapat dilihat negara anggota NATO yang diurutkan berdasarkan tahun masuknya negara tersebut menjadi anggota:

Tabel 3.1 Negara Anggota NATO

Years	Member States
1949	Belgium, Canada, Denmark, France, Iceland, Italy, Luxembourg, Netherlands, Norway, Portugal, United Kingdom, United States (founding members).
1952	Greece, Turkey
1955	Germany
1982	Spain
1999	Czech Republic, Hungary, Poland
2004	Bulgaria, Estonia, Latvia, Lithuania, Romania, Slovakia, Slovenia
2009	Albania, Croatia

Sumber: North Atlantic Treaty Organization.<sup>318</sup>

<sup>317</sup> Aksesinya merupakan pernyataan persetujuan turut serta untuk mengikat diri pada suatu perjanjian internasional. (Mochtar Kusumaatmadja dan Etty R Agoes, *Pengantar Hukum Internasional*, hal. 129).

### 3.3.3 Struktur Organisasi *North Atlantic Treaty Organization*

Organ pertama dari organisasi NATO dibentuk atas dasar Pasal 9 *the North Atlantic Treaty* yang disebut dengan *The North Atlantic Council* (untuk selanjutnya disebut sebagai “NAC”) merupakan organ utama dalam pengambilan keputusan pada organisasi tersebut.<sup>319</sup> Pasal 9 *The North Atlantic Treaty* menyatakan bahwa:

“*The Parties hereby establish a Council, on which each of them shall be represented, to consider matters concerning the implementation for this Treaty. The Council shall be so organized as to be able to meet promptly at any time. The Council shall set up such subsidiary bodies as may be necessary; in particular it shall establish immediately a defense committee which shall recommend measures for the implementation of Articles 3 and 5.*”<sup>320</sup>

Para negara anggota membentuk suatu *Council*, yang kemudian dikenal dengan NAC yang beranggotakan Menteri Luar Negeri para negara anggota dengan tujuan untuk melaksanakan implementasi ketentuan yang terdapat dalam *the North Atlantic Treaty*. NAC juga diberikan suatu mandat untuk membentuk organ-organ lainnya yang dianggap perlu, dan secara spesifik untuk membentuk *defence committee* demi pelaksanaan ketentuan Pasal 3 dan Pasal 5 dalam perjanjian.<sup>321</sup>

Kemudian dibentuk *the Defence Committee* yang terdiri dari para Menteri Pertahanan negara anggota atau perwakilannya yang diwujudkan pada pertemuan pertama NAC pada tanggal 17 September 1949.<sup>322</sup> Secara umum dapat dilihat bahwa struktur organisasi NATO terbagi menjadi dua, yakni (1) *Civil Structure*

---

<sup>318</sup> North Atlantic Treaty Organization, *Presentation Introduction to NATO*, <[www.nato.int/education/docs/intro\\_to\\_nato.pps](http://www.nato.int/education/docs/intro_to_nato.pps)>, diakses pada 1 Maret 2012, hal. 6.

<sup>319</sup> North Atlantic Treaty Organization, *The Beginings of NATO's Military Structure: Birth of the Alliance to the Fall of the Berlin Wall*, <[http://www.nato.int/nato\\_static/assets/pdf/pdf\\_publications/20120116\\_nato-mil-stru-e.pdf](http://www.nato.int/nato_static/assets/pdf/pdf_publications/20120116_nato-mil-stru-e.pdf)>, diakses pada 11 Januari 2012, hal. 2.

<sup>320</sup> North Atlantic Treaty Organization, *The North Atlantic Treaty (1949)*, Pasal 9.

<sup>321</sup> North Atlantic Treaty Organization, *The Beginings of NATO's Military Structure*, hal. 2.

<sup>322</sup> *Ibid.*

dan (2) *Military Structure*. Badan-badan utama dalam *Civil Structure* tersebut, adalah: *the NATO Headquarters (HQ)*, *the Permanent Representatives and National Delegations*, *The Secretary General*, dan *the International Staff (IS)*. Badan-badan utama dalam *Military Structure*, adalah: *the Military Committee*, *the Chairman of the Military Committee*, *Strategic NATO Commanders*, *International Military Staff*, *Allied Command Europe (ACE)*, and *Allied Command Atlantic (ACLANT)*.

*Military Committee* merupakan otoritas militer tertinggi dalam susunan organisasi NATO dan bekerja dibawa kewenangan *NAC*, *the Defence Planning Committee*, dan *Nuclear Planning Group*. Tugas utama *Military Committee* adalah untuk memberikan masukan kepada otoritas politik NATO atas upaya-upaya yang diperlukan untuk dilaksanakan dalam melaksanakan prinsip pertahanan bersama serta memberikan masukan dalam masalah militer, kebijakan yang akan diambil dan strategi dari NATO.<sup>323</sup> Selain itu, NATO dipimpin oleh seorang *Secretary General* yang menjabat selama empat tahun dan merupakan politikus senior dari negara anggota.<sup>324</sup> *Secretary General* NATO bertugas untuk mendukung dan mengarahkan proses konsultasi dan pengambilan keputusan dalam organisasi, dan juga merupakan juru bicara dari organisasi internasional dalam hubungannya dengan pihak luar.<sup>325</sup> *Secretary General* NATO pada saat ini adalah Anders Fogh Rasmussen, mantan Perdana Menteri Denmark.<sup>326</sup> Dengan demikian dapat dilihat bahwa NATO merupakan suatu organisasi yang memiliki organ-organ dan badan-badan tersendiri dalam pelaksanaan kewenangan dan tugasnya sesuai dengan *the North Atlantic Treaty*.

---

<sup>323</sup> Jennifer Medcalf, *NATO: A Beginner's Guide*, hal. 20.

<sup>324</sup> North Atlantic Treaty Organization, "What is NATO: An Introduction to the Transatlantic Alliance", hal. 9.

<sup>325</sup> North Atlantic Treaty Organization, "NATO Transformed", [http://www.nato.int/docu/nato-trans/html\\_en/nato\\_trans01.html](http://www.nato.int/docu/nato-trans/html_en/nato_trans01.html), diakses pada 18 Januari 2011, hal. 43.

<sup>326</sup> North Atlantic Treaty Organization, "What is NATO: An Introduction to the Transatlantic Alliance", hal. 9.



### 3.3.4 Status *North Atlantic Treaty Organization* dalam Hukum Internasional

Status NATO dalam hukum internasional dalam hal ini mencoba melihat dan menjawab apakah kemudian NATO dianggap sebagai organisasi internasional yang memiliki personalitas hukum dan merupakan subjek hukum internasional. Sebelumnya telah dijelaskan bahwa sebagai subjek hukum internasional adalah esensial bagi suatu entitas memiliki personalitas hukum, kemampuan bertindak dalam hukum internasional.<sup>327</sup> Dari pembentukan, tujuan dan fungsi, keanggotaan serta struktur organisasinya, NATO telah terlihat merupakan suatu organisasi yang dibentuk sebagai upaya kerja sama antar negara. Namun, untuk melihat status NATO dalam hukum Internasional perlu dilihat adanya personalitas hukum.

Dalam melihat personalitas hukum suatu organisasi internasional cara pertama dan termudah yang dapat dilaksanakan adalah dengan melihat adanya pemberian personalitas hukum tersebut berdasarkan piagam perbentukan suatu organisasi internasional yang didasarkan pada kehendak dari negara anggota (*will theory*). Pada *the North Atlantic Treaty*, yang merupakan dasar pendirian organisasi NATO tidak dapat ditemukan ketentuan yang secara eksplisit memberikan suatu personalitas hukum kepada NATO ataupun suatu ketentuan mengenai status hukum NATO.<sup>328</sup>

Walaupun demikian, personalitas hukum organisasi internasional dapat dilihat dalam tiga komponen perjanjian yang dibentuk oleh NATO di luar *The North Atlantic Treaty Organization*, yakni:<sup>329</sup> (1) *Agreement on the Status of the North Atlantic Treaty Organization, National Representatives and International Staff*<sup>330</sup> yang ditandatangani di Ottawa pada 20 September 1951 (selanjutnya

---

<sup>327</sup> Lihat pembahasan Bab 2 bagian 2.1.1 Personalitas Hukum Organisasi Internasional pada hal. 24.

<sup>328</sup> Tracisio Gazzini, "NATO's Role in the Collective Security System", *Journal of Conflict & Security Law*, (October, 2003), hal. 6.

<sup>329</sup> Sherrod Lewis Bumgardner, LTC Zoltan Hegedus dan Dominique Palmer-DeGreve, ed., *NATO Legal Deskbook*, Ed. 2, (2010), <<https://transnet.act.nato.int/WISE/Library/Legal/LEGALDESKB>>, diakses pada 5 Mei 2012, hal. 70.

<sup>330</sup> North Atlantic Treaty Organization, *Agreement on the Status of the North Atlantic Treaty Organization, National Representatives and International Staff*, ditandatangani di Ottawa

disebut sebagai “*Ottawa Agreement*”); (2) *Agreement between the Parties to the North Atlantic Treaty regarding the Status of their Forces*,<sup>331</sup> yang ditandatangani di London pada 19 Juni 1951 (selanjutnya disebut sebagai “*NATO SOFA*”); dan (3) *Protocol to the Status of International Military Headquarters set up pursuant to the North Atlantic Treaty*,<sup>332</sup> yang ditandatangani di Paris pada 28 Agustus 1952 (yang selanjutnya disebut sebagai “*Paris Protocol*”)

*Ottawa Agreement* dalam pengertian yang luas menyatakan bahwa NATO merupakan subyek hukum dalam hukum internasional, dengan diberikannya personalitas hukum kepada organisasi dalam perjanjian tersebut.<sup>333</sup> *Ottawa Agreement* pula mendefinisikan kekebalan dan hak-hak istimewa (*immunities and privileges*) dari NATO terhadap staf internasionalnya (namun tidak se penuh kekebalan yang diberikan kepada staf diplomatik) dan *national missions* yang didirikan untuk NATO (diberikan kekebalan penuh selayaknya kekebalan diplomatik).<sup>334</sup> Pengaturan tersebut dapat dilihat dalam Pasal III dan Pasal IV *Ottawa Agreement*. Pasal III menyatakan bahwa:

“*The Organization and Member States shall co-operate at all times to facilitate the proper administration of justice, secure the observance of police regulations and prevent the occurrence of any abuse in connection with the immunities and privileges set out in the present Agreement. If any Member State considers that there has been an abuse of any immunity or privilege conferred by this Agreement, consultations shall be held between that State and the Organization, or between the States concerned, to determine whether any such abuse has occurred, and, if so, to attempt to ensure that no repetition occurs.*”<sup>335</sup>

---

pada 20 September 1951, <[http://www.nato.int/cps/en/natolive/official\\_texts\\_17248.htm](http://www.nato.int/cps/en/natolive/official_texts_17248.htm)>, diakses pada 5 Mei 2012.

<sup>331</sup> North Atlantic Treaty Organization, *Agreement between the Parties to the North Atlantic Treaty regarding the Status of their Forces*, ditandatangani di London pada 19 Juni 1951, <[http://www.nato.int/cps/en/natolive/official\\_texts\\_17265.htm](http://www.nato.int/cps/en/natolive/official_texts_17265.htm)>, diakses pada 5 Mei 2012.

<sup>332</sup> North Atlantic Treaty Organization, *Protocol to the Status of International Military Headquarters set up pursuant to the North Atlantic Treaty*, ditandatangani di Paris pada 28 Agustus 1952, <[http://www.nato.int/cps/en/natolive/official\\_texts\\_173000.htm](http://www.nato.int/cps/en/natolive/official_texts_173000.htm)>, diakses pada 5 Mei 2012.

<sup>333</sup> Sherrod Lewis Bumgardner, LTC Zoltan Hegedus dan Dominique Palmer-DeGreve, ed., *NATO Legal Deskbook*, hal. 73.

<sup>334</sup> *Ibid.*

Pasal VI menyatakan bahwa:

*“The Organization shall possess juridical personality; it shall have the capacity to conclude contracts, to acquire and dispose of movable and immovable property and to institute legal proceedings.”*<sup>336</sup>

*NATO SOFA* dan *Paris Protocol* mengatur mengenai status dari *International Military Headquarters* dan status dari pasukan NATO. *NATO SOFA* dalam hal ini mengatur mengenai status dari pasukan negara anggota NATO yang dikirimkan atau diterima sebagai suatu bagian kerja sama dalam ketentuan NATO. Dalam Pasal X *Paris Protocol* diatur mengenai status *International Military Headquarters* yang menyatakan:

*“Each Supreme Headquarters shall possess juridical personality; it shall have the capacity to conclude contracts and to acquire and dispose of property. The receiving State may, however, make the exercise of such capacity subject to special arrangements between it and the Supreme Headquarters or any subordinate Allied Headquarters acting on behalf of the Supreme Headquarters.”*<sup>337</sup>

Walaupun ketiga instrumen tersebut bukan merupakan dasar pembentuk adanya NATO sebagai organisasi akan tetapi ketiga perjanjian tersebut adalah merupakan perjanjian yang penting dalam jalannya tugas dan fungsi NATO. Sehingga dapat dikatakan bahwa dengan demikian negara anggota memperlihatkan kehendaknya untuk memberikan personalitas hukum kepada NATO dalam pelaksanaan fungsinya sebagai organisasi internasional.

Namun, selain dari adanya instrumen yang secara eksplisit menyatakan adanya personalitas hukum NATO sebagai organisasi internasional, dapat dilihat pula adanya personalitas hukum NATO yang dapat dilihat atas terpenuhinya unsur-unsur objektif yang merupakan dasar adanya personalitas hukum sesuai dengan *objective theory*. Dalam hal ini yang paling esensial yang perlu dilihat

---

<sup>335</sup> North Atlantic Treaty Organization, *Agreement on the Status of the North Atlantic Treaty Organization, National Representatives and International Staff*, Pasal III.

<sup>336</sup> *Ibid.*, Pasal VI

<sup>337</sup> North Atlantic Treaty Organization, *Protocol to the Status of International Military Headquarters set up pursuant to the North Atlantic Treaty*, Pasal X.

adalah adanya kehendak tersendiri dari NATO yang terpisah dari negara anggotanya, yakni *volonté distincte* dari organisasi tersebut. Salah satu hal yang dapat diperhatikan dalam hal ini adalah adanya kemampuan dari NATO untuk membentuk perjanjian internasional dan melaksanakan hubungan dengan anggota masyarakat internasional lainnya. Kemampuan membentuk perjanjian internasional tersebut dapat dilihat dalam Pasal XXV *Ottawa Agreement*, yang menyatakan:

*“The Council acting on behalf of the Organization may conclude with any Member State or States supplementary agreements modifying the provisions of the present Agreement, so far as that State or those States are concerned.”*<sup>338</sup>

Dalam hal ini NATO dapat membentuk suatu perjanjian internasional sebagai suatu entitas hukum (yakni organisasi internasional) yang terpisah dari negara anggotanya.<sup>339</sup> Dengan demikian NATO telah bertindak dan menunjukkan adanya suatu kehendak tersendiri yang dapat dipisahkan dengan kehendak subyek hukum lainnya, terutama negara anggotanya, yang memperlihatkan adanya *volonté distincte* NATO.

Dengan demikian dapat disimpulkan bahwa NATO dalam hal ini telah diberikan suatu personalitas hukum oleh negara anggotanya melalui tiga instrumen yang berperan penting dalam pelaksanaan fungsi dan tujuan perbentukan NATO, memiliki tujuan yang dapat dicapai dengan adanya tindakan independen yang terpisah dari negara anggota, mempunyai kapasitas untuk melakukan suatu perjanjian dengan subjek hukum lainnya, dan memiliki permanen organ yang terpisah dari negara anggota yang dapat mengambil keputusan yang mengikat negara anggota. Maka NATO sebagai organisasi internasional adalah subyek hukum internasional.

---

<sup>338</sup> North Atlantic Treaty Organization, *Agreement on the Status of the North Atlantic Treaty Organization, National Representatives and International Staff*, Pasal XXV.

<sup>339</sup> Tracisio Gazzini, “NATO’s Role in the Collective Security System”, hal. 6.

### 3.3.5 Pelaksanaan Sistem Keamanan Kolektif oleh *North Atlantic Treaty Organization*

Pasal 5 *The North Atlantic Treaty* memperlihatkan kunci utama prinsip dari pembentukan NATO, sebagai salah satu organisasi pertahanan regional, yakni: penyerangan terhadap satu negara anggota organisasi dianggap sebagai penyerangan terhadap semua negara anggota dan untuk hal tersebut para negara anggota akan melaksanakan upaya kolektif dalam melawan terhadap penyerangan tersebut.<sup>340</sup> Terlihat bahwa kemudian keutamaan prinsip *collective self-defense* sebagai landasan dalam pembentukan NATO didukung dengan perumusan kewajiban dalam *The North Atlantic Treaty*.<sup>341</sup> Contohnya dapat dilihat dalam Pasal 9 yang membentuk adanya *defense committee* yang berupaya untuk melaksanakan tujuan *collective self-defense*.

*Collective self-defense* yang menjadi dasar pembentukan NATO secara langsung adalah berhubungan dengan Pasal 51 Bab VII Piagam PBB. Pada pembentukannya, negara anggota menyatakan bahwa NATO merupakan organisasi pertahanan regional yang didasarkan pada *collective self-defense* pada Bab VII dan mengecualikan pengaturan Bab VIII Piagam PBB.<sup>342</sup> Berarti dengan demikian NATO dinyatakan bukan sebagai *regional arrangements* atau *agencies* seperti yang diatur dalam Bab VIII, melainkan NATO merupakan organisasi pertahanan regional yang hanya didasarkan atas *collective self-defense* sebagai tujuan dan fungsi adanya organisasi tersebut. Negara anggota NATO dalam hal ini secara politis takut akan adanya subordinasi kewenangan atas NATO dalam pelaksanaan upaya-upaya tindakannya apabila organisasi tersebut dibentuk atas dasar Bab VIII Piagam PBB.<sup>343</sup> Akibatnya, pelaksanaan sistem keamanan kolektif yang dapat diupayakan oleh NATO hanya terbatas pada Pasal 51 dalam Bab VII Piagam PBB.

---

<sup>340</sup> Captain Davis Brown, "The Role of Regional Organization in Stopping Civil Wars", *Air Force Law Review*, hal. 5.

<sup>341</sup> *Ibid.*

<sup>342</sup> Christopher J Borgen, "The Theory and Practice of Regional Organization Intervention in Civil Wars", hal. 6.

<sup>343</sup> *Ibid.*

Walaupun *raison d'être* (dasar utama) pembentukan NATO adalah atas dasar *collective self-defense*, namun pada kenyataannya misi militer pertama yang dilaksanakan oleh NATO sebagai organisasi bukanlah pelaksanaan *collective self-defense* melainkan upaya pelaksanaan *regional arrangements*.<sup>344</sup> Apabila diperhatikan lebih lanjut, NATO dapat dikatakan sebagai *regional arrangements* yang sesuai dengan ketentuan Bab VIII Piagam PBB yang didasarkan atas unsur-unsur dari terbentuknya konsep *regional arrangements*.<sup>345</sup> NATO merupakan organisasi regional, yakni konsep kawasan yang didasarkan kepada adanya kepentingan bersama, yang tak terbatas hanya pada wilayah yang sama. Dalam *Strategic Concept* NATO yang diadopsi pada tahun 2010 di Lisbon, dinyatakan bahwa “*NATO member states form a unique community of values, committed to the principles of individual liberty, democracy, human rights and the rule of law*”.<sup>346</sup> NATO dengan demikian telah menyatakan bahwa organisasi tersebut merupakan suatu organisasi yang didasarkan atas kepentingan bersama, tidak hanya terbatas pada konsep geografis. Selain itu, *collective self-defense* pula merupakan bagian dari pelaksanaan penjagaan keamanan dan perdamaian dunia yang merupakan pelaksanaan sistem keamanan kolektif. Dapat disimpulkan bahwa dasar pembentukan NATO yang berlandaskan terutama pada *collective self-defense* tidak membentuk suatu batasan pada pelaksanaan sistem keamanan kolektif yang terbatas pada Pasal 51 Piagam PBB. NATO dapat pula melaksanakan upaya-upaya sistem keamanan kolektif lainnya, seperti yang tertuang dalam Bab VIII Piagam PBB.

*Strategic Concept* yang dikeluarkan oleh NATO memperlihatkan tujuan dan peran strategis organisasi dalam pelaksanaan fungsi dan tujuan pembentukan organisasi. Dalam mukadimah dinyatakan bahwa: “... *determined that NATO will continue to play its unique and essential role in ensuring our common defence and*

<sup>344</sup> Captain Davis Brown, “The Role of Regional Organization in Stopping Civil Wars”, *Air Force Law Review*, hal. 13.

<sup>345</sup> Ademola Abass, *Regional Organizations and the Development of Collective Security*, hal. 39.

<sup>346</sup> North Atlantic Treaty Organization, “*Strategic Concept for the Defence and Security of the Members of the North Atlantic Treaty Organization*”, yang diadopsi pada tahun 2010 di Lisbon, <<http://www.nato.int/lisbon2010/strategic-concept-2010-eng.pdf>>, diakses pada 23 Mei 2012, Par. 2.

*security*”.<sup>347</sup> NATO memiliki peran yang unik dan esensial dalam pertahanan dan keamanan negara anggota pada khususnya serta dunia pada umumnya. Diakui adanya tiga tugas utama NATO dalam pelaksanaan peran tersebut, yakni:<sup>348</sup>

1. *Collective defence*, yakni dalam pelaksanaan pertahanan terhadap ancaman agresi pada setiap negara anggota sesuai dengan ketentuan Pasal 5 Washington Treaty.
2. *Crisis management*; NATO ikut berupaya dalam pelaksanaan pencegahan konfrontasi sebelum keadaan tersebut meningkat menjadi suatu konflik, pelaksanaan upaya penanganan terhadap konflik yang telah terjadi, dan upaya penciptaan stabilitas setelah terselesaikan suatu konflik, yang berdampak terhadap keamanan dan perdamaian kawasan trans-Atlantik.
3. *Cooperative security*; berperan serta dalam peningkatan keamanan internasional melalui suatu kerja sama dengan negara-negara lainnya dan organisasi internasional.

Tiga konsep strategi tersebut memperlihatkan adanya peranan NATO yang lebih luas daripada pelaksanaan *collective self-defense* semata, yang memperlihatkan pula adanya peranan NATO dalam pelaksanaan penjagaan keamanan dan perdamaian dunia lebih luas, termasuk di dalamnya pelaksanaan sistem keamanan kolektif PBB.

Upaya NATO berkontribusi lebih luas dalam pelaksanaan penjagaan keamanan dan perdamaian dunia dapat dilihat dalam pelaksanaan beberapa upaya, antara lain: *peacekeeping operations*, *coercive operations*, *peace implementing operations*, *defensive operations*. *Peacekeeping operations* dalam hal ini merupakan pelaksanaan operasi militer dalam suatu wilayah teritorial negara dengan persetujuan negara tersebut yang bertujuan untuk penjagaan keamanan dan perdamaian dunia.<sup>349</sup> Persetujuan dari tiap pihak tersebut menjadi dasar hukum pelaksanaan *peacekeeping operations* yang dilaksanakan oleh NATO

---

<sup>347</sup> *Ibid.*, Mukadimah.

<sup>348</sup> *Ibid.*, par. 4.

<sup>349</sup> Tracisio Gazzini, “NATO’s Role in the Collective Security System”, hal. 11.

sebagai organisasi pertahanan regional.<sup>350</sup> Contohnya dapat dilihat dalam pelaksanaan *peacekeeping operation* di Albania (pada tahun 1999) dan Macedonia (pada tahun 2001-2003) yang berkontribusi dalam peningkatan keamanan regional. NATO dalam hal ini kemudian menyatakan kesiapannya dalam melaksanakan *peacekeeping operations* “on a case-by-case basis and in accordance with its own procedures” di bawah otoritas Dewan Keamanan PBB.<sup>351</sup>

*Coercive measures* dapat berupa pelaksanaan upaya *enforcement measures* dalam Piagam PBB dalam mengatasi permasalahan yang berupa *a threat to the peace, breach to the peace*, atau *act of aggression* ataupun pelaksanaan sistem keamanan kolektif PBB. Dalam pelaksanaan *coercive measures*, adanya otorisasi yang diberikan oleh Dewan Keamanan PBB merupakan hal yang fundamental dalam melihat legitimasi pelaksanaan upaya tersebut.<sup>352</sup> Pemberian otorisasi tersebut dapat didasarkan pada Pasal 53 Piagam PBB yakni mengenai *regional arrangements* atas dasar penggolongan NATO sebagai suatu organisasi regional dalam pengertian tersebut, ataupun didasarkan dalam praktek Dewan Keamanan yang telah berlangsung dalam pemberian otorisasi terhadap negara anggota secara individual ataupun kolektif dalam pelaksanaan *enforcement measures*.<sup>353</sup> Contohnya dapat dilihat dalam pelaksanaan *coercive measures* yang diupayakan NATO dalam mendukung *United Nations Protection Force* (UNPROFOR) di Yugoslavia berdasarkan Resolusi Dewan Keamanan PBB 836, yakni pelaksanaan operasi udara, termasuk penyerangan udara dalam menangani konflik yang terjadi.<sup>354</sup>

*Peace implementing operation* dapat dilihat dalam contoh konflik di Bosnia Herzegovina. Konflik tersebut diselesaikan dengan membentuk suatu perjanjian perdamaian di Dayton dan ditandatangani di Paris, yang menyatakan

---

<sup>350</sup> *Ibid.*

<sup>351</sup> North Atlantic Treaty Organization, *NAC Ministerial Meeting Final Communiqué*, (Brussel, 17 Desember 1992), < <http://www.nato.int/docu/comm/49-95/c921217a.htm>>, diakses pada 23 Mei 2012, par. 4.

<sup>352</sup> Tracisio Gazzini, “NATO’s Role in the Collective Security System”, hal. 12.

<sup>353</sup> *Ibid.*

<sup>354</sup> *Ibid.*, hal. 3.



bahwa dalam pelaksanaan aspek militer dalam perjanjian tersebut ditunjuk NATO yang dapat membentuk suatu operasi militer dan meminta Dewan Keamanan PBB untuk membentuk suatu resolusi sebagai otorisasi dalam pelaksanaan upaya tersebut.<sup>355</sup> Dapat dilihat bahwa *peace implementing operation* yang dimaksud dalam hal ini adalah upaya NATO dalam mendukung implementasi perdamaian yang telah disepakati dalam suatu perjanjian perdamaian. Namun, perjanjian tersebut tidak mencukupi untuk dijadikan sebagai dasar pelaksanaan operasi, terutama dalam upaya *use of force* sehingga dalam hal ini diperlukan adanya otorisasi Dewan Keamanan PBB sebagai suatu upaya legalisasi terhadap penggunaan kekuatan tersebut.<sup>356</sup>

*Defensive operation* merupakan upaya NATO sebagai organisasi pertahanan regional dalam pelaksanaan upaya pertahanan sesuai dengan ruang lingkup pembentukannya. Hal ini memperlihatkan adanya kewenangan NATO dalam pelaksanaan fungsinya sebagai organisasi internasional dalam pelaksanaan upaya militer secara individu ataupun bekerja sama dengan entitas lainnya.<sup>357</sup> Contoh pelaksanaan upaya tersebut dapat dilihat dalam upaya *Defensive Operation on the Mediterranean Sea* yang merupakan pelaksanaan pengiriman kekuatan militer laut, kapal perang dan lainnya, dalam wilayah laut Mediterania dalam menanggapi penanganan terorisme internasional atas penyerangan yang terjadi di Amerika Serikat.<sup>358</sup>

Upaya-upaya tersebut memperlihatkan pelaksanaan peran NATO dalam sistem keamanan kolektif PBB, yang pula memperlihatkan adanya hubungan antara NATO dengan PBB. Hubungan tersebut memperlihatkan peran kedua NATO dalam *Strategic Concept*, yakni upaya *crisis management*. NATO dalam hal ini berupaya untuk bekerja sama dengan subyek hukum internasional lainnya dalam upaya internasional untuk menjaga keamanan dan perdamaian dunia.<sup>359</sup>

---

<sup>355</sup> *Ibid.*, hal. 5.

<sup>356</sup> *Ibid.*, hal. 16.

<sup>357</sup> *Ibid.*

<sup>358</sup> *Ibid.*, hal. 6.

Atas hubungannya dengan Dewan Keamanan PBB, dalam tabel berikut dapat dilihat pelaksanaan upaya yang dilakukan NATO untuk menjaga keamanan dan perdamaian dunia melalui sistem keamanan kolektif:

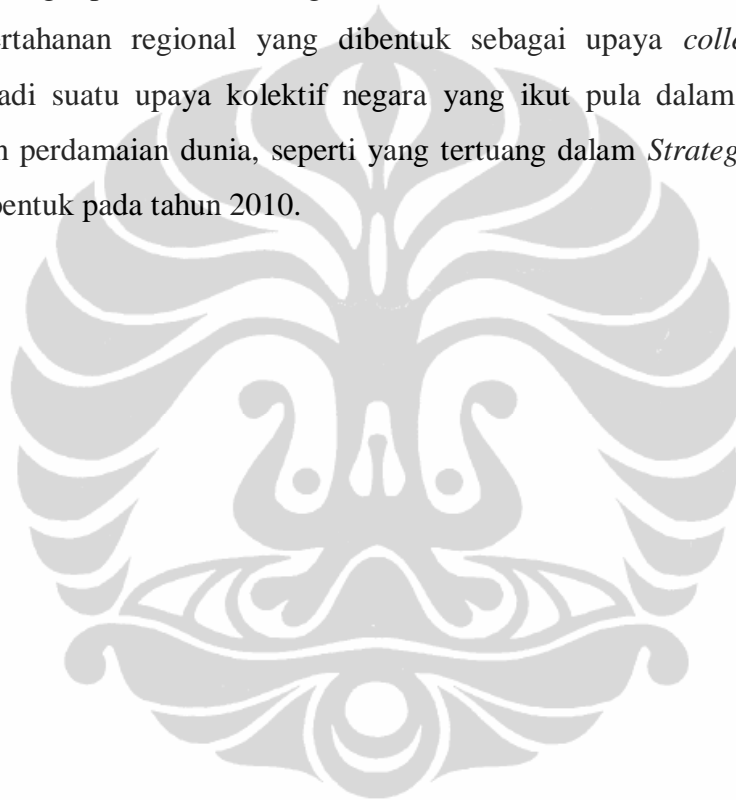
Tabel 3.2 *Regional, Sub-regional and Inter-regional Organization/Arrangements Cooperating with the United Nations in Peacekeeping and Peace-related Activities*

Name	Region	Area of Activities	Recent Activities
North Atlantic Treaty Organization (NATO)	Euro-Atlantic	Peacekeeping and peace-support operations	<p>Monitoring and enforcement of the maritime embargoes against the former Yugoslavia</p> <p>Enforcement of a “non-fly” zone over Bosnia and Herzegovina</p> <p>Air protection for UNPROFOR</p> <p>Assisting in establishing a safe and secure environment in Eastern Slavonia</p> <p>Implementing the Military Annex of the Dayton Peace Agreement for Bosnia and Herzegovina through NATO-led multinational peacekeeping force (IFOR/SFOR)</p> <p>Supporting the Civil Implementation of the Dayton Peace Agreement through SFOR</p> <p>Supporting the OSCE Kosovo Ground Verification Mission through NATO Air Verification Mission and a NATO Extraction Force</p>

Sumber: Lesson Learned Unit, Department of Peacekeeping Operations, United Nations.<sup>360</sup>

<sup>359</sup> North Atlantic Treaty Organization, *NAC Ministerial Meeting Final Communique*, par. 21.

Sehingga dapat disimpulkan bahwa, NATO merupakan organisasi pertahanan regional yang didirikan berlandaskan kewenangan *collective self-defense* yang merupakan *inherent rights* dari tiap-tiap negara yang dilaksanakan secara kolektif dalam bentuk suatu kerja sama regional. Kewenangan *use of force* yang dilaksanakan oleh NATO merupakan bagian dari pelaksanaan sistem keamanan kolektif dalam Bab VII Piagam PBB, namun hal tersebut tidak secara prinsip membatasi adanya upaya pelaksanaan sistem keamanan kolektif oleh NATO dalam ruang lingkup Bab VIII Piagam PBB. NATO telah berkembang dari organisasi pertahanan regional yang dibentuk sebagai upaya *collective self-defense* menjadi suatu upaya kolektif negara yang ikut pula dalam penjagaan keamanan dan perdamaian dunia, seperti yang tertuang dalam *Strategic Concept* yang telah dibentuk pada tahun 2010.



---

<sup>360</sup> Lessons Learned Unit Department of Peacekeeping Operations United Nations, *Cooperation Between the United Nations and Regional Organizations/Arrangements in a Peacekeeping Environment*, (Maret, 1999), Annex, hal. 24.

**BAB 4**  
**TANGGUNG JAWAB *NORTH ATLANTIC TREATY ORGANIZATION* DAN**  
**NEGARA ANGGOTA DALAM PELAKSANAAN *OPERATION UNIFIED***  
***PROTECTOR* DI LIBYA PADA TAHUN 2011**

Tanggung jawab organisasi internasional merupakan suatu konsekuensi dari adanya personalitas hukum internasional sebagai suatu subyek hukum dalam lalu lintas hukum internasional. Telah dijelaskan sebelumnya bahwa organisasi pertahanan regional memiliki peran yang besar dalam tindakannya melaksanakan sistem keamanan kolektif PBB. NATO sebagai suatu organisasi pertahanan regional memiliki peran dalam pelaksanaan sistem keamanan kolektif PBB yang tidak hanya terbatas pada Pasal 51 Piagam PBB sebagai dasar tujuan utama pembentukan organisasi. Dalam hal ini terlihat bahwa pengaturan hukum tanggung jawab internasional dan sistem keamanan kolektif merupakan dua sistem hukum paralel, yang berjalan sejajar satu sama lainnya.<sup>361</sup> Namun, dapat dilihat bahwa tanggung jawab internasional oleh suatu organisasi internasional sering muncul dalam pelaksanaan sistem keamanan kolektif.<sup>362</sup> Dalam hal terdapat suatu pelanggaran terhadap kewajiban internasional oleh suatu organisasi internasional dalam pelaksanaan sistem keamanan kolektif tersebut.

Tanggung jawab NATO dalam pelaksanaan sistem keamanan kolektif dapat dilihat dalam *Operation Unified Protector* pada tahun 2011 di Libya, yang dilaksanakan berdasarkan Otorisasi dari Dewan Keamanan PBB sesuai dengan Resolusi Dewan Keamanan PBB 1970 dan Resolusi 1973. Resolusi-resolusi tersebut dikeluarkan oleh Dewan Keamanan PBB menanggapi adanya pergolakan di Libya atas pelaksanaan kekerasan oleh rezim Gaddafi terhadap masyarakat Libya.<sup>363</sup> Gaddafi melaksanakan pembunuhan massal pada masyarakat, penangkapan tanpa alasan yang sah, penembakan terhadap demonstran,

---

<sup>361</sup> Kristen E Boon, "Regime Conflicts and the UN Security Council: Applying the Law of Responsibility", hal. 1.

<sup>362</sup> Ibid.

<sup>363</sup> Christian Henderson, "International Measures for the Protection of Civilians in Libya and Cote d'Ivoire", *International & Comparative Law Quarterly*, (2011), hal. 1.

penahanan dan penyiksaan terhadap oposisi dan pendayagunaan tentara bayaran asing.<sup>364</sup> Kemudian, pada 25 Februari 2012, *UN Human Rights Council* sangat mengecam tindakan yang dilakukan oleh rezim Gaddafi di Libya dengan menyatakan:

*“the gross and systemic human rights violations committed in Libya, including indiscriminate armed attacks against civilians, extrajudicial killings, arbitrary arrest, detention and torture of peaceful demonstrators, some of which may also amount to crimes against humanity.”*<sup>365</sup>

Berdasarkan hal tersebut, Dewan Keamanan PBB memberikan otorisasi dalam penggunaan semua upaya yang diperlukan (“*all necessary measures*”) dalam menangani permasalahan yang terjadi di Libya.<sup>366</sup> *Operation Unified Protector* dalam hal ini merupakan upaya NATO yang dilaksanakan dalam penerapan sistem keamanan kolektif PBB.

#### **4.1 Kerangka Hukum Pelaksanaan *Operation Unified Protector***

*Operation Unified Protector* merupakan operasi militer yang dilaksanakan oleh NATO di Libya pada tahun 2011. NATO secara formal mulai mengemban pengendalian atas semua upaya operasi militer di wilayah Libya sejak 31 Maret 2011<sup>367</sup>, yang sebelumnya telah dilaksanakan *Operation Odyssey Dawn* oleh Prancis, Inggris dan Amerika Serikat. *Operation Odyssey Dawn* yang kemudian dilanjutkan dengan pelaksanaan operasi atas pimpinan NATO, *Operation Unified Protector*, merupakan upaya internasional yang dilaksanakan oleh masyarakat internasional sebagai suatu reaksi atas terjadinya pelanggaran berat hak asasi

---

<sup>364</sup> Mehrdad Payandeh, “The United Nations, Military Intervention and Regime Change in Libya”, *Virginia Journal of International Law*, Vol. 52:533 (2012), hal. 373.

<sup>365</sup> United Nations, Report of the Human Rights Council on 15<sup>th</sup> Special Session, UN Doc. A/HRC/S-15/1, (25 Februari 2011), par. 1, hal. 3.

<sup>366</sup> Kristen E Boon, “Regime Conflicts and the UN Security Council: Applying the Law of Responsibility”, hal. 1.

<sup>367</sup> Claire Taylor, “Military Operations in Libya”, House of Commons Library, SN/IA/5909, <<http://www.parliament.uk/Templates/BriefingPapers/Pages/BPPdfDownload.aspx?bp-id=SN05909>>, diakses pada 4 Mei 2012, hal. 11.

manusia yang dilakukan oleh rezim Gaddafi di Libya. *Operation Unified Protector* dilaksanakan untuk mencapai tiga tujuan utama, yakni:<sup>368</sup>

1. *To enforce the UN arms embargo.* Sebanyak dua belas kapal perang NATO dari sembilan negara anggota berlayar di wilayah laut bebas (*international waters*) untuk mendukung upaya pelaksanaan embargo senjata dari PBB. Adapun tujuan utama dari pelaksanaan kegiatan tersebut adalah untuk mengawasi kapal-kapal dan pesawat udara yang bergerak masuk ke wilayah Libya, dan mempunyai hak untuk menghentikan serta menggeledah setiap kapal-kapal yang diduga membawa muatan yang dilarang.
2. *To enforce the non-fly zone.* Upaya larangan terbang bagi pesawat dari dan ke dalam wilayah Libya diterapkan dalam pelaksanaan *Operation Unified Proctetor*. NATO mengerahkan pesawat tempurnya untuk menghadang setiap pesawat yang melanggar larangan tersebut, dan pula menangkap setiap pesawat yang memasuki wilayah larangan terbang tanpa adanya pemberitahuan sebelumnya.
3. *To protect civilians and civilian centres.* NATO melaksanakan proses pengidentifikasian, pengawasan, dan pengumpulan informasi untuk membedakan pasukan-pasukan yang dapat memberikan ancaman terhadap masyarakat sipil dan wilayah yang didiami oleh masyarakat sipil. Atas informasi tersebut kemudian dilaksanakan upaya *use of force* untuk melindungi masyarakat.

Maka dapat disimpulkan bahwa NATO melaksanakan *Operation Unified Protector* dengan *command* dan *control* NATO dalam upaya penyelesaian pertikaian yang terjadi di Libya atas dasar kewenangan yang diberikan oleh Dewan Keamanan PBB dengan otorisasi Resolusi 1970 dan Resolusi 1973 yang dikeluarkan dalam penyelesaian permasalahan tersebut.

#### **4.1.1 Dasar Hukum Pelaksanaan *Operation Unified Protector***

*Operation Unified Protector* didasarkan atas otorisasi Dewan Keamanan PBB sesuai dengan ketentuan Resolusi 1970 dan Resolusi 1973 yang dikeluarkan

---

<sup>368</sup> Ibid., hal. 11-12.

berdasarkan ketentuan Bab VII Piagam PBB. Dalam hal ini dapat dinyatakan bahwa pelaksanaan operasi di Libya merupakan salah satu upaya sistem keamanan kolektif PBB yang memberikan otorisasi kepada negara untuk bertindak secara sendiri atau melalui organisasi regional atau *regional arrangements*.<sup>369</sup> NATO dalam hal ini melaksanakan tindakan tersebut sebagai salah satu organisasi pertahanan regional.

Sebelumnya, dapat dilihat bahwa penggunaan sistem keamanan kolektif atas kewenangan Dewan Keamanan PBB telah diambil berdasarkan ketentuan yang sesuai. Dalam Bab VII dinyatakan bahwa sebelum Dewan Keamanan PBB dapat melaksanakan upaya paksa (*enforcement measures*, pertama harus telah ditentukan bahwa suatu keadaan atau situasi tersebut merupakan *threat to peace, breach to peace, or act of aggression* sesuai dengan ketentuan Pasal 39 Piagam PBB.<sup>370</sup> Dalam Resolusi 1970 Dewan Keamanan PBB telah menyatakan adanya *threat to peace, breach to peace, or act of aggression* terhadap situasi di Libya secara implisit dengan menyatakan bahwa Dewan Keamanan PBB dalam hal ini bertindak sesuai dengan ketentuan Bab VII Piagam PBB.<sup>371</sup> Sedangkan dalam Resolusi 1973, hal tersebut dinyatakan secara eksplisit dalam mukadimah yang menyatakan “*determining that the situation in the Libyan Arab Jamahiriya continues to constitute a threat to international peace and security*”.<sup>372</sup> Sehingga dapat kemudian ditentukan upaya paksa (*enforcement measures*) baik yang berupa pelaksanaan upaya damai dan penggunaan kekerasan (*use of force*) untuk dilaksanakan dalam menangani situasi di Libya sebagai upaya sistem keamanan kolektif.

Resolusi Dewan Keamanan PBB 1970 dan 1973 menjadi penting dalam melihat adanya landasan hukum atas pelaksanaan *Operation Unified Protector*,

---

<sup>369</sup> United Nations, Security Council Resolution 1973, UN Doc. S/RES/1973, (17 Maret 2011), par. 4.

<sup>370</sup> Michael N Schmitt, “Wings over Libya: the Non-Fly Zone in Legal Perspective”, *Yale Journal of International Law Online*, (spring, 2011), hal. 2.

<sup>371</sup> Ibid. Lihat juga United Nations, Security Council Resolution 1970, UN Doc. S/RES/1970, (26 Februari 2011), Mukadimah. “*Acting under Chapter VII of the Charter of the United Nations*”.

<sup>372</sup> United Nations, Security Council Resolution 1973, Mukadimah.

terutama dalam permasalahan pemberian otorisasi dari Dewan Keamanan dalam pelaksanaan sistem keamanan kolektif. Kedua resolusi tersebut secara jelas menyatakan pemberian otorisasi kepada negara anggota PBB untuk dapat melaksanakan upaya sistem keamanan kolektif di wilayah Libya secara individual, atau melalui organisasi regional atau *regional arrangements*. Hal tersebut dapat dilihat dalam Paragraf 4 Resolusi Dewan Keamanan 1973, yakni: “*Authorizes Member States ... acting nationally or through regional organizations or arrangements, ... , to take all necessary measures*”<sup>373</sup>. Dengan demikian, pelaksanaan upaya dalam *Operation Unified Protector* telah berdasarkan atas otorisasi Dewan Keamanan PBB yang melegalisasikan upaya *use of force* dalam pelaksanaan *enforcement measures* terhadap situasi di Libya.

#### 4.1.1.1 Resolusi Dewan Keamanan 1970

Resolusi 1970 diadopsi oleh Dewan Keamanan PBB pada sidang ke-6491 pada tanggal 26 Februari 2011. Adanya banyak laporan mengenai pelanggaran hak asasi besar-besaran di Libya oleh rezim Gaddafi memicu pembahasan mengenai permasalahan tersebut oleh negara anggota Dewan Keamanan PBB, yang kemudian berakhir dengan diadopsinya Resolusi 1970.<sup>374</sup> Pada mukadimah Resolusi 1970 dapat dilihat pernyataan dan kecaman dari Dewan Keamanan PBB, organ-organ PBB lainnya, dan dari organisasi regional terhadap situasi yang terjadi di Libya. Reaksi dari masyarakat internasional secara regional terlihat dengan adanya kecaman yang dikeluarkan oleh *African Union* dan *the League of Arab States*. Pada 22 Februari 2011, *the Arab League* melarang Libya untuk mengikuti pertemuan yang diadakan oleh organisasi atas dasar pengecaman terhadap penggunaan kekuatan yang dilaksanakan Libya terhadap penduduk sipilnya.<sup>375</sup> *African Union* dalam hal ini juga mengecam situasi yang terjadi di

---

<sup>373</sup> Ibid., Par. 4.

<sup>374</sup> Mehrdad Payandeh, “The United Nations, Military Intervention and Regime Change in Libya”, hal. 375.

<sup>375</sup> Global Centre for the Responsibility to Protect, “Background Briefing: Responsibility to Protect after Libya and Cote D’Ivoire”, <[http://globalr2p.org/media/pdf/BACKGROUND\\_BRIEFING\\_R2P\\_AFTER\\_LIBYA\\_AND\\_COTE\\_DIVOIRE.pdf](http://globalr2p.org/media/pdf/BACKGROUND_BRIEFING_R2P_AFTER_LIBYA_AND_COTE_DIVOIRE.pdf)>, diakses pada 1 Juni 2012.



Libya dengan mengutuk “*disproportionate use of force*” di Libya dan meminta untuk penghentian segera tindakan “*repression and violence*” terhadap penduduk sipil.<sup>376</sup> Menanggapi kecaman tersebut, kemudian Dewan Keamanan PBB menyatakan bahwa atas dasar Bab VII Piagam PBB melaksanakan upaya paksa dalam Pasal 41 untuk menjaga keamanan dan perdamaian dunia, khususnya di wilayah Libya.<sup>377</sup>

Dapat dilihat bahwa upaya yang diarahkan dalam Resolusi 1970 merupakan *enforcement measures* tanpa adanya *use of force* dengan pemberian sanksi-sanksi secara damai sesuai dengan ketentuan dalam Pasal 41 Piagam PBB. Adapun upaya yang dilaksanakan yakni: *arms embargo*, *travel ban*, dan *asset freeze*. *Arms embargo* (embargo senjata) adalah upaya pembatasan secara menyeluruh terhadap setiap upaya perpindahan senjata ke dalam wilayah Libya. Hal ini dapat dilihat dalam paragraf ke-9 dalam Resolusi 1970 yang menyatakan:

*“Decide that all Member States shall immediately take the necessary measures to prevent the direct or indirect supply, sale or transfer to the Libyan Arab Jamahiriya, from or through their territories or by their nationals, or using their flag vessels or aircraft, of arms and related materiel of all types.”*<sup>378</sup>

*Travel ban* (larangan perjalanan) adalah upaya pembatasan perpindahan individu dari Libya ke luar wilayah negara tersebut terhadap beberapa individu yang telah ditentukan dalam resolusi. Pelarangan tersebut dapat dilihat dalam paragraf ke-15 dalam Resolusi 1970 yang menyatakan:

*“Decides that all Member States shall take the necessary measures to prevent the entry into or transit through their territories of individuals listed in Annex I of this resolution or designated by the committee established pursuant to paragraph 24 below”*<sup>379</sup>

---

<sup>376</sup> *Ibid.*

<sup>377</sup> “Acting under Chapter VII United Nations, and taking measures under its Article 41”. (United Nations, Security Council Resolution 1970, Mukadimah).

<sup>378</sup> *Ibid.*, par. 9.

<sup>379</sup> *Ibid.*, par. 15.

*Assets freeze* (pembekuan aset) merupakan upaya penyitaan aset-aset yang dimiliki atau dikuasai oleh individu secara langsung maupun tidak langsung. Adapun dalam Resolusi 1970, upaya *assets freeze* tercantum dalam paragraf 17, yang menyatakan:

*“Decides that all Member States shall freeze without delay all funds, other financial assets and economic resources which are on their territories, which are owned or controlled, directly or indirectly, by the individuals or entities listed in Annex II of this resolution or designated by the Committee established pursuant to paragraph 24 below, or by individuals or entities acting on their behalf or at their direction or by entities owned or controlled by them”*<sup>380</sup>

Dengan demikian mandat yang diberikan dalam Resolusi Dewan Keamanan 1970 tersebut adalah merupakan suatu mekanisme sistem keamanan kolektif PBB berdasarkan Bab VII Piagam PBB yakni berupa *enforcement measures* tanpa adanya *use of force*. *Arms embargo*, *travel ban* dan *assets freeze* dalam Resolusi tersebut tidak memberikan adanya kewenangan bagi negara anggota PBB dan organisasi internasional untuk mengupayakan *use of force* dalam implementasinya.

#### **4.1.1.2 Resolusi Dewan Keamanan 1973**

Resolusi 1973 diadopsi oleh Dewan Keamanan PBB pada sidang ke-6498 yang diselenggarakan pada tanggal 17 Maret 2011. Resolusi 1973 berhubungan dengan erat dengan adanya Resolusi 1970. Hal tersebut dapat dilihat dalam mukadimah Resolusi 1973 yang menyatakan bahwa Dewan Keamanan PBB *“recalling its resolution 1970 (2011) of 26 February 2011”*<sup>381</sup>. Resolusi 1973 dikeluarkan atas dasar bahwa *enforcement measures* tanpa adanya *use of force* yang dilaksanakan sesuai dengan otorisasi Resolusi Dewan Keamanan 1970 dianggap tidak berhasil dalam menyelesaikan permasalahan yang terjadi di Libya. Konflik yang terjadi dianggap sebagai suatu permasalahan yang *“continues to*

---

<sup>380</sup> Ibid., par. 17.

<sup>381</sup> United Nations, Security Council Resolution 1973, Mukadimah.

*constitute a threat to international peace and security*”.<sup>382</sup> Dalam hal ini telah disebutkan dengan jelas adanya *threat to the peace, breach of the peace, or act of aggression*, sesuai dengan ketentuan Pasal 39 Piagam PBB sebagai suatu syarat pendahuluan dalam upaya pelaksanaan sistem keamanan kolektif dalam Bab VII Piagam PBB.

Resolusi 1973 pula diadopsi dengan satu tujuan utama yakni perlindungan terhadap masyarakat sipil di Libya dari kelanjutan pelanggaran hak asasi manusia yang terjadi di wilayah tersebut. Hal ini dapat dilihat dalam Resolusi 1973, yang menyatakan bahwa:

*“Authorizes Member States ... , acting nationally or through regional organizations or arrangements, and acting in cooperation with the Security-General, to take all necessary measures , notwithstanding paragraph 9 of resolution 1970 (2011), to protect civilians and civilian populated areas under threat of attack in the Libyan Arab Jamahiriya, including Benghazi, while excluding a foreign occupation force of any form on any part of Libyan territory, ... ”*<sup>383</sup>

Untuk mencapai tujuan perlindungan terhadap masyarakat sipil di wilayah Libya tersebut selanjutnya dapat dilihat bahwa Dewan Keamanan PBB memberikan otoritas kepada negara, yang dapat bertindak sendiri atau melalui suatu organisasi internasional, untuk *“take all necessary measures”*. *“All necessary measures”* dalam resolusi tersebut diartikan sebagai suatu otorisasi terhadap segala upaya yang seperlunya untuk diambil.<sup>384</sup> Upaya *use of force* dalam hal ini dapat diupayakan dalam pengertian *“all necessary measures”* dalam resolusi tersebut. Namun, upaya *use of force* dalam hal ini harus dapat memenuhi pengertian dalam penekanan kata *“necessary”*, yakni upaya *use of force* dapat dilaksanakan namun tidak secara berlebihan dan harus sesuai dengan tujuan dari adanya Resolusi 1973, yakni perlindungan terhadap masyarakat sipil.<sup>385</sup>

---

<sup>382</sup> Ibid.

<sup>383</sup> Ibid., par. 4.

<sup>384</sup> Mehrdad Payandeh, “The United Nations, Military Intervention and Regime Change in Libya”, hal. 384.

<sup>385</sup> Ibid., hal. 385.

Sehingga dalam Resolusi Dewan Keamanan 1973 diberikan otorisasi pelaksanaan *enforcement measures* yang dapat berupa upaya *use of force*. Penggunaan kata “*all necessary measures*” telah memperlihatkan adanya intensi dalam pelaksanaan upaya *use of force* oleh Dewan Keamanan PBB. Upaya-upaya yang dapat dilaksanakan berdasarkan mandat dari resolusi tersebut adalah “*take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security*” sesuai dengan Pasal 42 Piagam PBB.<sup>386</sup> Namun, larangan terhadap penggunaan *land forces* secara jelas telah disebutkan dalam resolusi tersebut, sehingga dalam hal ini upaya *use of force* yang dapat dilakukan terbatas kepada *such action by air and sea* yang seperlunya untuk dilaksanakan dalam melindungi masyarakat sipil di Libya.

Pasal 42 Piagam PBB sebagai dasar hukum upaya pelaksanaan sistem keamanan kolektif dalam Resolusi 1973 tidak dinyatakan secara eksplisit. Resolusi 1973 secara jelas menyebutkan Resolusi 1970 dalam mukadimah dan menyatakan bahwa keadaan di Libya memburuk yang dapat disimpulkan telah menyatakan secara eksplisit bahwa *enforcement measures* dalam Resolusi 1970, yakni sesuai dengan pasal 41 tidak mencukupi untuk mengatasi permasalahan di Libya tersebut.<sup>387</sup> Apabila kemudian kita melihat redaksi Pasal 42 Piagam PBB dinyatakan bahwa:

“*Should the Security Council consider that measures provided in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea or land forces as may be necessary to maintain or restore international peace and security.*”<sup>388</sup>

Dengan demikian, dapat dilihat bahwa Resolusi 1973 dibentuk sesuai dengan ketentuan yang terdapat dalam Pasal 42 Piagam PBB. Oleh karena itu, upaya *use of force* dalam pelaksanaan Resolusi tersebut didasarkan pada kewenangan Dewan Keamanan PBB dalam Bab VII Piagam PBB, terutama Pasal 42 Piagam PBB.

---

<sup>386</sup> Michael N Schmitt, “Wings over Libya: the Non-Fly Zone in Legal Perspective”, hal. 3.

<sup>387</sup> Ibid.

<sup>388</sup> United Nations, Charter of the United Nations, Pasal 42.

Upaya-upaya pelaksanaan sistem keamanan kolektif yang dimandatkan dalam Resolusi 1973 ini antara lain: *non fly zone*, *enforcement of the arms embargo*, *ban on flights*, dan *asset freeze*. *Non fly zone* merupakan suatu upaya pelarangan penerbangan dalam wilayah udara negara lain, dalam hal ini wilayah udara Libya. Pelaksanaan *non fly zone* secara tidak langsung telah melanggar kedaulatan Libya atas wilayahnya, yakni wilayah udara.<sup>389</sup> Pelaksanaan *non fly zone* hanya dapat dilakukan dengan adanya otorisasi Dewan Keamanan PBB karena secara *de facto* dapat disamakan sebagai suatu tindakan okupasi terhadap wilayah negara lain.<sup>390</sup> Upaya *non fly zone* di Libya ini dilaksanakan untuk mencapai tujuan perlindungan masyarakat sipil dengan upaya menekan aktivitas militer rezim Gaddafi dalam penyerangan udara. Mandat *non fly zone* dituangkan dalam paragraf 6 Resolusi 1973 yang menyatakan: “*Decides to establish a ban on all flights in the airspace of the Libyan Arab Jamahiriya in order to help protect civilians*”<sup>391</sup>.

*Enforcement of arms embargo* merupakan upaya pelaksanaan *arms embargo*, seperti yang terdapat dalam Resolusi 1970, dengan implementasi yang lebih ketat. Resolusi 1973 mengubah redaksi paragraf 11 pada Resolusi 1970 yang menyangkut dengan pelaksanaan inspeksi upaya *arms embargo*. Resolusi 1973 memberikan otorisasi lebih kepada negara dengan menyatakan “... *authorizes Member States to use all measures commensurate to the specific circumstances to carry out such inspections*”<sup>392</sup>.

Upaya *ban on flights* merupakan upaya pelarangan terhadap penerbangan pesawat terbang berkebangsaan Libya dari dan ke dalam wilayah Libya<sup>393</sup>, dan merupakan salah satu bagian dari upaya *non fly zone*. Upaya *assets freeze* juga merupakan upaya yang dilaksanakan sejalan dengan Resolusi 1970, yakni

---

<sup>389</sup> Michael N Schmitt, “Wings over Libya: the Non-Fly Zone in Legal Perspective”, hal. 2.

<sup>390</sup> Ibid.

<sup>391</sup> United Nations, Security Council Resolution 1973, par. 6.

<sup>392</sup> Ibid., par. 13.

<sup>393</sup> Ibid., par. 17.

membekukan aset-aset yang dimiliki atau dikuasai oleh individu-individu yang dianggap termasuk ke dalam bagian dari rezim Gaddafi.<sup>394</sup>

Maka Resolusi 1970 dan Resolusi 1973 yang diadopsi oleh Dewan Keamanan PBB merupakan dasar hukum dari adanya pelaksanaan *Operation Unified Protector* sebagai salah satu upaya NATO dalam melaksanakan sistem keamanan kolektif PBB. Kedua resolusi tersebut menyatakan bahwa Dewan Keamanan PBB memberikan otorisasi kepada negara untuk bertindak melalui organisasi internasional dalam upaya paksa berdasarkan Bab VII Piagam PBB. Upaya paksa yang dimaksud dapat berupa upaya tanpa *use of force*, yakni berdasarkan Resolusi 1970 dan upaya *use of force* dalam Resolusi 1973.

#### 4.1.2 Struktur *Command and Control Operation Unified Protector*

*Operation Unified Protector* merupakan upaya pelaksanaan sistem keamanan kolektif yang didasarkan atas Resolusi Dewan Keamanan PBB 1970 dan Resolusi 1973 di bawah *command and control* NATO. *Command and control* atas *Operation Unified Protector* mulai diemban NATO pada 31 Maret 2011 terhadap semua operasi militer yang sebelumnya telah dilaksanakan.<sup>395</sup> Adapun *Operation Unified Protector* dalam hal ini melaksanakan upaya-upaya yang telah dimandatkan dalam Resolusi 1970 dan 1973 yakni berupa: *the arms embargo*, *non-fly zone*, dan *actions to protect civilians and civilians centres*.<sup>396</sup> Dengan demikian, NATO merupakan entitas yang memegang peranan *command and control* dalam pelaksanaan *Operation Unified Protector*, baik yang berupa upaya *use of force*, di Libya. Negara anggota dalam hal ini tunduk kepada *command and control* daripada NATO, yang hanya ikut berpartisipasi dalam mendukung *Operation Unified Protector* dengan memberikan bantuan militer.

*North Atlantic Council* di Brussel memegang komando politik secara keseluruhan atas *Operation Unified Protector* yang kemudian pelaksanaan

---

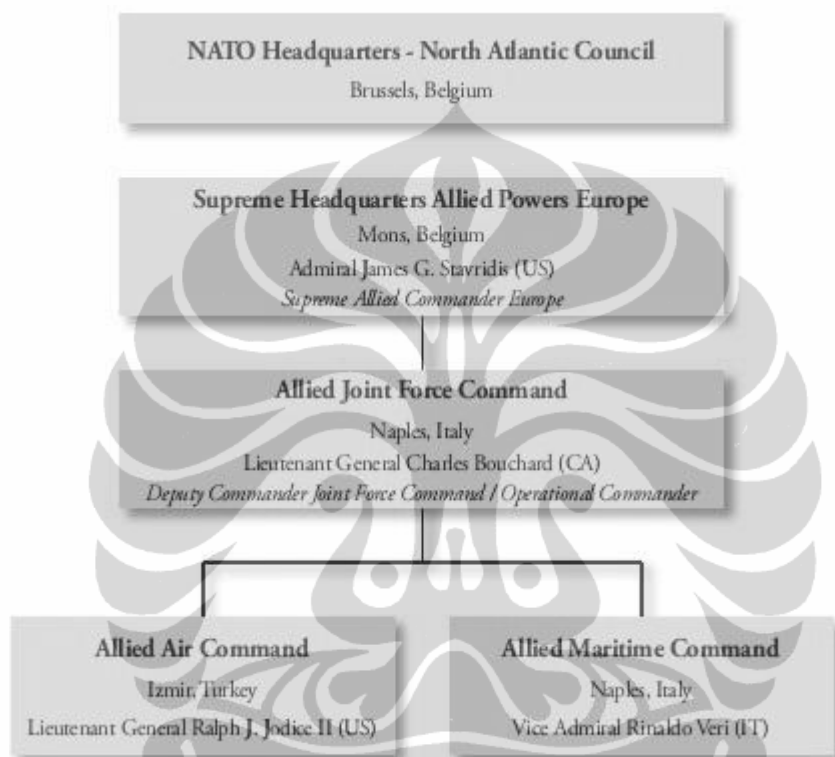
<sup>394</sup> Ibid., par 19, 20, dan 21.

<sup>395</sup> North Atlantic Treaty Organization, "NATO Takes Command in Libya Air Operations", <[http://www.nato.int/cps/en/natolive/news\\_71867.htm?mode=pressrelease](http://www.nato.int/cps/en/natolive/news_71867.htm?mode=pressrelease)>, diakses pada 13 Mei 2012.

<sup>396</sup> Ibid.

keputusan tersebut dijalankan oleh *Supreme Headquarters Allied Powers Europe* di Mons, Belgia, dan pelaksanaan operasi militer melalui *Joint Force Command* (JFC) Naples.<sup>397</sup> Adapun struktur *command and control* dari *Operation Unified Protector* tersebut dapat dilihat sebagai berikut:

Tabel 4.1 *Command and Control Operation Unified Protector*



Sumber: North Atlantic Treaty Organization<sup>398</sup>











Kontribusi negara anggota NATO dan negara lainnya dalam pelaksanaan mandat Dewan Keamanan PBB pada *Operation Unified Protector* dapat dilihat dari kontribusi aset militer yang diberikan dalam pelaksanaan operasi. Kontribusi aset militer dari negara dapat dilihat sebagai berikut:

<sup>397</sup> North Atlantic Treaty Organization, "NATO and Libya", <[http://www.nato.int/cps/en/natolive/topics\\_71652.htm](http://www.nato.int/cps/en/natolive/topics_71652.htm)>, diakses pada 13 Mei 2012.



<sup>398</sup> North Atlantic Treaty Organization, "*Operation Unified Protector: Command and Control*", <[http://www.nato.int/nato\\_static/assets/pdf/pdf\\_2011\\_03/20110325\\_110325-unified-protector-command-control.pdf](http://www.nato.int/nato_static/assets/pdf/pdf_2011_03/20110325_110325-unified-protector-command-control.pdf)>, diakses pada 13 Mei 2012.

Tabel 4.2 *Operation Contributing Nations (as of 5 April)*

**Operation Contributing Nations (as of 5 April)**

	Belgium		Qatar
	Bulgaria		Romania
	Canada		Spain
	Denmark		Sweden
	France		Turkey
	Greece		United Arab Emirates
	Italy		United Kingdom
	Netherlands		United States
	Norway		NATO AWACS

		
<b>Total</b>	<b>195</b>	<b>18</b>

Sumber: North Atlantic Treaty Organization<sup>399</sup>

Dapat dilihat dari kedua tabel di atas bahwa pelaksanaan *Operation Unified Protector* dijalankan melalui operasi militer di wilayah laut dan wilayah udara Libya yakni: *Allied Air Command* dan *Allied Maritime Command*. *Allied Air Command* merupakan upaya pelaksanaan *non-fly zone* NATO yang menutup wilayah udara Libya terhadap semua penerbangan, kecuali penerbangan dengan tujuan kemanusiaan.<sup>400</sup> *Allied Maritime Command* merupakan upaya komando pelaksanaan *arms embargo* yang dimandatkan dalam Resolusi 1970 dan Resolusi 1973. NATO dalam hal ini mengerahkan kapal perang untuk mengawasi wilayah perairan Libya dengan tujuan untuk membatasi sirkulasi perpindahan persenjataan, barang-barang yang berhubungan dengan persenjataan dan tentara

<sup>399</sup> North Atlantic Treaty Organization, “*Operation Unified Protector: Key Facts and Figures*”,  
 <[http://jfcnaples.nato.int/resources/11/Operation%20Unified%20Protector/OUP%20Media%20Releases/Key%20facts/KFF\\_05%20April.pdf](http://jfcnaples.nato.int/resources/11/Operation%20Unified%20Protector/OUP%20Media%20Releases/Key%20facts/KFF_05%20April.pdf)>, diakses pada 13 Mei 2012.

<sup>400</sup> North Atlantic Treaty Organization, “*Operation Unified Protector Protection of Civilians and Civilian-Populated Areas & Enforcement of the Non-Fly Zone*”,  
 <[http://www.nato.int/nato\\_static/assets/pdf/pdf\\_2011\\_10/20111005\\_111005-factsheet\\_protection\\_civilians.pdf](http://www.nato.int/nato_static/assets/pdf/pdf_2011_10/20111005_111005-factsheet_protection_civilians.pdf)>, diakses pada 13 Mei 2012.



bayaran yang dapat memperkuat pasukan rezim Gaddafi.<sup>401</sup> Dalam pelaksanaan perlindungan terhadap penduduk sipil di Libya (*protection of civilians and civilians populated area*), NATO melaksanakan upaya militer melalui udara, yakni pengeboman terhadap target-target militer yang dianggap sebagai suatu ancaman terhadap keselamatan masyarakat sipil.<sup>402</sup>

#### 4.1.3 Kewajiban dalam Hukum Internasional

*Operation Unified Protector* merupakan suatu upaya paksa (*enforcement measures*) dalam pelaksanaan sistem keamanan kolektif yang didasarkan pada Bab VII Piagam PBB. Dalam pelaksanaan upaya *use of force* tersebut terdapat dua prinsip yang harus dipenuhi oleh NATO sebagai suatu pelaksanaan upaya *enforcement measures*, yakni *the principles of necessity and proportionality*.<sup>403</sup> Kedua prinsip tersebut terdapat dalam *the law of use of force (ius ad bellum)* dan *international humanitarian law* (untuk selanjutnya disebut “IHL”).<sup>404</sup> Tujuan *protection of civilians* yang terdapat dalam Resolusi 1970 dan Resolusi 1973 merupakan pula pelaksanaan *international human rights*. Dalam hal ini penting dilihat adanya kewajiban hukum internasional yang harus dipenuhi NATO dalam pelaksanaan *enforcement measures* pada *Operation Unified Protector*, yakni: (1) *the Law of Use of Force (ius ad bellum)*, (2) IHL, (3) *International Human Rights Law*, dan (4) peraturan hukum internasional yang berkaitan.

##### 4.1.3.1 *The Law of Use of Force (Ius ad Bellum)*

Sumber utama *the law of use of force* adalah Piagam PBB, yang memperlihatkan adanya pengaturan mengenai dasar upaya *use of force*, yakni

---

<sup>401</sup> North Atlantic Treaty Organization, “*Operation Unified Protector NATO-led Arms Embargo against Libya*”, (Oktober, 2011), <[http://www.nato.int/nato\\_static/assets/pdf/pdf\\_2011\\_10/20111005\\_111005-factsheet\\_arms\\_embargo.pdf](http://www.nato.int/nato_static/assets/pdf/pdf_2011_10/20111005_111005-factsheet_arms_embargo.pdf)>, diakses pada 13 Mei 2012.

<sup>402</sup> North Atlantic Treaty Organization, “*Operation Unified Protector Protection of Civilians and Civilian-Populated Areas & Enforcement of the Non-Fly Zone*”.

<sup>403</sup> Judith Gardam, *Necessity, Proportionality and the Use of Force by States*, (Cambridge: Cambridge University Press, 2004), hal. 188.

<sup>404</sup> *Ibid.*, hal. 1.

terbatas pada upaya dalam Pasal 51 dan Piagam VII PBB.<sup>405</sup> Dalam pelaksanaan *Operation Unified Protector* tersebut haruslah didasarkan atas payung hukum Piagam PBB. NATO menjalankan mandat daripada Dewan Keamanan PBB yang memberikan legalisasi atas pelaksanaan upaya *use of force* yang dilaksanakan di Libya berdasarkan kepada Pasal 42 Piagam PBB. *Operation Unified Protector* telah memenuhi dua kondisi untuk terbentuknya dasar hukum pelaksanaan *enforcement measures*, yakni: (1) Dewan Keamanan PBB telah terlebih dahulu telah menetapkan adanya *threat to peace, breach of the peace, or act of aggression* yang terjadi di Libya sesuai dengan , (2) Dewan Keamanan PBB harus terlebih dahulu mengambil upaya damai dalam penyelesaian permasalahan, yakni sebelumnya melalui upaya Pasal 41 Piagam PBB.<sup>406</sup>

Prinsip *necessity* dalam pelaksanaan *use of force* berdasarkan Pasal 42 dapat berarti bahwa pelaksanaannya merupakan suatu kebutuhan yang harus dilaksanakan, yang berarti bahwa pelaksanaan upaya lainnya, terutama pelaksanaan upaya paksa dalam Pasal 41, telah terbukti tidak dapat memenuhi penyelesaian permasalahan.<sup>407</sup> Namun hal ini tidak berarti bahwa semua upaya paksa secara damai telah dilaksanakan sebelumnya untuk dapat melaksanakan upaya *use of force*. Prinsip *necessity* memperlihatkan adanya suatu kebutuhan akan upaya *use of force* diterapkan terhadap suatu permasalahan demi menjaga keamanan dan perdamaian dunia.

Berdasarkan Pasal 42 Piagam PBB, dapat dilihat pula bahwa Dewan Keamanan melaksanakan upaya *use force* dalam konteks tersebut hanya terhadap upaya menjaga keamanan dan perdamaian dunia. Sehingga dalam hal ini prinsip *proportionality* memperlihatkan adanya upaya yang dilaksanakan adalah sebanding dengan tujuan yang akan dicapai, yakni demi menjaga keamanan dan perdamaian dunia.<sup>408</sup> Sehingga pelaksanaan *use of force* oleh NATO harus

---

<sup>405</sup> Ibid., hal. 199.

<sup>406</sup> Olivera Medenica, "Protocol I and Operation Allied Force: Did NATO Abide by Principles of Proportionality?", *Loyola of Los Angeles International & Comparative Law Review*, (Mei, 2001), hal. 7.

<sup>407</sup> Judith Gardam, *Necessity, Proportionality and the Use of Force by States*, 200.

<sup>408</sup> Ibid., hal. 202.

mempertimbangkan dampak atas pelaksanaan upaya tersebut terhadap hak dan kewajiban pihak-pihak yang terlibat, termasuk pula dampaknya terhadap lingkungan.<sup>409</sup> Maka NATO dalam *Operation Unified Protector* sebagai suatu upaya pelaksanaan sistem keamanan kolektif atas otorisasi Dewan Keamanan PBB terikat untuk memenuhi pengaturan dari *the law of the use of force* yang terdapat dalam Piagam PBB tersebut.

#### 4.1.3.2 *International Humanitarian Law*

Keberlakuan IHL terhadap NATO dalam pelaksanaan *Operation Unified Protector* dalam hal ini dapat dilihat dalam dua aspek, yakni: (1) *ratione personae* dan (2) *ratione materiae*. Aspek *ratione personae* memperlihatkan adanya pandangan subjektif atas keberlakuan IHL terhadap NATO, sedangkan *ratione personae* memperlihatkan adanya pandangan objektif yang menekankan kepada kenyataan konflik yang ada dan keberlakuan IHL.<sup>410</sup> Secara subjektif, kapasitas NATO bertindak dalam hukum internasional, termasuk di dalamnya untuk dapat tunduk terhadap hukum internasional dapat dilihat dari instrumen pembentukan NATO itu sendiri dan pula dapat dilihat adanya kehendak NATO yang terpisah dari negara anggotanya. Suatu organisasi internasional secara *ratione personae* dapat dilihat dengan adanya wewenang organisasi untuk menggunakan kekuatan bersenjata memperlihatkan adanya kewajiban organisasi internasional untuk terikat pada IHL.<sup>411</sup> NATO berwenang untuk dapat menggunakan kekuatan bersenjata dalam suatu upaya *collective self-defense* dan dalam upaya pelaksanaan sistem keamanan kolektif PBB. Sehingga dalam hal ini NATO terikat kepada IHL dalam pelaksanaan penggunaan kekuatan bersenjata.

Sejalan dengan pendapat dari *International Committee of the Red Cross* (yang selanjutnya disebut ICRC), yang menyatakan bahwa IHL telah dianggap sebagai suatu *customary international law* yang mengikat kepada setiap negara

---

<sup>409</sup> Ibid.

<sup>410</sup> Gabriele Porretto dan Sylvain Vite, "The Application of International Humanitarian Law and Human Rights Law to International Organization", *University Centre for International Humanitarian Law*, < [http://www.adh-geneva.ch/docs/projets/CTR\\_application\\_du\\_DIH.pdf](http://www.adh-geneva.ch/docs/projets/CTR_application_du_DIH.pdf)>, diakses pada 10 Mei 2012, hal. 17.

<sup>411</sup> Ibid., hal. 19.

dan setiap angkatan bersenjata dalam suatu situasi konflik.<sup>412</sup> Dalam *Operation Unified Protector*, NATO merupakan pihak angkatan bersenjata yang terlibat dalam konflik di Libya dan atas dasar personalitas hukumnya NATO merupakan subyek hukum internasional yang dapat mengemban kewajiban tersendiri, maka dalam hal ini NATO berkewajiban untuk mematuhi IHL dalam pelaksanaan *use of force* dalam pelaksanaan *Operation Unified Protector*..

Keberlakuan IHL dalam hal ini juga dapat dilihat dari adanya kenyataan bahwa konflik yang terjadi secara *ratione materiae* memperlihatkan akan keberlakuan IHL. Secara umum, kriteria utama keberlakuan IHL adalah adanya suatu “*armed conflict*” (konflik bersenjata), yang didasarkan kepada kenyataan yang terjadi dalam suatu permasalahan bukan berdasarkan penentuan yang dibentuk oleh para pihak dalam suatu konflik.<sup>413</sup> IHL pada dasarnya berlaku pada *international armed conflict* antara dua negara atau lebih, tanpa memperhatikan adanya pernyataan deklarasi perang, dan juga terhadap *internal armed conflict* atau *non-international armed conflict* yang terjadi di dalam internal negara.<sup>414</sup>

ICRC berusaha mendefinisikan dua tipe konflik bersenjata berdasarkan beberapa opini dan dasar hukum yang ada, yakni:<sup>415</sup>

1. *International armed conflict* merupakan suatu konflik atau persengketaan yang melibatkan penggunaan angkatan bersenjata antara dua atau lebih negara.
2. *Non-international armed conflict* merupakan konfrontasi atau konflik bersenjata antara suatu negara dengan pasukan dari satu atau lebih kelompok-kelompok bersenjata, atau antara kelompok-kelompok bersenjata yang terdapat dalam satu wilayah negara. Konfrontasi tersebut

---

<sup>412</sup> Umesh Palwankar, “Applicability of International Humanitarian Law to United Nations Peace-Keeping Forces”, *International Review of the Red Cross*, no. 294, <<http://www.icrc.org/eng/resources/documents/misc/57jmbh.htm>>, diakses pada 10 Mei 2012.

<sup>413</sup> Gabriele Porretto dan Sylvain Vite, “The Application of International Humanitarian Law and Human Rights Law to International Organization”, hal. 32.

<sup>414</sup> Ibid.

<sup>415</sup> International Committee of the Red Cross, “How is the Term “Armed Conflict” Defined in International Humanitarian Law”, Opinion Paper, (Maret, 2008), <<http://www.icrc.org/eng/assets/files/other/opinion-paper-armed-conflict.pdf>>, hal. 5.

harus memenuhi parameter *minimum level of intensity* dan para pihak dalam konflik tersebut telah memenuhi *show a minimum of organization*. Dalam permasalahan di Libya dapat dilihat bahwa pada mulanya konflik yang terjadi merupakan *non-international armed conflict* antara pemerintah rezim Gaddafi dengan kelompok masyarakat sipil yang kemudian membentuk *the National Transitional Council* sebagai perwakilan dari masyarakat Libya.<sup>416</sup> Kemudian, dengan masuknya NATO sebagai pelaksana upaya PBB dalam menjaga perdamaian dan keamanan dunia, memperlihatkan adanya keterlibatan negara-negara dalam suatu upaya kolektif pada permasalahan tersebut. Terlihat dalam hal ini telah adanya secara efektif suatu pelaksanaan upaya bersenjata dengan intensitas yang cukup untuk secara substantif memberlakukan IHL.<sup>417</sup> Sehingga dapat dikatakan bahwa secara obyektif, *rationne materiae*, telah terbentuk *international armed conflict* yang memberlakukan pengaturan IHL di dalamnya.

Pendapat tersebut pula didukung oleh Human Rights Council yang dalam *Report of the International Commission of Inquiry to Investigate All Alleged Violations of International Human Rights Law in the Libyan Arab Jamahiriya* menyatakan bahwa penyerangan udara yang dilaksanakan oleh NATO membentuk adanya *international armed conflicts* di Libya.<sup>418</sup> Human Rights Council dalam hal ini pula menyimpulkan bahwa:

*“it concludes that the international armed conflict is legally separate to the continuing non-international armed conflict, and is thus a “co-existing international armed conflict”<sup>419</sup>.*

---

<sup>416</sup> Mehrdad Payandeh, “The United Nations, Military Intervention and Regime Change in Libya”, hal. 373.

<sup>417</sup> Gabriele Porretto dan Sylvain Vite, “The Application of International Humanitarian Law and Human Rights Law to International Organization”, hal. 34.

<sup>418</sup> 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, 17<sup>th</sup> Session, UN Doc. A/HRC/17/44, 1 Juni 2011, Par. 66.

<sup>419</sup> Ibid.

Ketentuan IHL dalam pelaksanaan *Operation Unified Protector* merupakan kewajiban yang harus dipenuhi NATO dan negara anggota, terutama pada *Geneva Convention (IV) Relative to the Protection of Civilian Person in Time of War* (yang selanjutnya disebut sebagai “*Geneva Convention IV*”) dan *Protocol Additional to the Geneva Conventions relating to the Protection of Victims of International Armed Conflicts (Protocol I)* (yang selanjutnya disebut sebagai “*Protocol I*”) yang sejalan dengan tujuan pelaksanaan *Operation Unified Protector* yakni perlindungan terhadap penduduk sipil di Libya. *Geneva Convention IV* mengatur mengenai perlindungan terhadap penduduk sipil secara keseluruhan dalam terjadinya *armed conflict*. *International armed conflict* telah terbukti terjadi di Libya sehingga kemudian pengaturan dalam *Geneva Conventions* berlaku dan harus diterapkan oleh para pihak dalam konflik yang terjadi di Libya. Dalam hal ini perlindungan diberikan kepada penduduk sipil yang tidak terlibat dalam pertempuran, anggota dari pasukan bersenjata yang tidak lagi ikut dalam pertempuran, dan kombatan yang cedera dalam penahanan, dan sebab-sebab lainnya di luar pertempuran yang terjadi.<sup>420</sup> Mereka haruslah diperlakukan secara manusiawi dengan pelarangan perlakuan:

*violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;*  
*(b) taking of hostages;*  
*(c) outrages upon personal dignity, in particular humiliating and degrading treatment;*  
*(d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.”<sup>421</sup>*

Dalam pelaksanaan *Operation Unified Protector*, perlindungan terhadap penduduk sipil haruslah dijunjung tinggi, dengan melaksanakan ketentuan yang terdapat dalam *Geneva Convention IV*.

---

<sup>420</sup> International Committee of the Red Cross, *Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention)*, ditandatangani pada 12 Agustus 1949, berlaku pada 21 Oktober 1950, 75 UNTS 287, <<http://www.unhcr.org/refworld/docid/3ae6b36d2.html>>, diakses pada 1 Juni 2012, Pasal 3.

<sup>421</sup> *Ibid.*

*Protocol I* mengatur prinsip dasar perlindungan warga sipil dalam kewajiban bagi para pihak dalam *international armed conflict* untuk membedakan setiap saat antara penduduk sipil dan kombatan, dan antara objek-objek sipil dan objek-objek militer, sehingga penyerangan hanya dapat dilaksanakan terhadap objek-objek militer saja.<sup>422</sup> Hal ini memperlihatkan adanya prinsip *distinction*, yakni suatu keharusan untuk mengidentifikasi dan membedakan antara penduduk sipil dan kombatan, serta target militer yang sah.<sup>423</sup> Pasal 52 (1) *Protocol I* juga menambahkan bahwa “*civilian objects shall not be the object of attack*”.<sup>424</sup> *Protocol I* juga mengatur mengenai permasalahan prinsip *proportionality* dalam upaya *use of force*. Prinsip *proportionality* mengharuskan dalam suatu penyerangan atau pengerahan kekuatan militer adanya keseimbangan antara upaya yang dilaksanakan dengan kerugian yang akan ditimbulkan terhadap masyarakat sipil.<sup>425</sup> Intinya prinsip *proportionality* memberikan batasan terhadap pelaksanaan upaya militer yang dilaksanakan dengan pencapaian tujuan perlindungan terhadap masyarakat sipil. Dalam hal ini NATO pada *Operation Unified Protector* terikat untuk mematuhi pelaksanaan IHL tersebut.

#### 4.1.3.3 *International Human Rights Law*

*Human Rights*, hak asasi manusia, ditafsirkan dapat berlaku “*always, everywhere, and to everyone*”.<sup>426</sup> *Human rights law* dalam hal ini mengatur keberlakuan hak asasi manusia, yang juga berlaku dalam hal terjadinya *armed conflicts*. Hak asasi manusia merupakan bagian yang esensial dari setiap manusia

<sup>422</sup> Yoram Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict*, (Cambridge:Cambridge University Press, 2004), hal. 115.

<sup>423</sup> Sherrod Lewis Bumgardner, *NATO Legal Deskbook*, ed. 2., (2010), <<https://transnet.act.nato.int/WISE/Library/Legal/LEGALDESKB>>, diakses pada 31 Mei 2012, hal. 249.

<sup>424</sup> International Committee of the Red Cross, Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), (8 Juni 1977), 1225 UNTS 3, <<http://www.unhcr.org/refworld/docid/3ae6b36b4.html>>, diakses pada 20 Mei 2012, Pasal 52 (1).

<sup>425</sup> Olivera Medenica, “Protocol I and Operation Allied Force: Did NATO Abide by Principles of Proportionality?”, hal. 12.

<sup>426</sup> Rene Provost, *International Human Rights and Humanitarian Law*, (Cambridge:Cambridge University Press, 2004), hal. 152.

yang harus dapat dihormati dan dijunjung tinggi oleh negara. Dalam Resolusi 1970 dan Resolusi 1973 sendiri, pelanggaran terhadap hak asasi manusia merupakan suatu dasar adanya pelaksanaan otorisasi Dewan Keamanan PBB terhadap upaya *Operation Unified Protector*. Dewan Keamanan menyatakan: “*deploring the gross and systemic violation of human rights*” dalam mukadimah Resolusi 1970 yang menjadi perhatian dalam permasalahan di Libya.<sup>427</sup> Sehingga terlihat bahwa dalam hal ini Dewan Keamanan PBB menjunjung hak asasi manusia dan pelaksanaan dari *human rights law* dalam *enforcement measures* yang dimandatkan.

Dewan Keamanan PBB telah menyatakan bahwa setiap pihak dalam konflik bersenjata (*armed conflict*) harus menjunjung tinggi kewajiban *human rights law* yang berlaku pada permasalahan tersebut.<sup>428</sup> Begitu pula dengan pelaksanaan *enforcement measures* yang akan dilaksanakan di Libya, NATO sebagai pihak dalam *armed conflict* yang terjadi harus menjunjung kewajiban dalam *international human rights law*. Dengan demikian pelaksanaan *Operation Unified Protector* harus sesuai dengan ketentuan dalam *international human rights law*.

#### 4.1.3.4 Peraturan Hukum Internasional Lainnya

NATO sebagai subyek hukum internasional dapat mengemban hak dan kewajiban dalam lalu lintas hukum internasional. Hak dan kewajiban tersebut dapat terbentuk dari perjanjian yang dibentuk oleh NATO ataupun berdasarkan peraturan hukum internasional yang dapat mengikat NATO sebagai suatu subyek hukum. Sebelumnya telah dijelaskan bahwa dalam pelaksanaan *Operation Unified Protector*, NATO terikat untuk memenuhi kewajibannya dalam *the law of use of force*, IHL, dan *international human rights law*. Peraturan hukum lainnya yang berlaku dalam pelaksanaan *Operation Unified Protector* dapat pula mengikat NATO sebagai suatu subyek hukum untuk mematuhi pengaturan tersebut.

---

<sup>427</sup> United Nations, Security Council Resolution 1970, Mukadimah.

<sup>428</sup> United Nations, *International Legal Protection of Human Rights in Armed Conflict*, (United Nations Publication, 2011), hal. 97.



Salah satunya contohnya dapat dilihat dalam pelaksanaan *Allied Maritime Command*, yang merupakan operasi militer NATO dalam pelaksanaan *arms embargo* di wilayah perairan Libya, NATO terikat pada peraturan hukum laut internasional. Hal tersebut diakui NATO dengan menyatakan bahwa dalam pelaksanaan *Operation Unified Protector* terikat pada kewajiban yang berhubungan dengan *international maritime law*, terutama dalam hal *safety of life at sea* (SOLAS) dan *search and rescue* (SAR), yang mewajibkan kapal-kapal NATO untuk menanggapi panggilan darurat di laut dan memberikan pertolongan seperlunya.<sup>429</sup> Maka pelaksanaan *Operation Unified Protector* NATO terikat pada pelaksanaan kewajiban NATO dalam hukum internasional.

#### **4.2 Tanggung Jawab North Atlantic Treaty Organization dan Negara Anggota dalam Pelaksanaan *Operation Unified Protector* di Libya pada Tahun 2011**

Pelaksanaan *Operation Unified Protector* telah diakhiri dengan dilaksanakannya operasi terakhir NATO AWACS, pesawat pengintai yang terbang untuk terakhir kalinya di atas wilayah udara Libya pada 31 Oktober 2011, dan dengan keluarnya kapal-kapal perang NATO dan negara anggota dari wilayah laut Libya pada keesokan harinya.<sup>430</sup> Pengakhiran *Operation Unified Protector* sejalan dengan berakhirnya otorisasi yang diberikan Dewan Keamanan PBB dengan dikeluarkannya Resolusi 2009 pada tanggal 16 September 2011. Dalam resolusi tersebut, Dewan Keamanan telah melihat adanya perkembangan situasi di Libya menjadi lebih baik daripada sebelumnya dan berharap akan kembalinya stabilitas Libya.<sup>431</sup>

Resolusi 2009 memperlihatkan adanya penarikan terhadap Resolusi 1970 dan Resolusi 1973.<sup>432</sup> Serta lebih jauh memperlihatkan adanya pengakhiran atas

---

<sup>429</sup> North Atlantic Treaty Organization, “Operation Unified Protector NATO-led Arms Embargo against Libya”.

<sup>430</sup> North Atlantic Treaty Organization, “NATO and Libya”.

<sup>431</sup> “Takes note of the developments in Libya, welcomes the improved situation there, and looks forward to stability in Libya”, (United Nations, Security Council Resolution 2009, UN Doc S/RES/2009, (16 September 2011), Par. 1).

pemberian otorisasi kepada negara dan organisasi internasional dalam pelaksanaan sistem keamanan kolektif di Libya, dengan menyatakan:

*“emphasis its intention to keep the measures imposed by paragraphs 6 to 12 of resolution 1973 (2011) under continuous review and underlines its readiness, as appropriate and when circumstances is permit, to lift those measures and to terminate authorization given to Member States in paragraph 4 of resolution 1973 (2011) in consultation with the Libyan authorities.”*<sup>433</sup>

Dalam hal ini dapat dilihat Dewan Keamanan PBB mencabut otorisasi yang diberikan kepada negara anggota ataupun organisasi internasional pada khususnya dalam paragraf 4 Resolusi 1973, yakni mengenai pelaksanaan *all necessary measures* dalam upaya perlindungan terhadap masyarakat sipil di Libya. Dengan demikian upaya yang dilakukan NATO, melalui *Operation Unified Protector*, dapat dinyatakan diberhentikan dengan dicabutnya otorisasi yang diberikan. Sehingga pada tanggal 31 Oktober 2011, NATO dengan resmi menyatakan telah berakhirnya *Operation Unified Protector* di Libya.

Sejalan dengan berakhirnya pelaksanaan *Operation Unified Protector* terdapat beberapa laporan mengenai pelaksanaan operasi tersebut dan keadaan di Libya oleh *Human Rights Council PBB*<sup>434</sup>, *Amnesty International*<sup>435</sup>, dan *Human Rights Watch*<sup>436</sup>, terutama dalam permasalahan pelaksanaan operasi udara dalam upaya perlindungan terhadap masyarakat sipil di Libya. Terdapat pula laporan dari *Council of Europe*<sup>437</sup> mengenai peristiwa yang terjadi di wilayah laut Libya pada

---

<sup>432</sup> “Recalling its resolutions 1970 (2011) of 25 February and 1973 (2011) of 17 March 2011”, (Ibid., Mukadimah).

<sup>433</sup> Ibid., Par. 20.

<sup>434</sup> United Nations Human Rights Council, Report of the International Commission of Inquiry on Libya, UN Doc. A/HRC/19/68, (2 Maret 2012).

<sup>435</sup> Amnesty International, Libya: the Forgotten Victims of NATO Strikes, <<http://www.amnesty.org/en/library/asset/MDE19/003/2012/en/8982a094-60ff-4783-8aa8-8c80a4fd0b14/mde190032012en.pdf>>, diakses pada 8 Mei 2012.

<sup>436</sup> Human Rights Watch, Unacknowledged Deaths: Civilian Casualties in NATO’s Air Campaign in Libya, (United States of America:Human Rights Watch, 2012), <<http://www.hrw.org/sites/default/files/reports/libya0512webwcover.pdf>>, diakses pada 14 Mei 2012.

saat pelaksanaan operasi laut oleh NATO dalam upaya pelaksanaan *arms embargo*.

*Human Rights Council* PBB telah dimandatkan untuk melaksanakan penyelidikan terhadap pelanggaran IHL di Libya dengan adanya Resolusi *Human Rights Council* PBB S-15/1 yang berjudul “*Situation of Human Rights in the Libyan Arab Jamahiriya*” dan membentuk adanya *international Commission of Inquiry on Libya*.<sup>438</sup> *Human Rights Council* PBB dalam penyelidikannya menemukan adanya insiden pelaksanaan *Operation Unified Protector* yang menewaskan masyarakat sipil dan merusak infrastruktur masyarakat, walaupun telah dilaksanakan dengan hati-hati.<sup>439</sup> Setidaknya terdapat lima serangan udara NATO yang dicatat oleh *International Commission of Inquiry on Libya* yang berdampak kepada masyarakat sipil dan tidak sesuai dengan ketentuan hukum internasional.<sup>440</sup> Penemuan tersebut juga dilaporkan oleh *Amnesty International* dan *Human Rights Watch* dalam laporannya yang menyebutkan terdapat beberapa warga sipil yang tidak terlibat dalam pertempuran (*hostilities*) menjadi korban dalam pelaksanaan serangan udara NATO di Libya. Menurut *Amnesty International*, sejumlah 55 warga sipil menjadi korban, termasuk di dalamnya 16 orang anak-anak dan 14 orang wanita, yang merupakan korban atas serangan udara NATO di Tripoli (5 orang), Zlitan (3 orang), Majer (34 orang), Sirte (9 orang) dan Brega (4 orang).<sup>441</sup>

Sedangkan laporan *Council of Europe* memperlihatkan insiden yang menewaskan 72 orang *asylum seeker* dan *refugees* di wilayah laut Libya, dengan tidak ditanggapinya *distress call* dari kapal yang ditumpangi ke-72 orang tersebut berkaitan dengan pelaksanaan *Operation Unified Protector* oleh NATO di

---

<sup>437</sup> Council of Europe, Lives Lost in the Mediterranean Sea: Who is Responsible?, <<http://assembly.coe.int/Documents/WorkingDocs/Doc11/EDOC12617.pdf>>, diakses pada 8 Mei 2012.

<sup>438</sup> United Nations Human Rights Council, Situation of Human Rights in the Libyan Arab Jamahiriya, UN Doc S-15/1, (25 Februari 2011).

<sup>439</sup> United Nations Human Rights Council, Report of the International Commission of Inquiry on Libya, Par. 86.

<sup>440</sup> Ibid.

<sup>441</sup> Amnesty International, Libya: the Forgotten Victims of NATO Strikes, hal. 6.

wilayah laut Libya.<sup>442</sup> Menurut laporan *Council of Europe*, pada tanggal 26 Maret 2011, kapal yang ditumpangi 72 orang tersebut berangkat meninggalkan wilayah Libya dari Tripoli, namun kapal tersebut mengalami keadaan bahaya di tengah-tengah wilayah laut Libya.<sup>443</sup> Kapal tersebut terombang-ambing di lautan dengan keadaan yang penuh sesak dengan 72 orang dan sedikit persediaan makanan. Sehingga akhirnya Kapten kapal mengirimkan sinyal tanda bahaya.<sup>444</sup> Namun, tidak ada kapal yang datang untuk menolong kapal yang dalam keadaan bahaya tersebut dan menewaskan 63 orang penumpang kapal. NATO pada saat tersebut sedang menjalankan *Allied Maritime Operation* di wilayah laut Libya disinyalir mengetahui adanya tanda bahaya tersebut, namun tidak mengambil tindakan yang segera untuk menolong kapal tersebut.<sup>445</sup>

Laporan-laporan tersebut memperlihatkan adanya beberapa pelanggaran hukum yang terjadi dalam pelaksanaan *Operation Unified Protector* di Libya. Sehingga dengan adanya fakta-fakta yang terungkap dalam laporan-laporan tersebut dapat memunculkan rezim tanggung jawab internasional atas pelanggaran yang terjadi dalam pelaksanaan sistem keamanan kolektif dengan memperlihatkan adanya *international wrongful act* yang dibuktikan berdasarkan adanya pelanggaran terhadap kewajiban internasional dan atribusi kepada subjek hukum yang bertanggung jawab.

#### **4.2.1 *International Wrongful Act* dalam Pelaksanaan *Operation Unified Protector***

Dalam melihat adanya tanggung jawab hukum dari suatu subyek hukum internasional unsur yang utama dan pertama yang harus dibuktikan adalah adanya *international wrongful act* sebagai landasan dalam melihat kesalahan dari suatu subyek hukum internasional. Seperti telah dinyatakan sebelumnya bahwa tanggung jawab internasional dari subyek hukum internasional muncul dengan

---

<sup>442</sup> Council of Europe, *Lives Lost in the Mediterranean Sea: Who is Responsible?*, hal, 3, par. 14.

<sup>443</sup> *Ibid.*, hal. 2, par. 2.

<sup>444</sup> *Ibid.*, par. 4.

<sup>445</sup> *Ibid.*, par. 8.

adanya *international wrongful act* yang dilakukan oleh subyek hukum internasional<sup>446</sup>. *International wrongful act* merupakan unsur utama adanya tanggung jawab internasional, terutama pula dalam melihat adanya tanggung jawab suatu entitas dalam hukum internasional baik negara maupun organisasi internasional. Seperti yang telah dijelaskan sebelumnya, bahwa unsur utama timbulnya tanggung jawab negara dan organisasi internasional adalah *international wrongful act*.<sup>447</sup> Pasal 2 DASR telah menyebutkan bahwa tanggung jawab negara muncul dalam adanya suatu *international wrongful act* dari tindakan suatu negara baik yang berupa tindakan aktif (*commission*) ataupun tindakan pasif (*omission*).<sup>448</sup> Kemudian adanya elemen *international wrongful act* dalam tindakan suatu negara dapat dilihat dengan dipenuhinya dua unsur dalam pelaksanaan tindakan, yakni (1) tindakan tersebut membentuk suatu pelanggaran terhadap kewajiban negara dalam hukum internasional dan (2) tindakan tersebut merupakan tindakan negara yang dapat secara sah diatribusikan kepada negara.

Hal ini dapat dilihat dalam kasus *Phosphates in Morocco* dan *United States Diplomatic and Consular Staff in Tehran Case*, yang memperlihatkan adanya gagasan *international wrongful act* dalam melihat lahirnya tanggung jawab negara atas pelaksanaan suatu tindakan. Lebih lanjut pula dijelaskan bahwa *international wrongful act* suatu negara dapat dilihat dengan menentukan, pertama adanya pelanggaran kewajiban negara dalam hukum internasional dan kedua menentukan apakah tindakan tersebut merupakan tindakan negara yang sah dengan melihat dapatkah tindakan tersebut kemudian diatribusikan kepada negara.<sup>449</sup>

Dalam melihat adanya tanggung jawab suatu organisasi internasional, ILC dalam DARIO menyatakan dalam Pasal 3 bahwa tanggung jawab dari organisasi

---

<sup>446</sup> C F Amerasinghe, "The Essence of the Structure of International Responsibility", hal. 6.

<sup>447</sup> Lihat kembali pembahasan 2.2.1.2 Unsur-Unsur Tanggung Jawab Negara, dan pembahasan 2.2.2.1 Unsur-Unsur Tanggung Jawab Organisasi Internasional pada Bab 2.

<sup>448</sup> International Law Commission, "Draft Articles on the Responsibility of States for Internationally Wrongful Acts", Pasal 2.

<sup>449</sup> International Court of Justice, *United States Diplomatic and Consular Staff in Tehran*, Judgment, ICJ Report 1980, hal 29, par. 56; Permanent Court of International Justice, *Phosphates in Morocco*, Judgment, 1938, PCIJ Series A/B, No. 74, hal. 10 dan hal. 28.

internasional muncul dengan adanya *international wrongful act* organisasi internasional dalam pelaksanaan tindakannya.<sup>450</sup> Pasal 4 DARIO menjelaskan unsur dalam melihat adanya *international wrongful act* adalah (1) bahwa tindakan tersebut merupakan tindakan yang dapat diatribusikan kepada organisasi internasional dan (2) membentuk adanya suatu pelanggaran atas kewajiban internasional yang mengikat kepada organisasi.<sup>451</sup> Konsep yang dituangkan oleh ILC dalam DARIO dapat pula dilihat sejalan dengan praktek yang ada, yakni salah satunya dalam *Advisory Opinion on the Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*. Dalam kasus, tersebut dinyatakan bahwa organisasi internasional adalah terikat atas kewajiban secara umum dalam hukum internasional, baik berdasarkan perjanjian atau hukum internasional secara umum.<sup>452</sup> Maka pelanggaran terhadap kewajiban hukum internasional mengakibatkan munculnya tanggung jawab dari organisasi internasional.

Dapat disimpulkan bahwa *international wrongful act* suatu entitas menimbulkan adanya tanggung jawab internasional entitas tersebut yang dapat dilihat dari adanya praktek-praktek negara dan serta kesimpulan yang dibentuk oleh ILC. Dengan demikian, dalam melihat tanggung jawab internasional dalam pelaksanaan *Operation Unified Protector* terlebih dahulu harus diperhatikan adanya *international wrongful act*, yakni adanya (1) pelanggaran terhadap suatu kewajiban internasional dan (2) atribusi tindakan kepada entitas yang tepat yang kemudian memperlihatkan entitas mana yang bertanggung jawab dalam kasus ini.

#### 4.2.1.1 Pelanggaran Kewajiban Internasional

Laporan-laporan dari badan internasional atas pelaksanaan *Operation Unified Protector* di Libya dapat menjadi titik awal dalam melihat adanya *international wrongful act*, terutama dalam hal melihat pelanggaran terhadap

---

<sup>450</sup> “every international wrongful act of an international organization entails the international responsibility of that organization” (International Law Commission, “Draft Articles on the Responsibility of International Organization”, Pasal 3).

<sup>451</sup> Ibid., Pasal 4.

<sup>452</sup> House of Lords, *R (on the application of Al-Jedda) (FC) v. Secretary of State for Defence*, UKHL 58, (2007), <<http://www.publications.parliament.uk/pa/ld/ldjudgmt.htm>>, diakses pada 4 April 2012.

kewajiban internasional pasukan, pada pelaksanaan sistem keamanan kolektif. Atas laporan *Human Rights Council PBB*, *Amnesty International*, dan *Human Rights Watch* mengenai korban dan kerugian dari pihak sipil atas penyerangan udara NATO, terdapat dua peristiwa penyerangan yang terjadi di Majer dan Zlitan yang menunjukkan adanya korban jiwa terbesar dalam pelaksanaan *Operation Unified Protector* di Libya. Peristiwa Majer merupakan peristiwa dengan korban masyarakat sipil terbanyak dalam pelaksanaan serangan udara NATO yakni sebanyak 34 warga sipil. Penyerangan terjadi pada 8 Agustus 2011 terhadap dua rumah warga sipil, yang salah satunya menjadi tempat penampungan warga yang terlantar (*displaced person*).<sup>453</sup> Menurut NATO, penyerangan dilaksanakan atas dasar indikasi bahwa kedua tempat tersebut merupakan “*staging base and military accommodation*” dari pasukan Gadaffi.<sup>454</sup> Namun, dalam penyelidikannya baik *Human Rights Council PBB*, *Amnesty International* ataupun *Human Rights Watch* tidak menemukan adanya aktivitas militer ataupun unsur-unsur militer lainnya di wilayah tersebut.<sup>455</sup>

Penyerangan di Zlitan terjadi pada 4 Agustus 2011, yakni terhadap rumah keluarga Mustafa al-Morabit yang berdampak pada terbunuhnya istri dan dua anaknya.<sup>456</sup> Menurut NATO, penyerangan dilaksanakan berdasarkan identifikasi rumah keluarga tersebut sebagai *Government senior commander’s command and control node* di wilayah Zlitan.<sup>457</sup> Namun, dalam laporannya, *Human Rights Council PBB*, *Amnesty International* ataupun *Human Rights Watch* tidak

---

<sup>453</sup> Human Rights Watch, *Unacknowledged Deaths: Civilian Casualties in NATO’s Air Campaign in Libya*, hal. 12.

<sup>454</sup> *Ibid.*

<sup>455</sup> United Nations Human Rights Council, *Report of the International Commission of Inquiry on Libya*, par. 621; Amnesty International, *Libya: the Forgotten Victims of NATO Strikes*, hal. 13; Human Rights Watch, *Unacknowledged Deaths: Civilian Casualties in NATO’s Air Campaign in Libya*, hal. 12.

<sup>456</sup> United Nations Human Rights Council, *Report of the International Commission of Inquiry on Libya*, par. 629.

<sup>457</sup> *Ibid.*, par. 630.

menemukan bukti atas indikasi tersebut, ataupun adanya aktivitas militer serta unsur-unsur militer.<sup>458</sup>

Dalam hal ini kedua penyerangan tersebut bukan merupakan suatu penyerangan terhadap objek militer yang merupakan target yang sah sesuai dengan ketentuan dalam IHL. Korban dalam penyerangan NATO di Majer dan Zlitan tidak terbukti telah ikut dalam pelaksanaan pertempuran, sehingga merupakan penduduk sipil bukan merupakan kombatan. Penyerangan terhadap penduduk sipil melanggar kewajiban yang terdapat dalam *Geneva Conventions IV* yang melarang adanya “*violence to life and person*” daripada penduduk sipil.<sup>459</sup> Hal ini pula tidak memperlihatkan adanya perlindungan terhadap penduduk sipil sesuai dengan tujuan utama otorisasi pelaksanaan *Operation Unified Protector* oleh Dewan Keamanan PBB dalam Resolusi 1970 dan 1973.

Penyerangan tersebut pula tidak sesuai dengan ketentuan dalam *Protocol I* yang memperlihatkan adanya prinsip *distinction* dan *proportionality*. Prinsip *distinction* yang mewajibkan NATO untuk membedakan antara warga sipil dan kombatan, serta target militer yang sah, yakni penyerangan hanya dapat dilaksanakan terhadap *military objectives*.<sup>460</sup> *Military objectives* yang dimaksud adalah benda-benda yang berdasarkan sifat, lokasi dan peruntukannya memberikan kontribusi terhadap tindakan militer dan terhadap pemusnahan objek tersebut dapat memberikan keuntungan militer.<sup>461</sup> Kedua penyerangan di Majer dan Zlitan, tidak memenuhi prinsip di atas. Kedua target berdasarkan sifatnya tidak memperlihatkan secara intrinsik adanya karakter militer, yakni tidak

---

<sup>458</sup> United Nations Human Rights Council, Report of the International Commission of Inquiry on Libya, par. 631; Amnesty International, Libya: the Forgotten Victims of NATO Strikes, hal. 10; Human Rights Watch, Unacknowledged Deaths: Civilian Casualties in NATO’s Air Campaign in Libya, hal. 13.

<sup>459</sup> International Committee of the Red Cross, *Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention)*, Pasal 3.

<sup>460</sup> “*In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives*”. (International Committee of the Red Cross, Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), Pasal 48).

<sup>461</sup> *Ibid*, Pasal 52 (2).



ditemukannya unsur-unsur militer dalam wilayah tersebut oleh *Human Rights Council PBB*, *Amnesty International*, dan *Human Rights Watch*. Berdasarkan lokasinya kedua target, baik yang berada di Majer maupun Zliten, bertempat pada daerah penduduk sipil yang memperbesar kemungkinan terhadap dampak pada penduduk sipil di sekitarnya. Berdasarkan peruntukannya, telah dijelaskan pada kedua target tersebut tidak diperuntukkan dalam pelaksanaan kekuatan militer. Sehingga dalam hal ini target yang diserang di Majer dan Zliten bukan merupakan *military objectives* melainkan merupakan *civilians object* yang berdasarkan Pasal 52 Protocol I tidak dapat dijadikan target penyerangan. Pada kedua tempat tidak ditemukan adanya *military objectives*, ataupun komponen-komponen militer lainnya. Sehingga dalam pelaksanaan penyerangan udara tersebut prinsip *distinction* telah dilanggar, yang mengakibatkan adanya pelanggaran kewajiban NATO dalam IHL.

Seperti yang telah dijelaskan sebelumnya, dalam laporan *Council of Europe*, ditemukan adanya pelanggaran atas kewajiban NATO terhadap *International Maritime Law*, terutama dalam pelaksanaan kewajiban untuk memberikan pertolongan terhadap kapal dalam keadaan keadaan berbahaya (*distress*). Kewajiban tersebut tertuang dalam Pasal 98 UNCLOS dan dalam *the 1974 International Convention for Safety of Life at Sea* (yang untuk selanjutnya disebut sebagai “SOLAS 1974”) serta *the 1979 International Convention on Maritime Search and Rescue* (yang untuk selanjutnya disebut sebagai “SAR 1979”). Pasal 98 UNCLOS menyatakan bahwa setiap negara untuk mewajibkan master kapal berkebangsaan negara tersebut untuk *assist person in distress, proceed to the rescue of persons and render assistance in collision situations*.<sup>462</sup>

---

<sup>462</sup> Pasal 98: “1) *Every State shall require the master of a ship flying its flag, in so far as he can do so without serious danger to the ship, the crew or the passengers:*

- (a) *to render assistance to any person found at sea in danger of being lost;*
- (b) *to proceed with all possible speed to the rescue of persons in distress, if informed of their need of assistance, in so far as such action may reasonably be expected of him;*
- (c) *after a collision, to render assistance to the other ship, its crew and its passengers and, where possible, to inform the other ship of the name of his own ship, its port of registry and the nearest port at which it will call.*

2) *Every coastal State shall promote the establishment, operation and maintenance of an adequate and effective search and rescue service regarding safety on and over the sea and, where circumstances so require, by way of mutual regional arrangements cooperate with neighboring States for this purpose.* (United Nation, *United Nations Convention on the Law of the Sea 1982*, (10 Desember 1982)).

Kewajiban tersebut kemudian lebih diperluas dalam SOLAS 1974 dan SAR 1979. SOLAS 1974 memperlihatkan adanya kewajiban bagi negara anggota untuk menjunjung keselamatan pada wilayah laut.<sup>463</sup> SAR 1974 memperlihatkan adanya kewajiban pelaksanaan pencarian dan penyelamatan (*search and rescue*) terhadap individu yang dalam keadaan bahaya di wilayah laut.<sup>464</sup> Kedua instrumen tersebut melengkapi UNCLOS dengan mengukuhkan kewajiban untuk memberikan bantuan kepada kapal dalam keadaan bahaya (*to render assistance*) tanpa mempertimbangkan nasionalitas, status atau hal-hal lainnya dalam memberikan bantuan.<sup>465</sup>

Walaupun dalam ketentuan tersebut dijelaskan bahwa pelaksanaan kewajiban pemberian pertolongan hanya mengikat negara, namun NATO dalam hal ini mengakui adanya kewajiban yang harus dihormati dan dilaksanakan dalam pelaksanaan *Operation Unified Protector* di Libya terutama dalam pelaksanaan operasi di wilayah laut.<sup>466</sup> NATO dalam laporan *Council of Europe* tidak mengindahkan adanya kapal dalam keadaan *distress* yang ditumpangi 72 warga Libya di sekitar wilayah laut Libya dalam wilayah operasi laut *Operation Unified Protector*. Peristiwa tersebut mengakibatkan tewasnya 63 penumpang dengan hanya 9 orang yang selamat. NATO dalam hal ini tidak melaksanakan kewajiban

---

<sup>463</sup> *Chapter V Safety of Navigation, Regulation 10: "1) The master of a ship at sea, on receiving a signal from any source that a ship or aircraft or survival craft thereof is in distress, is bound to proceed with all speed to the assistance of the persons in distress informing them if possible that he is doing so. If he is unable or, in the special circumstances of the case, considers it unreasonable or unnecessary to proceed to their assistance, he must enter in the logbook the reason of failing to proceed to the assistance of their persons in distress".* (International Conference on Safety of Life at Sea, *the 1974 International Convention for Safety of Life at Sea*, ditandatangani di London pada 1 November 1974, <<http://www.imo.org/KnowledgeCentre/ReferencesAndArchives/HistoryofSOLAS/Documents/SOLAS%201974%20Final%20Act%20and%20Convention%20with%20Proces%20bverbal%20of%20rectification%20of%2022%20December%201982.pdf>>, diakses pada 2 Juni 2012).

<sup>464</sup> International Maritime Organization, *the 1979 International Convention on Maritime Search and Rescue*, ditandatangani di Hamburg pada 27 April 1979, <<http://www.imo.org/About/Conventions/ListOfConventions/Pages/International-Convention-on-Maritime-Search-and-Rescue-%28SAR%29.aspx>>, diakses pada 2 Juni 2012, Bab 2.

<sup>465</sup> Council of Europe, *Lives Lost in the Mediterranean Sea: Who is Responsible?*, hal. 10, par. 52.

<sup>466</sup> Lihat pernyataan NATO; "*All NATO maritime units are fully aware of their responsibilities with regard to the International Maritime Law regarding Safety of Life at Sea (SOLAS)*". (North Atlantic Treaty Organization, "Operation Unified Protector NATO-led Arms Embargo against Libya").

dalam hukum internasional, yakni khususnya dalam *International Maritime Law*, yang merupakan suatu pelanggaran.

Pelanggaran kewajiban tersebut merupakan salah satu unsur dari penentuan adanya *international wrongful act* dari suatu subyek hukum internasional.<sup>467</sup> Dalam hal ini adanya *international wrongful act* dalam *Operation Unified Protector* telah terlihat dengan tidak dipenuhinya unsur pertama, yakni adanya pelanggaran terhadap kewajiban-kewajiban IHL dan *International Maritime Law*.

#### 4.2.1.2 Prinsip Atribusi

Setelah terbentuknya unsur pelanggaran kewajiban internasional dalam pelaksanaan *Operation Unified Protector*, selanjutnya untuk melihat adanya tanggung jawab internasional pada NATO ataupun negara anggotanya, perlu kemudian dilihat unsur kedua dalam *international wrongful act* yakni atribusi daripada tindakan pelanggaran kewajiban internasional yang ada kepada NATO ataupun negara anggota. Dalam hal ini, prinsip atribusi berhubungan dengan DARIO dan DASR sebagai aturan umum atribusi kepada organisasi internasional dan negara. Atribusi dalam hal ini melihat adanya satu kondisi yang melihat kaitan terhadap suatu tindakan kepada suatu entitas, baik kepada organisasi internasional ataupun negara.

Dalam DASR dinyatakan bahwa prinsip dasar atribusi tindakan negara adalah setiap tindakan organ negara merupakan tindakan negara yang sah. Hal ini dapat dilihat dalam Pasal 4 DASR, yang menyatakan:

*“the conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of a state”*.<sup>468</sup>

---

<sup>467</sup> International Law Commission, “Draft Articles on the Responsibility of States for Internationally Wrongful Acts”, Pasal 1; International Law Commission, “Draft Articles on the Responsibility of International Organization”, Pasal 4.

<sup>468</sup> International Law Commission, “Drafts Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries 2001”, pasal 4.

Bahwa setiap tindakan organ negara yang sah, baik dalam pelaksanaan fungsi legislatif, eksekutif, maupun yudikatif, berdasarkan hukum nasional negara, adalah dapat diatribusikan kepada negara. Maka tindakan tersebut merupakan tindakan negara yang sah.

Dalam DARIO, prinsip dasar atribusi tertuang dalam Pasal 6, yang menyatakan bahwa:

*“the conduct of an organ or agent of an international organization in the performance of functions of that organ or agent shall be considered an act of that organization under international law, whatever position the organ or agent holds in respect of the organization.”*<sup>469</sup>

Sama halnya dengan atribusi terhadap negara, suatu tindakan dari organ atau agen organisasi internasional yang sah merupakan tindakan dari organisasi internasional dalam hukum internasional. Dapat disimpulkan dalam hal ini secara umum prinsip atribusi memperlihatkan adanya hubungan antara *international wrongful act* yang terjadi, dilaksanakan oleh organ atau agen suatu entitas, dengan entitas tersebut, baik negara maupun organisasi internasional.

Penerapan prinsip atribusi dapat pula dilihat pada kasus Behrami, Saramati dan Al-jedda yang merupakan kasus-kasus terbaru yang mempersalahkan adanya tanggung jawab negara dan organisasi internasional dalam pelaksanaan sistem keamanan kolektif.<sup>470</sup> Secara singkat ketiga kasus dapat dilihat memiliki kesamaan, yakni ketiganya memperlihatkan adanya permasalahan penentuan tanggung jawab kepada entitas, negara atau organisasi internasional, dalam pelaksanaan *peacekeeping operations* yang merupakan bagian dari sistem keamanan kolektif PBB. Untuk itulah prinsip atribusi pada kasus-kasus tersebut menjadi penentu dalam melihat tanggung jawab dari organisasi internasional atau negara anggotanya.

---

<sup>469</sup> International Law Commission, “Draft Articles on the Responsibility of International Organization”, Pasal 6.

<sup>470</sup> Lihat 2.2.2.2. Konsep Tanggung Jawab Organisasi Internasional dalam Praktek pada Bab 2.

Pada kasus Behrami dan Saramati, *European Court of Human Rights* memutuskan bahwa pengadilan tidak berwenang dalam menyelesaikan perkara atas dasar bahwa entitas yang bertanggung jawab terhadap pelanggaran hak asasi manusia tersebut adalah PBB yang memegang *ultimate command and control* terhadap pelaksanaan operasi KFOR dan UNMIK yang dijalankan dalam *unified command and control*.<sup>471</sup> Pengadilan menerapkan prinsip atribusi yang menyatakan bahwa agen negara dalam hal ini secara sah berada di bawah *effective control* daripada organisasi internasional, yakni PBB dengan pelaksanaan *unified command and control* dalam *peacekeeping operation*.<sup>472</sup> Kriteria utama dalam penentuan atribusi adalah derajat *effective control* yang dilaksanakan suatu entitas dalam suatu operasi. Dapat dilihat kemudian bahwa tindakan tersebut diatribusikan kepada entitas yang memiliki kontrol terhadap agen yang melaksanakan tindakan secara keseluruhan. Bahwa kemudian negara mengirimkan pasukannya dalam pelaksanaan *peacekeeping operations* tidak berarti bahwa pasukan bertindak untuk dan atas perintah negara.

Namun, dalam kasus Al-jedda, *House of Lords* Inggris mempunyai pandangan yang berbeda dalam melihat entitas yang bertanggung jawab atas pelanggaran hak asasi manusia yang terjadi. *House of Lords* tidak melihat adanya *effective control* dari PBB dalam pembentukan pasukan koalisi di Irak.<sup>473</sup> Dewan Keamanan PBB tidak memberikan delegasi kewenangan kepada Inggris dalam hal pembentukan pasukan bersama dengan negara-negara lainnya dalam pelaksanaan operasi, melainkan dalam hal ini Dewan Keamanan PBB memberikan otorisasi kepada negara-negara untuk pelaksanaan tindakan yang tidak dapat dilaksanakannya.<sup>474</sup> Otorisasi dalam hal ini memperlihatkan pemberian legalitas terhadap tindakan yang dilakukan oleh negara dan tidak memperlihatkan adanya kontrol dari PBB terhadap tindakan tersebut. *House of Lords* memberikan suatu

---

<sup>471</sup> European Court of Human Rights, *Grand Chamber Decision as to the Admissibility of Behrami and Behrami v. France and Saramati v. France, Germany and Norway*, 2 Mei 2007, <<http://cmiskp.echr.coe.int/tkp197/viewhbk.asp?sessionId=85174712&s>>, par. 141.

<sup>472</sup> *Ibid*, par. 29 dan par. 121.

<sup>473</sup> House of Lords, *R (on the application of Al-Jedda) (FC) v. Secretary of State for Defence*, UKHL 58, (2007), par. 23.

<sup>474</sup> *Ibid*.

kesimpulan bahwa pembentukan pasukan internasional di Irak bukanlah atas perintah PBB, tidak dibentuk atas *effective control* PBB.<sup>475</sup> Sehingga dalam hal ini PBB tidak memegang *effective control* terhadap pasukan negara-negara dalam pasukan internasional tersebut. Negara tetap memegang kendali terhadap pasukannya sebagai suatu agen yang sah dari negara dan kesemua tindakan agen tersebut secara sah dapat diatribusikan kepada negara.

Maka, prinsip atribusi dapat dinyatakan sebagai suatu gagasan yang memperlihatkan hubungan antara agen atau pelaksana tindakan dengan entitas dalam hukum internasional yang bertanggung jawab atas suatu tindakan. Secara umum, setiap tindakan yang dilaksanakan agen yang sah dari negara ataupun organisasi internasional merupakan tanggung jawab dari negara dan organisasi internasional tersebut. Namun, dalam hal agen-agen dari negara dan organisasi internasional berada dalam satu komando yang menjadi penentu utama atribusi tindakan terhadap entitas hukum internasional adalah dengan melihat *direction and control* utama terhadap pelaksanaan operasi, yang dalam DARIO ditentukan dengan melaksanakan *effective control test* terhadap pelaksanaan operasi.

Dalam suatu *peace operation*, personil militer suatu negara tidaklah bertindak sebagai agen dari negara, akan tetapi personil militer berada di bawah kekuasaan dari PBB ataupun suatu organisasi internasional.<sup>476</sup> Dalam *Operation Unified Protector*, kondisi seperti tersebut terlihat, negara-negara anggota NATO berkontribusi dalam pelaksanaan operasi dengan memberikan kekuatan militer di bawah komando NATO.<sup>477</sup> Komando politik dipegang oleh *North Atlantic Council*, dan komando operasional dalam operasi dipegang oleh *Allied Joint Force Command*.<sup>478</sup> Apabila kemudian atribusi *international wrongful act* yang telah terjadi dalam *Operation Unified Protector* dilaksanakan berdasarkan prinsip umum atribusi maka tindakan tersebut dapat diatribusikan baik kepada negara

---

<sup>475</sup> *Ibid.*, par. 24.

<sup>476</sup> Kjetil Mujezinovic Larsen, "Attribution of Conduct in Peace Operations: the 'Ultimate Authority and Control' test", *European Journal of International Law*, (2008), hal. 3.

<sup>477</sup> North Atlantic Treaty Organization, "Operation Unified Protector: Key Facts and Figures".

<sup>478</sup> North Atlantic Treaty Organization, "Operation Unified Protector: Command and Control".

anggota, yang dalam hal ini kekuatan militernya langsung terlibat dalam pelaksanaan tindakan, ataupun NATO sebagai keseluruhan pelaksana wewenang operasi.

Untuk dapat melihat secara jelas atribusi dalam kasus ini, dapat dilihat adanya unsur *command and control* yang utama, yang memperlihatkan hubungan antar pasukan *Operation Unified Protector* dengan entitas yang dapat bertanggung jawab atas *international wrongful act* yang terjadi. Terdapat dua tes yang dapat dilakukan dalam melihat *command and control*, yakni (1) *effective control test* dan (2) *exclusive direction and control test*. Dalam *effective control test*, pengatribusian suatu tindakan kepada organisasi internasional ataupun negara didasarkan pada adanya *effective control* atas tindakan tersebut.<sup>479</sup> *Effective Control* yang dimaksud adalah “*the factual control that is exercised over the specific conduct taken by the organ or agent placed at the receiving organization’s disposal*”.<sup>480</sup> Sedangkan *exclusive direction and control test*, dalam hal ini adalah atribusi tindakan terhadap suatu entitas apabila entitas tersebut melaksanakan *exclusive direction and control* terhadap tindakan tersebut.<sup>481</sup> *Exclusive control* dalam hal ini memperlihatkan adanya kontrol terhadap suatu tindakan yang spesifik, tidak secara luas terhadap suatu operasi.<sup>482</sup>

Seperti yang telah disebutkan sebelumnya, bahwa secara keseluruhan *command and control Operation Unified Protector* berada pada NATO, di mana *North Atlantic Council* bertindak dalam pelaksanaan komando politik dan *Allied Jointed Force Command* melaksanakan komando dalam tindakan operasi yang ada, yang di dalamnya dibagi menjadi operasi udara yang dikomandoi oleh *Allied Air Command* dan operasi laut yang dikomandoi oleh *Allied Air Command*. *Effective control test* dalam hal ini telah memperlihatkan adanya *effective control* terhadap keseluruhan operasi, terhadap kekuatan militer negara anggota oleh

---

<sup>479</sup> Caitlin A Bell, “Reassessing Multiple Attribution: the International Law Commission and the Behrami and Saramati Decision”, *International Law and Politics*, Vol. 42, hal. 514.

<sup>480</sup> *Ibid.*

<sup>481</sup> Kjetil Mujezinovic Larsen, “Attribution of Conduct in Peace Operations: the ‘Ultimate Authority and Control’ test”, hal. 5.

<sup>482</sup> *Ibid.*

NATO. Sehingga dengan *effective control test*, NATO merupakan entitas yang dapat bertanggung jawab atas *international wrongful act* yang terjadi.

*Exclusive direction and control test* apabila diaplikasikan dalam kasus ini, perlu dilihat secara spesifik *exclusive control* dalam tindakan *international wrongful act* yang terjadi yakni dalam upaya penyerangan udara dan upaya operasi laut yang dilaksanakan. Kekuatan militer udara dan laut dalam pelaksanaan *Operation Unified Protector* merupakan kontribusi negara, namun mereka tidaklah bertindak untuk negara sebagai agen atau organ negara. Kekuatan militer tersebut berada di bawah kewenangan NATO dalam hal ini pada *Allied Air Command* dan *Allied Maritime Command*. Sehingga dengan tes ini pula dapat dilihat adanya atribusi yang tepat dilihat kepada NATO sebagai entitas yang dalam hal ini bertanggung jawab atas tindakan tersebut. Sehingga dari prinsip atribusi ini dapat dilihat bahwa NATO memegang *effective control* secara keseluruhan operasi, negara anggota hanya memberikan pasukannya untuk dapat dikendalikan oleh NATO. Maka unsur atribusi dalam hal ini terpenuhi dan telah terbentuk adanya *international wrongful act* dari NATO dalam *Operation Unified Protector*.



## BAB 5 PENUTUP

### 5.1 Kesimpulan

#### 5.1.1 Konsep Tanggung Jawab Organisasi Internasional dalam Hukum Internasional

Konsep tanggung jawab internasional merupakan gagasan yang didasarkan pada kemampuan dari suatu entitas dalam hukum internasional untuk dapat bertindak dan bertanggung jawab atas tindakannya dalam hukum internasional. Kemampuan tersebut didasarkan kepada adanya personalitas hukum dari suatu entitas dalam hukum internasional. Oleh karena itu pada awalnya, tanggung jawab dalam hukum internasional hanya dilihat berhubungan dengan negara yang merupakan subjek hukum utama dari hukum internasional. Negara dalam hal ini dianggap memiliki personalitas hukum dalam hukum internasional dan pada awalnya merupakan satu-satunya subyek hukum internasional.

Namun, dengan kemunculan organisasi internasional dalam kancah hukum internasional, masyarakat internasional mulai menganggap bahwa negara bukanlah satu-satunya entitas yang memiliki personalitas hukum. Entitas lainnya, salah satunya organisasi internasional, dapat pula memiliki personalitas hukum. Organisasi internasional dalam hal ini dilihat memiliki suatu personalitas hukum yang dihubungkan dengan adanya *volonté distinct* dari organisasi dalam pelaksanaan tugas dan fungsinya. Walaupun organisasi internasional merupakan badan yang dibentuk negara, namun dalam pelaksanaan fungsinya secara efektif terlihat bahwa organisasi internasional merupakan suatu badan yang terpisah dari negara anggotanya yang memperlihatkan adanya *volonté distinct* dari organisasi internasional. Sehingga organisasi internasional merupakan subyek hukum internasional yang memiliki personalitas hukum dan sebagai konsekuensinya organisasi internasional dapat dinyatakan bertanggung jawab atas tindakannya.

Dalam melihat tanggung jawab organisasi internasional, sama halnya dengan tanggung jawab negara, unsur yang utama adalah adanya *international wrongful act* yang terjadi dalam tindakan organisasi. *International wrongful act* tersebut dalam DARIO, yang dibentuk oleh ILC, dan praktik-praktik negara, dapat

ditentukan berdasarkan dua unsur utama, yakni (1) adanya suatu pelanggaran terhadap kewajiban internasional dan (2) bahwa tindakan tersebut merupakan tindakan yang sah dari organisasi internasional yang dapat dihubungkan dengan organisasi internasional berdasarkan pada prinsip atribusi.

Maka sebagai subyek hukum yang memiliki personalitas hukum dalam lalu lintas hukum internasional, organisasi internasional dapat dikatakan memiliki tanggung jawab dalam suatu tindakan dari organisasi yang sah dan merupakan suatu pelanggaran terhadap kewajiban internasional. Pelanggaran kewajiban internasional dalam hal ini dapat berupa pelanggaran kewajiban atas perjanjian internasional ataupun terhadap kewajiban internasional yang mengikat kepada organisasi internasional berdasarkan prinsip umum hukum internasional. Serta tindakan tersebut telah terbukti merupakan tindakan dari organisasi yang sah, yang dapat diatribusikan kepada organisasi internasional sebagai subyek hukum internasional.

### **5.1.2 Peran Organisasi Internasional dalam Sistem Keamanan Kolektif (*Collective Security*)**

Sistem keamanan kolektif merupakan gagasan akan adanya suatu pengaturan bersama dari negara-negara untuk pelaksanaan penjagaan keamanan bersama. Gagasan utama dari sistem keamanan kolektif tercermin dalam upaya pembentukan suatu susunan organisasi dari negara-negara yang bertujuan dan berfungsi sebagai suatu pengaturan atas keamanan bersama dari para anggota organisasi. Kemudian sistem keamanan kolektif dapat terlihat dilembagakan ke dalam Piagam PBB yang merupakan suatu organisasi yang dibentuk dalam pelaksanaan penjagaan dan keamanan dunia.

Sistem keamanan kolektif PBB bertumpu kepada tujuan dari PBB dalam menjaga keamanan dan perdamaian dunia secara keseluruhan. Mekanisme sistem keamanan kolektif PBB dapat dilihat secara keseluruhan dalam Bab VI Piagam PBB yang mengatur penyelesaian permasalahan dengan cara damai (*peaceful settlement of disputes*), Bab VII Piagam PBB yang mengatur pelaksanaan upaya paksa yang dapat diberikan kepada negara yang melanggar sistem keamanan kolektif (*enforcement measures*) serta pula mengatur permasalahan *self-defense*

dari negara anggota PBB, dan pada Bab VIII Piagam PBB yang memperlihatkan adanya hubungan antara PBB dan organisasi regional dalam pelaksanaan sistem keamanan kolektif (*regional arrangements*). Kesemua pengaturan tetap memperlihatkan keutamaan peran PBB, yakni Dewan Keamanan PBB dalam pelaksanaan setiap upaya untuk menjaga keamanan dan perdamaian dunia.

Sehingga organisasi internasional lainnya, termasuk organisasi pertahanan regional, dalam hal ini melaksanakan sistem keamanan kolektif PBB yang berada di bawah subordinasi dewan keamanan PBB. Bab VIII Piagam PBB memperlihatkan peranan yang besar dari organisasi pertahanan regional yang berhubungan dengan Dewan Keamanan PBB dalam pelaksanaan upaya sistem keamanan kolektif. Namun, subordinasi PBB tersebut tidak sepenuhnya mengikat kepada semua organisasi pertahanan regional, contohnya kepada NATO.

NATO merupakan organisasi pertahanan regional yang dibentuk secara eksklusif dibentuk dalam pelaksanaan *collective self-defense* dari negara anggotanya berdasarkan Pasal 51 pada Bab VII Piagam PBB. Namun, hal ini tidak membatasi peran NATO pada hanya pelaksanaan *collective self-defense*. Terlihat banyaknya operasi yang dilaksanakan oleh NATO adalah merupakan implementasi dari upaya sistem keamanan kolektif PBB. Pelaksanaan sistem keamanan kolektif PBB oleh NATO didasarkan kepada adanya otorisasi dari Dewan Keamanan PBB atas tindakan yang diperlukan dalam penjagaan keamanan dan perdamaian dunia yang masih merupakan upaya pelaksanaan sistem keamanan kolektif.

Sehingga dapat disimpulkan bahwa organisasi internasional, khususnya organisasi pertahanan regional berperan dalam pelaksanaan sistem keamanan kolektif PBB yakni sebagai pelaksana daripada kewenangan PBB dalam penjagaan dan keamanan dunia. Hal ini diperlihatkan dari adanya upaya otorisasi dan subordinasi dari Dewan Keamanan PBB terhadap organisasi pertahanan regional dalam pelaksanaan sistem keamanan kolektif.

### 5.1.3 Tanggung Jawab Negara Anggota dan *North Atlantic Treaty Organization* atas Pelanggaran Hukum dalam Pelaksanaan *Operation Unified Protector* di Libya pada Tahun 2011.

*Operation Unified Protector* di Libya pada Tahun 2011 merupakan salah satu upaya pelaksanaan sistem keamanan kolektif PBB yang dilaksanakan oleh NATO. Dalam hal ini, NATO tidaklah bertindak dalam pelaksanaan upaya *collective self-defense* seperti yang tertuang dalam piagam pembentukannya namun, NATO melaksanakan otorisasi yang diberikan oleh Dewan Keamanan PBB kepada negara ataupun organisasi internasional yang berkehendak untuk bertindak dalam penjagaan keamanan dan perdamaian dunia. Otorisasi tersebut dapat dilihat dalam Resolusi 1970 dan Resolusi 1973 yang dikeluarkan oleh Dewan Keamanan PBB dalam menjawab situasi yang terjadi di Libya.

Resolusi 1970 dan Resolusi 1973 memberikan legalitas atas pelaksanaan upaya paksa oleh NATO dan negara anggotanya dalam pelaksanaan *Operation Unified Protector*, yakni termasuk juga upaya *use of force* yang perlu dilaksanakan untuk menjaga keamanan dan perdamaian dunia. Dalam pelaksanaan *Operation Unified Protector* dapat terlihat adanya konsep tanggung jawab internasional apabila kemudian terdapat *international wrongful act* yang terjadi. Dalam hal ini terlihat adanya hubungan antara pelaksanaan sistem keamanan kolektif dan tanggung jawab internasional.

Sesuai dengan prinsip dasar dari tanggung jawab internasional, untuk melihat adanya tanggung jawab suatu subyek hukum pertama kali harus dibuktikan adanya pelanggaran terhadap kewajiban internasional dalam pelaksanaan *Operation Unified Protector* di Libya. Laporan-laporan yang dikeluarkan oleh badan internasional, yakni antara lain *Human Rights Council* PBB, *Amnesty International*, *Human Rights Watch* dan *Council of Europe*, memperlihatkan fakta-fakta mengenai terjadinya pelanggaran kewajiban internasional dalam pelaksanaan *Operation Unified Protector* di antaranya adalah pelanggaran terhadap kewajiban yang tertuang dalam IHL dan *International Maritime Law*. Beberapa penyerangan yang dilaksanakan dalam *Operation Unified Protector* tersebut melanggar ketentuan prinsip *distinction* dan prinsip *proportionality* yang mengakibatkan jatuhnya korban masyarakat sipil. Hal ini

juga telah melanggar tujuan pelaksanaan operasi yakni dalam memberikan perlindungan kepada masyarakat sipil di Libya. Pelanggaran *International Maritime Law* terlihat dari adanya kelalaian dalam *Operation Unified Protector* dalam pemberian pertolongan kepada kapal yang berada dalam keadaan berbahaya (*distress*) dalam wilayah laut Libya. Sehingga dengan demikian kesalahan tersebut telah memperlihatkan adanya pelanggaran terhadap kewajiban internasional yang mengikat kepada NATO dan negara anggota dalam *Operation Unified Protector*.

Selanjutnya, dalam melihat tanggung jawab subyek hukum atas pelanggaran tersebut perlu dilihat pula bahwa tindakan yang terjadi merupakan tindakan yang sah dan dapat dihubungkan kepada subyek hukum internasional. Dalam hal ini prinsip atribusi kemudian dapat memberikan jawab terhadap entitas yang bertanggung jawab. *Operation Unified Protector* dalam hal ini merupakan suatu bentuk operasi gabungan dari angkatan bersenjata negara dengan NATO dalam upaya sistem keamanan kolektif, sehingga unsur *command and control* menjadi penting dalam pengatribusian tindakan pelanggaran kewajiban internasional. NATO merupakan pemegang utama *command and control* dalam pelaksanaan operasi, yakni dengan memegang secara penuh terhadap komando politis dan komando operasional dari *Operation Unified Protector*. Berdasarkan *effective control test* dan *exclusive direction and control test* terlihat bahwa tindakan pelanggaran kewajiban internasional dapat diatribusikan kepada NATO sebagai pemegang pengendali utama, bukan kepada negara maupun kepada PBB.

Negara dalam hal ini tidak memegang kendali atas pasukannya yang telah dilibatkan dalam operasi. PBB dalam hal ini pula tidak memegang kendali dalam upaya tersebut, yang hanya memberikan otorisasi terhadap pelaksanaan *Operation Unified Protector*. Sehingga dapat disimpulkan bahwa telah terlihat adanya *International Wrongful Act* dari NATO dalam pelaksanaan *Operation Unified Protector* di Libya pada tahun 2011.

## 5.2 Saran

Kasus *Operation Unified Protector* NATO di Libya pada tahun 2011 tersebut memperlihatkan adanya tanggung jawab organisasi internasional dan

hubungannya dengan tanggung jawab negara anggota organisasi. Pembentukan DARIO memperlihatkan perkembangan sejarah dalam pekerjaan ILC selama 60 tahun dalam membahas topik tanggung jawab internasional. Permasalahan utama dalam kasus tersebut adalah bagaimana melihat entitas yang bertanggung jawab dalam pelaksanaan operasi bersama yang dilaksanakan oleh organisasi internasional dan negara.

DARIO dalam hal ini telah memperlihatkan adanya pengaturan yang umum mengenai atribusi tindakan terhadap suatu organisasi internasional dalam pelaksanaan operasi bersama dengan negara. Prinsip-prinsip yang diatur dalam DARIO secara jelas telah memperlihatkan keadaan-keadaan di mana organisasi internasional merupakan subyek hukum yang bertanggung jawab atas *international wrongful act* yang terjadi. Salah satunya dengan memperlihatkan adanya prinsip *effective control test* dalam melihat *control and command* sebagai penentu atribusi tindakan dalam suatu operasi bersama. DARIO telah pula dapat membentuk adanya tanggung jawab organisasi internasional sebagai subyek hukum internasional selain dari negara.

Sehingga dapat dinyatakan bahwa DARIO dalam hal ini telah dapat setidaknya memberikan pengaturan yang umum dalam melihat tanggung jawab organisasi internasional dalam hukum internasional, dan telah dapat memperlihatkan prinsip-prinsip umum dalam pelaksanaan prinsip atribusi tindakan dalam hukum internasional. Maka dari itu, penulis menyarankan bahwa DARIO yang telah sampai pada drafts hasil dari *2<sup>nd</sup> reading* pada ILC untuk kemudian direkomendasikan kepada Majelis Umum PBB untuk kemudian dapat diambil tindakan sesuai dengan ketentuan yang ada dan pada akhirnya untuk dapat memberikan rekomendasi kepada negara anggota PBB untuk menerima DARIO menjadi suatu konvensi yang mengikat. Dengan demikian, pengaturan terhadap permasalahan tanggung jawab organisasi internasional dan hubungannya dengan tanggung jawab negara dapat menjadi lebih jelas dengan adanya pengaturan sebagai dasar hukumnya.

## DAFTAR PUSTAKA

### Buku

- Abass, Ademola. *Regional Organizations and the Development of Collective Security: Beyond Chapter VIII of the UN Charter*. Oxford:Hart Publishing. 2004.
- Amerasinghe, C F. *Principles of the Institutional Law of International Organization*. ed. 2. Cambridge:Cambridge University Press. 2005.
- Arend, Anthony Clark dan Robert J. Beck. *International Law and the Use of Force : Beyond the UN Charter Paradigm*. New York:Routledge. 1995.
- Barkin, J Samuel. *International Organization: Theories and Institution*. ed. 1. New York:Palgrace Macmillan. 2006.
- Claude Jr., Inis L. *Swords into Plowshares: the Problems and Progress of International Organization*. New York:Random House, Inc. 1956.
- Crawford, James, Allain Pellet dan Simon Olleson. Ed. *The Law of International Responsibility*. Oxford:Oxford University Press. 2010.
- Dinstein, Yoram. *The Conduct of Hostilities under the Law of International Armed Conflict*. Cambridge:Cambridge University Press. 2004.
- Dixon, Martin. *Textbook on International Law*. ed. 2. London:Blackstone Press Limited. 1993.
- Engdahl, Ola. *Protection of Personnel in Peace Operations: The Role of the 'Safety Convention' against the Background of General International Law*. Leiden:Koninklijke Brill NV. 2007.
- Frowein, J A dan R wolfrum. Ed. *Max Planck Yearbook of United Nations Law*. Vol. 6. Netherlands:Kluwer Law International. 2002.
- Gardam, Judith. *Necessity, Proportionality and the Use of Force by States*. Cambridge:Cambridge University Press. 2004.
- Garner, Bryan E. Ed. *Black's Law Dictionary*. ed. 9. United State of America:West Publishing Co. 2009
- Harris, D J. *Cases and Materials on International Law*. ed. 5. London:Sweet & Maxwell. 1998.

- Klabbers, Jan. *An Introduction to International Institutional Law*. Cambridge:Cambridge University Press. 2002.
- Kusumaatmadja, Mochtar dan Eddy R Agoes. *Pengantar Hukum Internasional*. ed. 2. cet. Ke-1. Bandung:PT Alumni. 2003.
- Lindley-French, Julian dan Neil Macfarlane. *The North Atlantic Treaty Organization: The Enduring Alliance*. New York:Routledge. 2007.
- Luck, Edward C. *United Nations Security Council: Practice and Promise*, (New York:Routledge, 2006), hal. 31.
- Malanczuk, Peter. *Akehurst's Modern Introduction to International Law*. ed. 7. London:Routledge. 1997.
- Mamudji, Sri, et al. *Metode Penelitian dan Penulisan Hukum*. Jakarta:Badan Penerbit Fakultas Hukum Universitas Indonesia. 2005.
- Medcalf, Jennifer. *NATO: A Beginner's Guide*. Oxford:Oneworld Publications. 2005.
- North Atlantic Treaty Organization. *60 Years of NATO*. Brussels:NATO Public Diplomacy Division. 2009.
- Provost, Rene. *International Human Rights and Humanitarian Law*. Cambridge:Cambridge University Press. 2004
- Ragazzi, Maurizia. Ed. *International Responsibility Today: Essay in Memory of Oscar Schachter*. Leiden:Koninklijke Brill NV. 2005.
- Schermers, G dan Niels M Blokker. *International Institutional Law: Unity Within Diversity*. ed. 4. Leiden:Koninklijke Brill NV. 2003.
- Smit, Christian Reus. Ed. *The Politics of International Law*. Cambridge:Cambridge University Press. 2004.
- Soekanto, Soerjono. *Pengantar Penelitian Hukum*. Cet. 3. Jakarta:Universitas Indonesia (UI-Press). 1986.
- Starke, J G. *An Introduction to International Law*. ed. 4. London:Butterworth & CO. LTD. 1958.
- Suryokusumo, Sumaryo. *Pengantar Hukum Organisasi Internasional*. Jakarta:PT Tatanusa. 2007.
- Suardi, Sri Setianingsih. *Pengantar Hukum Organisasi Internasional*. Jakarta:Penerbit Universitas Indonesia (UI-Press). 2004.



- Thakur, Ramesh. *The United Nations, Peace and Security: From Collective Security to the Responsibility to Protect*. Cambridge:Cambridge University Press. 2006.
- United Nations. *Basic Facts About the United Nations*. New York:News and Media Division United Nations Department of Public Information. 2004.
- \_\_\_\_\_. *International Legal Protection of Human Rights in Armed Conflict*. United Nations Publication. 2011.
- Wallace, Rebecca M M. *International Law*. ed. 2. London:Sweet & Maxwell. 1992.
- Wet, Erika de. *The Chapter VII Powers of the United Nations Security Council*. Oxford:Hart Publishing. 2004.
- White, N D. *Keeping the Peace: the United Nations and the Maintenance of International Peace and Security*. Manchester:Manchester University Press. 1993.

### Peraturan

- International Committee of the Red Cross. *Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention)*. Ditandatangani pada 12 Agustus 1949. Berlaku pada 21 Oktober 1950. 75 UNTS 287. <<http://www.unhcr.org/refworld/docid/3ae6b36d2.html>>. Diakses pada 1 Juni 2012.
- \_\_\_\_\_. *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*. 8 Juni 1977. 1225 UNTS 3. <<http://www.unhcr.org/refworld/docid/3ae6b36b4.html>>. Diakses pada 20 Mei 2012.
- International Conference on Safety of Life at Sea. *the 1974 International Convention for Safety of Life at Sea*. Ditandatangani di London pada 1 November 1974. <<http://www.imo.org/KnowledgeCentre/ReferencesAndArchives/HistoryofSOLAS/Documents/SOLAS%201974%20Final%20Act%20and%20Conv>

[ention%20with%20Proces%20bverbal%20of%20rectification%20of%2022%20December%201982.pdf](#)>. Diakses pada 2 Juni 2012.

International Law Commission. “Draft Articles on the Responsibility of International Organization”. *Yearbook of International Law Commission*. vol. II. Part Two. 2011.

\_\_\_\_\_. “Draft Articles on the Responsibility of States for Internationally Wrongful Acts”. *Yearbook of International Law Commission*. vol. II. Part Two. 2001.

International Maritime Organization. *the 1979 International Convention on Maritime Search and Rescue*. Ditandatangani di Hamburg pada 27 April 1979.

<http://www.imo.org/About/Conventions/ListOfConventions/Pages/International-Convention-on-Maritime-Search-and-Rescue-%28SAR%29.aspx>.

Diakses pada 2 Juni 2012.

*Montevideo Convention on Rights and Duties of States*. Ditandatangani pada 26 Desember 1933. Mulai berlaku pada 26 Desember 1934.

North Atlantic Treaty Organization. *Agreement between the Parties to the North Atlantic Treaty regarding the Status of their Forces*. Ditandatangani di London pada 19 Juni 1951.

[http://www.nato.int/cps/en/natolive/official\\_texts\\_17265.htm](http://www.nato.int/cps/en/natolive/official_texts_17265.htm)>. Diakses pada 5 Mei 2012.

\_\_\_\_\_. *Agreement on the Status of the North Atlantic Treaty Organization, National Representatives and International Staff*. Ditandatangani di Ottawa pada 20 September 1951.

[http://www.nato.int/cps/en/natolive/official\\_texts\\_17248.htm](http://www.nato.int/cps/en/natolive/official_texts_17248.htm)>. Diakses pada 5 Mei 2012.

\_\_\_\_\_. *Protocol to the Status of International Military Headquarters set up pursuant to the North Atlantic Treaty*. Ditandatangani di Paris pada 28 Agustus 1952.

[http://www.nato.int/cps/en/natolive/official\\_texts\\_173000.htm](http://www.nato.int/cps/en/natolive/official_texts_173000.htm)>. Diakses pada 5 Mei 2012.

- \_\_\_\_\_. *The Atlantic Charter* (1941).  
<[http://www.nato.int/cps/en/natolive/official\\_texts\\_16912.htm](http://www.nato.int/cps/en/natolive/official_texts_16912.htm)>. Diakses pada 1 Mei 2012.
- \_\_\_\_\_. *The North Atlantic Treaty* (1949). Ditandatangani pada 4 April 1949.  
<[http://www.nato.int/cps/en/SID-41426331-6494A785/natolive/topics\\_67656.htm](http://www.nato.int/cps/en/SID-41426331-6494A785/natolive/topics_67656.htm)>. Diakses pada 18 Januari 2011.
- United Nations. *Charter of the United Nations*. 24 Oktober 1945. 1 UNTS XVI.  
<<http://www.un.org/en/documents/charter/chapter1.shtml>>. Diakses pada 15 Maret 2012.
- \_\_\_\_\_. *Convention on the Safety of United Nations and Associated Personnel*. Ditandatangani pada 9 Desember 1994 di New York. Berlaku mulai 15 Januari 1999.
- \_\_\_\_\_. *United Nations Convention on the Law of the Sea 1982*. 10 Desember 1982.

### Dokumen

- Amnesty International. *Libya: the Forgotten Victims of NATO Strikes*.  
<<http://www.amnesty.org/en/library/asset/MDE19/003/2012/en/8982a094-60ff-4783-8aa8-8c80a4fd0b14/mde190032012en.pdf>>. Diakses pada 8 Mei 2012.
- Council of Europe. *Lives Lost in the Mediterranean Sea: Who is Responsible?*.  
<<http://assembly.coe.int/Documents/WorkingDocs/Doc11/EDOC12617.pdf>>. Diakses pada 8 Mei 2012.
- Human Rights Watch. *Unacknowledged Deaths: Civilian Casualties in NATO's Air Campaign in Libya*. United States of America: Human Rights Watch. 2012.  
<<http://www.hrw.org/sites/default/files/reports/libya0512webwcover.pdf>>. Diakses pada 14 Mei 2012.
- Lessons Learned Unit Department of Peacekeeping Operations United Nations. *Cooperation Between the United Nations and Regional Organizations/Arrangements in a Peacekeeping Environment*. Maret, 1999.

North Atlantic Treaty Organization. *NAC Ministerial Meeting Final Communiqué*. Brussel, 17 Desember 1992. <<http://www.nato.int/docu/comm/49-95/c921217a.htm>>. Diakses pada 23 Mei 2012.

\_\_\_\_\_. *Strategic Concept for the Defence and Security of the Members of the North Atlantic Treaty Organization*. Diadopsi pada tahun 2010 di Lisbon. <<http://www.nato.int/lisbon2010/strategic-concept-2010-eng.pdf>>. Diakses pada 23 Mei 2012.

United Nations Human Rights Council. *Report of the International Commission of Inquiry on Libya*. UN Doc. A/HRC/19/68. 2 Maret 2012.

\_\_\_\_\_. *Situation of Human Rights in the Libyan Arab Jamahiriya*. UN Doc S-15/1. 25 Februari 2011.

United Nations. *Definition of Aggression*. General Assembly Resolution 3314 (XXIX). Disahkan pada 14 Desember 1974.

\_\_\_\_\_. *General Assembly Fifty-first Session: Report of the Secretary-General*. A/51/389. 20 September 1996.

\_\_\_\_\_. *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*. 17th Session. UN Doc. A/HRC/17/44. 1 Juni 2011.

\_\_\_\_\_. *Report of the Human Rights Council on 15th Special Session*. UN Doc. A/HRC/S-15/1. 25 Februari 2011.

\_\_\_\_\_. *Report of the International Law Commission: Fifty-fourth Session*. Supplement No. 10 (A/57/10). New York. 2002.

\_\_\_\_\_. *Responsibility of International Organization: Comments and Observations Received from International Organization*. UN Doc. A/CN.4/545. 25 Juni 2004.

\_\_\_\_\_. *Security Council Resolution 1970*. UN Doc. S/RES/1970. 26 Februari 2011.

\_\_\_\_\_. *Security Council Resolution 1973*. UN Doc. S/RES/1973. 17 Maret 2011.

\_\_\_\_\_. *Security Council Resolution 2009*. UN Doc S/RES/2009. 16 September 2011.

United States of America. *Department of State Bulletin*. No. 2111. Juni. 1986.

## Kasus

European Court of Human Rights Grand Chamber. *Behrami and Behrami v. France and Saramati v. France, Germany and Norway*. Decision on Admissibility. 31 Mei 2007.

Federal Supreme Court (First Civil Court). *Arab Organization for Industrialization and others v. Westland Helicopters Ltd.*. Judgment. 19 Juli 1988. 80 ILR 652.

House of Lords. *R (on the application of Al-Jedda) (FC) v. Secretary of State for Defence*. UKHL 58. 2007. <http://www.publications.parliament.uk/pa/ld/ldjudgmt.htm>. Diakses pada 4 April 2012.

International Court of Justice. *Advisory Opinion on the Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*. ICJ Reports 1980.

\_\_\_\_\_. *Corfu Channel*. Merits. Judgment. ICJ Reports 1949.

\_\_\_\_\_. *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*. Advisory Opinion. ICJ Reports 1999.

\_\_\_\_\_. *Gabcikovo-Nagymaros*. Merits. Judgment. ICJ Report 1997.

\_\_\_\_\_. *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*. Merits. Judgment. ICJ Reports 1986.

\_\_\_\_\_. *Reparation Case of Injuries Suffered in the Service of the United Nations*. Advisory Opinion. ICJ Report 1949.

\_\_\_\_\_. *United States Diplomatic and Consular Staff in Tehran*. Judgment. ICJ Report 1980.

Permanent Court of International Justice. *Factory at Chorzow (Germany v. Poland)*. PCIJ (ser. A) No. 17. September. 1928.

\_\_\_\_\_. *Phosphates in Morocco*. Judgment. PCIJ Series A/B. No. 74. 1938.

Reports of International Arbitration Award. *Spanish Zone of Morocco (Great Britain v. Spain)*. 1924. 2 R.I.A.A.

### Artikel/Jurnal Hukum

- Arend, Anthony Clark. "Symposium: The United Nations, Regional Organization, and Military Organization". *Duke Journal of Comparative & International Law*. Fall. 1996. Hal. 1-23.
- Bell, Caitlin A. "Reassessing Multiple Attribution: the International Law Commission and the Behrami and Saramati Decision". *International Law and Politics*. Vol. 42. Hal. 501-548.
- Blokker, Niels. "Is the Authorization Authorized?: Powers and Practice of the UN Security Council to Authorize the Use of Force by Coalitions of the Able and Willing". *European Journal of International Law*. September. 2000. Hal. 1-28.
- Boon, Kristen E. "New Directions in Responsibility: Assessing the International Law Commission's Draft Articles on the Responsibility of International Organization". *Yale Journal of International Law Online*. Spring, 2012. Hal. 1-10.
- Borgen, Christopher J. "The Theory and Practice of Regional Organization Intervention in Civil Wars". *New York University Journal of International Law & Politics*. Summer. 1994. Hal. 1-27.
- Brown, Captain Davis. "The Role of Regional Organization in Stopping Civil Wars". *Air Force Law Review*. 1997. Hal. 1-40.
- d'Aspermont, Jean. "Abuse of the Legal Personality of International Organization and the Responsibility of Member States". *International Organization Law Review*. Leiden:Koninklijke Brill NV. 2007. Hal. 91-119.
- Danchin, Peter G. "Things Fall Apart: the Concept of Collective Security in International Law". *University of Maryland School of Law Legal Studies Research Paper No. 2010-35*. <<http://ssrn.com/abstract=1662428>>. Diakses pada 11 April 2012. Hal. 35-75.
- Farrior, Stephanie. "Introductory Note to Behrami and Behrami v France and Saramati v France, Germany & Norway, European Court of Human Rights (31 May 2007)". *Vermont Law School Legal Studies Research Paper Series*. <<http://ssrn.com/abstract=1417982>>. Diakses pada 30 September 2011.

- Fowler, Michael R dan Jessica Fryrear. "Collective Security and the Fighting in the Balkans". *Northern Kentucky Law Review*. (2003). Hal. 1-45.
- Franck, Thomas M dan Mohamed El Baradei. "The Codification and Progressive Development of International Law: A Unitar Study of the Role and Use of the International Law Commission". *American Journal of Interantional Law*. Juli. 1982. Hal. 1-9.
- Gazzini, Tracisio. "NATO's Role in the Collective Security System". *Journal of Conflict & Security Law*. October. 2003. Hal. 1-31.
- Grady, Broderick C. "Article 5 of the North Atlantic Treaty: Past, Present and Uncertain Future". *Georgia Journal of International and Comparative Law*. Fall. 2002. Hal. 1-23.
- Hafner, Gerard. "Accountability of International Organization". *American Society of International Law*. April. 2003. Hal. 1-6.
- Henderson, Christian. "International Measures for the Protection of Civilians in Libya and Cote d'Ivoire". *International & Comparative Law Quarterly*. 2011. Hal. 1-11.
- Hickey Jr., James E. "Challenges to Security Council Monopoly Power over the Use of Force in Enforcement Actions: the Case of Regional Organization". *IUS Gentium*. Fall. 2004. Hal. 1-22.
- Holder, William E. "International Organization: Accountability and Responsibility". *Proceeding of the Annual Meeting (American Society of International Law)*. vol. 97. April. 2003. Hal. 231-236.
- Larsen, Kjetil Mujezinovic. "Attribution of Conduct in Peace Operations: the 'Ultimate Authority and Control' test". *European Journal of International Law*. 2008. Hal. 1-19.
- Medenica, Olivera. "Protocol I and Operation Allied Force: Did NATO Abide by Principles of Proportionality?". *Loyola of Los Angeles International & Comparative Law Review*. Mei 2001. Hal. 1-83.
- Meyer, Jane A. "Collective Self-Defense and Regional Security: Necessary Exceptions to A Globalist Doctrine". *Boston University International Law Journal*. Fall. 1993. Hal. 1-37.

- Murphy, Ray. "United Nations Military Operations and International Humanitarian Law: What Rules Apply to Peacekeepers?". *Criminal Law Forum*. Netherlands:Kluwer Academic Publishers. 2003. Hal. 153-194.
- Orakhelashvili, Alexander. "R (on the Application of Al-Jedda) (FC) v. Secretary of State for Defence. [2007] UKHL 58". *The American Journal of International Law*. Vol. 102. No. 2. April. 2008. Hal. 486-523.
- Paliwal, Suyash. "The Primacy of Regional Organization in International Peacekeeping: the African Example". *Virginia Journal of International Law*. Vol. 51. Issue 1. (2010). <<http://ssrn.com/abstract=1536966>>. Diakses pada 27 April 2012. hal. 185-230.
- Payandeh, Mehrdad. "The United Nations, Military Intervention and Regime Change in Libya". *Virginia Journal of International Law*. Vol. 52:533. 2012. Hal. 355-403.
- Ryngaert, Cedric dan Holly Buchanan. "Member State Responsibility for the Acts of International Organization". *Utrecht Law Review*. Vol. 7. Issue 1. January. 2011. Hal. 131-146.
- Sari, Aurel. "Autonomy, Attribution and Accountability: Reflections on the Behrami Case". <<http://ssrn.com/abstract=1635803>>. Diakses pada 30 September 2011. Hal. 1-23.
- Schmitt, Michael N. "Wings over Libya: the Non-Fly Zone in Legal Perspective". *Yale Journal of International Law Online*. Spring. 2011. Hal. 1-14.
- Sucharitkul, Sompong. "State Responsibility and International Liability under International Law". *Loyola of Los Angeles International and Comparative Law Review*. vol. 18. (1996). <<http://digitalcommons.lmu.edu/ilr/vol18/iss4/6>>. Diakses pada 19 April 2012. Hal. 821-839.

### **Publikasi Elektronik**

- Bumgardner, Sherrod Lewis, LTC Zoltan Hegedus dan Dominique Palmer-DeGreve. Ed. *NATO Legal Deskbook*. ed. 2. 2010. <<https://transnet.act.nato.int/WISE/Library/Legal/LEGALDESKB>>. Diakses pada 5 Mei 2012.



- Central Commission for the Navigation of the Rhine. "Organisation". <<http://www.ccr-zkr.org/11000000-en.html>>. Diakses pada 13 Maret 2012.
- Global Centre for the Responsibility to Protect. "Background Briefing: Responsibility to Protect after Libya and Cote D'ivoire". <[http://globalr2p.org/media/pdf/BACKGROUND\\_BRIEFING\\_R2P\\_AFT ER\\_LIBYA\\_AND\\_COTE\\_DIVOIRE.pdf](http://globalr2p.org/media/pdf/BACKGROUND_BRIEFING_R2P_AFT ER_LIBYA_AND_COTE_DIVOIRE.pdf)>. Diakses pada 1 Juni 2012.
- International Committee of the Red Cross. "How is the Term "Armed Conflict" Defined in International Humanitarian Law". *Opinion Paper*. Maret 2008. <<http://www.icrc.org/eng/assets/files/other/opinion-paper-armed-conflict.pdf>>. Diakses pada 10 Mei 2012
- North Atlantic Treaty Organization. "NATO and Libya". <[http://www.nato.int/cps/en/natolive/topics\\_71652.htm](http://www.nato.int/cps/en/natolive/topics_71652.htm)>. Diakses pada 13 Mei 2012.
- \_\_\_\_\_. "NATO Arms Embargo Against Libya Operation Unified Protector". <[http://www.nato.int/nato\\_static/assets/pdf/pdf\\_2011\\_03/20110325\\_110325-unified-protector-factsheet.pdf](http://www.nato.int/nato_static/assets/pdf/pdf_2011_03/20110325_110325-unified-protector-factsheet.pdf)>. Diakses pada 15 Maret 2012.
- \_\_\_\_\_. "NATO Takes Command in Libya Air Operations". <[http://www.nato.int/cps/en/natolive/news\\_71867.htm?mode=pressrelease](http://www.nato.int/cps/en/natolive/news_71867.htm?mode=pressrelease)>. Diakses pada 13 Mei 2012.
- \_\_\_\_\_. "NATO Transformed". <[http://www.nato.int/docu/nato-trans/html\\_en/nato\\_trans01.html](http://www.nato.int/docu/nato-trans/html_en/nato_trans01.html)>. Diakses pada 18 Januari 2011.
- \_\_\_\_\_. "Operation Unified Protector Protection of Civilians and Civilian-Populated Areas & Enforcement of the Non-Fly Zone". <[http://www.nato.int/nato\\_static/assets/pdf/pdf\\_2011\\_10/20111005\\_111005-factsheet\\_protection\\_civilians.pdf](http://www.nato.int/nato_static/assets/pdf/pdf_2011_10/20111005_111005-factsheet_protection_civilians.pdf)>. Diakses pada 13 Mei 2012.
- \_\_\_\_\_. "Operation Unified Protector NATO-led Arms Embargo against Libya". Oktober 2011. <[http://www.nato.int/nato\\_static/assets/pdf/pdf\\_2011\\_10/20111005\\_111005-factsheet\\_arms\\_embargo.pdf](http://www.nato.int/nato_static/assets/pdf/pdf_2011_10/20111005_111005-factsheet_arms_embargo.pdf)>. Diakses pada 13 Mei 2012.

- \_\_\_\_\_. “Operation Unified Protector: Command and Control”.  
<[http://www.nato.int/nato\\_static/assets/pdf/pdf\\_2011\\_03/20110325\\_110325-unified-protector-command-control.pdf](http://www.nato.int/nato_static/assets/pdf/pdf_2011_03/20110325_110325-unified-protector-command-control.pdf)>. Diakses pada 13 Mei 2012.
- \_\_\_\_\_. “Operation Unified Protector: Key Facts and Figures”.  
<[http://jfcnaples.nato.int/resources/11/Operation%20Unified%20Protector/OUP%20Media%20Releases/Key%20facts/KFF\\_05%20April.pdf](http://jfcnaples.nato.int/resources/11/Operation%20Unified%20Protector/OUP%20Media%20Releases/Key%20facts/KFF_05%20April.pdf)>.  
Diakses pada 13 Mei 2012.
- \_\_\_\_\_. “What is NATO:An Introduction to the Transatlantic Alliance”.  
<[http://www.nato.int/welcome/brochure\\_WhatIsNATO\\_en.pdf](http://www.nato.int/welcome/brochure_WhatIsNATO_en.pdf)>. Diakses pada 3 Maret 2012.
- \_\_\_\_\_. *NATO in the 21st Century*. <[www.nato.int/docu/21-cent/21st\\_eng.pdf](http://www.nato.int/docu/21-cent/21st_eng.pdf)>.  
Diakses pada 2 Maret 2012.
- \_\_\_\_\_. *Presentation Introduction to NATO*.  
<[www.nato.int/education/docs/intro\\_to\\_nato.pps](http://www.nato.int/education/docs/intro_to_nato.pps)>. Diakses pada 1 Maret 2012.
- \_\_\_\_\_. *The Beginings of NATO’s Military Structure: Birth of the Alliance to the Fall of the Berlin Wall*.  
<[http://www.nato.int/nato\\_static/assets/pdf/pdf\\_publications/20120116\\_nato-mil-stru-e.pdf](http://www.nato.int/nato_static/assets/pdf/pdf_publications/20120116_nato-mil-stru-e.pdf)>. Diakses pada 11 Januari 2012.
- Palwankar, Umesh. “Applicability of International Humanitarian Law to United Nations Peace-Keeping Forces”. *International Review of the Red Cross*. no. 294.  
<<http://www.icrc.org/eng/resources/documents/misc/57jmbh.htm>>.  
Diakses pada 10 Mei 2012.
- Porretto, Gabriele dan Sylvain Vite. “The Application of International Humanitarian Law and Human Rights Law to International Organization”. *University Centre for International Humanitarian Law*. <[http://www.adh-geneva.ch/docs/projets/CTR\\_application\\_du\\_DIH.pdf](http://www.adh-geneva.ch/docs/projets/CTR_application_du_DIH.pdf)>. Diakses pada 10 Mei 2012.
- Taylor, Claire. “Military Operations in Libya”. *House of Commons Library*. SN/IA/5909.

<http://www.parliament.uk/Templates/BriefingPapers/Pages/BPPdfDownload.aspx?bp-id=SN05909>>. Diakses pada 4 Mei 2012.

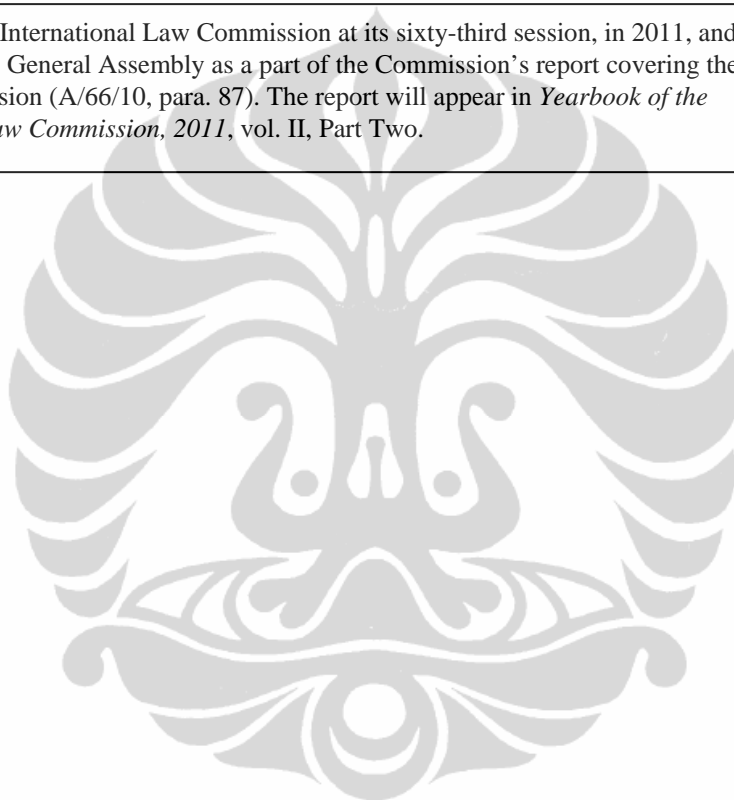
Wet, Erika de dan Michael Wood. "Collective Security". *Max Planck Encyclopedia of Public International Law*.  
<[http://www.mpepil.com/sample\\_article?id=/epil/entries/law-9780199231690-e270&recno=2&](http://www.mpepil.com/sample_article?id=/epil/entries/law-9780199231690-e270&recno=2&)>. Diakses pada 7 Maret 2012.



# Draft articles on the responsibility of international organizations

2011

Adopted by the International Law Commission at its sixty-third session, in 2011, and submitted to the General Assembly as a part of the Commission's report covering the work of that session (A/66/10, para. 87). The report will appear in *Yearbook of the International Law Commission, 2011*, vol. II, Part Two.



Copyright © United Nations  
2011

## **Responsibility of international organizations**

### **Part One**

#### **Introduction**

#### **Article 1**

##### **Scope of the present draft articles**

1. The present draft articles apply to the international responsibility of an international organization for an internationally wrongful act.
2. The present draft articles also apply to the international responsibility of a State for an internationally wrongful act in connection with the conduct of an international organization.

#### **Article 2**

##### **Use of terms**

For the purposes of the present draft articles,

(a) “international organization” means an organization established by a treaty or other instrument governed by international law and possessing its own international legal personality. International organizations may include as members, in addition to States, other entities;

(b) “rules of the organization” means, in particular, the constituent instruments, decisions, resolutions and other acts of the international organization adopted in accordance with those instruments, and established practice of the organization;

(c) “organ of an international organization” means any person or entity which has that status in accordance with the rules of the organization;

(d) “agent of an international organization” means an official or other person or entity, other than an organ, who is charged by the organization with carrying out, or helping to carry out, one of its functions, and thus through whom the organization acts.

### **Part Two**

#### **The internationally wrongful act of an international organization**

##### **Chapter I**

##### **General principles**

#### **Article 3**

##### **Responsibility of an international organization for its internationally wrongful acts**

Every internationally wrongful act of an international organization entails the international responsibility of that organization.

#### **Article 4**

##### **Elements of an internationally wrongful act of an international organization**

There is an internationally wrongful act of an international organization when conduct consisting of an action or omission:

- (a) is attributable to that organization under international law; and
- (b) constitutes a breach of an international obligation of that organization.

**Article 5**  
**Characterization of an act of an international organization as internationally wrongful**

The characterization of an act of an international organization as internationally wrongful is governed by international law.

**Chapter II**  
**Attribution of conduct to an international organization**

**Article 6**  
**Conduct of organs or agents of an international organization**

1. The conduct of an organ or agent of an international organization in the performance of functions of that organ or agent shall be considered an act of that organization under international law, whatever position the organ or agent holds in respect of the organization.

2. The rules of the organization apply in the determination of the functions of its organs and agents.

**Article 7**  
**Conduct of organs of a State or organs or agents of an international organization placed at the disposal of another international organization**

The conduct of an organ of a State or an organ or agent of an international organization that is placed at the disposal of another international organization shall be considered under international law an act of the latter organization if the organization exercises effective control over that conduct.

**Article 8**  
**Excess of authority or contravention of instructions**

The conduct of an organ or agent of an international organization shall be considered an act of that organization under international law if the organ or agent acts in an official capacity and within the overall functions of that organization, even if the conduct exceeds the authority of that organ or agent or contravenes instructions.

**Article 9**  
**Conduct acknowledged and adopted by an international organization as its own**

Conduct which is not attributable to an international organization under articles 6 to 8 shall nevertheless be considered an act of that organization under international law if and to the extent that the organization acknowledges and adopts the conduct in question as its own.

**Chapter III**  
**Breach of an international obligation**

**Article 10**  
**Existence of a breach of an international obligation**

1. There is a breach of an international obligation by an international organization when an act of that international organization is not in conformity with what is required of it by that obligation, regardless of the origin or character of the obligation concerned.

2. Paragraph 1 includes the breach of any international obligation that may arise for an international organization towards its members under the rules of the organization.

#### **Article 11**

##### **International obligation in force for an international organization**

An act of an international organization does not constitute a breach of an international obligation unless the organization is bound by the obligation in question at the time the act occurs.

#### **Article 12**

##### **Extension in time of the breach of an international obligation**

1. The breach of an international obligation by an act of an international organization not having a continuing character occurs at the moment when the act is performed, even if its effects continue.

2. The breach of an international obligation by an act of an international organization having a continuing character extends over the entire period during which the act continues and remains not in conformity with that obligation.

3. The breach of an international obligation requiring an international organization to prevent a given event occurs when the event occurs and extends over the entire period during which the event continues and remains not in conformity with that obligation.

#### **Article 13**

##### **Breach consisting of a composite act**

1. The breach of an international obligation by an international organization through a series of actions and omissions defined in aggregate as wrongful occurs when the action or omission occurs which, taken with the other actions or omissions, is sufficient to constitute the wrongful act.

2. In such a case, the breach extends over the entire period starting with the first of the actions or omissions of the series and lasts for as long as these actions or omissions are repeated and remain not in conformity with the international obligation.

#### **Chapter IV**

##### **Responsibility of an international organization in connection with the act of a State or another international organization**

#### **Article 14**

##### **Aid or assistance in the commission of an internationally wrongful act**

An international organization which aids or assists a State or another international organization in the commission of an internationally wrongful act by the State or the latter organization is internationally responsible for doing so if:

(a) the former organization does so with knowledge of the circumstances of the internationally wrongful act; and

(b) the act would be internationally wrongful if committed by that organization.

#### **Article 15**

##### **Direction and control exercised over the commission of an internationally wrongful act**

An international organization which directs and controls a State or another international organization in the commission of an internationally wrongful act by the State or the latter organization is internationally responsible for that act if:

(a) the former organization does so with knowledge of the circumstances of the internationally wrongful act; and

(b) the act would be internationally wrongful if committed by that organization.

#### **Article 16**

##### **Coercion of a State or another international organization**

An international organization which coerces a State or another international organization to commit an act is internationally responsible for that act if:

(a) the act would, but for the coercion, be an internationally wrongful act of the coerced State or international organization; and

(b) the coercing international organization does so with knowledge of the circumstances of the act.

#### **Article 17**

##### **Circumvention of international obligations through decisions and authorizations addressed to members**

1. An international organization incurs international responsibility if it circumvents one of its international obligations by adopting a decision binding member States or international organizations to commit an act that would be internationally wrongful if committed by the former organization.

2. An international organization incurs international responsibility if it circumvents one of its international obligations by authorizing member States or international organizations to commit an act that would be internationally wrongful if committed by the former organization and the act in question is committed because of that authorization.

3. Paragraphs 1 and 2 apply whether or not the act in question is internationally wrongful for the member States or international organizations to which the decision or authorization is addressed.

#### **Article 18**

##### **Responsibility of an international organization member of another international organization**

Without prejudice to draft articles 14 to 17, the international responsibility of an international organization that is a member of another international organization also arises in relation to an act of the latter under the conditions set out in draft articles 61 and 62 for States that are members of an international organization.

#### **Article 19**

##### **Effect of this Chapter**

This Chapter is without prejudice to the international responsibility of the State or international organization which commits the act in question, or of any other State or international organization.

#### **Chapter V**

##### **Circumstances precluding wrongfulness**

#### **Article 20**

##### **Consent**

Valid consent by a State or an international organization to the commission of a given act by another international organization precludes the wrongfulness of



that act in relation to that State or the former organization to the extent that the act remains within the limits of that consent.

**Article 21**  
**Self-defence**

The wrongfulness of an act of an international organization is precluded if and to the extent that the act constitutes a lawful measure of self-defence under international law.

**Article 22**  
**Countermeasures**

1. Subject to paragraphs 2 and 3, the wrongfulness of an act of an international organization not in conformity with an international obligation towards a State or another international organization is precluded if and to the extent that the act constitutes a countermeasure taken in accordance with the substantive and procedural conditions required by international law, including those set forth in Chapter II of Part Four for countermeasures taken against another international organization.

2. Subject to paragraph 3, an international organization may not take countermeasures against a responsible member State or international organization unless:

- (a) the conditions referred to in paragraph 1 are met;
- (b) the countermeasures are not inconsistent with the rules of the organization; and
- (c) no appropriate means are available for otherwise inducing compliance with the obligations of the responsible State or international organization concerning cessation of the breach and reparation.

3. Countermeasures may not be taken by an international organization against a member State or international organization in response to a breach of an international obligation under the rules of the organization unless such countermeasures are provided for by those rules.

**Article 23**  
**Force majeure**

1. The wrongfulness of an act of an international organization not in conformity with an international obligation of that organization is precluded if the act is due to *force majeure*, that is, the occurrence of an irresistible force or of an unforeseen event, beyond the control of the organization, making it materially impossible in the circumstances to perform the obligation.

2. Paragraph 1 does not apply if:

- (a) the situation of *force majeure* is due, either alone or in combination with other factors, to the conduct of the organization invoking it; or
- (b) the organization has assumed the risk of that situation occurring.

**Article 24**  
**Distress**

1. The wrongfulness of an act of an international organization not in conformity with an international obligation of that organization is precluded if the author of the

act in question has no other reasonable way, in a situation of distress, of saving the author's life or the lives of other persons entrusted to the author's care.

2. Paragraph 1 does not apply if:

(a) the situation of distress is due, either alone or in combination with other factors, to the conduct of the organization invoking it; or

(b) the act in question is likely to create a comparable or greater peril.

#### **Article 25** **Necessity**

1. Necessity may not be invoked by an international organization as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that organization unless the act:

(a) is the only means for the organization to safeguard against a grave and imminent peril an essential interest of its member States or of the international community as a whole, when the organization has, in accordance with international law, the function to protect the interest in question; and

(b) does not seriously impair an essential interest of the State or States towards which the international obligation exists, or of the international community as a whole.

2. In any case, necessity may not be invoked by an international organization as a ground for precluding wrongfulness if:

(a) the international obligation in question excludes the possibility of invoking necessity; or

(b) the organization has contributed to the situation of necessity.

#### **Article 26** **Compliance with peremptory norms**

Nothing in this Chapter precludes the wrongfulness of any act of an international organization which is not in conformity with an obligation arising under a peremptory norm of general international law.

#### **Article 27** **Consequences of invoking a circumstance precluding wrongfulness**

The invocation of a circumstance precluding wrongfulness in accordance with this Chapter is without prejudice to:

(a) compliance with the obligation in question, if and to the extent that the circumstance precluding wrongfulness no longer exists;

(b) the question of compensation for any material loss caused by the act in question.

### **Part Three** **Content of the international responsibility of an international organization**

#### **Chapter I** **General principles**

#### **Article 28** **Legal consequences of an internationally wrongful act**

The international responsibility of an international organization which is entailed by an internationally wrongful act in accordance with the provisions of Part Two involves legal consequences as set out in this Part.

#### **Article 29**

##### **Continued duty of performance**

The legal consequences of an internationally wrongful act under this Part do not affect the continued duty of the responsible international organization to perform the obligation breached.

#### **Article 30**

##### **Cessation and non-repetition**

The international organization responsible for the internationally wrongful act is under an obligation:

- (a) to cease that act, if it is continuing;
- (b) to offer appropriate assurances and guarantees of non-repetition, if circumstances so require.

#### **Article 31**

##### **Reparation**

1. The responsible international organization is under an obligation to make full reparation for the injury caused by the internationally wrongful act.
2. Injury includes any damage, whether material or moral, caused by the internationally wrongful act of an international organization.

#### **Article 32**

##### **Relevance of the rules of the organization**

1. The responsible international organization may not rely on its rules as justification for failure to comply with its obligations under this Part.
2. Paragraph 1 is without prejudice to the applicability of the rules of an international organization to the relations between the organization and its member States and organizations.

#### **Article 33**

##### **Scope of international obligations set out in this Part**

1. The obligations of the responsible international organization set out in this Part may be owed to one or more States, to one or more other organizations, or to the international community as a whole, depending in particular on the character and content of the international obligation and on the circumstances of the breach.
2. This Part is without prejudice to any right, arising from the international responsibility of an international organization, which may accrue directly to any person or entity other than a State or an international organization.

### **Chapter II**

#### **Reparation for injury**

#### **Article 34**

##### **Forms of reparation**

Full reparation for the injury caused by the internationally wrongful act shall take the form of restitution, compensation and satisfaction, either singly or in combination, in accordance with the provisions of this Chapter.

**Article 35**  
**Restitution**

An international organization responsible for an internationally wrongful act is under an obligation to make restitution, that is, to re-establish the situation which existed before the wrongful act was committed, provided and to the extent that restitution:

- (a) is not materially impossible;
- (b) does not involve a burden out of all proportion to the benefit deriving from restitution instead of compensation.

**Article 36**  
**Compensation**

1. The international organization responsible for an internationally wrongful act is under an obligation to compensate for the damage caused thereby, insofar as such damage is not made good by restitution.
2. The compensation shall cover any financially assessable damage including loss of profits insofar as it is established.

**Article 37**  
**Satisfaction**

1. The international organization responsible for an internationally wrongful act is under an obligation to give satisfaction for the injury caused by that act insofar as it cannot be made good by restitution or compensation.
2. Satisfaction may consist in an acknowledgement of the breach, an expression of regret, a formal apology or another appropriate modality.
3. Satisfaction shall not be out of proportion to the injury and may not take a form humiliating to the responsible international organization.

**Article 38**  
**Interest**

1. Interest on any principal sum due under this Chapter shall be payable when necessary in order to ensure full reparation. The interest rate and mode of calculation shall be set so as to achieve that result.
2. Interest runs from the date when the principal sum should have been paid until the date the obligation to pay is fulfilled.

**Article 39**  
**Contribution to the injury**

In the determination of reparation, account shall be taken of the contribution to the injury by wilful or negligent action or omission of the injured State or international organization or of any person or entity in relation to whom reparation is sought.

**Article 40**  
**Ensuring the fulfilment of the obligation to make reparation**

1. The responsible international organization shall take all appropriate measures in accordance with its rules to ensure that its members provide it with the means for effectively fulfilling its obligations under this Chapter.

2. The members of a responsible international organization shall take all the appropriate measures that may be required by the rules of the organization in order to enable the organization to fulfil its obligations under this Chapter.

### **Chapter III**

#### **Serious breaches of obligations under peremptory norms of general international law**

##### **Article 41**

###### **Application of this Chapter**

1. This Chapter applies to the international responsibility which is entailed by a serious breach by an international organization of an obligation arising under a peremptory norm of general international law.

2. A breach of such an obligation is serious if it involves a gross or systematic failure by the responsible international organization to fulfil the obligation.

##### **Article 42**

###### **Particular consequences of a serious breach of an obligation under this Chapter**

1. States and international organizations shall cooperate to bring to an end through lawful means any serious breach within the meaning of article 41.

2. No State or international organization shall recognize as lawful a situation created by a serious breach within the meaning of article 41, nor render aid or assistance in maintaining that situation.

3. This article is without prejudice to the other consequences referred to in this Part and to such further consequences that a breach to which this Chapter applies may entail under international law.

### **Part Four**

#### **The implementation of the international responsibility of an international organization**

##### **Chapter I**

###### **Invocation of the responsibility of an international organization**

##### **Article 43**

###### **Invocation of responsibility by an injured State or international organization**

A State or an international organization is entitled as an injured State or an injured international organization to invoke the responsibility of another international organization if the obligation breached is owed to:

- (a) that State or the former international organization individually;
- (b) a group of States or international organizations including that State or the former international organization, or the international community as a whole, and the breach of the obligation:
  - (i) specially affects that State or that international organization; or
  - (ii) is of such a character as radically to change the position of all the other States and international organizations to which the obligation is owed with respect to the further performance of the obligation.

##### **Article 44**

###### **Notice of claim by an injured State or international organization**

1. An injured State or international organization which invokes the responsibility of another international organization shall give notice of its claim to that organization.
2. The injured State or international organization may specify in particular:
  - (a) the conduct that the responsible international organization should take in order to cease the wrongful act, if it is continuing;
  - (b) what form reparation should take in accordance with the provisions of Part Three.

**Article 45**  
**Admissibility of claims**

1. An injured State may not invoke the responsibility of an international organization if the claim is not brought in accordance with any applicable rule relating to the nationality of claims.
2. When the rule of exhaustion of local remedies applies to a claim, an injured State or international organization may not invoke the responsibility of another international organization if any available and effective remedy has not been exhausted.

**Article 46**  
**Loss of the right to invoke responsibility**

The responsibility of an international organization may not be invoked if:

- (a) the injured State or international organization has validly waived the claim;
- (b) the injured State or international organization is to be considered as having, by reason of its conduct, validly acquiesced in the lapse of the claim.

**Article 47**  
**Plurality of injured States or international organizations**

Where several States or international organizations are injured by the same internationally wrongful act of an international organization, each injured State or international organization may separately invoke the responsibility of the international organization for the internationally wrongful act.

**Article 48**  
**Responsibility of an international organization and one or more States or international organizations**

1. Where an international organization and one or more States or other international organizations are responsible for the same internationally wrongful act, the responsibility of each State or organization may be invoked in relation to that act.
2. Subsidiary responsibility may be invoked insofar as the invocation of the primary responsibility has not led to reparation.
3. Paragraphs 1 and 2:
  - (a) do not permit any injured State or international organization to recover, by way of compensation, more than the damage it has suffered;

(b) are without prejudice to any right of recourse that the State or international organization providing reparation may have against the other responsible States or international organizations.

#### **Article 49**

##### **Invocation of responsibility by a State or an international organization other than an injured State or international organization**

1. A State or an international organization other than an injured State or international organization is entitled to invoke the responsibility of another international organization in accordance with paragraph 4 if the obligation breached is owed to a group of States or international organizations, including the State or organization that invokes responsibility, and is established for the protection of a collective interest of the group.

2. A State other than an injured State is entitled to invoke the responsibility of an international organization in accordance with paragraph 4 if the obligation breached is owed to the international community as a whole.

3. An international organization other than an injured international organization is entitled to invoke the responsibility of another international organization in accordance with paragraph 4 if the obligation breached is owed to the international community as a whole and safeguarding the interest of the international community as a whole underlying the obligation breached is within the functions of the international organization invoking responsibility.

4. A State or an international organization entitled to invoke responsibility under paragraphs 1 to 3 may claim from the responsible international organization:

(a) cessation of the internationally wrongful act, and assurances and guarantees of non-repetition in accordance with draft article 30; and

(b) performance of the obligation of reparation in accordance with Part Three, in the interest of the injured State or international organization or of the beneficiaries of the obligation breached.

5. The requirements for the invocation of responsibility by an injured State or international organization under draft articles 44, 45, paragraph 2, and 46 apply to an invocation of responsibility by a State or international organization entitled to do so under paragraphs 1 to 4.

#### **Article 50**

##### **Scope of this Chapter**

This Chapter is without prejudice to the entitlement that a person or entity other than a State or an international organization may have to invoke the international responsibility of an international organization.

#### **Chapter II**

##### **Countermeasures**

#### **Article 51**

##### **Object and limits of countermeasures**

1. An injured State or an injured international organization may only take countermeasures against an international organization which is responsible for an internationally wrongful act in order to induce that organization to comply with its obligations under Part Three.

2. Countermeasures are limited to the non-performance for the time being of international obligations of the State or international organization taking the measures towards the responsible international organization.

3. Countermeasures shall, as far as possible, be taken in such a way as to permit the resumption of performance of the obligations in question.

4. Countermeasures shall, as far as possible, be taken in such a way as to limit their effects on the exercise by the responsible international organization of its functions.

#### **Article 52**

##### **Conditions for taking countermeasures by members of an international organization**

1. Subject to paragraph 2, an injured State or international organization which is a member of a responsible international organization may not take countermeasures against that organization unless:

- (a) the conditions referred to in article 51 are met;
- (b) the countermeasures are not inconsistent with the rules of the organization; and
- (c) no appropriate means are available for otherwise inducing compliance with the obligations of the responsible international organization concerning cessation of the breach and reparation.

2. Countermeasures may not be taken by an injured State or international organization which is a member of a responsible international organization against that organization in response to a breach of an international obligation under the rules of the organization unless such countermeasures are provided for by those rules.

#### **Article 53**

##### **Obligations not affected by countermeasures**

1. Countermeasures shall not affect:

- (a) the obligation to refrain from the threat or use of force as embodied in the Charter of the United Nations;
- (b) obligations for the protection of human rights;
- (c) obligations of a humanitarian character prohibiting reprisals;
- (d) other obligations under peremptory norms of general international law.

2. An injured State or international organization taking countermeasures is not relieved from fulfilling its obligations:

- (a) under any dispute settlement procedure applicable between it and the responsible international organization;
- (b) to respect any inviolability of organs or agents of the responsible international organization and of the premises, archives and documents of that organization.

#### **Article 54**

##### **Proportionality of countermeasures**



Countermeasures must be commensurate with the injury suffered, taking into account the gravity of the internationally wrongful act and the rights in question.

#### **Article 55**

##### **Conditions relating to resort to countermeasures**

1. Before taking countermeasures, an injured State or international organization shall:
  - (a) call upon the responsible international organization, in accordance with draft article 44, to fulfil its obligations under Part Three;
  - (b) notify the responsible international organization of any decision to take countermeasures and offer to negotiate with that organization.
2. Notwithstanding paragraph 1 (b), the injured State or international organization may take such urgent countermeasures as are necessary to preserve its rights.
3. Countermeasures may not be taken, and if already taken must be suspended without undue delay if:
  - (a) the internationally wrongful act has ceased; and
  - (b) the dispute is pending before a court or tribunal which has the authority to make decisions binding on the parties.
4. Paragraph 3 does not apply if the responsible international organization fails to implement the dispute settlement procedures in good faith.

#### **Article 56**

##### **Termination of countermeasures**

Countermeasures shall be terminated as soon as the responsible international organization has complied with its obligations under Part Three in relation to the internationally wrongful act.

#### **Article 57**

##### **Measures taken by States or international organizations other than an injured State or organization**

This Chapter does not prejudice the right of any State or international organization, entitled under article 49, paragraphs 1 to 3, to invoke the responsibility of another international organization, to take lawful measures against that organization to ensure cessation of the breach and reparation in the interest of the injured State or organization or of the beneficiaries of the obligation breached.

#### **Part Five**

##### **Responsibility of a State in connection with the conduct of an international organization**

#### **Article 58**

##### **Aid or assistance by a State in the commission of an internationally wrongful act by an international organization**

1. A State which aids or assists an international organization in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if:
  - (a) the State does so with knowledge of the circumstances of the internationally wrongful act; and

- (b) the act would be internationally wrongful if committed by that State.
- 2. An act by a State member of an international organization done in accordance with the rules of the organization does not as such engage the international responsibility of that State under the terms of this article.

#### **Article 59**

##### **Direction and control exercised by a State over the commission of an internationally wrongful act by an international organization**

1. A State which directs and controls an international organization in the commission of an internationally wrongful act by the latter is internationally responsible for that act if:

- (a) the State does so with knowledge of the circumstances of the internationally wrongful act; and

- (b) the act would be internationally wrongful if committed by that State.

2. An act by a State member of an international organization done in accordance with the rules of the organization does not as such engage the international responsibility of that State under the terms of this draft article.

#### **Article 60**

##### **Coercion of an international organization by a State**

A State which coerces an international organization to commit an act is internationally responsible for that act if:

- (a) the act would, but for the coercion, be an internationally wrongful act of the coerced international organization; and

- (b) the coercing State does so with knowledge of the circumstances of the act.

#### **Article 61**

##### **Circumvention of international obligations of a State member of an international organization**

1. A State member of an international organization incurs international responsibility if, by taking advantage of the fact that the organization has competence in relation to the subject-matter of one of the State's international obligations, it circumvents that obligation by causing the organization to commit an act that, if committed by the State, would have constituted a breach of the obligation.

2. Paragraph 1 applies whether or not the act in question is internationally wrongful for the international organization.

#### **Article 62**

##### **Responsibility of a State member of an international organization for an internationally wrongful act of that organization**

1. A State member of an international organization is responsible for an internationally wrongful act of that organization if:

- (a) it has accepted responsibility for that act towards the injured party; or

- (b) it has led the injured party to rely on its responsibility.

2. Any international responsibility of a State under paragraph 1 is presumed to be subsidiary.

**Article 63**  
**Effect of this Part**

This Part is without prejudice to the international responsibility of the international organization which commits the act in question, or of any State or other international organization.

**Part Six**  
**General Provisions**

**Article 64**  
*Lex specialis*

These draft articles do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of an international organization, or of a State in connection with the conduct of an international organization, are governed by special rules of international law. Such special rules of international law may be contained in the rules of the organization applicable to the relations between an international organization and its members.

**Article 65**  
**Questions of international responsibility not regulated by these draft articles**

The applicable rules of international law continue to govern questions concerning the responsibility of an international organization or a State for an internationally wrongful act to the extent that they are not regulated by these draft articles.

**Article 66**  
**Individual responsibility**

These draft articles are without prejudice to any question of the individual responsibility under international law of any person acting on behalf of an international organization or a State.

**Article 67**  
**Charter of the United Nations**

These draft articles are without prejudice to the Charter of the United Nations.

---

---

# Advance Unedited Version

Distr.: General  
1 June 2011

Original: English

---

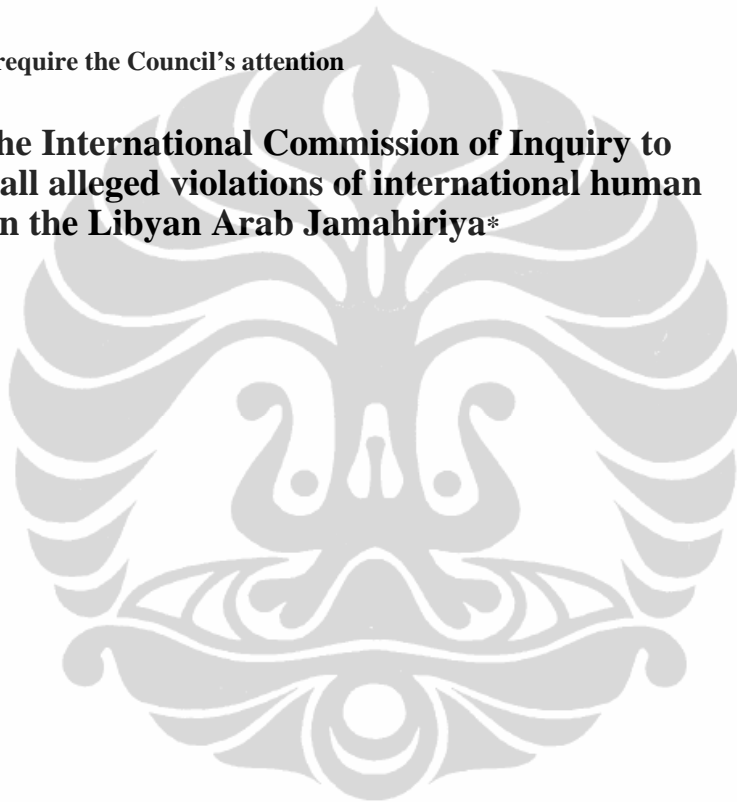
## Human Rights Council

Seventeenth session

Agenda item 4

Human rights situation that require the Council's attention

### **Report of the International Commission of Inquiry to investigate all alleged violations of international human rights law in the Libyan Arab Jamahiriya\***



---

\* Late submission.

*Summary***Mandate and methods of work of the international commission of inquiry**

Pursuant to Human Rights Council resolution S-15/1 of 25 February 2011, entitled “Situation of human rights in the Libyan Arab Jamahiriya”, the President of the Human Rights Council established the international commission of inquiry, and appointed M. Cherif Bassiouni as the Chairperson of the commission, and Asma Khader and Philippe Kirsch as the two other members.

In paragraph 11 of resolution S-15/1, the Human Rights Council requested the commission to investigate all alleged violations of international human rights law in the Libyan Arab Jamahiriya, to establish the facts and circumstances of such violations and of the crimes perpetrated and, where possible, to identify those responsible, to make recommendations, in particular, on accountability measures, all with a view to ensuring that those individuals responsible are held accountable.

The commission decided to consider actions by all parties that might have constituted human rights violations throughout the Libyan Arab Jamahiriya. It also considered violations committed before, during and after the demonstrations witnessed in a number of cities in the country in February 2011. In the light of the armed conflict that developed in late February 2011 in the Libyan Arab Jamahiriya and continued during the commission’s operations, the commission looked into both violations of international human rights law and relevant provisions of international humanitarian law, the *lex specialis* that applies during armed conflict.<sup>1</sup> Furthermore, following the referral of the events in the Libyan Arab Jamahiriya by the Security Council to the International Criminal Court, the commission also considered events in the light of international criminal law.<sup>2</sup>

The commission established direct contact with the Government of the Libyan Arab Jamahiriya and the National Transitional Council, as well as with representatives of civil society and individuals throughout the country. It met with over 350 people during its field missions, including meetings with 113 people (doctors and other medical staff, patients and members of their families) in 10 hospitals, meeting with 30 people detained in two locations in the country (Tripoli and Benghazi) and meetings with 148 people<sup>3</sup> displaced either within the Libyan Arab Jamahiriya or in transit points or refugee camps outside it.

The commission reviewed all allegations raised in connection with issues arising under its mandate. It studied a large number of reports, submissions and other documentation either researched of its own initiative or provided by others, amounting to more than 5,000 pages of documents, more than 580 videos and over 2,200 photographs.

The quality of the evidence and the information obtained by the commission varied in its accuracy and reliability. The commission opted for a cautious approach in the present report by consistently referring to the information obtained as being distinguishable from evidence that could be used in criminal proceedings, whether national or international. It was also careful to make a distinction between information and reports received and testimony it heard first-hand, as well as facts that it observed first-hand. This cautionary

---

<sup>1</sup> *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004*, p. 178, para. 106.

<sup>2</sup> The commission used as its basis articles 6 to 8 of the Rome Statute of the International Criminal Court.

<sup>3</sup> The number includes people interviewed individually or in groups.

approach should not, however, be read as an indication that the allegations of international human rights law and international humanitarian law violations contained in the report are not credible or sufficient in quality and quantity to warrant the concern of the international community.

It should be noted that the reports received by non-governmental organizations were useful and, apparently, reliable. The reports received from Government sources and those of the National Transitional Council did not, however, reflect the same evidentiary qualitative standard. Government reports contained mainly either general denials or specific allegations not supported by evidence. Both sides supplied the commission with broad statements based on unconfirmed reports, allegations or public rumours. The commission informed all sides of its evidentiary standards and met with officials and non-governmental organizations on both sides, informing them on these standards and advising them on reporting requirements. Nevertheless, all such information, notwithstanding their qualitative differences, were taken into account.

Since the beginning of the situation in February 2011, the media, including the international media, have been active in providing reports on events, including videotaped materials. Similarly, a large number of videos and still pictures were given to the commission by individuals, non-governmental organizations, the Government and the National Transitional Council. While the commission took these visual documentary sources into account, their authenticity will have to be ascertained once the sources, such as the details with respect to time and place, can be obtained. In time and with resources, one could reconstitute a visual/photographic record of certain events by establishing a database project linking the visual imagery with written reports. Nevertheless, the large number of videos and pictures, as well as of similar pictures obtained from different sources, tends to give credibility to the accuracy and genuine nature of these images, which in many cases amount to clear indications of violation of international human rights law, humanitarian law and criminal law.

### **Findings of the commission with regard to violations of international human rights law, humanitarian law and criminal law**

The commission notes that a range of serious human rights concerns about the situation in the Libyan Arab Jamahiriya in previous years have been raised in international forums, in particular by the United Nations human rights treaty bodies and special procedures mechanisms. The *jamahiriya* system of government instituted by the Qadhafi regime is a very particular one involving one-man rule using fear, intimidation and incentives based on loyalty. By its very nature, it has not been susceptible to governance based on the rule of law and the protection of human rights. For example, such fundamental rights as the right to freedom of association and the right to freedom of expression and association have been criminalized and are subject to penalties, including the death penalty and life imprisonment. Moreover, the absence of an effective rule of law system and the existence of a judiciary that is not independent, and the dominance of a number of paramilitary and security apparatuses, have also led to the consolidation of a climate of fear and oppression. It is against this background of repression of rights that one has to assess the repressed demand for democracy and the rule of law in early 2011.

The events prompting the convening of a special session of the Human Rights Council and the subsequent establishment of the commission began with mass demonstrations in the Libyan Arab Jamahiriya in February 2011. What started as a series of peaceful demonstrations aiming at achieving reforms in governance and more particularly seeking to see the regime evolve into a democratic form of government subject to the rule of law and upholding human rights was met with the opposition of the Government and of

those supporting it. Within a relatively short period of time, this initial phase escalated into a civil war in which opposing forces fought battles in cities and for the control of territory. In mid-March, international intervention was authorized by the Security Council pursuant to its resolution 1973 (2011). The cumulative number of people killed or injured to date is not certain; Government officials, the National Transitional Council and non-governmental organizations have provided estimates that range from 10,000 to 15,000 killed.

The commission evaluated the events in the Libyan Arab Jamahiriya in accordance with legal regimes applicable to the stages of events occurring in that country. The first demonstrations and Government reaction (from 15 February) took place during a time of peace, requiring analysis on the basis of international human rights law.<sup>4</sup> Subsequently, on the basis of the information available, the commission concluded that a non-international armed conflict had commenced by or around 24 February 2011, bringing into play both international humanitarian law<sup>5</sup> alongside international human rights law. A separate coexisting international armed conflict commenced with external military action pursuant to Security Council resolution 1973 (2011) for which the norms of international humanitarian law relating to international armed conflicts are applicable.<sup>6</sup>

In assessing the information available, the commission reached conclusions with regard to a number of serious violations of international human rights law and humanitarian law. The major conclusions are summarized in the paragraphs below.

There is sufficient evidence to suggest that Government forces used excessive force against demonstrators, at least in the early days of the protests, leading to significant deaths and injuries. Such actions represented a serious breach of a range of rights under international human rights law, including the right to life, the right to security of person, the right to freedom of assembly and the right to freedom of expression. With regard to the latter days of protests as the situation escalated, more investigation would be required to assess the use of force by security forces, and in particular more detail concerning the actions taken by demonstrators in order that the response of Government authorities.

Government forces have arbitrarily detained a significant number of people in many cities and towns across the country. In addition to not affording individuals proper legal protections, it would appear that arrests and detentions were carried out in a “blanket” fashion, targeting suspected opposition supporters or regions viewed as being opposed to

---

<sup>4</sup> The Libyan Arab Jamahiriya is a party to many international human rights instruments, including the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights, the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of All Forms of Discrimination against Women, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the Convention on the Rights of Child, the International Convention on the Protection of the Rights of all Migrant Workers and Members of Their Families and the Convention on the Prevention and Punishment of the Crime of Genocide. It has also ratified a number of related optional protocols, including the one most relevant to the current context, the Optional Protocol to the Convention on the Rights of Child on the involvement of children in armed conflict. The Libyan Arab Jamahiriya is also bound by relevant norms of customary international law.

<sup>5</sup> Of particular relevance in this field is common article 3 to the four Geneva Conventions and Protocol Additional II to the Geneva Conventions relating to the Protection of Victims of Non-International Armed Conflicts, to which the Libyan Arab Jamahiriya is a party, as well as customary international humanitarian law.

<sup>6</sup> This includes all the provisions of the four Geneva Conventions, together with Protocol Additional I to the Geneva Conventions relating to the Protection of Victims of International Armed Conflicts (to which the Libyan Arab Jamahiriya and most of the international coalition States are a party), as well as relevant customary international humanitarian law.

the regime, rather than being related to the commission of criminal acts or other security-related reasons associated with the armed conflict.

The Government of the Libyan Arab Jamahiriya has engaged in a pattern of enforced disappearances of persons in violation of its obligations under international human rights law and international humanitarian law. The commission received very little information on violations committed by the armed opposition in relation to arbitrary arrest or other forms of deprivation of liberty or disappearances.

Torture and other forms of cruel, inhuman or degrading treatment were committed by both the Government and the opposition forces in violation of obligations under international human rights law and humanitarian law. Violations were most common with regard to persons held in detention, including incommunicado detention, and to those perceived to be supporters of “the other side” to the conflict. The Government-related cases were reported both in peacetime (against persons detained in relation to the demonstrations) and subsequently, during the armed conflict.

A range of actions taken by Government forces had the effect of impeding or preventing altogether access to medical care, whether by refusing assistance in the immediate aftermath of demonstrations or by later obstructing access to hospitals, taking action against medical personnel or allegedly abducting people from hospitals. In such actions, there have been clear violations of the right to an adequate standard of health, as well as other serious violations involved in the particular actions taken against medical personnel or patients.

Serious attacks on journalists and other media professionals, designed primarily to stifle coverage of the Government response to the demonstrations and the ongoing armed conflict, and/or to retaliate against perceived or feared criticism of the regime, were reported. Media professionals have been subject to arbitrary arrest, torture, ill-treatment, harassment, intimidation, enforced disappearances and, in some cases, have been the subject of targeted attacks. Authorities took specific action to impede the flow of information (inside as well as outside the country), including by cutting landline telephone communications, Internet access and other means of communication. Such actions represent violations of the country’s obligations under international human rights law and international humanitarian law.

With regard to the conduct of hostilities, the commission concluded that there had been serious violations of international humanitarian law, with further investigation required in other areas in order to assess reports fully. The commission received sufficient consistent information concerning the degree of injuries and the type of victims to suggest that there have been at least indiscriminate attacks against civilians by Government forces and a failure to take sufficient precautionary steps to protect civilians. Further investigation would be necessary to determine whether there was any intentional targeting of civilians. Protected objects, such as mosques and cultural objects, have certainly been damaged during the conflict. At this point in time, the commission is unable to determine whether attacks on such objects were intentional. The commission is, however, able to establish that there have been instances of deliberate destruction of objects indispensable to the civilian population. It considers that there have been attacks on medical transports and facilities in situations that appear to have been targeted attacks, with other instances requiring further investigation. It also considers that the Libyan authorities have failed to facilitate access for humanitarian agencies to address the needs of civilian populations in the country. It considers that there have been attacks on humanitarian units, though without further information it is not able to establish whether they were intentional. The commission concludes that there has been a failure to take precautionary steps to minimize damage to civilian and protected objects. It is also satisfied that there has been a misuse of the distinctive emblems of the Geneva Conventions by Government forces during the conflict.



The commission did not receive any first-hand information concerning violations by the armed opposition force and is therefore not in a position to determine whether any relevant violations occurred.

With regard to allegations concerning the use of mercenaries, the commission established that foreign nationals had taken part in the conflict, including perpetrating human rights violations, particularly on the side of Government forces. Further investigation would, however, be required to determine whether those armed individuals fell into the category of “mercenaries” within the provisions of international law; in particular, more information is needed on the residential status of foreign nationals involved with the security forces and the means and purposes for which they were recruited.

Migrant workers, particularly those from sub-Saharan Africa, were subject to mistreatment in violation of international human rights law and international humanitarian law. Mistreatment of migrant workers has taken many forms, including having their houses subject to arbitrary search, being beaten and subject to other cruel and inhuman treatment. The most serious attacks on migrant workers appear to have been linked to a suspicion that such persons were “mercenaries” on the basis of their national origin or skin colour. Attacks were most frequently made by persons associated with the opposition forces. There were also cases of Government forces subjecting migrant workers to human rights violations, including arbitrary arrest, physical attacks and other ill-treatment, which require further investigation. In many locations, there were reports of attacks by unaffiliated armed civilians. The failure of authorities to protect migrant workers from such attacks raises separate issues of responsibility. Further investigation is required on the reports of extrajudicial killings received by the commission.

With regard to the use of weaponry, the commission is concerned that the Libyan authorities have not been making appropriate and precautionary assessments which would, in the commission’s view, militate against the use of weapons such as mortars in densely-populated urban areas. The commission is also concerned about reports of the use of weapons such as expanding bullets, cluster munitions and phosphorous weapons in highly populated areas. Further investigation, however, including forensic analysis, would be needed to confirm the use of these ammunitions.

The commission received, but was unable to verify, individual accounts of rape. It notes, however, that sufficient information was received to justify further investigation to ascertain the extent of sexual violence, including whether cases were linked to incitement by the command of either side. It is evident that reports of rape have had a major psychological and social impact and have spread fear among the population. Given the allegations that rape was committed as part of a policy to spread such fear, further investigation would be warranted.

The ongoing conflict is having a significant negative impact on the rights of children. With regard to the use and recruitment of child soldiers, the commission considers that more investigation and research is required, in close cooperation with relevant United Nations agencies, notably the United Nations Children’s Fund and the Office of the Special Representative of the Secretary-General for Children and Armed Conflict, as well as other non-governmental organizations.

With regard to allegations concerning the conduct of hostilities by the North Atlantic Treaty Organization (NATO), the commission is not in a position at this stage to assess the veracity of the information received concerning indiscriminate attacks on civilians. The commission has not, however, seen evidence to suggest that civilians or civilian objects have been intentionally targeted by NATO forces, nor that it has engaged in indiscriminate attacks.

The combination of the factors mentioned in the report has led to the impunity of those who have committed violations of international law identified in the report, and emboldened them in the continuation of their abuses against the civilian population.

In its resolution 1970 (2011), the Security Council referred the situation in the Libyan Arab Jamahiriya to the Prosecutor of the International Criminal Court pursuant to the Rome Statute. It has therefore vested primary jurisdiction with respect to the determination of criminal responsibility with the International Criminal Court. It is in this perspective that the commission has consulted with the Court, but has not to date shared information about its findings. The determination of individual criminal responsibility and command responsibility for both sides requires further investigation and corroboration of certain facts ascertained by the commission. Nonetheless, in the present report, the commission identifies a number of violations that have led it to the conclusion that international crimes, and specifically crimes against humanity and war crimes, have been committed in the Libyan Arab Jamahiriya.

The commission has found that there have been acts constituting murder, imprisonment, other forms of severe deprivation of physical liberty in violation of fundamental rules of international law, torture, persecution, enforced disappearance and sexual abuse that were committed by Government forces as part of a widespread or systematic attack against a civilian population with knowledge of the attack. Such acts fall within the meaning of “crimes against humanity”.

The commission has found that there have been many serious violations of international humanitarian law committed by Government forces amounting to “war crimes”. Under the listing of “war crimes” in the Rome Statute applicable to non-international armed conflict, the commission has identified violations involving violence to life and person, outrages upon personal dignity in particular humiliating and degrading treatment, intentionally directing attacks against protected persons and targets including civilian structures, medical units and transport using the distinctive emblems of the Geneva Conventions. The commission also received considerable information concerning indiscriminate attacks on civilians and civilian objects (including protected objects, such as mosques, buildings of cultural significance and hospitals) and attacks on humanitarian-related personnel and transport; further investigation would, however, be required to determine whether those attacks on civilians and civilian objects amounted to “intentional targeting” within the meaning of the Rome Statute. Further investigation would also be required in relation to whether children under 15 years of age were conscripted into or enlisted in armed forces or groups, or used them to participate actively in hostilities, as well as into allegations of rape during the conflict.

The consistent pattern of violations identified creates an inference that they were carried out as a result of policy decisions by Colonel Qadhafi and members of his inner circle. Further investigation is required in relation to making definitive findings with regard to the identity of those responsible for the crimes committed. The commission received some information concerning individual perpetrators of crimes, but more investigation is also required on this issue.

The commission received fewer reports of facts that would amount to the commission of international crimes by forces connected with the opposition. It has established that some acts of torture and cruel treatment and some outrages upon personal dignity in particular humiliating and degrading treatment have been committed by opposition armed forces, in particular against persons in detention, migrant workers and those believed to be mercenaries. Under the Rome Statute, those that occurred during the period of armed conflict constitute war crimes. Further investigation would be required into alleged acts of rape and into whether children under the age of 15 years were conscripted into or enlisted in armed forces or groups, or used them to participate actively in hostilities.

On the basis of the information currently available, the commission is not of the view that the violations committed by the opposition armed forces were part of any “widespread or systematic attack” against a civilian population such as to amount to crimes against humanity.

Notwithstanding the cautionary approach taken by the commission in the present report, it should be clear that a significant number of international human rights law violations have occurred, as well as war crimes and crimes against humanity, as described above. These violations and crimes have been committed in large part by the Government in accordance with the command and control system established by Colonel Qadhafi through the different military, paramilitary, security and popular forces that he has employed in the pursuit of a systematic and widespread policy of repression against opponents to his regime and his leadership. There have also been violations by opponents to the regime, which are also described in the report. The commission expressed these concerns to both sides, urging them to cease and desist from these practices and to bring their respective conduct into conformity with the requirements of international law.

The commission is concerned about reports of ongoing violations – not only in relation to new instances of violations, but also the continuing effect of past violations, in particular with regard to those who have disappeared and whose fate remains unknown. The commission is also concerned by a lack of apparent action by the Government to address the violations that to date have been the subject of considerable attention. Although some progress has been made in relation to the release of some persons from detention, including journalists and other media professionals, the commission has not received information about the many people unaccounted for, nor has it received information to confirm that credible investigations are being conducted into violations that have occurred.

The commission is aware of the challenges that lie ahead for the Libyan Arab Jamahiriya in relation to responding to the violations that have occurred. When or how the conflict will come to an end is still unknown. The prospective transition to democracy, the introduction of the rule of law, the equitable allocation of national resources, the restoration of public safety, the reconstruction of public administration, social cohesion across clans and provinces, the strengthening of civil society and the opening of the country to a new peaceful and democratic order will necessarily have to take into account the historic baggage left behind by the Qadhafi regime, including the situation described in the present report.

All of the above considerations and the present report should also be viewed in the light of future post-conflict justice and transitional justice mechanisms designed to provide justice and reconciliation among the people of the Libyan Arab Jamahiriya in order to ensure peace in that country, as well as between the country and the international community. While post-conflict justice and transitional justice are not within the scope of the commission, its fact-finding work will nevertheless be useful in connection with the goals of post-conflict justice and transitional justice.

The commission was able to accomplish its mandate in a relatively short period of time, particularly for a period of ongoing conflict. It considers that further work has to be done in order to investigate fully the numerous allegations it continues to receive at a time when the conflict is still ongoing. Future work would also permit an assessment of the veracity of the allegations received, particularly with regard to the use of mercenaries, the use of child soldiers, sexual violence and violations against migrant workers. Finally, 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.

## Recommendations

1. The commission calls on the Government of the Libyan Arab Jamahiriya:
  - (a) To immediately cease acts of violence against civilians in violation of applicable international humanitarian law and international human rights law;
  - (b) To conduct exhaustive, impartial and transparent investigations into all alleged violations of international human rights law and international humanitarian law, and in particular to investigate, with a view to prosecuting, cases of extrajudicial, summary or arbitrary executions, disappearances and torture, with full respect for judicial guarantees;
  - (c) To release unconditionally and immediately all those who are being held as a result of their participation in peaceful demonstrations or otherwise being arbitrarily detained;
  - (d) To reveal the names of all those in its custody, as well as those who have died in its custody, in order to relieve the suffering of the relatives of the disappeared; in the cases of those who have died, the Government should produce evidence of their deaths together with the precise whereabouts of their burial sites;
  - (e) To grant adequate reparations to the victims or their families, and to take all appropriate measures to prevent the recurrence of violations;
  - (f) To ensure free, full and unrestricted access to all places of detention for humanitarian and human rights organizations, granting access to all facilities without prior notice and to all premises of each detention centre, the possibility for repeat visits to the same place and the possibility to interview prisoners in private without witnesses;
  - (g) To bring all laws and policies of the Libyan Arab Jamahiriya into conformity with international human rights standards.
2. The commission calls on the National Transitional Council:
  - (a) To ensure the immediate implementation of applicable international humanitarian law and international human rights law;
  - (b) To conduct exhaustive, impartial and public investigations into all alleged violations of international human rights law and international humanitarian law, and in particular to investigate, with a view to prosecuting, cases of extrajudicial, summary or arbitrary executions and torture, with full respect for judicial guarantees;
  - (c) To grant adequate reparations to the victims or their families, and to take all appropriate measures to prevent the recurrence of such violations;
  - (d) To make further efforts to ensure strict control over weapons in the possession of individuals;
  - (e) To ensure free, full and unrestricted access to all places of detention for humanitarian and human rights organizations, granting access to all facilities without prior notice and to all premises of each detention centre, the possibility for repeat visits to the same place and the possibility to interview prisoners in private without witnesses.
3. With regard to the humanitarian situation, the commission calls on the Government and the National Transitional Council to fulfil their respective

obligations under international humanitarian law, particularly those regarding the protection of civilians, including the facilitation of immediate, free and unimpeded access for humanitarian personnel to all persons in need of assistance, in accordance with applicable international law.

4. The commission, in view of the time frame within which it has had to complete its work, and considering the gravity and the complexity of the situation, recommends that the Human Rights Council remain seized of the situation by extending the mandate of the commission or by establishing a mechanism with the ability to continue the necessary investigations into both the human rights and humanitarian law situations in the Libyan Arab Jamahiriya for a period of one year.



## Report of the International Commission of Inquiry to investigate all alleged violations of international law in the Libyan Arab Jamahiriya

### Contents

	<i>Paragraphs</i>	<i>Page</i>
I. Introduction .....	1–19	
II. Background .....	20–29	
III. The Commission’s findings of violation of international human rights law and international humanitarian law .....	30–80	
A. Introduction .....	30–35	
B. The events from February 2011 .....	36–45	
C. Categories of security groups participating in the events .....	46–59	
D. International legal framework for the Commission’s analysis.....	60–80	
IV. Violations .....	81–235	
A. Excessive use of force against demonstrators .....	82–99	
B. Arbitrary detentions and enforced disappearances .....	100–120	
C. Torture and other forms of ill-treatment .....	121–129	
D. Denial of access to medical treatment .....	130–139	
E. Freedom of expression.....	140–154	
F. Attacks on civilians, civilian objects, protected persons and objects.....	155–180	
G. Prohibited weapons.....	181–189	
H. Use of mercenaries .....	190–201	
I. Migrant workers.....	202–210	
J. Sexual violence.....	211–219	
K. Children in armed conflict .....	220–227	
L. NATO’s use of force .....	228–235	
V. Assessment and findings .....	236–267	
VI. Recommendations .....	268–271	
<b>Annexes</b>		
I. Programme of Work of the International Commission of Inquiry on Libya.....		
II. Glossary of Terms .....		
III. Member States and Organizations that Submitted Information to the International Commission of Inquiry .....		

### Acronyms and Abbreviations

AP I	Additional Protocol I to the Geneva Conventions Relating to the Protection of Victims of International Armed Conflict
AP II	Additional Protocol II to the Geneva Conventions Relating to the Protection of Victims of Non-International Armed Conflict
CAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CEDAW	Convention on the Elimination of all forms of Discrimination against Women
CMW	International Convention on the Protection of the Rights of all Migrant Workers and Members of their Families
CERD	Convention on the Elimination of all forms of Racial Discrimination
CRC	Convention on the Rights of the Child
ESA	External Security Agency
HRC	Human Rights Council
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
IOM	International Organization for Migration
ISA	Internal Security Agency
JSA	Jamahiriya Security Organization
NATO	North Atlantic Treaty Organization
NGO/NGOs	Non-governmental Organization
NTC	National Transitional Council
OUA	Organization of African Unity
OCHA	Office for the Coordination of Humanitarian Affairs
OHCHR	Office of the High Commissioner for Human Rights
OPCRC-AC	Optional Protocol to the CRC on the Involvement of Children in Armed Conflict
Rome Statute	Rome Statute of the International Criminal Court
SC	Security Council
UNCT	United Nations Country Team
UNDP	United Nations Development Programme
UNDSS	United Nations Department of Safety and Security
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNHCR	Office of the United Nations High Commissioner for Refugees

UNICEF	United Nations Children's Fund
UNMAS	United Nations Mine Action Service
UNODC	United Nations Office on Drugs and Crimes
WFP	World Food Programme
WHO	World Health Organization
WGAD	Working Group on Arbitrary Detention
WGEID	Working Group on Enforced or Involuntary Disappearances





## I. Introduction

### 1. Mandate and Methods of work

1. On 25 February 2011, the 15<sup>th</sup> Special Session of the United Nations Human Rights Council (henceforth HRC) adopted resolution A/HRC/RES/S-15/1 entitled “Situation of Human Rights in the Libyan Arab Jamahiriya” which inter alia, decided to dispatch an independent, international Commission of Inquiry.

2. Accordingly, on 15 March 2011, the President of the Human Rights Council established the United Nations International Commission of Inquiry (henceforth the Commission) and appointed its three members, Mr. M. Cherif Bassiouni (Egypt); Ms. Asma Khader (Jordan) and Mr. Philippe Kirsch (Canada). The President also designated Mr. M. Cherif Bassiouni as the Chairperson of the Commission. As requested by the Human Rights Council, the Office of the United Nations High Commissioner for Human Rights (OHCHR) established a secretariat to support the Commission.

3. Operative paragraph 11 of resolution A/HRC/RES/S-15/1 requested the Commission “to investigate all alleged violations of international human rights law in the Libyan Arab Jamahiriya, establish the facts and circumstances of such violations and of the crimes perpetrated and where possible, to identify those responsible, to make recommendations, in particular, on accountability measures, all with a view to ensuring that those individuals responsible are held accountable.”

4. Accordingly, the Commission determined that it was required to consider actions by all parties that might have constituted human rights violations throughout the territory of Libya. The Commission was also asked to consider the “facts and circumstances of such violations and of the crimes perpetrated.” Given the Security Council’s referral of events in Libya to the International Criminal Court, the Commission has also considered events in light of international criminal law.<sup>7</sup> The Commission’s temporal mandate is not limited and therefore includes violations before, during and after the demonstrations witnessed in a number of cities in Libya in February 2011. With an armed conflict having developed in late February in Libya and continuing during the Commission’s operations, the Commission looked into both violations of international human rights law and relevant provisions of international humanitarian law, the *lex specialis* which applies during armed conflict.<sup>8</sup>

5. In view of the time frame within which it had to complete its work, the Commission necessarily had to be selective in the choice of issues and incidents for investigation. The report does not purport to be exhaustive in documenting the very high number of relevant incidents that occurred in the period covered by the Commission’s mandate. Nevertheless, the Commission considers that the report is illustrative of the main patterns of violations.

6. The Commission agreed at the outset that it would treat information it obtained on a confidential basis. In order to protect their safety and privacy, the names of the victims, witnesses and other sensitive sources are generally not explicitly referred to in the report unless explicitly agreed by the source and deemed appropriate by the Commission or the case has been otherwise well publicized. It also decided to limit its contacts with the media to providing factual information about its visits. On 9 April 2011, the Chair of the

---

<sup>7</sup> The Commission has used as its basis Articles 6-8 of the Rome Statute of the International Criminal Court (henceforth “the Rome Statute”).

<sup>8</sup> *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004*, p. 178, para. 106.

Commission, together with the two other members held a press conference in Geneva informing about its mandate and the planned visit to Libya. On 3 May 2011, the Commission issued a press statement informing about its field missions.

7. The Commission endeavoured to establish direct contact with the Government of the Libyan Arab Jamahiriya and the National Transitional Council (NTC) as well as representatives of civil society and individuals throughout the country. The Commission gathered first hand information with regard to the situation in Libya by conducting interviews with victims, community representatives, local authorities, members of NGOs and experts, government officials and United Nations officials during its meetings in Geneva, Libya, Egypt and Tunisia. In Libya, the Commission and/or members of the Secretariat visited Benghazi, Al-Bayda, Tobruk, Tripoli and Az-Zawiyah; in Egypt, Cairo, Marsa Matruh and As-Sallum; and, in Tunisia, Tunis, Djerba, Ras Adjir, Sfax, Sousse, Tataouine and Zarzis. Details of its programme can be found in Annex I. The Commission is grateful for all the assistance provided in connection with its work, in particular by the Office for the Coordination of Humanitarian Affairs (OCHA), United Nations Children's Fund (UNICEF), United Nations Development Programme (UNDP), United Nations Department of Safety and Security (UNDSS), Office of the United Nations High Commissioner for Refugees (UNHCR), World Food Programme (WFP), and OHCHR staff for facilitation of the Commission's field missions.

8. The Commission adopted an inclusive approach to receiving information and views on matters within its mandate during both its field missions and other investigations. Particular information gathering methods have included:

- a) Interviews with victims, witnesses and other persons having relevant information. The Commission met with over 350 persons during its field missions. The interviews were conducted in person by members of the Commission and/or members of the Secretariat. In one case the Commission was unable to conduct the meeting in person, but an interview took place by telephone.<sup>9</sup> These included meetings with:
  - 113 persons (doctors and other medical staff, patients and members of their families) in 10 hospitals (3 in Cairo, 1 in Alexandria, 2 in Benghazi, 1 in Tataouine, 2 in Sfax and 1 in Sousse);
  - 30 persons detained at two locations in Libya (Tripoli and Benghazi);
  - 148 persons<sup>10</sup> displaced either within Libya or in transit points or refugee camps outside Libya (1 in Benghazi, 1 at Ramada, 3 at Ras Ajdir and 1 in As-Sallum);
- b) Meetings with a number of Government officials of Libya, Egypt and Tunisia, as well as representatives of the NTC and officials of the United Nations including the Secretary-General's Special Envoy to Libya, Mr. Abdelilah Al-Khatib;
- c) Site visits to specific locations where incidents had occurred. In this respect, the Commission was able to visit some sites in Benghazi and Tripoli, though its access was limited due to the ongoing armed conflict;

<sup>9</sup> This case was that of Ms. Iman al-Obeidi whose account of being raped has been widely publicised. A Commission member also met with members of her family. During its visit to Tripoli, the Commission raised concerns about Ms. Al-Obeidi and requested she be given permission to leave the country. Ms. Al-Obeidi subsequently was able to leave Libya in early May 2011.

<sup>10</sup> This number includes persons interviewed individually or in groups.

- d) Analysis of video and photographic images gathered by the Commission throughout the reporting period;
- e) Review of hospital and medical reports about injuries to victims and other relevant information such as death certificates and forensic reports;
- f) Meetings with a variety of interlocutors, including members of the diplomatic community, representatives of the parties concerned, non-governmental organizations (NGOs), professional associations; military analysts, medical doctors and legal experts during its field mission and its other investigations;
- g) The review of reports of international organizations, including the United Nations; reports and other documentation produced by non-governmental and civil society organizations; media reports; and writings of academics and analysts on the conflict<sup>11</sup>;
- h) Invitations, through notes verbales to United Nations Member States<sup>12</sup> and United Nations agencies, departments and bodies and to regional organizations to provide information relating to the Commission's investigations;
- i) The wide circulation of a public call for written submissions from NGOs and other organizations and individuals interested in bringing information to the attention of the Commission.

9. The Commission reviewed all allegations raised in connection with issues arising under its mandate. It studied a large number of reports, submissions and other documentation either researched of its own motion or provided by others, amounting to more than 5000 pages of documents, over 580 videos and over 2200 photographs. The Commission's records, including records of interviews, have been maintained and will be handed over to OHCHR at the end of its functioning, in accordance with established rules and procedures.

10. In establishing its findings, the Commission sought to rely primarily and whenever possible on information it gathered first-hand.

## 2. Challenges faced by the Commission

11. The Commission faced significant challenges in carrying out its mandate in the short period preceding this Report:

- a) The Commission was given a broad mandate with a very tight deadline requiring it and the Secretariat to work intensively and under heavy time pressure. The President of the Human Rights Council appointed the three members of the Commission on 15 March 2011 with a mandate to report back at the 17th Session of the Council and to submit the report by 30 May 2011, allowing for a period of investigation of approximately 2 months;
- b) The Commission faced significant security considerations, logistical and administrative hurdles in arranging at very short notice visits to Benghazi and Tripoli;
- c) The Commission was not able to visit sites where the conflict was ongoing, such as Misrata and Ajdabiya and other locations where incidents were reported.

<sup>11</sup> A listing of Member States and Organizations that submitted information to the Commission is contained in Annex III.

<sup>12</sup> Eight Member States submitted information to the Commission of Inquiry in response to its Note Verbale dated 3 May 2011.

Security considerations limited the Commission's ability to enjoy access to persons and places.

- d) The ongoing armed conflict and the particularly repressive conditions in certain areas significantly contributed to an atmosphere in which many victims and prospective witnesses feared or may have feared speaking of their experiences given the ongoing risk to them or to their families. The Commission was also mindful of the need to avoid taking any actions which would endanger victims and witnesses. Furthermore, damage to systems of communication meant that it was difficult for the Commission to engage in extensive verification or follow up of some of the information received.
- e) Given the ongoing nature of the conflict, violations have continued to be reported during the Commission's operation leading to a massive increase in potential violations to be investigated.

12. Given all these circumstances, the Commission is of the view that more time is necessary to carry out further investigation within Libya for a comprehensive inquiry, followed by appropriate time for analysis and the writing of additional reports.

13. Notwithstanding these constraints, the Commission considers that it has been able to gather a substantial body of material with respect to violations of international human rights, international humanitarian law and international criminal law that have occurred. Further investigation is critical in relation to fulfilling the mandate with respect to fully exploring the scope of the violations, identifying those with responsibility for the violations and crimes and making appropriate recommendations.

### **3. Cooperation with Governments and other Institutions.**

14. Through letters dated 21 March, 1, 9, 17 and 21 April respectively, the Commission sought the cooperation of the Government of Libya, requesting a visit to Tripoli and Az-Zawiyah. Furthermore, through letters dated 26 April, 5 May and 19 May, the Commission also requested the Government of Libya to provide specific information and calling for the release of 18 detained journalists as well as for the release of a number of detainees with whom it met while in Tripoli. The Commission received a response from the Government of Libya on 25 May which contained details with respect to two of the journalists, but regrets that the Government of Libya did not respond with information on the whereabouts of other individuals concerned. It notes nevertheless that out of the list of 18 journalists, 4 have been released in the meantime. The Commission also regrets that the Government of Libya failed to inform it that one of the journalist included in the list was already dead at the time when the Commission was inquiring about his fate.

15. By letter dated 9 April 2011, the Commission sought the cooperation of the NTC, with respect to a visit to Benghazi, Al-Bayda and Tobruk. By letter dated 18 May, it also asked further information on specific issues related to its mandate. The Commission is thankful for the responses received with respect to both letters.

16. The Commission also sought and obtained the cooperation of the Egyptian and Tunisian authorities in arranging for field visits in their countries.

17. The Commission also wrote to the North Atlantic Treaty Organization (NATO) on 18 May asking for information relating to its operations in Libya. To date, no response has been received from NATO.

18. The Commission has been consulting with the Office of the Prosecutor of the International Criminal Court (ICC) whose office has been investigating alleged international crimes committed in Libya since 15 February 2011. In undertaking this

liaison, the Commission and the ICC have been committed to respecting appropriate confidentiality and independence requirements of each body.

#### 4. Acknowledgments

19. The Commission is grateful to the numerous Libyans and other foreign nationals, especially victims and witnesses of violations, who have shared with it their stories and views. The Commission is also grateful to all the member states, United Nations agencies, domestic and international NGOs that have supported its mandate and have provided a vast amount of relevant and well-documented information. The Commission is appreciative of the dedicated work of the Secretariat to support its work. The Commission wishes to formally thank the Governments of Libya and representatives of the NTC for their cooperation and readiness to accept the request for a visit. It also wishes to thank both the Egyptian and Tunisian authorities for facilitating the conduct of its programme at short notice.

## II. Background

20. Libya is bordered by the Mediterranean Sea to the north, Egypt to the east, Sudan to the south-east, Chad and Niger to the south, and Algeria and Tunisia to the west. With an area of almost 1,800,000 square kilometers (700,000 sq mi), Libya is the fourth largest country in Africa, and the 17th largest country in the world. The capital, Tripoli, is home to 1.7 million of Libya's 6.4 million people. The three traditional parts of the country are Tripolitania, Fezzan and Cyrenaica. Libya has the highest Human Development Index in Africa and the fourth highest Gross Development Product per capita in Africa as of 2009. Libya has the 10th largest proven oil reserves in the world and the 17th highest petroleum production.

21. Most Libyans claim descent from the Bedouin Arab tribes of the Banu Hilal and the Banu Sulaym, who are said to have invaded the Maghrib in the 11th century. The tribe, a form of social organization that allowed the grouping of nomadic peoples scattered across the country's vast spaces, was the foundation of social order for much of Libya's history. There is also a substantial Amazigh population mainly living in the region of the Nafusa Mountain which rises out of the desert at the Tunisian border. At the beginning of the 21st century, Libya's population included a substantial number of foreign migrant workers—largely from sub-Saharan African countries—temporarily residing in the country.<sup>13</sup>

22. Libya was part of the Ottoman Empire, from 1517 through 1910 at which time a French-Ottoman agreement was signed to settle borders between Tripolitania, Tunisia and Algeria. Italy invaded Libya in 1911 and by the end of the 1930's, Italy was in control of the regions of Tripolitania and Cyrenaica. The Italian government encouraged a settlement policy for its nationals and invested heavily in infrastructure. As a result, in late 1930's around 150,000 Italians had settled in Libya and constituted roughly one-fifth of that country's total population. As a result of the North Africa campaigns of 1941–43 of World War II, Libya's infrastructure was largely destroyed. By 1945, Libya was impoverished,

<sup>13</sup> It has been estimated that there were approximately 2.5 million migrant workers in Libya in early 2011, mainly from Asia and Sub-Saharan Africa. See OCHA Report, *Initial Assessment of Migrant Workers from Libya in Tunisia*, OCHA, Tunisia, 18 March 2011, p. 9, available from [http://northafrica.humanitarianresponse.info/Portals/0/Reports/Assessment/IA%20Assessment%20Report-%20Choucha%20Camp%20%20March%202011\(f\).pdf](http://northafrica.humanitarianresponse.info/Portals/0/Reports/Assessment/IA%20Assessment%20Report-%20Choucha%20Camp%20%20March%202011(f).pdf).

under populated and divided into 3 regions (Tripolitania, Cyrenaica and Fezzan) of differing political, economic, and religious traditions.<sup>14</sup>

23. On 21 November 1949, the United Nations General Assembly passed a resolution stating that Libya was to be constituted as an independent and sovereign State no later than 1 January 1952.<sup>15</sup>

24. Muhammad Idris al-Mahdi al-Senusi was chosen as King by the National Assembly in 1950. On 24 December 1951, Libya declared its independence as the United Kingdom of Libya. The 1951 Constitution created Libya as a federal State, with separate Parliaments for each province. An amendment to the Constitution in 1963 ended the federal system which in turn led to a more centralized government.<sup>16</sup>

25. The discovery of significant oil reserves in 1959 enabled one of the world's poorest nations to become an extremely wealthy state. Resentment, however, festered among some factions over concentration of the nation's wealth in the hands of an oligarchy. Growing resentment brought a group of military officers led by Mu'ammarr Qadhafi, Chairman of the Union of Free Unionist Officers to stage a coup d'état against King Idris on 1 September 1969.

26. The first years of the revolution were a period of transition during which Colonel Qadhafi<sup>17</sup> consolidated his power with the one-party system of the Arab Socialist Union, created in 1971. A "Popular Revolution" was announced in August 1973. This envisaged Libyan people directly participating in the governance of their country through people's committees. "Popular rule" was declared by the General People's Congress in March 1977. As a culmination of these reforms, the country was renamed the Great Socialist People's Libyan Arab Jamahiriya. "Jamahiriya" was a word created and used exclusively in Libya to describe the "State of the masses" and to reflect the aim of the regime: a country liberated not only from colonial or neo-colonial rule but also from partisan and bureaucratic obstacles.<sup>18</sup>

27. Revolutionary Committees were established in 1977 to maintain popular support for the ideology of the regime, summarised in Colonel Qadhafi's "Green Book."<sup>19</sup> Colonel Qadhafi, who was appointed by the General People's Congress as its Secretary-General, officially relinquished this position in March 1979 to devote himself to "revolutionary work". In March 1990 the General People's Congress appointed him Supreme Leader and gave his instructions the force of law. On 23 September 2009 he was introduced at the United Nations General Assembly as the "Leader of the Revolution of Libya."<sup>20</sup> In reality, he remains not only the head of State but the head of Government in Libya, exercising virtually absolute powers. Members of Colonel Qadhafi's family are appointed to key functions. His second son, Saif al-Islam Qadhafi, for instance, was appointed general

<sup>14</sup> Dirk Vandewalle, *A History of Modern Libya* (Cambridge, Cambridge University Press, 2006), p. 36. The three regions mentioned correspond to the North-West region around Tripoli, the North-East region around Benghazi and the South-West mountain areas respectively.

<sup>15</sup> Question of the disposal of the former Italian Colonies, A/RES/289(IV)AD.

<sup>16</sup> Dirk Vandewalle, *A History of Modern Libya* (Cambridge, Cambridge University Press, 2006), p. 73.

<sup>17</sup> In this report, the Commission has chosen to use the title "Colonel Qadhafi" as a matter of consistent terminology whilst being aware of the range of titles he has held at particular times.

<sup>18</sup> For a discussion of the significance of this term, see Dirk Vandewalle, *A History of Modern Libya* (Cambridge, Cambridge University Press, 2006), pp. 102-138.

<sup>19</sup> Amnesty International, *Libya of Tomorrow, What Hope for Human Rights*, 23 June 2010 (Index number: MDE 19/007/2010), p.17 See further Amnesty International, *Libya: Summary of Amnesty International's Prisoners Concerns, October 1987* (Index number: MDE 19/005/1984).

<sup>20</sup> A/64/PV.3, p. 15.

coordinator of the Popular Social Command in October 2009 with power over the legislature.<sup>21</sup> Other family members have command positions within the military, including the Khamis *Katiba*<sup>22</sup> and Military Intelligence and control of telecommunications.<sup>23</sup>

### Legal System of Libya

28. The legal system of Libya is based on a combination of Civil Law and Islamic legal principles. In 1971, Colonel Qadhafi abolished the former system of Shari'a and secular courts and replaced it with a single system integrating Islamic and secular principles. The judicial system is formally comprised of a four-tiered hierarchy: Summary Courts, Courts of First Instance, Courts of Appeal and the Supreme Court of Libya.

29. The Constitution adopted in 1951 included several articles guaranteeing the enjoyment of human rights including equality before the law, equal opportunities and equal responsibilities for public duties and obligations, "without distinction of religion, belief, race, language, wealth, kinship or political or social opinions". However, the Constitution was suspended in 1969. At that point, the Revolutionary Command Council<sup>24</sup> adopted a temporary "Constitutional Declaration." On 2 March 1977, the Declaration of the People's Authority launched a new political system based on the ideals of Colonel Qadhafi contained in his "Green Book." Henceforth, acts of the Revolutionary Command Council were legally immune and could not be contested before any judicial tribunal.<sup>25</sup> By virtue of Law No. 6/1982, the Libyan Supreme Court was denied the right to determine matters involving constitutionality of laws.<sup>26</sup>

## III. The Commission's findings of violations of international human rights law and international humanitarian law

### A. Introduction

30. In order to understand the current situation in Libya, it is important to place developments within the broader human rights context in Libya. This includes the economic disparities and manner of governance (explored in the Background section), and

<sup>21</sup> The Office of the Prosecutor of the ICC has noted that over recent years, Colonel Qadhafi has authorized his second eldest son Saif al-Islam to act as de facto prime minister and given him authority, to control State finances. See International Criminal Court, Office of the Prosecutor, *Prosecutor's Application Pursuant to Article 58 as to Mu'ammur Mohammed Abu Minyar GADDAFI, Saif Al-Islam GADDAFI and Abdullah AL-SENUSSI*, 16 May 2011 (No. ICC-01/11), p. 5. The Commission has noted many changes in the inner circle of Colonel Qadhafi and in particular the whimsical granting of powers to some of those persons including the shifting of powers from one to another.

<sup>22</sup> *Katiba* is usually translated into brigade though this does not connote a specific number of personnel, with brigades varying in size from 500 to 1500 members. Some brigades have an even larger number of members.

<sup>23</sup> See International Criminal Court, Office of the Prosecutor, *Prosecutor's Application Pursuant to Article 58 as to Mu'ammur Mohammed Abu Minyar GADDAFI, Saif Al-Islam GADDAFI and Abdullah AL-SENUSSI*, 16 May 2011 (No. ICC-01/11, pp. 5-6.

<sup>24</sup> The Revolutionary Command Council was the body in charge of decision-making from 1969 to 1980, according to Dirk Vandewalle, *A History of Modern Libya* (Cambridge, Cambridge University Press, 2006), p. 105.

<sup>25</sup> Adam Abdelmoula, "Libya: The Control of Lawyers by the State" *Journal of the Legal Profession* vol. 17:55 (1992), pp. 56-75.

<sup>26</sup> *Ibid.*

serious human rights issues. The Commission notes that a range of human rights concerns about Libya have been raised in international fora, in particular by United Nations human rights Treaty Bodies and Special Procedures mechanisms. The large number of documented enforced disappearances and cases of extrajudicial, summary or arbitrary executions has been noted by the Human Rights Committee, along with concerns expressed about the lack of information concerning effective investigation and redress.<sup>27</sup> Unresolved cases of disappearance include those of Libyan opposition members Jaballa Hamed Matar and Izzat Al-Megaryef (disappeared in 1990), former Libyan Minister of Foreign Affairs and Ambassador to the United Nations and later opposition figure Mansour Rashid El-Kikhiya (disappeared in 1993). In 1978 Lebanese cleric Imam Musa Al-Sadr was also disappeared in Libya with two companions.<sup>28</sup> Concerns have been raised about arbitrary arrest, the absence of judicial review of detention and the length of pre-trial detention.<sup>29</sup> Concerns have also been raised as to the systematic use of torture and cruel, inhuman or degrading treatment or punishment.<sup>30</sup> Although torture is considered a crime under the Libyan penal code,<sup>31</sup> the Committee against Torture has been critical of the absence of prompt and impartial investigations into incidents of torture.<sup>32</sup>

31. Freedom of speech and to engage in public affairs have been significantly curtailed in law and in practice. Law No. 71/1972 prohibited the establishment of political parties and made illegal associations undertaking of “political activities.”<sup>33</sup> “Political activity” for this purpose is defined broadly to include any activity based on a political ideology contrary to the principles of the Al-Fateh Revolution of 1 September 1969.<sup>34</sup> As the Human Rights Committee has noted as a matter of concern, by virtue of this and Article 206 of the Penal Code, the death penalty can still be imposed for the establishment of prohibited groups.<sup>35</sup> Law 20/1991, entitled On Enhancing Freedom, further significantly limits free speech by providing that “each citizen has the right to express his opinions and ideas openly in People’s Congresses and in all mass media, no citizen is questioned on the exercise of this right unless this has been abused in a way that prejudices the People’s Authority or is used

<sup>27</sup> Concluding observations of the Human Rights Committee, Libyan Arab Jamahriya, CCPR/C/LBY/CO/4, para. 14.

<sup>28</sup> Note that the Working Group on Enforced or Involuntary Disappearances has transmitted 14 cases to the Libyan Government; of those, five cases have been clarified on the basis of information provided by sources, and nine remain outstanding, see A/HRC/13/31, para. 333. During the Commission’s investigation, information was also provided to the Commission as to the disappearance of many persons in the past, in particular from the Nafusa mountain region.

<sup>29</sup> Concluding observations of the Human Rights Committee, Libyan Arab Jamahriya, CCPR/C/LBY/CO/4, para. 19.

<sup>30</sup> *Ibid*, para. 15.

<sup>31</sup> Article 435 of the Penal code (Law No. 48/1956) stipulates that “Any public official who orders the torture of the accused or tortures them himself is punishable by a prison term of three to 10 years”.

<sup>32</sup> Concluding Observations of the Committee against Torture, Libyan Arab Jamahriya, A/54/44, paras. 176-189.

<sup>33</sup> Articles 2 and 3, Law No. 71/1972.

<sup>34</sup> See Concluding observations of the Human Rights Committee, Libyan Arab Jamahriya, CCPR/C/LBY/CO/4, paras. 13 and 23. Amnesty International reported that in 2002, 86 persons were prosecuted for their membership of the Muslim Brotherhood. In that case, two of the leaders were sentenced to death, 73 others to life imprisonment and 11 to ten years imprisonment, Amnesty International, *Libyan Arab Jamahiriya, Briefing to the Human Rights Committee*, June 2007, p.17, available from [http://www2.ohchr.org/english/bodies/hrc/docs/ngos/AL\\_LibyaAJ.pdf](http://www2.ohchr.org/english/bodies/hrc/docs/ngos/AL_LibyaAJ.pdf).

<sup>35</sup> Concluding observations of the Human Rights Committee, Libyan Arab Jamahriya, CCPR/C/LBY/CO/4, para. 24.



for personal interest.”<sup>36</sup> The Committee has also expressed concerns about laws which prevent the exercise of the right to freedom of association and peaceful assembly.<sup>37</sup>

32. In relation to economic, social and cultural rights, the Committee on Economic, Social and Cultural rights noted with satisfaction that Libya has the highest literacy and educational enrolment rates in North Africa, as well as high rates of female students in schooling.<sup>38</sup> The Committee on the Rights of the Child has also acknowledged that education is free of charge, that primary school attendance is nearly universal and that health services are free for all children.<sup>39</sup> The same Committee added, however, that many measures “reflect a predominantly welfare- rather than rights-based approach”.<sup>40</sup> The Committee on Economic, Social and Cultural Rights has also highlighted that despite the country’s economic wealth, 28 per cent of the population do not have sustainable access to an improved water source.<sup>41</sup> Several of the United Nations treaty bodies have raised concerns about the difficult situation of the Amazigh who are not recognized as a minority and are impeded from preserving and expressing their cultural and linguistic identity.<sup>42</sup>

33. In relation to women’s human rights, while there have been particular improvements (e.g. changes to nationality laws), Libyan society remains male dominated, with gender-based discrimination widespread. In addition to entrenched discriminatory norms within Libyan culture and stereotypes on women’s role in family and society,<sup>43</sup> the enforcement of laws itself displays discrimination. The Committee on the Elimination of All Forms of Discrimination against Women regretted that legal provisions relating to personal status, in particular concerning marriage (including polygamy), divorce and inheritance, do not provide for equal rights for women and men.<sup>44</sup>

34. The Commission heard repeatedly during its investigation that some particular human rights violations in the past have had a deep psycho-social impact on the community. The first case relates to the extrajudicial killing of prisoners in Abu Salim prison in June 1996. Events began with a riot by prisoners calling for better conditions including access to health care, family visits and the right to have their cases heard before the courts. Libyan security officials headed by Abdullah al-Senusi and Nasr al-Mabrouk reached an agreement with representatives of the prisoners. The Commission was told by relatives of prisoners that, under the direction of Abdullah al-Senusi, some 1272 persons were killed by machinegun fire by prison guards. Only many years later were family members informed of the deaths. One witness who spoke to the Commission referred to being notified only 10 years after the events. In the intervening years, families of many victims had come on a weekly basis to the prison to bring food and clothing. The guards would accept the provisions, leaving relatives with the belief that their relatives were alive.

<sup>36</sup> Article 8 Law No. 20/1991.

<sup>37</sup> Concluding Observations of the Human Rights Committee, Libyan Arab Jamahiriya, CCPR/C/LBY/CO/4, para. 25.

<sup>38</sup> Concluding Observations of the Committee on Economic, Social and Cultural Rights, Libyan Arab Jamahiriya, E/C.12/LYB/CO/2, para. 6.

<sup>39</sup> Concluding observations of the Committee on the Rights of the Child, Libyan Arab Jamahiriya, CRC/C/15/Add.84, para. 4.

<sup>40</sup> *Ibid*, para. 7.

<sup>41</sup> Concluding Observations of the Committee on Economic, Social and Cultural Rights, Libyan Arab Jamahiriya, E/C.12/LYB/CO/2, para. 19.

<sup>42</sup> Concluding Observations of the Committee on the Elimination of Racial Discrimination, Libyan Arab Jamahiriya, CERD/C/64/CO/4, para. 15; Concluding Observations of the Committee on Economic, Social and Cultural Rights, Libyan Arab Jamahiriya, E/C.12/LYB/CO/2, paras. 22-24.

<sup>43</sup> Concluding Observations of the Committee on the Elimination of All Forms of Discrimination against Women, Libyan Arab Jamahiriya, CEDAW/C/LBY/CO/5, para. 21.

<sup>44</sup> *Ibid*, para. 17.

In 2007, after receiving information from the Government of Libya that a Commission was inquiring into the events at Abu Salim the Human Rights Committee expressed concern “that some eleven years after the event, the State party was unable to provide information on the status of the work of the Commission responsible for the inquiry into the events at Abu Salim prison in 1996.”<sup>45</sup> The second case reported to the Commission as having particular resonance related to the public hanging of university students accused of directly or indirectly opposing the regime at the university, with other students forced to watch. The Commission was told that one such hanging took place in Tripoli at the Faculty of Agriculture, Al-Fateh University and another in Benghazi at the Faculty of Law, Ghar Yunis University in 1985.

35. It is against this background of repression of rights that one has to assess the pent up demand for democracy and the rule of law in early 2011.

## B. The events from February 2011

36. The events which prompted the convening of the Special Session of the Human Rights Council and the subsequent establishment of the Commission began with mass demonstrations in Libya in February 2011, in which participants called for democratic reform and the toppling of the Qadhafi regime. Such uprisings seem to have been inspired in part by similar popular uprisings in neighboring countries culminating in Tunisia with the resignation of President Zine El Abidine Ben Ali, and in Egypt with the resignation of President Hosni Mubarak. According to protestors, these demonstrations were peaceful. The Government of Libya has disputed this claim, a matter further examined by the Commission in Section IV A. (Excessive use of force against demonstrators). The Government response to these demonstrations was to use significant force. This caused an escalation of the use of force until by late February a situation of civil war had developed in Libya. For present purposes, the major developments can be summarized as follows: Phase 1 (demonstration phase) and Phase 2 (armed conflict).

### Phase 1

37. Libyan authorities appear to have been keen to prevent mass demonstrations in Libya, taking steps such as arresting persons calling for such action.<sup>46</sup> The arrest on 15 February of Mr. Fathi Terbil, a well-known lawyer and human rights defender (who had been representing many of the families of inmates killed in the Abu Salim prison)<sup>47</sup> by Libyan internal security forces (*Jihaz al-Amn al-Dakhili*) sparked a mass protest in Benghazi. On 16 February, protests spread to Al-Bayda, Al-Quba, Darnah and Tobruk. Authorities sought to disperse the protestors, utilizing various methods, including teargas and batons. Significant casualties were reported. Protests intensified on 17 February, the “Day of Rage,” commemorating the five year anniversary since a Government crackdown on an Abu Salim related demonstration outside the Italian Embassy.<sup>48</sup> The largest protest took place in Benghazi where thousands gathered in front of the court house, though protests were also held in a number of other towns including Al-Bayda, Tobruk, Tajurah,

<sup>45</sup> Concluding Observations of the Human Rights Committee, Libyan Arab Jamahriya, CCPR/C/LBY/CO/4, para. 14.

<sup>46</sup> In addition to the arrest of Terbil referred to in para. 37 of this report, the Commission also notes some other high profile arrests such as of Jamal al Haji on 1 February 2011, and Farag, Al-Mahdi, Sadiq and Ali Hmeid in Tripoli on 16 February 2011, all of whom had called for public demonstrations.

<sup>47</sup> As to the Abu Salim incident, see para. 34 of this report.

<sup>48</sup> These demonstrations were organised largely through social networks.

Tripoli, Misrata and Darnah. Security forces opened fire with live ammunition in several locations.

38. As news of these events spread, protests snowballed. Incidents of protestors being injured by government forces were reported in Benghazi (in front of Al-Fadhil bin Omar *Katiba*), Ajdabiya and Al-Bayda (at the Al-Abraq airport) on 18 February, and Misrata on 19 February amongst other locations. By this point, some demonstrators were taking more “offensive” action including taking over the *Katiba* premises<sup>49</sup> and the airport in Benghazi. Large-scale protests emerged in Tripoli on 20 February with scenes of both government use of significant force and protestors attacking governments buildings. In the following days, clashes intensified in Tripoli (for instance in the Green Square area). Media reported that security forces used fighter jets and live ammunition against protestors in the capital. Authorities disputed these claims, explaining that there were ammunition dumps in remote areas away from residential areas. Active fighting was also occurring in Az-Zawiyahh,<sup>50</sup> Sabha and Sabratah. By 24 February, media reports indicated that protestors were in control of Tobruk, Benghazi, Misrata and Zuwarah.<sup>51</sup>

39. In the Government’s response to the Commission, the Government stated its position that the use of force was necessary to counter attacks by the crowds. There appeared to be implicit threats in the language used, for instance, in the address by Saif al-Islam Qadhafi (son of Colonel Qadhafi) on Libyan National Television on 21 February that “We will fight to the last man and woman and bullet.”<sup>52</sup> Colonel Qadhafi on Libyan National Television on 22 February announced that he would lead “millions to purge Libya inch by inch, house by house, household by household, alley by alley, and individual by individual until I purify this land.” He blamed foreigners for the problems and called the protestors “rats” who needed to be executed.

## Phase 2

40. By late February, an armed conflict had developed between armed opposition forces and Government forces.<sup>53</sup> The armed conflict is continuing. Not all areas of the country have experienced the direct fighting. Battles have been focused on specific cities.<sup>54</sup> In early March, Al-Brega and Ajdabiya were the particular focus of battles, with reports of aerial bombing and Libyan forces sought to regain control of territory with fighting also continuing in Misrata.

<sup>49</sup> Al-Fadhil bin Omar *Katiba*. This is the major *Katiba* premises in Benghazi.

<sup>50</sup> On 24 February 2011, there were reports of an attack by Government forces against a mosque in Az-Zawiyahh where protestors were holding a sit-in.

<sup>51</sup> See for instance, BBC News, “Libya protests: Gaddafi embattled by opposition gains”, 24 February 2011, available from <http://www.bbc.co.uk/news/world-africa-12564104>; Al-Jazeera, “Gaddafi loses more Libyan cities”, 24 February 2011, available from <http://english.aljazeera.net/news/africa/2011/02/2011223125256699145.html>; and Associated Press, “Libyan City Celebrates Freedom From Gadhafi”, 24 February 2011, available from <http://abcnews.go.com/International/wireStory?id=12983621>.

<sup>52</sup> See Saif al-Islam speech on Libyan State Television, where he said that “we will fight until the last men, until the last women, the last bullet” translated by Commissions’ staff. Speech record available from [http://www.youtube.com/watch?v=Pp6DFM9\\_NuU&feature=related\\_\(minute 36:40\)](http://www.youtube.com/watch?v=Pp6DFM9_NuU&feature=related_(minute%2036:40)). The Government also sought to allay unrest by proposing the release of 110 members of the Libyan Fighter Islamic Group.

<sup>53</sup> The legal significance of the development of an armed conflict is discussed at Section III. D. (International legal framework for the Commission’s analysis) of this report.

<sup>54</sup> Particular cities affected include Ajdabiya, Al-Brega, Benghazi, Bin Jawad, Misrata, Ras Lanuf, Uqaylah and Az-Zawiyah.

41. On 2 March in Benghazi, the NTC, led by Mustafa Abdul Jalil (the former Minister of Justice) was established by virtue of the Council issuing its first decree forming the Council and declaring itself to be the “sole representative of all Libya.” It has subsequently been recognized by France, Gambia, Italy, Jordan, Kuwait, Maldives and Qatar.

42. On 17 March, the United Nations Security Council adopted Resolution 1973, authorizing a no-fly zone over Libya and the taking of “all necessary measures” to protect civilians against government forces. Airstrikes began on 19 March under initial leadership of the United Kingdom, France and the United States. NATO took control of the military operations on 31 March.

43. The conflict has already caused significant internal displacement and movement of persons into neighboring countries. As of 20 May, some 814,022 persons were reported to have left Libya.<sup>55</sup> Amongst this group, 322,262<sup>56</sup> are estimated to be Libyan. A majority of those who have crossed borders are migrant workers.

44. International Statements and actions: There has been a strong response from the international community in relation to the alleged violations of human rights occurring in Libya, with a particular focus on the protection of civilians. The Human Rights Council held a Special Session of the Human Rights Council on 25 February. On 26 February the United Nations Security Council passed Resolution 1970, imposing sanctions on the Qadhafi regime and referring the situation in Libya to the International Criminal Court<sup>57</sup> before deciding on 17 March upon the imposition of the no-fly zone in Resolution 1973.<sup>58</sup> Libya was suspended from the Human Rights Council on 1 March through a decision of the General Assembly.<sup>59</sup>

45. On 6 March, Former Jordanian Foreign Minister Abdelilah Al-Khatib was appointed UN special envoy to Libya. Statements of concern on various aspects of human rights and humanitarian law violations have been issued by a number of United Nations senior officials and mandate holders, including the Secretary-General<sup>60</sup>, the High Commissioner for Human Rights,<sup>61</sup> the Chair of the Working Group on the Use of Mercenaries (speaking on behalf of all Special Procedures mandate holders at the Special Session of the Human Rights Council),<sup>62</sup> the Secretary-General’s Special Representative for Children and Armed Conflict,<sup>63</sup> the Working Group on Enforced or Involuntary Disappearances,<sup>64</sup> the

<sup>55</sup> Of these 402,981 persons have crossed into Tunisia, 286,515 into Egypt, 66,337 into Niger, 24,663 into Chad, 18,674 into Algeria and 2800 into Sudan. See OCHA Situation Report No. 38, Libyan Arab Jamahiriya, Crisis, 20 May 2011, available from <http://northafrica.humanitarianresponse.info/Reports/SituationReports.aspx>. Italy has also received significant numbers of persons fleeing from Libya. According to a communication received from the Italian Interior Ministry, dated 28 May 2011, 14,642 had arrived to Italy since the beginning of the Libyan crisis, mainly to the island of Lampedusa.

<sup>56</sup> See IOM, “Response to the Libyan Crisis”, External Situation Report, 23 May 2011, External Situation Report, 23 May 2011, available from <http://www.migration-crisis.com/libya/page/index/2>.

<sup>57</sup> S/RES/1970 (2011).

<sup>58</sup> S/RES/1973 (2011).

<sup>59</sup> A/RES/65/265.

<sup>60</sup> SG/SM/13572.

<sup>61</sup> In addition to her statement during the debate of the HRC on 25 February 2011, the High Commissioner for Human Rights, Navanethem Pillay, issued statements concerning Libya on 10 March 2011 (“Pillay condemns Libyan Security Forces violence against journalists”), and on 20 April 2011 (“Libya’s indiscriminate attacks on civilians in Misrata may be international crimes”).

<sup>62</sup> See Statement of José-Luis Gomez del Prado to the Special Session of the Human Rights Council, 25 February 2011.

<sup>63</sup> Statements of Radhika Coomaraswamy on Protection of Children in Libya on 9 March 2011, and Statement on the situation of children in Misrata on 19 April 2011.

Committee on the Protection of the Rights of All Migrant Workers and Members of their Families,<sup>65</sup> the Committee on the Elimination of all Forms of Racial Discrimination<sup>66</sup> and the Secretary-General's Special Representative on Sexual Violence in Conflict.<sup>67</sup> The Prosecutor of the International Criminal Court on 16 May applied to the Pre-Trial Chamber of the International Criminal Court for arrest warrants for three named individuals, namely Colonel Qadhafi, Saif al-Islam Qadhafi and Abdullah al-Senusi, for crimes against humanity in relation to events in February in Libya.<sup>68</sup>

### C. Categories of security groups participating in the events

#### Government Forces

46. The security arrangements in Libya are complex with multiple entities empowered to use force, command structures difficult to ascertain and apparently little or no lateral command communication between the different security agencies. In short, the Commission has faced the situation of seeing a number of different structures operating in different capacities at different times and at different places. The description below of the Government security forces is based on the Commission's examination of the situation on the ground, secondary sources and a number of interviews carried out with reliable sources during the Commission's visits to Egypt, Tunisia and Libya.

47. **Government Armed Forces:**<sup>69</sup> The Libyan Armed Forces are comprised of an Army, an Air Force and a Navy. The Armed Forces are believed to be formally responsible for 61,500 active personnel<sup>70</sup>. In recent years, it has reportedly been marginalized and not involved in internal security operations. Whilst there is a hierarchy within the army, other factors such as tribal membership and known loyalty to the Revolution are said to play an important role in the level of responsibility accorded to individuals within the Armed Forces.<sup>71</sup>

48. **The *Kata'eb*** play a much larger role in relation to internal security. Each *Katiba* has a name which has a political significance such as the name of its commander, for example, the *Khamis Katiba* is named after one of Colonel Qadhafi's sons. Individual *Katiba* are said to number some 3000 persons and be armed with heavy weaponry. Other named brigades are - The Deterrence *Katiba* (*Liwa al-Redah*) (stationed outside Tripoli). Membership in the *Kata'eb* is based on loyalty and family or tribal ties, with a division of personnel instituted so as to ensure loyalty by means of implicit threats to members of the

<sup>64</sup> Statement "Libya: wave of enforced disappearances may amount to a crime against humanity", 24 March 2011.

<sup>65</sup> Statement on Situation of Migrant Workers in Libya, 8 April 2011.

<sup>66</sup> Statement under CERD's Early Warning and Urgent Action Procedure, 2 March 2011.

<sup>67</sup> Statement of Margot Wallstrom, Concern over Sexual Violence in Libya, 20 April 2011.

<sup>68</sup> International Criminal Court, Office of the Prosecutor, *Prosecutor's Application Pursuant to Article 58 as to Mu'ammur Mohammed Abu Minyar GADDAFI, Saif Al-Islam GADDAFI and Abdullah AL-SENUSSI*, 16 May 2011 (No. ICC-01/11).

<sup>69</sup> In this report, the term "Government forces" is used as an umbrella term to refer to all of the various security-related organizations listed in this segment.

<sup>70</sup> Hanspeter Mattes, "Challenges to Security Sector Governance in the Middle East: the Libyan Case", Conference paper, presented at the Workshop on "Challenges of Security Sector Governance in the Middle East", held in Geneva on 12-13 July 2004, (Geneva Centre for the Democratic Control of Armed Forces – DCAF, 2004), p. 3, available from [http://se2.dcaf.ch/serviceengine/Files/DCAF/23853/ieventattachment\\_file/7b8d5f97-23c5-43a4-ae81-bb5b0843634c/en/ev\\_geneva\\_04071113\\_Mattes.pdf](http://se2.dcaf.ch/serviceengine/Files/DCAF/23853/ieventattachment_file/7b8d5f97-23c5-43a4-ae81-bb5b0843634c/en/ev_geneva_04071113_Mattes.pdf).

<sup>71</sup> *Ibid.*

family or tribe of any person who may be suspected of disloyalty. In general, it is difficult to ascertain, how and why a given *Katiba* is organized and dissolved and under whose command it is at any given time. The Commission was informed by one witness that before the February events, each *Katiba* was assigned to a particular area and given a specific responsibility.<sup>72</sup>

49. **The Revolutionary Committees** were set up in 1977 to “safeguard the Revolution.”<sup>73</sup> Their members wear civilian clothes and are armed with small weapons (handguns and AK47’s). Sources that the Commission spoke with estimated that the Revolutionary Committees have tens of thousands of members, possibly between 60,000 and 100,000 members. According to information collected by the Commission, the Revolutionary Committees are tasked with police functions including the arrest of counter-revolutionaries and the management of numerous detention centers in most cities and towns across the country. The Revolutionary Committees have been described as the “most important security organization” and “remain the closest to Colonel Qadhafi himself.”<sup>74</sup>

50. **The Jamahiriya Security Organization (JSO)** includes the Internal Security Agency (ISA) and the External (or Foreign) Security Agency (ESA). According to information provided to the Commission, the ISA, under the leadership of Colonel Abdullah al-Senusi is tasked with monitoring anti-Qadhafi organizations, such as lawyers and doctors’ unions and individuals to evaluate the extent of any threat to the regime.<sup>75</sup> The Internal Security Agency reports directly to Colonel Qadhafi. The ESA was formerly commanded by Musa Kusa (who defected from the regime in February).<sup>76</sup> This agency reportedly planned, coordinated and provided support to military operations and terrorist activities abroad. External security dealt also with military intelligence and intelligence assessment overseas but was not usually directly involved in internal security affairs. While regular prisons fall under the authority of the General People’s Committee for Justice [the Ministry of Justice], it is the ISA that has jurisdiction over the Abu Salim and Ain Zarah prisons.<sup>77</sup> Members of both the ISA and ESA wear civilian clothes and their vehicles are not marked with distinctive signs.

51. The Commission received reports concerning the involvement of a **Riot Police force** (*Quwat al-Da’m al-Markazi*) in suppressing demonstrations. Its command structure is unknown. Little is known either about the Public Security Agency (*Al-Amn Al-Am*).

52. **The Revolutionary Guard** is a structured political and paramilitary apparatus within the armed forces tasked with ensuring loyalty to the regime. Its members are believed to be the Revolutionary Committees members within the Armed Forces.<sup>78</sup> According to information provided to the Commission, the Revolutionary Guard (*al-Haras*

<sup>72</sup> The Commission was able to compile a list of *Katibas* with their geographic location and main commanding officers.

<sup>73</sup> Hanspeter Mattes, “Challenges to Security Sector Governance in the Middle East: the Libyan Case” (2004), p. 13.

<sup>74</sup> *Ibid.*

<sup>75</sup> According to information received by the Commission, the commander for the eastern region of the ISA at the time of the events in February was Senusi al-Wizri; and the commander for Tripoli, Brigadier General Tuhani Khaled.

<sup>76</sup> According to information received by the Commission, other officials as of February included the head of the Special Operations Unit, Abu Zayd Dorda.

<sup>77</sup> These two prisons are known for holding in detention political prisoners for years without trial. Human Rights Watch, “Truth and Justice Can’t Wait”, 12 December 2009, available from <http://www.hrw.org/en/node/87096/section/8>.

<sup>78</sup> Hanspeter Mattes, “Challenges to Security Sector Governance in the Middle East: the Libyan Case” (2004), p. 15.

*al-Thawri*) includes six brigades (a Special Forces Brigade, an Infantry Brigade, an Artillery Brigade, and three tank brigades all stationed on the outskirts of Tripoli). It is thought to be approximately 40,000 strong<sup>79</sup> and “the real frontier protection force.”<sup>80</sup> The force has access to battle tanks, armored personnel carriers, helicopters and possibly anti-aircraft artillery and guided weapons. A unit from the Guards, composed solely of female soldiers and known as the “Green Nuns” or “Revolutionary Nuns” serves as the Colonel’s bodyguards. Members of the Revolutionary Guard are uniformed.

### **An Amorphous System**

53. The structure, mandate and reporting lines of Libya’s various security agencies described above, including the *Kata’eb* and the Revolutionary Committees remain unclear to outside observers. Transparency and accountability mechanisms are limited to an extreme. This amorphous system, in the Commission’s view, reflects a purposeful policy to obfuscate responsibility as well as to minimize any threat to the central control of Colonel Qadhafi himself. The most important characteristic of these security organizations is that they are neither subject to institutional political control nor to control by the public but have been controlled exclusively by the Revolutionary Leadership led by Colonel Qadhafi.

54. All the information which the Commission received indicated that the agencies described above operate pursuant to direct orders of the Colonel. Lines of communication between the various security organizations are vertical and ultimately meet in the office of Colonel Qadhafi. Orders appear to be given by Colonel Qadhafi through satellite phone calls to commanders. It is also likely that some orders may have been issued by SMS but it is mostly personal communication based on voice recognition. This makes more difficult the task of tracing orders and commands.

55. Furthermore, according to information received by the Commission, some communications to security agencies may be given by code in public speeches. For example, before attacking Benghazi, Colonel Qadhafi said publicly: “I love you Benghazi”, which was interpreted by some who spoke to the Commission as meaning “I will come after you”. A former Libyan diplomat publicly stated on 23 February 2011, that Colonel Qadhafi’s speech of the night before [22 February] was a code for his forces to attack certain locations including Az-Zawya, Sorman and Sabratha which were subsequently attacked on 23 February.<sup>81</sup> It has been contended that Colonel Qadhafi established a “one-man rule” in which his officials “instantly promoted the Leader’s pronouncements to dogma”.<sup>82</sup>

### **The Opposition Armed Forces**

56. The forces on the opposition side of the armed conflict have formed recently and at least according to information available to the Commission do not appear to have the same level of organization as regular armed forces. Groups of supporters of the opposition came

<sup>79</sup> See, Intelligence/World/Libya/Maktab Maaloumat al-Kaed, “Al Haras Assauri, Revolutionary Guard”, available from <http://www.globalsecurity.org/intell/world/libya/rg.htm>

<sup>80</sup> Progressive Management, “Libya: Federal Research Study and Country Profile with Comprehensive Information, History, and Analysis - Politics, Economy, Military - Mu’ammarr al Qadhafi”, 5 February 2011.

<sup>81</sup> The Telegraph, “Gaddafi’s speech was ‘code to start genocide against Libyans’”, 23 February 2011, available from <http://www.telegraph.co.uk/news/worldnews/africaandindianocean/libya/8342349/Gaddafi-speech-was-code-to-begin-genocide-against-Libyans.html>.

<sup>82</sup> Dirk Vandewalle, *A History of Modern Libya* (Cambridge, Cambridge University Press, 2006), p. 177.

together in various cities and merged with defecting individual army soldiers and military units to form what is now variably known as the “Free Libyan Army,” the “National Libyan Army” or the ‘rebels.’<sup>83</sup> Subsequently, volunteers from different cities, towns and villages in Libya joined the opposition forces. During its visit to eastern Libya, the Commission was able to observe young volunteers holding ID cards with barcodes. It was explained that the ID cards were distributed when the individuals were issued with a weapon.

57. Few details are available on the strength and organization of the opposition armed forces. Reports suggest the forces include “thousands of men” who are attending ad hoc training camps in ten different locations in eastern Libya. After this training, units of four or five people are ready to be deployed to the frontline. Reports also suggest that a number of western countries are providing trainings to the troops. It has been reported that command structures within the armed opposition forces have been unclear. General Abdul Fatah Yunis, former Commander of an Army Special Force and most recently Minister of Interior defected on 22 February 2011 and became the top field commander of the opposition forces with General Khalifa Hufter becoming the Deputy. A Military Council under the NTC established on 5 March was set up to co-ordinate security matters, headed by Omar Hariri. International media has reported the creation of at least two Brigades of opposition forces, Omar al-Mukhtar Brigade in Ajdabiya and Ali Hassan al-Jaber Brigade, named after the Al-Jazeera cameraman killed in March by forces loyal to Colonel Qadhafi.

58. According to information received by the Commission, the weapons and vehicles available to the opposition forces initially comprised equipment captured during battles with governmental forces or taken from military posts and warehouses upon gaining control of such facilities together with equipment belonging to the defecting military units. The opposition armed forces are also believed to be receiving equipment from foreign countries including uniforms and communication means.

#### **International Forces**

59. Following United Nations Security Council resolution 1973 authorising member states and regional organisations to, enforce a no-fly zone and take “all necessary measures” to protect civilians in Libya, an initial coalition of states led by the USA, UK and France resorted to employ military means with a view to enforcing the resolution. According to NATO, as of 31 May, the coalition includes the following countries: Belgium, Bulgaria, Canada, Denmark, France, Greece, Italy, Jordan, Netherlands, Norway, Qatar, Romania, Spain, Sweden, Turkey, UAE, UK and USA. On 31 March, NATO assumed full command of military operations against Libya.

### **D. International legal framework for the Commission’s analyses**

#### **1. Legal Classification of the Situation**

60. The escalation of the situation in Libya has particular consequences in terms of the application of international law. In legal terms, the periods can be demarked as (i) “peace-time,” (ii) “non-international armed conflict” and (iii) “co-existing international armed conflict.” For the purposes of the application of relevant legal standards, it is necessary to define more closely the relevant time periods involved.

61. **Peace-time Libya:** When the demonstrations began in mid-February, Libya could be classified as being in a normal state of peace.

<sup>83</sup> The term “rebels” is used by both the NTC and its military commander, General Abdul Fatah Yunis to refer to the totality of the opposition forces. It has also been used by some Government officials.



62. **Non-International Armed Conflict:** The precise date for determining when this change from peace to non-international armed conflict occurred is somewhat difficult in the current circumstances. The Commission notes that other organisations that have been examining this question such as the Prosecutor of the ICC and the International Committee of the Red Cross (ICRC) have not put forward a particular date.<sup>84</sup>

63. The Commission notes the definition of non-international armed conflicts in Additional Protocol II to the Geneva Conventions Relating to the Protection of Victims in Non-International Armed Conflict (to which Libya is a party), namely conflicts “which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.” The situation must constitute more than either isolated acts of violence, a mere internal disturbance or riot and involve protracted violence, engaging both the Government forces and an organised armed group. No definition of non-international armed conflict is provided for in the four Geneva Conventions (which includes the protections of Common Article 3). Jurisprudence has developed, however, defining non-international armed conflict as whenever there is “protracted armed violence between governmental authorities and organized armed groups or between such groups within a State.”<sup>85</sup>

64. In determining whether a non-international armed conflict exists, the Commission has thus had to consider the intensity of the conflict, the extent of relevant control of territory and the nature of the armed group in opposition to the Government. Examining the nature of the armed group involves considering such factors as whether there is a hierarchical command structure, the extent to which it is able to carry out organized operations (e.g. organises into zones of responsibility, means of communication); discipline systems, the nature of logistical arrangements and how the group presents itself (e.g. whether it is capable of involvement in negotiations).

65. Information is more readily available concerning the intensity of the conflict and how the opposition forces have gained territorial control than many aspects of the organisation of the armed opposition forces. On 19 February, Government opponents assumed control over the *Katiba* premises in Benghazi,<sup>86</sup> and also took control of the airport in Benghazi. On the same day in Tobruk, Government opponents took over Omar al-Mukhtar *Katiba* and confiscated weaponry. On 20 February, demonstrators controlled the town of Al-Shahat, east of Libya, and reportedly “arrested” persons fighting with the Qadhafi forces. By 24 February, anti government forces appear to have taken control of Tobruk, and Misrata. By 26 February, Security Council Resolution 1970 welcomed various institutions’ condemnation of serious violations of human rights and humanitarian law in Libya,<sup>87</sup> Whilst the Commission lacks full information concerning several aspects of the

<sup>84</sup> The Prosecutor of the International Criminal Court in his report to the Security Council, for instance, referred to there being an armed conflict in Libya ‘since the end of February’, see International Criminal Court, Office of the Prosecutor, *First Report of the Prosecutor of the International Criminal Court to the UN Security Council Pursuant to UNSCR 1970 (2011)*, 4 May 2011, para. 37. Jakob Kellenberger, President of the ICRC, stated on 10 March 2011 that a non-international armed conflict existed in Libya but without stipulating the commencement date, see ICRC, “Libya: urgent to apply the rules of war” News Release 11/53, 10 March 2011.

<sup>85</sup> *Prosecutor v Tadic*, Jurisdiction Decision, ICTY (Appeals Chamber), Decision of 2 October 1995, para. 70. A similar formulation was adopted in the Rome Statute (Article 8(2)(f)).

<sup>86</sup> This was the Al Fadhil bin Omar *Katiba* premises, the major such premise in Benghazi.

<sup>87</sup> S/RES/1970 (2011) Preambular paragraph 3. Note also Security Council Press Statement on Libya (SC/10180 AFR/2120), 22 February 2011, which also speaks of international humanitarian law.

opposition forces organization, it has reached the preliminary view that by or around 24 February, a non-international armed conflict had developed sufficient to trigger the application of AP II and Common Article 3 of the Geneva Conventions.

66. **Co-existing International Armed Conflict:** The airstrikes to enforce the no-fly zone imposed by the Security Council through Resolution 1973 which began on 19 March brought into being an international armed conflict between the States participating in this military action and the Libyan state. The Commission has noted that the objective of this international military action is to enforce Security Council Resolution 1973. It is also satisfied that the actions of NATO and other foreign States involved are not exercising control over the military actions of either of the parties to the non-international armed conflict. As such, it concludes that the international armed conflict is legally separate to the continuing non-international armed conflict, and is thus a “co-existing international armed conflict.”

## 2. Bodies of Applicable Law

67. There are three major bodies of international law most relevant to the situation in Libya from February to the present: international human rights law, international humanitarian law and international criminal law.

### International Human Rights Law

68. International human rights law continued to apply throughout the period being examined by the Commission, albeit with some potential variation during the period of armed conflict.

69. Libya is a party to major United Nations human rights treaties: the International Covenant on Economic, Social and Cultural Right (ICESCR),<sup>88</sup> the International Covenant on Civil and Political Rights (ICCPR),<sup>89</sup> the Convention on the Elimination of all forms of Racial Discrimination (CERD),<sup>90</sup> the Convention on the Elimination of Discrimination Against Women (CEDAW),<sup>91</sup> the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment and Punishment (CAT),<sup>92</sup> the Convention on the Rights of Child (CRC),<sup>93</sup> the International Convention on the Protection of the Rights of all Migrant Workers and Members of their Families (CMW)<sup>94</sup> and the Convention on the Prevention and Punishment of the Crime of Genocide.<sup>95</sup> It has also ratified a number of related Optional Protocols, including most relevantly for the current context, the Optional Protocol to the CRC on the involvement of children in armed conflict (OPCRC-AC).<sup>96</sup> Libya is also a party to the Convention on the Non-Application of Statutory Limits to War Crimes and Crimes against Humanity.<sup>97</sup> At a regional level, Libya is a party to the African Charter on Human and Peoples’ Rights<sup>98</sup> and the Protocol on the Rights of Women in Africa.<sup>99</sup> As a

<sup>88</sup> Ratified by Libya on 15 May 1970.

<sup>89</sup> Ratified by Libya on 15 May 1970.

<sup>90</sup> Ratified by Libya on 3 July 1968.

<sup>91</sup> Ratified by Libya on 16 May 1989.

<sup>92</sup> Ratified by Libya on 16 May 1989.

<sup>93</sup> Ratified by Libya on 15 April 1993.

<sup>94</sup> Ratified by Libya on 18 June 2004.

<sup>95</sup> Ratified by Libya on 16 May 1989.

<sup>96</sup> Ratified by Libya on 29 October 2004 with a binding declaration made under Article 3. See further in Section IV. K. (Children in armed conflict.)

<sup>97</sup> Ratified by Libya on 16 May 1989.

<sup>98</sup> Ratified by Libya on 19 July 1986.

<sup>99</sup> Ratified by Libya on 23 May 2004.

State party to these treaties, Libya is bound to respect, protect, promote and fulfill the human rights of all persons within its jurisdiction. This includes the right to afford an effective remedy to those whose rights have been violated (including the provision of reparations) as well as the responsibility of the State to investigate and bring to justice perpetrators of particular violations.<sup>100</sup> Libya is also bound by relevant rules of international human rights law which form a part of customary international law.

70. Libya has not notified the Secretary-General of any state of emergency and subsequent derogations made to its obligations under the ICCPR. Article 4 of the ICCPR permits State parties to derogate from obligations “in time of public emergency which threatens the life of the nation”, the existence of which is officially proclaimed, Derogations are only permissible to the extent strictly required by the exigencies of the situation, and the measure must not be inconsistent with their other obligations under international law or involve discrimination solely on the ground of race, colour, sex, language, religion or social origin. Article 4 also clearly stipulates the provisions which are non-derogable which include but are not limited to the right to life, the prohibition of torture or cruel, inhuman or degrading punishment, and freedom of thought, conscience and religion.<sup>101</sup>

71. International human rights law applies both in peace and times of armed conflict. As the International Court of Justice (ICJ) has concluded “The protection offered by human rights conventions does not cease in case of armed conflict.”<sup>102</sup> Instead, it applies alongside international humanitarian law which is the *lex specialis* during times of armed conflict.

#### *Non-State Actors and International Human Rights Law*

72. Non-state actors in Libya, in particular the authorities and forces of the National Transitional Council cannot formally become parties to the international human rights treaties and are thus not formally given obligations under the treaties. Although the extent to which international human rights law binds non-state actors remains contested as a

<sup>100</sup> See Human Rights Committee, General Comment No. 31 on The Nature of the General Legal Obligation Imposed on State Parties to the Covenant (2004), paras. 15-19. In this General Comment, the Human Rights Committee considered that the duty to bring perpetrators to justice attaches in particular to violations that are criminal under domestic or international law, torture and similar cruel, inhuman and degrading treatment, summary and arbitrary killing and enforced disappearance. See also the *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, adopted by the General Assembly in December 2005, and the *Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity* (which were recognised in a consensus resolution of the UN Commission on Human Rights in 2005).

<sup>101</sup> Note also the further rights which the Human Rights Committee has explained are non-derogable: including the right of all persons deprived of their liberty to be treated with humanity and with respect for the inherent dignity of the human person, the prohibition against taking hostages, abductions or unacknowledged detention, certain elements of the right of minorities to protection, the prohibition of deportation or forcible transfer of population and the prohibition of propaganda for war and advocacy of national, racial or religious hatred that would constitute incitement to discrimination, hostility or violence, as well as procedural rights necessary for the protection of non-derogable rights. These subsidiary obligations include the right to take proceedings before a court to enable the court to decide on the lawfulness of the detention and remedies such as habeas corpus. Human Rights Committee, General Comment No. 29 on Article 4 (2001), paras. 13 and 15.

<sup>102</sup> *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004*, p. 178, paras. 105-106. See also statements concerning international humanitarian law as *lex specialis* in *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 240, para. 25.

matter of international law,<sup>103</sup> it is increasingly accepted that where non-state groups exercise de facto control over territory, they must respect fundamental human rights of persons in that territory.<sup>104</sup> The Commission has taken the approach that since the NTC has been exercising de facto control over territory akin to that of a Governmental authority, it will examine also allegations of human rights violations committed by the its forces. The Commission notes that the NTC has made a public undertaking in which it committed to “build a constitutional democratic civil state based on the rule of law, respect for human rights and the guarantee of equal rights and opportunities for all its citizens including full political participations by all citizens and equal opportunities between men and women and the promotion of women empowerment.”<sup>105</sup>

### International humanitarian law

73. International humanitarian law binds all parties to an armed conflict. Libya is a party to the four Geneva Conventions of 12 August 1949 as well as Additional Protocols I and II to the Geneva Conventions.<sup>106</sup> It is also a party to a range of other international humanitarian law instruments concerning weaponry.<sup>107</sup> Libya is also a party to the OAU Convention for the Elimination of Mercenarism in Africa and the International Convention against the Recruitment, Use, Financing and Training of Mercenaries.<sup>108</sup> It has not, however, ratified the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects, the Convention on Cluster Munitions or the Convention on the Prohibition, Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction. Libya is also a party to the Convention for the Protection of Cultural Property in the Event of Armed Conflict.

74. In relation to the non-international armed conflict which developed in Libya, of particular significance are the provisions of Additional Protocol II to the Geneva Conventions Relating to the Protection of Victims of Non-International Armed Conflict (AP II) together with the provisions of Common Article 3 of the Geneva Conventions (“Common Article 3”). The parties to the conflict are also bound by the provisions of customary international humanitarian law.<sup>109</sup>

<sup>103</sup> For a more expansive view of the application of international human rights law, see Andrew Clapham, *Human Rights Obligations of Non-State Actors* (Oxford, Oxford University Press, 2006).

<sup>104</sup> To similar effect, see UN Secretary-General, *Report of the Secretary-General’s Panel of Experts on Accountability in Sri Lanka*, 31 March 2011, para. 188, available from: [http://www.un.org/News/dh/infocus/Sri\\_Lanka/POE\\_Report\\_Full.pdf](http://www.un.org/News/dh/infocus/Sri_Lanka/POE_Report_Full.pdf).

<sup>105</sup> <http://www.ntclibya.org/english/the-statement/>. A Press release concerning this undertaking was issued on 29 March, see <http://web.llibya.org/2011/03/31/ntc-press-release-a-vision-of-a-democratic-libya/>.

<sup>106</sup> Libya ratified the four Geneva Conventions on 22 May 1956. Additional Protocol I (AP I) and Additional Protocol II (AP II) to the Geneva Conventions were both ratified on 7 June 1978.

<sup>107</sup> Libya is a party to the *Protocol for the Prohibition of the Use of Asphyxiating, Poisonous or other Gases, and of Bacteriological Methods of Warfare* (ratified on 29 December 1971), the *Convention for the Protection of Cultural Property in the Event of Armed Conflict*, the *Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction* (ratified on 19 January 1982), the *Convention on the Prohibition on the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction* (ratified on 6 January 2004).

<sup>108</sup> Both were ratified by Libya on 22 September 2000.

<sup>109</sup> See Jean-Marie Henckaerts and Louise Doswald-Beck for the International Committee of the Red Cross, *Customary International Humanitarian Law* (3 vols.), (Cambridge, Cambridge University Press, 2005). (henceforth “the ICRC Study on Customary International Humanitarian Law”).

75. As a result of some additional treaty action by Libya, some of the standards applicable to the Government of Libya are higher. In particular, by ratifying the OPCRC-AC, Libya has agreed to take all feasible steps to ensure that members of their armed forces under 18 years of age do not take a direct part in hostilities and that persons under 18 are not compulsorily recruited into their armed forces.<sup>110</sup> By virtue of making a declaration under Article 3, Libya has declared 18 years of age as the age of voluntary recruitment. The Protocol also obliges Libya to take all feasible measures to prevent armed groups from recruiting and using in hostilities those under 18.<sup>111</sup>

76. In relation to the international armed conflict, the full provisions of the four Geneva Conventions, as well as customary international humanitarian norms relating to international armed conflict apply to engagements. Libya and most of the States involved in the military intervention have also ratified Additional Protocol I to the Geneva Conventions Relating to the Protection of Victims of International Armed Conflict (AP I).<sup>112</sup>

77. As the Security Council has underlined in Security Council Resolution 1325, it is important for all States to apply fully the relevant norms of international humanitarian law and international human rights law to women and girls, and to take special measures to protect women and girls from gender based violence during armed conflict.<sup>113</sup>

### International Criminal Law

78. International criminal law provides the means of enforcement at the international level of egregious violations of international human rights law and serious violations of international humanitarian law which are recognized at international law as attracting individual criminality. Libya has not become a party to the Rome Statute of the ICC. However, pursuant to the Rome Statute,<sup>114</sup> the Security Council referred the situation of Libya to the Prosecutor of the ICC in Resolution 1970.<sup>115</sup> The ICC can exercise jurisdiction over war crimes, crimes against humanity and genocide as defined in the Rome Statute.<sup>116</sup> There have been no allegations of genocide in the context of Libya thus far. However, there have been allegations of facts which may constitute war crimes and/or crimes against humanity under the Statute.

79. **War Crimes:** A detailed listing of which actions constitute war crimes under the Rome Statute is contained within Article 8 of the Statute. In the context of non-international armed conflict, this comprises serious violations of Common Article 3 as well as other serious violations of the laws and customs of international law applicable in non-international armed conflict. In the context of an international armed conflict, these actions comprise grave breaches of the Geneva Conventions and acts which constitute serious violations of the laws and customs of international law applicable in international armed conflict.

<sup>110</sup> See Articles 1 and 2 of the OPCRC-AC.

<sup>111</sup> See Article 4, OPCRC-AC.

<sup>112</sup> The only States participating or providing support functions for the military intervention, which are not party to AP I are Turkey and the United States of America.

<sup>113</sup> S/RES/1325. See also Security Council Resolution 1820 (S/RES/1820).

<sup>114</sup> Such referrals are permissible under Article 13(b) of the Rome Statute.

<sup>115</sup> S/RES/1970.

<sup>116</sup> See William Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (Oxford, Oxford University Press, 2010), Otto Triffterer, *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* 2<sup>nd</sup> ed, (Oxford, Hart Publishing, 2008) and M. Cherif Bassiouni, *International Criminal Law* (3 vols.) 3<sup>rd</sup> ed, (Boston, Martinus Nijhoff, 2008).

80. **Crimes against humanity** are crimes that shock the conscience of humanity. According to the definition provided for in the Rome Statute, crimes against humanity occur where certain acts are undertaken as part of a widespread or systematic attack against any civilian population with knowledge of the attack.<sup>117</sup> The individual crimes committed in this context may include murder, extermination, enslavement, deportation or forced transfer of population, imprisonment, torture, rape, persecutions against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender or other grounds, enforced disappearance, apartheid, or other inhumane acts of a similar character intentionally causing great suffering or serious injury to body or to mental or physical health. There is no necessity for a nexus with an armed conflict in order to demonstrate a crime against humanity.

## IV. Violations

81. The Commission has received information concerning a wide range of violations of international human rights and international humanitarian law and crimes under international criminal law. In this section, the Commission evaluates a number of the key violations, beginning with violations alleged during the demonstration period, before moving to ones specific to an armed conflict. Several categories of violations took place in both periods and so have been integrated in some segments. In relation to the armed conflict period, the vast majority of information received has been related to the non-international armed conflict, so that subsections IV. A. to K. focus on this aspect, with violations alleged in the course of the international armed conflict addressed in subsection IV. L. Conclusions in this section are limited to referring to violations of international human rights and international humanitarian law. Discussion of the commission of international crimes is dealt with in the Assessment section.

### A. Excessive use of force against demonstrators

#### 1. Introduction

82. The catalyst for establishment of this Commission of Inquiry was concern over the use of force against demonstrators in mid to late February. The Human Rights Council in Resolution S-15/1, expressed “deep concern at the deaths of hundreds of civilians,” referring also to “indiscriminate armed attacks against civilians” and “extrajudicial killings.”<sup>118</sup> The particular circumstances, leading up to the use of force by security forces against demonstrators, have been contested by the demonstrators and the Government. The Government has stated that its security forces refrained from using live ammunition and instead used tear-gas on 15 February. The Government has further stated that demonstrators’ violent actions, in attacking police stations, necessitated the use of force by authorities. Protestors have reiterated the peaceful nature of their demonstrations. Estimates of those killed and injured also vary. On 20 February, human rights groups estimated that approximately 233 persons had been killed.<sup>119</sup> Saif al-Islam Qadhafi made reference to 98

<sup>117</sup> Article 7 Rome Statute. See M. Cherif Bassiouni, *Crimes Against Humanity: Historical Evolution and Contemporary Practice* (Cambridge, Cambridge University Press, 2011).

<sup>118</sup> A/HRC/RES/S-15/1, Preambular paragraph 4 and paragraph 1.

<sup>119</sup> Human Rights Watch, “Libya: Government Should Demand End to Unlawful Killings; Death Toll Up to at Least 233 Over Four Days”, 20 February 2011, available from <http://www.hrw.org/en/news/2011/02/20/libya-governments-should-demand-end-unlawful-killings>.

persons having been killed during an interview on the same day.<sup>120</sup> The Office of the Prosecutor of the International Criminal Court has estimated that 500-700 persons were killed in February (though this estimate would take into account some of the armed conflict period).<sup>121</sup> It is accepted by both the Government and the demonstrators that Government forces used significant force, including the use of firearms and other weaponry against persons participating in demonstrations in various locations within Libya during the period studied by the Commission.

83. In examining the response to the demonstrations, in particular claims of excessive use of force, the Commission met with a variety of Government and NTC officials and spoke with over 80 persons regarding the incidents during the demonstrations, particularly persons who had taken part in demonstrations, persons wounded, medical staff members and other persons with relevant information. The Commission also had access to a variety of reports prepared by other organisations in relation to recent events.

## 2. Applicable Law

84. International human rights law prohibits arbitrary deprivation of life (Article 6 ICCPR), guarantees security of persons (Article 9 ICCPR) and prohibits cruel, inhuman or degrading treatment or punishment of persons (Article 7 ICCPR). Excessive use of force by law enforcement officials (whether police or military or other members of State security forces) impinges on these fundamental guarantees. Specialised soft law standards, in particular the *Code of Conduct for Law Enforcement Officials* and the *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials*<sup>122</sup> provide further guidance on this subject. Non-violent means are to be used as far as possible before resorting to the use of force (principle of “necessity”), and any use of force must be limited to that which is proportionate to the seriousness of the offence and the legitimate objective to be achieved (principle of “proportionality”). Firearms are to be used only in self-defence or in defence of others against imminent threat of death or serious injury; to prevent a particularly serious crime involving grave threat to life; or to arrest a person posing such a threat and who is resisting efforts to stop the threat or to prevent that person’s escape. Before using firearms, law enforcement officials must identify themselves as law enforcement officials and give a clear warning that firearms will be used. Further, sufficient time must be provided for the warning to be observed, unless this would unduly create a risk of death or serious harm to the officer or other persons, or would be clearly inappropriate or pointless in the circumstances.<sup>123</sup> Explicit guidance is also provided in relation to respecting persons’ right to participate in lawful and peaceful assemblies in accordance with Article 21 of the

<sup>120</sup> See Saif al-Islam speech on Libyan State Television, where he said that “the number of deaths reached 14 in Bayda and 84 in Benghazi, in total ... some mass media were exaggerating ..., personally I heard the day before yesterday that more than 250 people were killed and more than 180 injured. This was an unimaginable exaggeration”. Speech translated by Commissions’ staff. Speech record available from [http://www.youtube.com/watch?v=Pp6DFM9\\_NuU&feature=related\\_\(minute\\_6:09\)](http://www.youtube.com/watch?v=Pp6DFM9_NuU&feature=related_(minute_6:09)).

<sup>121</sup> International Criminal Court, Office of the Prosecutor, *First Report of the Prosecutor of the International Criminal Court to the UN Security Council Pursuant to UNSCR 1970 (2011)*, 4 May 2011, p. 4.

<sup>122</sup> *Code of Conduct for Law Enforcement Officials*, adopted by General Assembly Resolution 34/169, 17 December 1979; and *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials*, adopted by the Eighth United Nations Conference on the Prevention of Crime and the Treatment of Offenders, 7 September 1990.

<sup>123</sup> See Article 3 of the *Code of Conduct for Law Enforcement Officials* and *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials*.

ICCPR.<sup>124</sup> Depending on the circumstances, particular violations might also amount to constituent acts of a crime against humanity (e.g. murder or persecution) if committed as part of a widespread or systematic attack against a civilian population with knowledge of that attack.<sup>125</sup>

### 3. Factual Findings

85. The Commission has concluded that the Government's reaction, in seeking to repress the demonstrations, involved the use of lethal force and that in the early days of the protest there was little evidence to suggest that the protestors were engaged in other than peaceful assembly. The Commission has not been able to determine the exact numbers of casualties during the demonstration phase, in part because its access to places and persons was limited, but also due to specific Government action taken in the aftermath of the demonstrations which has limited available physical and documentary evidence. The Commission received specific information concerning events in the following locations.<sup>126</sup>

86. **Benghazi:** The Commission received information that 20 demonstrators were killed in Benghazi on 17 February<sup>127</sup> with a further 20 killed on 19 February and 60 killed on 20 February.<sup>128</sup> According to Benghazi Medical Centre, of the fatalities registered at that location on 17 February (estimated at 11), 90% were shot in the upper part of the body, in particular in the chest and head. Doctors and nurses at the Benghazi Medical Centre indicated that a significant number of fatalities arrived in the following days.

87. **Tripoli:** The Commission interviewed persons with information concerning demonstrations in Tripoli on 17 February. Persons spoke of security forces using force to disperse demonstrators in Green Square and in Algeria Square, leaving several protestors dead. On 21 February, there were indications of some violent actions by protestors with the burning of Government buildings, such as police stations on Omar al-Mukhtar Street and the People's Hall on Andalus Street and the Friday market area. However, the Commission received information that even if security forces were justified in using some sort of force, the use of force was indiscriminate. One example given was that of a 21 year old woman who was killed while watching the scene in Sidi Khalifa Street in the city.

88. Human Rights Watch stated that at least 62 corpses were brought to the morgues in Tripoli between 20 and 22 February after protestors had been fired at randomly by Libyan

<sup>124</sup> If an assembly is unlawful but nonviolent, law enforcement officials must avoid using force, or where this is not practicable, must restrict force to the minimum extent necessary. In the case of violent assemblies, law enforcement officials may use firearms only when less dangerous means are not practicable and only to the minimum extent necessary; Principles 13-14, *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials*.

<sup>125</sup> Article 7 (1)(a) and 7(1)(h) Rome Statute.

<sup>126</sup> This listing of locations relates to places or events on which the Commission has gathered the most information, in part due to the locations it was able to visit. However, this should not be taken to be an exhaustive list, since confrontations between demonstrators and government forces happened in other locations.

<sup>127</sup> Human Rights Watch, "Libya: Security Forces Kill 84 Over Three Days; End Attacks on Peaceful Protesters", 18 February 2011, available from <http://www.hrw.org/en/news/2011/02/18/libya-security-forces-kill-84-over-three-days>.

<sup>128</sup> Amnesty International, "Libyan Leader Must End Spiralling Killings", 20 February 2011, available from <http://www.amnesty.org/en/news-and-updates/libyan-leader-must-end-spiralling-killings-2011-02-20>, and Human Rights Watch "Libya: Government Should Demand End to Unlawful Killings", 20 February 2011, available from <http://www.hrw.org/en/news/2011/02/20/libya-governments-should-demand-end-unlawful-killings>.



forces.<sup>129</sup> In relation to demonstrations in the Fashlum, Tajurah and Al-Dibri neighborhoods of Tripoli, the Commission received information that on 20 February, government forces shot at demonstrators, leaving estimated 15 persons dead and many others injured. The Commission received further information that the repression of the demonstrations continued on 23 and 25 February.<sup>130</sup>

89. The Commission was told by several witnesses that security forces of the government collected the corpses of persons from streets and hospitals. There were also accounts of bodies being exhumed by bulldozers after being buried. Security forces were also said to have raided hospitals to remove injured persons. It was also reported to the Commission that a number of wounded were denied access to hospitals, while others did not seek medical treatment for fear of being detained by the Security Forces.

90. **Darnah:** The Commission received information that six persons were killed in Darnah on 17 February when security forces opened fire at approximately 150 persons protesting against the regime. No tear-gas or warning shots were said to have been employed before the use of live ammunition. A number of those who were killed had been shot in the upper part of the body. In one case, an individual was said to have been shot six times in the head and chest by a member of the ISA. One witness, explained:

*“We went to peaceful demonstration [on 17 February] and were attacked by security. Six were killed during the 30 minutes demonstration. I was hit...Children are targeted in the face, without differentiating. 6 people were hit in face on 17th in Darnah...Snipers were on top of buildings shooting. Not a Katiba but people from internal security, instructed to do so, to target people, no teargas used, they targeted us with live bullets.”*

91. **Tobruk:** The Commission collected information regarding the demonstration in Ash-Shuhada Square (previously known as Al-Jamahiirya Square) in Tobruk which triggered an intervention, according to witnesses, from joint governmental security agencies, including the Internal Security Agency, riot police, and Revolutionary Committees. Witnesses reported that several security personnel were stationed on the roofs of nearby buildings and were firing at demonstrators. The Commission has established that live ammunition was used, killing at least four demonstrators and injuring 51 others.

92. **Al-Bayda:** According to medical records provided to the Commission, at least 40 persons were killed during peaceful demonstrations between 16 and 19 February. On 16 February, members of Al-Bayda Internal Security Agency fired live ammunition at a demonstration in Al-Salhi Square and the Commission has verified that several demonstrators had been killed. On 17 February, according to information received by the Commission from forensic and prosecutorial authorities, security forces of Khamis *Katiba* were deployed in Al-Bayda where they shot at demonstrators without prior warning, resulting in the deaths of 11 other demonstrators. Other witnesses spoke specifically of actions of the ISA and Revolutionary Committees in shooting at persons during demonstrations.

<sup>129</sup> Human Rights Watch, “Libya: Commanders Should Face Justice for Killings”, 22 February 2011, available from <http://www.hrw.org/en/news/2011/02/22/libya-commanders-should-face-justice-killings>.

<sup>130</sup> A medical practitioner interviewed by the Commission stated that following the repression of demonstrations in Tajurah, he saw 15 persons killed and 10 wounded on 20 February 2011 and that most were hit at the head, chest and abdomen. He also saw 35 who had received wounds to the head and chest on 25 February 2011.

93. On 18 February, at the demonstrations near Al-Abraq Airport<sup>131</sup> (east of Al-Bayda town), the Commission received information that 11 persons were killed by security personnel of Khamis *Katiba*, including the Commander of Husein al-Jiwiki *Katiba*. According to several sources, the Commander was killed when he refused to shoot at demonstrators, and was shot as a result of his refusal to shoot at demonstrators. Witnesses noted that an 11 year old child was shot in the head while sitting inside a house close to the place of incident.

94. Medical sources and forensic specialists in Al-Bayda mentioned that the vast majority of those killed were shot in the upper part of their bodies. They estimated that 80% had been shot in the head and another 10% had been shot in the chest, neck, or mouth. According to the same sources, the vast majority of those killed were shot with only one bullet.

95. **Misrata:** The Commission received information relating to Misrata and demonstrations held there between 19 and 22 February. The Commission heard evidence that riot-control police shot live ammunition at demonstrators killing at least one person Khaled Abushamah on 19 February. On 20 February, following the funeral of Mr. Abushamah, thousands of people gathered on Tripoli Street, Misrata, to protest and met with Security forces again shooting live ammunition. In addition to the riot control police, members of the *Baltajiyah*<sup>132</sup> were also said to be present and to have taken part in shooting at demonstrators. The Commission has also been informed that AK47's and anti-aircraft weapons were used against demonstrators. On 21 and 22 February, demonstrators attacked Revolutionary Committee offices, police stations and military barracks, taking arms and weapons from these locations.

96. The Commission was told that when the demonstrations erupted, instructions were given to security forces to withdraw from police stations and security premises.<sup>133</sup> The Government has stressed that the live ammunition was only employed in response to demonstrators' violent actions. The Government also noted that demonstrators attacked police stations, destroying approximately 17 stations several of them in various cities and towns of Libya, and that demonstrators took up arms against the security forces. The Government was thus of the view that any use of force had been justifiable.

97. The majority of information collected by the Commission, however, indicates that the Government forces used live ammunition against unarmed peaceful demonstrators in many instances. While in some locations, and in particular post 19 February, demonstrators increasingly took violent actions, the Commission concludes that the early days of the demonstration were peaceful. This conclusion is based upon information received from participants in the demonstration, but has also been corroborated through information collected from some security personnel. One member of security personnel, currently in detention, stated that he was among 250 soldiers deployed by the regime to "contain demonstrators" in Benghazi on 17 February. Interrogation records provided to the Commission by the Benghazi General Prosecutor's Office state that members of the security forces were given orders, by their commanding officers, to use force against

<sup>131</sup> The event is commonly known among Libyans as "Al-Abraq Airport battle".

<sup>132</sup> In describing these *Baltajiyah*, witnesses referred to armed young men acting as groups in a "gang like" fashion to disrupt the demonstration.

<sup>133</sup> "The Great Socialist People's Libyan Arab Jamahiriya Response to Accusations Relating to Human Rights Violations," report submitted to the Commission by Libyan Ministry of Foreign Affairs, on 16 May 2011 in Geneva. This was confirmed in discussions with representatives of the NTC. The Government ascribed this action to a desire to minimize civilian casualties, a position with which the NTC did not agree.

demonstrators. In at least one transcript, there is an admission of involvement by a member of the security forces in the random shooting of protestors in Benghazi on 20 February. Similar information was provided in relation to the deliberate deployment of members of *Kata'eb* to violently disperse demonstrations in Al-Bayda. In one case a former Security Director who has since joined with opposition forces disclosed that he sought to gain approval for the redeployment of officers outside Al-Bayda from the highest levels of the Internal Security Agencies and senior political figures. He did not receive authorization and was told to take instructions only from Khamis Qadhafi. The Benghazi Prosecutor's Office has also collected information relating to orders being given to fire at demonstrators on 17 February in Ras Lanuf and that security personnel had complied with said orders by utilizing anti-aircraft weaponry.

98. The Commission has not been able to determine if all participants in the demonstration were unarmed. However, from the information it has received, together with the videos and photos it has examined, it considers it likely that in the early days of the protest, the protestors were engaged in peaceful assemblies.

#### 4. Conclusions

99. The Commission considers that there is sufficient evidence to suggest that the Government forces engaged in excessive use of force against demonstrators, at least in the early days of the protests, leading to significant deaths and injuries. The nature of injuries inflicted in several locations (with high proportions shot in the head or upper body) is indicative of "shoot to kill" operations. From the common style of response in many parts of the country, it would appear likely that the forces were given orders to engage in the harsh crackdown of demonstrators. Such actions represented a serious breach of a range of rights under the ICCPR including the right to life, the right to security of person, as well as freedom of assembly and freedom of expression. In relation to the latter days of protests as the situation escalated, more investigation would be required to assess the security forces' use of force, in particular more detail concerning the actions taken by demonstrators in these days in order to assess the response by Government authorities.

## B. Arbitrary Detentions and Enforced Disappearances

### 1. Introduction

100. Claims have been made of hundreds of arbitrary detentions of persons and/or their enforced disappearance as part of a Government repression of dissent. Particular groups who have been said to be subject to such treatment include those associated with the protests and journalists. The Human Rights Council in its Resolution S-15/1 expressed its "deep concern" at the "arbitrary arrests, detention and torture of peaceful demonstrators".<sup>134</sup> The Commission held over fifty interviews with persons (including detainees, their families or eyewitnesses in Libya, Tunisia and Egypt) who referred to cases of arbitrary detention and disappearance both during the demonstration and armed conflict periods. The Commission has also been provided with information from a variety of human rights organisations. The Commission has not been in a position to verify the hundreds of cases put to it by other organisations, however, has sought to investigate whether a pattern of arbitrary arrests and/or detentions occurred.

<sup>134</sup> A/JRC/RES/S-15/1, Operative Paragraph 1.

## 2. Applicable Law

### Arbitrary Detention

101. 21. Article 9 of the ICCPR prohibits arbitrary arrest or detention of individuals. It provides that “no one shall be deprived of liberty except on such grounds in accordance with such procedures as are established by law.” Persons arrested are to be informed at the time of arrest of the reasons for the arrest and promptly informed of any charges.<sup>135</sup> Anyone arrested or detained on a criminal charge is to be brought promptly before a judge or other officer authorized by law to exercise judicial power and is entitled to trial within a reasonable period or release.<sup>136</sup> Persons have a right to take proceedings before a court for the purposes of reviewing the lawfulness of detention and to be released if the detention is unlawful.<sup>137</sup> Lawfulness of detention is to be considered as both lawfulness under domestic law and lawfulness under international law.<sup>138</sup> The term “arbitrary” needs to be considered in terms of appropriateness, proportionality and reasonableness.<sup>139</sup>

### Enforced Disappearance

102. While Libya is not a party to the specialized convention concerning enforced disappearances,<sup>140</sup> it is a party to the ICCPR, provisions of which are infringed by enforced disappearance. Such action violates a person’s right to recognition as a person before the law,<sup>141</sup> to liberty and security and freedom from arbitrary detention including the right to be brought promptly before a judge or other official for review of the lawfulness of detention.<sup>142</sup> Disappearance may also be associated with torture and other forms of cruel, inhuman or degrading treatment and extrajudicial execution, in violation of the right to life and torture and other forms of cruel, inhuman or degrading treatment.<sup>143</sup>

103. Under international humanitarian law, persons taking no active part in the hostilities are entitled to be treated humanely.<sup>144</sup> Customary international humanitarian law rules also include a prohibition on arbitrary deprivation of liberty<sup>145</sup> and require parties to the conflict to keep a register of persons deprived of their liberty,<sup>146</sup> respect detainees’ family life, to

<sup>135</sup> Article 9(2) ICCPR.

<sup>136</sup> Article 9(3) ICCPR.

<sup>137</sup> The ICCPR also provides for a right of compensation for unlawful arrest or detention.

<sup>138</sup> See for instance, *A v Australia*, Human Rights Committee, Communication No. 560/1993, CCPR/C/59/D/560/1993, para. 9.5.

<sup>139</sup> *A v Australia*, Human Rights Committee, Communication No. 560/1993, CCPR/C/59/D/560/1993, para. 9.2. In considering unlawful remand, the Committee has also highlighted that factors of inappropriateness, injustice and lack of predictability that may render arbitrary an otherwise lawful detention; see *Van Alphen v The Netherlands*, Human Rights Committee, Communication No. 305/1988, CCPR/C/39/D/305/1988.

<sup>140</sup> *International Convention on the Protection of all Persons from Enforced Disappearance*.

<sup>141</sup> Article 16 ICCPR.

<sup>142</sup> Article 9 ICCPR.

<sup>143</sup> The Human Rights Committee in its General Comment No 20 (1992), para. 11, on Article 7 of the ICCPR, recognized that safeguards against torture included having provisions against incommunicado detention, granting detainees suitable access to persons such as doctors, lawyers and family members, ensuring detainees are held in places that are officially recognized as places of detention and for their names and places of detention, as well as for the names of persons responsible for their detention, to be kept in registers readily available and accessible to those concerned, including relatives and friends.

<sup>144</sup> Article 4(1) AP II, Common Article 3 of the four Geneva Conventions of 1949.

<sup>145</sup> Rule 99, ICRC Study on Customary International Humanitarian Law, p. 344.

<sup>146</sup> Rule 123, ICRC Study on Customary International Humanitarian Law, p. 439.

permit detainees to receive visitors, especially near relatives to the degree practicable<sup>147</sup> and allow correspondence between detainees and their families.<sup>148</sup> Parties to a conflict must take all feasible measure to account for persons reported missing as a result of the conflict and efforts must be made to provide family members with any information the Party has on their fate.<sup>149</sup> The practice of enforced disappearance also may be a gateway to other violations such as torture, murder or extra judicial executions. The combined effect of particular international humanitarian law obligations leads to the conclusion that the practice of disappearance is prohibited by customary international humanitarian law.<sup>150</sup>

104. Furthermore, “imprisonment or other severe deprivation of liberty in violation of fundamental rules of international law” and enforced disappearance are acts recognized in the Rome Statute as potentially giving rise to a crime against humanity if committed as part of a widespread or systematic attack against any civilian population, with knowledge of the attack.<sup>151</sup>

### 3. Factual Findings

105. In a number of cities visited the Commission has been able to observe posters on public buildings, courthouses, and hospitals containing the pictures and names of disappeared persons. Family members had placed such posters in the hope that someone would be able to provide them with information as to the whereabouts or the life or death of their relatives.

106. The Commission received considerable information concerning the detention of persons by Government forces. The information received by the Commission, indicated that Government forces arrested or detained hundreds of civilians in many cities and towns across Libya, in an organized fashion, utilizing various brigades and other security forces. Interviewees reported that the authorities’ repression of demonstrations was followed by reprisals against individuals having organized or participated in demonstrations. Numerous reports were received of persons being taken to “informal” places of detention. Following their release, a number of persons gave information concerning their being held along with others in such unofficial places of detention maintained by government forces.

107. When persons were detained, they were not informed of the basis for the deprivation of liberty. Many persons arrested, in the aftermath of the demonstrations, have not been brought before a competent, independent and impartial court or other authority to have the lawfulness of their detention subject to review. Instead, they have been held outside the reach of the law, without the possibility of resorting to legal procedures. Consistent testimonies received by the Commission indicate that Government forces stopped civilians at checkpoints or in the streets, regularly verified identity cards of travellers, arrested and detained persons according to their place of origin or residence, each being used as proxies to indicate that persons were supporters of the opposition. While some were released after being questioned, others were taken by authorities and are suspected to be held in detention facilities or prisons in Tripoli, or transferred to Ianzana, Jdaydah, and Abu Salim detention

<sup>147</sup> Rule 126, ICRC Study on Customary International Humanitarian Law, p. 438.

<sup>148</sup> Rule 125 ICRC Study on Customary International Humanitarian Law, p. 445. This right is also explicitly protected in Article 5(2) (b) of AP II.

<sup>149</sup> Rule 117, ICRC Study on Customary International Humanitarian Law, p. 421.

<sup>150</sup> Rule 98, ICRC Study on Customary International Humanitarian Law, p. 340.

<sup>151</sup> See Article 7(1)(e) and Article 7(1)(i) Rome Statute. Enforced disappearance is further defined in Article 7(2)(i) as “the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time.”

facilities. Two persons from Nalut, for instance, stated to the Commission that: they had been arrested by government forces and later transferred to an unknown military location. They were detained along with other persons, some of whom are still missing.

108. The Commission received information about a large number persons missing or disappeared, both during the demonstrations and during the armed conflict. Reports were forthcoming from several cities in the east including Ajdabiya, Al-Bayda, Darnah, Misrata, Ras Lanuf, Surt and Tobruk, as well as cities in the west including in Tripoli Az-Zawiyah, Zuwarah and the Nafusa Mountain. Interviewees noted that hundreds of persons disappeared in the first days of demonstrations as well as after the conflict started. Witnesses told the Commission that some Government forces specifically communicated threats that abductions would continue unless their community aligned with the Qadhafi regime. Interviewees stated that the majority of persons disappeared during the conflict have been civilians who were travelling inside the country, or had encountered checkpoints run by Government forces. Some were simply walking in the streets or buying groceries when they were last seen.

109. It is difficult to ascertain the exact number of disappearances. The Commission received a list of 10 names of persons reported to have disappeared during the second half of February in Tobruk, and of 110 disappeared persons who disappeared from the Nafusa Mountain area. Alkarama submitted to the Commission a list of 740 names of persons who had been reportedly arrested, detained or abducted by Government forces and were believed to have been disappeared. Human Rights Watch documented 72 possible disappearance cases based on interviews with family members or witnesses to the arrest of missing persons. According to Human Rights Watch, the Libyan Red Crescent Society in Benghazi has recorded 370 missing person cases from Benghazi and Al-Bayda.<sup>152</sup>

110. The Commission collected considerable information relating to the disappearances of persons from the Nafusa mountain area in particular.<sup>153</sup> According to several interviews conducted by the Commission with eyewitnesses and families of victims in refugee camps in Tunisia, a large number of persons have been disappeared since mid-February.

111. An interviewee from Zintan District, reported to the Commission that Government forces started stopping travellers as of mid-March on their way to the mountain to check their identity cards and detain them if they were residents of districts supporting the opposition. They were then taken away to unknown places. The interviewee also noted that the Government forces restricted the locations where fuel was available in the outskirts of Yafran and Zintan districts and would then capture persons from those locations.

112. Witnesses referred to Libyan authorities' failure to acknowledge detention and failure to respond to requests for information about those missing. In several interviews, the Commission heard that relatives called a missing person's mobile phone and ended up speaking with someone who they believed to be from the Government's security forces. The Commission met with persons who re-appeared after being held incommunicado, tortured or ill-treated for few days.

113. One interviewee told the Commission that hundreds of residents of the Nafusa Mountain have disappeared as of mid-February throughout March and April 2011. He

<sup>152</sup> Human Rights Watch, "Libya: At Least 370 Missing From Country's East; Fate of Libyans in Government Custody Unknown", 30 March 2011, available from <http://www.hrw.org/en/news/2011/03/30/libya-least-370-missing-countrys-east>.

<sup>153</sup> As indicated earlier, the Commission has received reports of disappearances from many geographical locations. The inclusion of particular cases from Nafusa Mountain area reflects the nature of the Commission's field investigations only.

stated that his cousin from Yafran District, and his friend from Jado District disappeared in March 2011. None of them carried weapons. Their families have not heard from them since. Another interviewee noted that government forces abducted his civilian cousin from Nalut District on 18 March 2011. He reported that his cousin had been detained for expressing pro-opposition views, and that he had not taken part in the hostilities. His whereabouts remain unknown.

114. In some cases documented by the Commission, persons who had been disappeared appeared subsequently on Al-Libya TV channel, a channel which is owned by Saif al-Islam Qadhafi. They were reportedly forced to state their alignment to the regime during a live transmission in an attempt to send a message to the opposition that their followers are traitors. During the broadcast, some others confessed to being members of Al-Qaida group in Libya while having visible signs of torture or ill-treatment on their faces and bodies.

115. Interviewees from the Nafusa Mountain, for example, stated that three residents of Nalut District disappeared in Tiji District around 6 March 2011, 40 kilometres away from Nalut, while travelling to Tripoli to buy car spare parts. Two days later, Al-Libya TV Channel broadcast them voicing their alignment and support to Colonel Qadhafi. Signs of beating were evident with their faces swollen and blue bruises marked their eyeballs.

116. The Commission documented cases of the disappearance of at least fourteen medical personnel by government forces from hospitals in Az-Zawiyah, Benghazi and Tripoli. An Egyptian physician told the Commission that his colleague, a Libyan physician disappeared together with an Egyptian practitioner in the beginning of March, in Ras Lanuf. His colleague was later seen on Al-Libya TV wearing military uniform and confessing that he belonged to Al-Qaeda. This case was also referred to in the submission of Alkarama to the Commission, along with the details of six other cases of disappearances of doctors in western Libya since the beginning of the uprising. Another physician told the Commission about the disappearances of four anaesthetic surgeons in Az-Zawiyah between February and March 2011. The Commission received further information concerning the arrest of a physician from Misrata with his 3 children and his 18 years old daughter in Tripoli. Their whereabouts remain unknown.

117. Reports indicate that journalists who were covering events were also subject to arbitrary arrests and disappearance. As a result of international pressure, some have been released but others are still missing or unaccounted for. At least a dozen of journalists as well as other media professionals including foreigners went missing in Libya. These cases (and the Commission's specific interventions in these cases) have been further explored in Section IV. E. of this report.

118. Foreign nationals also reported to the Commission that numbers of migrants disappeared in Tripoli. Interviewees in refugee camps in Tunisia noted that migrant workers had disappeared since the uprising had begun, mainly in raids conducted by government forces in migrants' camps in Tripoli. Their whereabouts are still unknown. Several interviewees mentioned that Saif al-Islam Qadhafi's *Katiba* had entered workers' compounds, ill-treated residents, robbed them of their belongings and had taken people away. They also told the Commission that migrants had been abducted in the streets, taken from their homes, ill-treated and/or blackmailed in order to be released. While some had succeeded in finding a way out by paying ransoms, others remain in custody.

119. The Commission has received very little information on violations committed by the armed opposition in relation to arrest, detention of abduction or any form of deprivation of liberty or disappearance.

#### 4. Conclusion

120. The Commission concludes that government forces have arbitrarily detained a significant number of persons in many cities and towns across Libya. In addition to not affording persons proper legal protections, it would appear that arrests and detentions were carried out in a “blanket” fashion, targeting suspected opposition supporters or regions viewed as being against the regime, rather than being based upon suspicion of criminal responsibility or other security-related reasons associated with the armed conflict. The Commission has also documented a range of cases of persons who have been disappeared, many of whom remain unaccounted for. On the basis of its investigation, the Commission is satisfied that the Government of Libya has engaged in a pattern of enforced disappearances of persons in violation of its obligations under international human rights and international humanitarian law. The Commission has received very little information on violations committed by the armed opposition in relation to arbitrary arrest, or other forms of deprivation of liberty or disappearances.

### C. Torture and other forms of ill-treatment

#### 1. Introduction

121. Reports concerning the use of torture and other forms of cruel, inhuman or degrading treatment or punishment by both government and opposition authorities have been received by the Commission. Both entities have denied their involvement in such violations. As part of its investigation, the Commission visited two detention facilities, one each in Benghazi and Tripoli, and interviewed a total of 30 detainees. The Commission also interviewed other witnesses and alleged victims of torture and ill-treatment in the course of its field mission.

#### 2. Applicable Law

122. Under international human rights law, there is a clear prohibition on torture and other forms of cruel, inhuman or degrading treatment in Article 7 of the ICCPR. A fuller definition of torture is provided for in the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT): “torture” means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.<sup>154</sup> International humanitarian law explicitly prohibits the torture and cruel treatment of persons taking no active part in hostilities (including members of armed forces who have laid down their arms or been rendered *hors de combat*).<sup>155</sup> Such conduct constitutes a war crime and torture is an act which can form part of a crime against humanity.<sup>156</sup>

<sup>154</sup> Article 1(1) CAT.

<sup>155</sup> Article 4(2)(a) AP II, Common Article 3 of the Geneva Conventions.

<sup>156</sup> See Article 8(2)(c)(i) and Article 7(1)(f) Rome Statute.



### 3. Factual Findings

#### a) Violations committed by Government forces

123. The Commission received information from many persons of their torture or cruel, inhuman or degrading treatment or punishment.

124. One man who spoke with the Commission related that he had been arrested by members of the Public Security Agency and Internal Security Agency in Benghazi on 17 February and taken to the Benghazi police station. At that point, he and the other 26 persons arrested were all beaten by security personnel. Clubs and rifles were used to inflict the beating. About 15 minutes after the beating finished, the group were transported to the Internal Security Agency premises in Sidi Jaber, in central Benghazi, where they were tortured with electricity shocks on their sexual organs. The man also reported seeing the ISA forcibly removing the nails and teeth of another detainee. When the Commission visited Al-Jdaydah detention centre in Tripoli, two detainees out of the five interviewed, told the Commission that they had been subjected to severe beating during the first days of their detention.

125. Another man arrested on 25 February in connection with a demonstration in Tajurah, reported that he was blindfolded and taken to an unknown destination where he was beaten with electric wires. His arms were tied in the back while he was repeatedly hit with a Kalashnikov on his forehead and the back of his head. He mentioned that he was detained for 10 days and beaten by batons. During his detention, he could also hear the voices of other persons screaming and moaning from pain. On the fifth day, the abusive treatment led to the inflammation of his wounds, causing him to faint due to the pain. When he woke up, he was beaten again. He was threatened with being beaten again if he did not go on Al-Libya TV channel saying that he was supportive of Colonel Qadhafi and confess to being part of the Al Qaeda group.

126. A Jordanian migrant reported that he was stopped by Khamis *Katiba* soldiers on his way to a nearby shop in his neighborhood in Maya area in Tripoli. He stated that after being beaten on all parts of his body, he was taken to a nearby detention facility, where he was held and beaten for a week on the head, face, fingers, hands and legs with batons and rifles. He was stripped and “forced to perform like a dog”. He noted that he fainted many times under torture. The Commission could see bruises on his fingers while interviewing him, several weeks after his detention.

#### b) Violations committed by opposition armed forces

127. On 20 April, the Commission visited Benghazi Detention Centre, a facility run by Opposition forces. The Commission met with 25 detainees out of the 72 held at the Center at that time. Detainees interviewed included five foreign nationals from Chad, Niger, Algeria and Syria. The majority of interviewees said that they had not been beaten during their detention. However, some reported, being beaten with clubs at the time of their capture.

128. Information was also received that foreign nationals had been tortured or subject to other forms of ill-treatment by opposition forces. One Palestinian man, stated that on 22 March 2011 approximately 50 armed men raided his house in Az-Zawiyah and arrested him along with five other male members of his family. According to information received by the Commission, armed men in green uniforms blindfolded him and took him to a hospital being used as a detention facility in Az-Zawiyah. During the 3 days of his detention, he reported that he was repeatedly kicked and beaten with batons and was subjected to inhuman treatment. Physical abuse was said to be a daily routine in the facility. He witnessed other people in the detention centre being subjected to inhuman treatment. He

reported that many of them were perceived pro-Qadhafi and included both Libyans and migrants. He noted that detainees were kept in very poor conditions and had been regularly threatened with death.

#### **4. Conclusion**

129. The Commission concludes that torture and other forms of cruel, inhuman or degrading treatment was committed by both the Government and the opposition forces in violation of obligations under international human rights and humanitarian law. Violations were most common with respect to persons held in detention (including incommunicado detention) and persons perceived to be supporters of “the other side” to the conflict. The cases related to government responsibility occurred both in peacetime (against persons detained in relation to the demonstrations) as well as subsequently during the armed conflict.

### **D. Denial of access to medical treatment**

#### **1. Introduction**

130. The Commission received numerous reports in its investigation that Government forces prevented persons from gaining access to medical treatment in the aftermath of the demonstrations. This prevention took the form of refusing to facilitate medical assistance, blocking access to medical facilities or in the most extreme cases, allegedly attacking persons or abducting persons in hospital viewed as associated with the protests. During the course of its investigation, the Commission spoke to over 40 persons who raised topics related to being hindered in their attempts to access health care, primarily following the demonstrations.<sup>157</sup>

#### **2. Applicable Law**

131. Under Article 12 of the ICESCR, Libya is bound to respect the right to everyone to the enjoyment of the highest attainable standard of physical and mental health. As the Committee on Economic, Social, and Cultural Rights has highlighted in its General Comment on Article 12, this includes an obligation not to prevent access to health services as a punitive measure. While the specific example provided by the Committee relates to where medical services are prevented as a punitive measure in times of armed conflict contrary to international humanitarian law, this obligation applies at all times.<sup>158</sup>

#### **3. Factual Findings**

132. The Commission repeatedly heard of cases in which persons were either denied access to medical care, or faced obstacles by security forces to facilitate access to health care after having been wounded in demonstrations. In one case reported to the Commission, a protestor in Al-Bayda on 18 February had received three gun shots and was provided with no medical care despite calls for the security forces provided assistance. He was left bleeding from 16:00 until 20:00 when he died, as a result of the lack of medical attention. In a separate case, another man from Al-Bayda also spoke of the lack of medical attention:

<sup>157</sup> This section deals primarily with impeding access to health care in the aftermath of the demonstrations. The subject of attacks on medical personnel and facilities and failure to fulfil obligations with respect to tending the wounded and sick during the armed conflict are dealt with separately under Section IV. F.

<sup>158</sup> ICESCR, General Comment No. 14 of Article 12 (2000), para. 34.

*“Those in the airport came out on to us firing arms and I was shot along with Sarah Albal who died later in the evening without medical care.<sup>159</sup> I was shot on my right thigh on the left side...We requested medical emergency because we were wounded and no one responded. We asked for water they refused and searched us. On Saturday 19 February afternoon, we were then moved from the hall and literally thrown into a truck after blindfolding us and whoever moved was hit. We were put on board a military airplane on the floor and we arrived to Tripoli at night. We could hear them say ‘this one is dead, this one is alive.’ We landed in Mateigha airport and were taken to the military hospital there. There the doctors took the blindfold off and put me in a bed for half an hour then they took me into surgery.*

133. Another witness from Benghazi who had been shot while participating in a demonstration on 17 February reported hearing instructions that no medical help was to be given and that a debate ensued amongst the military before he was taken to Benghazi Medical Centre:

*I could hear the crowd around me say this one is still alive, I heard another reply don’t touch anyone. Someone said to put me in the dumpster. I could hear a quarrel among them. One said: one is still alive, another said I will take him for medical help in the ambulance, another replied no, another replied I will take him in my personal car so the one who said no told them to disarm and take off their military uniform. They put me in the back seat and took me out of the military camp from the back gate and handed me to the Benghazi Medical Center.”*

134. The Commission also received information from medical professionals that the entries and exits to hospitals and accident centres had been closed by government forces to prevent people from entering to receive treatment. A doctor in Tripoli reported:

*“Ambulances full of mercenaries or Qadhafi forces did not let me out of hospital and prevented all exit and entry. I spoke with colleagues at Abu Salim accident centre and Az-Zawiyah and they also said no one could enter.”*

135. Alkarama also reported that border guards and Colonel Qadhafi's security services were preventing injured individuals from crossing into Tunisia to seek medical assistance.

136. The Commission also heard several reports of attacks on wounded persons and abductions from hospitals. According to one person interviewed by the Commission, in Benghazi in the early days of the protest, an employee at Al-Jalaa' hospital let alleged mercenaries enter through a back door “in order to kill the injured demonstrators.” Another person, reported having heard of similar accounts and that a fight erupted inside the hospital as friends and relatives of the injured banded together to protect them from being taken or killed. A nurse in Benghazi speaking to Channel Four said that on the evening of 17 February, armed men wearing "military or police" uniforms entered the hospital at which she was working at around 2:00, and carried away three patients who had been injured during the protest on the same date. The nurse added that staff were ushered into a room and kept there until the patients had been loaded into a vehicle outside.<sup>160</sup>

137. An interviewee from Zintan in the west stated that on the night of 21 February, government forces invaded hospitals, abducted patients and killed others on the spot. Medical personnel who tried to protect patients were abducted.

<sup>159</sup> This may be a reference to the person who died in the previous witness' account.

<sup>160</sup> Channel 4 News, “Libya: ‘Armed men kidnap wounded from Hospital’”, 18 April 2011, available from <http://www.channel4.com/news/libya-armed-men-kidnap-wounded-from-hospital>.

138. In Tripoli a doctor serving at the Medical Centre reported witnessing members of the *Kata'eb* abducting the wounded from his hospital. Reports of such abductions were said to have had a chilling effect on persons accessing hospitals.

#### 4. Conclusion

139. The Commission considers that a range of actions taken by government forces have had the effect of impeding or preventing altogether access to medical care. This has taken the form of refusing assistance in the immediate aftermath of demonstrations, later interrupting access to hospitals, taking action against medical personnel and allegedly abducting persons from hospitals. In such actions, there have been clear violations of the right to adequate standard of health, as well as other serious violations involved in the particular actions undertaken against medical personnel or patients.<sup>161</sup>

### E. Freedom of Expression

#### 1. Introduction

140. Both the Human Rights Council<sup>162</sup> and the Security Council<sup>163</sup> made specific reference to concern regarding issues surrounding freedom of expression. The HRC called upon the Libyan Government to cease intimidation, persecution and arbitrary arrests of individuals, including journalists<sup>164</sup> while the Security Council condemned acts of violence and intimidation committed by the Libyan authorities against journalists, media professionals and associated personnel.<sup>165</sup> The Committee to Protect Journalists has documented more than 80 attacks on the press between 16 February and 20 May, which includes five fatalities, at least three serious injuries, 50 detentions, 11 assaults, two attacks on news facilities, the jamming of Al-Jazeera and Al-Hurra transmissions, at least four instances of obstruction of journalists' activities and expulsion of two international journalists.<sup>166</sup>

#### 2. Applicable Law

141. International human rights law expressly provides for freedom of expression, which includes the freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of choice. While it can be subject to restrictions, these are to be only as provided for by law and are necessary for respect for the rights or reputations of others, for the protection of national security, public order, public health or morals (Article 19 ICCPR). The Human Rights Committee has referred to the role of journalists in disseminating information and the way in which attacks on journalists, whether in the form of arbitrary arrests, torture, killings or other means are incompatible with Article 19.<sup>167</sup>

<sup>161</sup> Reference is made in other sections of this report to the other violations such as abductions and enforced disappearance.

<sup>162</sup> A/HRC/RES/S-15/1.

<sup>163</sup> S/RES/1970 (2011), Preambular para. 10.

<sup>164</sup> A/HRC/RES/S-15/1, Operative para. 3.

<sup>165</sup> S/RES/1970 (2011), Preambular para. 6. See also the reference in Security Council Resolution 1970, S/RES/1970, Preambular para. 10, on the need to respect freedom of expression, including freedom of the media.

<sup>166</sup> The Committee to Protect Journalists, "Journalists under attack in Libya: The tally" available from <http://www.cpj.org/blog/2011/05/journalists-under-attack-in-libya.php> (accessed on 27 May 2011).

<sup>167</sup> For a recent discussion of this topic, see the Draft General Comment No. 34 (2011) on Article 19 of the Human Rights Committee, CCPR/C/GC/34/CRP.6, paras. 12 and 22.

Under international humanitarian law journalists are civilians and thus entitled to the range of protections for civilian personnel,<sup>168</sup> as underlined by the Security Council in 2006.<sup>169</sup> Whilst the Rome Statute does not refer specifically to attacks against journalists, particular actions can be considered within the existing framework of war crimes and crimes against humanity.

### 3. Factual findings

142. Reports received by the Commission indicate that Libyan authorities frequently resorted to action aimed at restricting the dissemination of information including cutting off landlines, Internet access and media outlets. A significant number of interviewees informed the Commission of an extensive media blackout implemented by authorities particularly in the eastern part of the country. Social networking and mobile phones used by groups to rally support for demonstrations were also reportedly blocked. Internet connections were slowed down in major cities and various websites were blocked, in particular those that relayed views that were not supportive of government. According to several media sources, around 18 February, Twitter, Facebook and Al-Jazeera websites were blocked.<sup>170</sup> According to UNESCO, the authorities also jammed the signal of foreign media.<sup>171</sup>

143. Persons who were using mobile phones to take photograph or to film the demonstrations were allegedly arrested and had their phones seized by security forces. One man interviewed by the Commission reported that persons were prevented from filming injured persons in Tajurah on 25 February by security forces. The Commission also received information suggesting that the government forces continued to confiscate electronic equipment including mobile phones, cameras, computer and memory sticks from persons leaving Libya in order to prevent the transmission of information outside the country.<sup>172</sup>

144. Media activists based in Tripoli reported restrictions on means of communication and reported remaining under persistent Government surveillance. Some foreign journalists faced expulsion. Several received warnings from the authorities to leave the country.<sup>173</sup> Specific actions by government forces were taken to restrict reporting. On 4 March, for

<sup>168</sup> See Rule 34, ICRC Study on Customary International Humanitarian Law, p 115.

<sup>169</sup> S/RES/1378.

<sup>170</sup> See for instance: The Committee to Protect Journalists, "Journalists under attack in Libya: The tally" available from <http://www.cpj.org/blog/2011/05/journalists-under-attack-in-libya.php> (accessed on 27 May 2011) and BBC News, "As it happened: Clashes rock Libya and Bahrain" available from [http://news.bbc.co.uk/2/mobile/middle\\_east/9402327.stm](http://news.bbc.co.uk/2/mobile/middle_east/9402327.stm).

<sup>171</sup> United Nations Educational, Scientific and Cultural Organisation (UNESCO), "Director-General condemns violence and intimidation of journalists in Libya" 16 March 2011, available from [www.unesco.org/new/en/media-services/single-view/news/director\\_general\\_condemns\\_violence\\_and\\_intimidation\\_of\\_journalists\\_in\\_libya/](http://www.unesco.org/new/en/media-services/single-view/news/director_general_condemns_violence_and_intimidation_of_journalists_in_libya/), and Reuters, "Libya cuts off internet services-network monitor", 19 February 2011, available from [www.reuters.com/article/2011/02/20/libya-protests-internet-idUSN1917005520110220](http://www.reuters.com/article/2011/02/20/libya-protests-internet-idUSN1917005520110220).

<sup>172</sup> The Commission interviewed several foreign nationals and Libyans fleeing the fighting towards Tunisia who reported that their sim-cards were broken and phones taken away by Government forces at checkpoints to conceal evidence they may possess.

<sup>173</sup> On 30 March 2011, Libyan authorities expelled Michael Georgy, a Reuter's correspondent who had been covering the conflict since 28 February, without justification. See Reuters, "Libyan Government expels Reuters Correspondent", 30 March 2011, available from [www.reuters.com/article/2011/03/30/us-libya-reuters-idUSTRE72T3XH20110330](http://www.reuters.com/article/2011/03/30/us-libya-reuters-idUSTRE72T3XH20110330) and the Committee to Protect Journalists, "Journalists under attack in Libya: The tally", available from <http://www.cpj.org/blog/2011/05/journalists-under-attack-in-libya.php> (accessed on 27 May 2011).

instance, authorities prevented international journalists from reporting on a government crackdown on protesters in Tajurah District.

145. According to media reports, on 16 February, Libyan security forces reportedly arrested four persons while being interviewed by a journalist in Al-Izba al-Khadrah, Tripoli. The detainees were subsequently transferred to an undisclosed location. One person interviewed by the Commission reported that he was forced to flee Libya upon receiving threats of attack or arrest by government forces after having spoken with international media. The treatment of journalists at the event in which Ms. Iman al-Obeidi shared her account of being gang raped by government forces has been well publicised. Security guards were said to have physically assaulted some journalists who attempted to protect her and destroyed their cameras and recording equipment of those who had recorded her statement.<sup>174</sup>

146. Journalists and media personnel have themselves been subject to arbitrary detention and disappearance. Foreign journalists were constantly watched by government officials and routinely detained by security forces. Staff working for eight news outlets, including the Los Angeles Times, the BBC, and Agence France-Presse, for example, were detained on 5 March outside Az-Zawiyah for nearly seven hours.<sup>175</sup> During a visit to Al-Jdaydah Detention Centre, the Commission interviewed a Tunisian-Canadian journalist and correspondent of the Canadian newspaper, who had been arrested on 17 March 2011 after crossing into Libya from Al-Dehiba crossing point, south-east of Tunisia. This journalist was eventually released on 19 May, after spending over 60 days in prison.<sup>176</sup> *The journalist informed the Commission that upon his entry into Libya, the Libyans took him to prison. Although he did not report ill-treatment while inside the prison, there were concerns about his psychological and physical integrity. He was not brought before a competent court or charges levelled against him. He was allowed once to make a phone call.*

147. Escalating attacks against journalists and media professionals continue to be reported. This has included killings, expulsion and enforced disappearances. There have been reported cases of the authorities being viewed as inciting violence against journalists.<sup>177</sup> On 24 February, in an interview with Al-Jazeera, Saif al-Islam, attacked the Arab media for broadcasting what he referred to as “lies”, adding that it is a media war. He stated “*the conspiracy does not come from Libyans but from your Arab brothers who*

<sup>174</sup> See for instance, Human Rights Watch, “Immediately Release Woman Who Alleged Rape”, 28 March 2011, available from [www.hrw.org/en/news/2011/03/28/libya-immediately-release-woman-who-alleged-rape](http://www.hrw.org/en/news/2011/03/28/libya-immediately-release-woman-who-alleged-rape), and Amnesty International, “End Campaign to Discredit Eman Al Obeidi”, 31 March 2011, available from [www.amnesty.org/en/news-and-updates/libya-end-campaign-discredit-eman-al-obeidi-2011-03-31](http://www.amnesty.org/en/news-and-updates/libya-end-campaign-discredit-eman-al-obeidi-2011-03-31).

<sup>174</sup> The Committee to Protect Journalists, “Libya must free Guardian reporter; obstruction continues”, 11 March 2011, available from [www.cpj.org/2011/03/libya-must-free-guardian-reporter-obstruction-cont.php](http://www.cpj.org/2011/03/libya-must-free-guardian-reporter-obstruction-cont.php).

<sup>175</sup> *Ibid.*

<sup>176</sup> Canoe.ca, “Lotif Ghars: Journaliste Tuniso-canadien libere”, 19 May 2011, available from <http://fr.canoe.ca/infos/quebeccanada/archives/2011/05/20110519-110608.html> and Press TV, “Al-Alam reporter gives account of Libya ordeal”, 26 May 2011, available from <http://www.presstv.ir/detail/181763.html>.

<sup>177</sup> United Nations Educational, Scientific and Cultural Organisation (UNESCO), “Director-General condemns violence and intimidation of journalists in Libya”, 16 March 2011, available from [www.unesco.org/new/en/media-services/single-view/news/director\\_general\\_condemns\\_violence\\_and\\_intimidation\\_of\\_journalists\\_in\\_libya/](http://www.unesco.org/new/en/media-services/single-view/news/director_general_condemns_violence_and_intimidation_of_journalists_in_libya/).

*unleashed on you their broadcaster's poisoned words and false rumors. They misguided the Libyans with media and false information.*"<sup>178</sup>

148. The Commission has received reports that at least five journalists have been killed, while others have endured harassment, torture and incommunicado detention. In one of the incidents, the Commission received information that on 12 March, *Ali Hassan Al Jaber, a cameraman for the Al-Jazeera television network was killed and his colleague injured in an ambush on the outskirts of Benghazi. The team was on their way back to Benghazi from a trip to Slough where they had been conducting interviews with demonstrators. Two masked assailants opened fire on their car in the middle of the road between Al-Nuwagia and Al-Hawari.*

149. On 20 April, photojournalist and film-maker Tim Hetherington<sup>179</sup> and photographer Chris Hondros<sup>180</sup> were killed and two other non-Libyan co-workers were injured in what appears to be a mortar attack in the city of Misrata.<sup>181</sup> According to information received, Hetherington and Hondros were among other journalists reporting from Tripoli Street in Misrata when the incident occurred.

150. On 5 April on the outskirts of Al-Brega, Mr. Anton Hammerl was with three other journalists<sup>182</sup> covering the fighting, when he was shot and killed by government forces. One of his colleagues present at the time, Mr James Foley, was quoted in the Globalpost as saying that they witnessed two armoured Libyan military trucks carrying pro-Qadhafi troops who were firing AK-47s over their heads: *"We thought we were in the crossfire. But eventually, we realized they were shooting at us. You could see and hear the bullets hitting the ground near us."*<sup>183</sup>

151. The Commission is aware of reports relating to the detention of four New York Times journalists<sup>184</sup> on 15 March who were released on 21 March into the custody of Turkish diplomats. The New York Times has reported that its personnel were handcuffed, blindfolded, beaten, whereas the female reporter was sexually assaulted while in

<sup>178</sup> Alarabiya TV website, 24 February 2011, available from [www.alarabiya.net/articles/2011/02/24/139040.html](http://www.alarabiya.net/articles/2011/02/24/139040.html), The Committee to Protect Journalists, "Journalists under attack in Libya: The tally", available from <http://www.cpj.org/blog/2011/05/journalists-under-attack-in-libya.php> (accessed on 27 May 2011).

<sup>179</sup> Tim Hetherington, 40, was a seasoned photojournalist who contributed photographs to U.S magazine Vanity Fair. He directed Restrepo, an acclaimed 2010 documentary film about fighting in Afghanistan, which was nominated for an Oscar.

<sup>180</sup> Chris Hondros, 41, award winning U.S war photographer worked for Getty Images.

<sup>181</sup> Human Rights Watch, "Journalists killed in Libya", 20 April 2011, available from [www.hrw.org/en/news/2011/04/20/libya-journalists-killed-misrata](http://www.hrw.org/en/news/2011/04/20/libya-journalists-killed-misrata), United Nations Educational, Scientific and Cultural Organisation (UNESCO), "Director-General deplors death of photojournalists Tim Hetherington and Chris Hondros in Libya", 22 April 2011, available from [www.unesco.org/new/en/media-services/single-view/news/director\\_general\\_deplors\\_death\\_of\\_photojournalists\\_tim\\_hetherington\\_and\\_chris\\_hondros\\_in\\_libya](http://www.unesco.org/new/en/media-services/single-view/news/director_general_deplors_death_of_photojournalists_tim_hetherington_and_chris_hondros_in_libya).

<sup>182</sup> Manuel Varela de Seijas Brabo (Spanish freelance photographer on contract with the European Press Photo Agency); James Foley (American citizen, working for the Global Post); and Morgana Gillis (American freelancer for Christian Science Monitor, the Atlantic and USA Today. They were all released on 18 May 2011.

<sup>183</sup> The Globalpost online, "Reporter release tempered by news of colleagues death", 19 May 2011, available from [www.globalpost.com/dispatch/news/regions/africa/110519/libya-journalist-death-anton-hammerl-james-foley-clare-gillis](http://www.globalpost.com/dispatch/news/regions/africa/110519/libya-journalist-death-anton-hammerl-james-foley-clare-gillis). In this as in most of the cases reported in this section, the details of the events have been included in many news reports.

<sup>184</sup> The journalists are Anthony Shadid (the New York Times Beirut bureau chief), Tyler Hicks and Lynsey Addario (photographers), and Stephen Farrell (reporter and videographer).

captivity.<sup>185</sup> The female staff member reported that “*There was a lot of groping, every man who came in contact with us basically felt every inch of my body short of what was under my clothes.*” One man grabbed her breasts and another punched her in the face. Others explained that they were repeatedly beaten with punch, rifle butts and continuously told they are going to die. They were transported into a vehicle, which stopped repeatedly at checkpoints, each time allowing for a new group of soldiers to land a fresh punch or a rifle butt in their backs.<sup>186</sup>

152. A BBC news team of three were detained on 7 March at an army roadblock and taken to a military barrack in Tripoli. They reported that they were blindfolded, beaten with fists, knees and rifles, hooded and subjected to mock executions by members of the Libyan army and secret police. One of the three, Chris Cobb Smith was quoted saying that “*the situation inside the detention center was horrendous, with people being handcuffed with swelling hands and broken ribs. He stated that at one point a guy in plainclothes with a small sub-machine gun, walked up to him, putting his gun next to his neck and pulling the trigger twice. The bullet whisked past his ear. The soldier just laughed. The second member of the team, Feras Killani, a correspondent of Palestinian descent, was particularly singled out for repeated beatings and was accused of being a spy. At some point, they were all convinced they were going to die.*”<sup>187</sup>

153. There have also been a significant number of disappearances of journalists reported. The Commission drew the attention of the Libyan Government to the cases of at least 18 journalists as well as other media professionals including both Libyans and foreigners, who went missing in Libya and whose whereabouts remains unknown. The Commission wrote to the Libyan authorities on 26 April and 5 May, registering concerns with regards to the cases of 18 missing journalists and requested thorough investigations of these cases. Among the cases referred by the Commission to Libyan authorities were six Libyan journalists, who have been missing since February. On 19 May 2011, the Commission, in a letter to the Libyan authorities, welcomed the release of four journalists<sup>188</sup> and urged them to look into the cases of the remaining detained journalists with a view to releasing them. The Commission also renewed its appeal for the release on humanitarian grounds of the two detained journalists Mr. Lotfi Ghars and Mr. Mohamed Ali Abdelrahman, with whom the Commission met during the visit to Al-Jdaydah detention center in Tripoli. The Commission received guarantees by the Libyan authorities, who vowed to investigate the cases of missing journalists and assured the Commission that they would be released before June 2011. On 25 May 2011, the Libyan authorities informed the Commission through a letter that Mr Lotfi Ghars had been released, but that Mr Abdelrahman remained in detention awaiting trial on charges including the dissemination of incorrect information. The Commission has been disturbed by reports of the killing of one of the journalists that the Commission inquired about, Mr. Anton Hammerl, who had been killed on 5 April at the outskirts of Al-Brega (see paragraph 150 above).

#### 4. Conclusion

154. During its investigations, the Commission has established that government forces were responsible for attacks on journalists and other media professionals, designed

<sup>185</sup> The New York Times, “Freed times journalists give account of captivity”, 21 March 2011, available from [www.nytimes.com/2011/03/22/world/africa/22times.html?pagewanted=2](http://www.nytimes.com/2011/03/22/world/africa/22times.html?pagewanted=2).

<sup>186</sup> *Ibid.*

<sup>187</sup> BBC News, “Gaddafi forces detain and beat BBC Arabic team”, 10 March 2011, available from [www.bbc.co.uk/news/world-africa-12695077](http://www.bbc.co.uk/news/world-africa-12695077).

<sup>188</sup> Manuel Varela de Seijas (Spanish), James Foley (American), Clare Morgana Gillis (American) and Nigel Chandler (British) were all released on 18 May by the Libya authorities.



primarily to stifle coverage of the Government response to the demonstrations, the ongoing armed conflict and/or to retaliate for perceived or feared criticisms of the regime. Media professionals have been subject to arbitrary arrest, torture, ill-treatment, harassment, intimidation, enforced disappearances and in some cases have been the object of targeted attacks. In addition, authorities took specific action to impede the flow of information (inside as well as outside the country) including cutting landline telephone communications, internet access and other means of communication. Such actions represent violations of the government's obligation under international human rights law and international humanitarian law.

## **F. Attacks on Civilians, Civilian Objects, Protected Persons and Objects**

### **1. Introduction**

155. During the armed conflict which has emerged in Libya, there have been a range of reports made concerning attacks on civilians and civilian objects, either alleging intentional targeting or indiscriminate attacks or attacks having a disproportionate impact on civilian populations. Limited access to cities where fighting was ongoing and the fluid dynamics of the conflict limited the collection of accurate data and hindered the Commission's ability to verify information received. Thus the Commission has not had full access to information regarding the relevant military targets in particular locations, nor indeed was able to verify the status of all affected persons. It has received, however, significant information concerning the impact of the conflict on civilians and civilian objects and certain general contextual information through speaking to over 115 persons and reviewing other material. In this segment, the initial part deals with intentional or indiscriminate attacks on civilians and civilian objects in general, with later parts examining allegations with respect to persons and objects enjoying an explicit protected status under international humanitarian law.

### **2. Applicable Law**

156. In times of armed conflict, international humanitarian law is the *lex specialis*. International humanitarian law prohibits the intentional targeting of civilians<sup>189</sup> and indiscriminate attack on civilians.<sup>190</sup> Forces are to distinguish between civilian and military persons.<sup>191</sup> Forces must also distinguish between civilian and military objects. Deliberate attacks on civilian objects are prohibited. The notion of "civilian objects" embraces all objects (e.g. houses, private dwellings, orchards, schools, shelters, hospitals, churches, mosques, synagogues, museums, works of art) that neither serve nor are used for military purposes. Attacks on places where both civilian and combatants may be found are prohibited if they are not directed at a specific military objective or if they use methods or means of combat which cannot be directed at a specific military objective. It is prohibited to launch an attack which may be expected to cause incidental loss of civilian life, injury to

<sup>189</sup> See AP II Article 13(1): "The civilian population and individual civilians shall enjoy general protection against the dangers arising from military operations." See also AP II Article 13(2): "The civilian population, as such, as well as individual civilians, shall not be the object of attack." Common Article 3 prohibits "violence to life and person, in particular murder of all kinds" against persons taking no active part in hostilities.

<sup>190</sup> See Rule 11, ICRC Study on Customary International Humanitarian Law, p. 37.

<sup>191</sup> Implicit in Article 13(2) AP II and Rule 1 ICRC Study on Customary International Humanitarian Law, p. 3.

civilians, and/or damage to civilian objects which would be excessive in relation to the anticipated concrete and direct military advantage.<sup>192</sup>

157. In order to protect civilians, customary international law requires parties to take precautions including to:

- do everything feasible to verify that targets are military objectives;
- take all feasible precautions in the choice of means and methods of combat with a view to avoiding and in any event to minimizing incidental loss of civilian life, injury to civilians and damage to civilian objects;
- to do everything feasible to assess extent to which the attack may be expected to cause incidental damage and refrain from launching attacks which may be expected to cause incidental loss of civilian life or injury to civilians or civilian objects, which would be excessive in relation to the concrete and direct military advantage anticipated; and to cancel/suspend an attack should it become apparent that the target is not a military objective or that the incidental damage would be excessive;
- give effective advance warning of attacks which may affect the civilian population unless circumstances do not permit, for example, where a surprise attack is necessary to the success of an operation;
- when a choice is possible between several military objectives for obtaining a similar military advantage, the objective to be selected must be that the attack on which may be expected to cause the least danger to civilian lives and to civilian objects.<sup>193</sup>

158. International humanitarian law also incorporates specific protections for persons or objects. Of particular relevance in the current conflict are the following rules. It is prohibited to commit an act of hostility directed against historic monuments, works or art or places of worship which constitute the cultural or spiritual heritage of peoples.<sup>194</sup> Attacking, destroying, removing or otherwise rendering useless objects which are indispensable to the survival of the civilian population is prohibited.<sup>195</sup> Sieges must still allow for vital foodstuffs and other essential supplies to be delivered to the civilian population.<sup>196</sup> Parties to a conflict are obliged to allow and facilitate the unimpeded passage of humanitarian relief for civilians in need.<sup>197</sup> Humanitarian relief personnel must be respected and protected as well as objects used for humanitarian relief operations.<sup>198</sup>

159. Detailed international humanitarian law provisions deal with the protection of medical personnel and associated topics. Medical personnel as well as medical units and transport must be respected and protected in all circumstances. This rule is implicit in Common Article 3 of the Geneva Conventions which requires that wounded and sick be collected and cared for. It receives more explicit recognition under AP II which requires respect and protection of medical personnel, medical units and medical transport, which

<sup>192</sup> See Rule 14, ICRC Study on Customary International Humanitarian Law, p 46.

<sup>193</sup> See Rules 15-21 ICRC Study on Customary International Humanitarian Law, pp. 51-67.

<sup>194</sup> Article 16 AP II.

<sup>195</sup> Article 14 AP II.

<sup>196</sup> While sieges to achieve a military objective are permitted, sieges that cause starvation are not (see Article 14, AP II). The passage of foodstuffs and other essential supplies must be permitted: see Rules 53 and 55 of the ICRC Study on Customary International Humanitarian Law, pp 186, 193.

<sup>197</sup> See Rule 55 of the ICRC Study on Customary International Humanitarian Law, p. 193.

<sup>198</sup> See Rules 31-32 of the ICRC Study on Customary International Humanitarian Law, pp. 105 and 109. Note also Article 8(2)(e)(iii) of the Rome Statute.

must not be the object of attack<sup>199</sup> as well as specific rules regarding tending to the wounded and sick.<sup>200</sup> The distinctive emblem of the red cross/red crescent is to be displayed by medical units and on medical transports and is to be respected in all circumstances. It is not to be used improperly.<sup>201</sup>

160. There are also a range of international human rights law guarantees of particular relevance for this topic. This includes not only the prohibition of arbitrary deprivation of life,<sup>202</sup> but the right to the highest attainable standard of physical and mental health,<sup>203</sup> the right to an adequate standard of living,<sup>204</sup> freedom of religion<sup>205</sup> and cultural rights.<sup>206</sup>

161. Under the Rome Statute, there are a variety of war crimes which correspond to breaches of many of the international humanitarian law guarantees. These include the war crimes of intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities,<sup>207</sup> intentionally directing attacks against civilian buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives,<sup>208</sup> intentionally directing attacks against medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law<sup>209</sup> in addition to the war crimes representing serious violations of Common Article 3.<sup>210</sup> Particular type of attacks against civilians (including medical personnel) may also amount to a crime against humanity if committed as part of a widespread or systematic attack against any civilian population, with knowledge of the attack.

### 3. Factual findings

#### a) Intentional or Indiscriminate Attacks on Civilians

162. The Commission received considerable information from witnesses concerning intentional or indiscriminate attacks on civilians or attacks having a disproportionate impact on civilians. During its field missions, civilian witnesses raised examples in three locations in particular: Ajdabiya, Nafusa Mountain and Misrata.<sup>211</sup>

163. **Ajdabiya:** The Commission received information about heavy fighting in Ajdabiya where artillery and rocket-propelled grenades (RPG) were reportedly used. One witness referred to the case of a family whose car was hit by a rocket exploding ten meters away

<sup>199</sup> Articles 9(1) and 11(1) AP II. Medical personnel, units and transport lose their protection if they are being used, outside their humanitarian function, to commit acts harmful to the enemy: see Article 11(2) AP II.

<sup>200</sup> See for instance Article 8 AP II.

<sup>201</sup> Article 12 AP II.

<sup>202</sup> Article 6 ICCPR.

<sup>203</sup> Article 12 ICESCR.

<sup>204</sup> Article 11 ICESCR.

<sup>205</sup> Article 18 ICESCR.

<sup>206</sup> Article 15 ICESCR and Article 27 ICCPR.

<sup>207</sup> Article 8(2)(e)(i) Rome Statute.

<sup>208</sup> Article 8(2)(e)(iv) Rome Statute.

<sup>209</sup> See Article 8(2)(e)(ii). See also Article 8(2)(e)(iv) of the Rome Statute. In addition some acts may constitute part of a crime against humanity.

<sup>210</sup> Article 8(2)(c) Rome Statute.

<sup>211</sup> There have been reports of attacks on civilians in many locations in Libya. The choice of the two areas featured in this report is based upon locations where the Commission gathered first hand information and should not be taken as indicative of allegations being limited to these areas.

while they were fleeing the fighting in Ajdabiya. As a result, three family members were killed and two others were injured, including an 8-year old boy treated in the Benghazi Medical Center. A doctor working in Ajdabiya mentioned to the Commission that the wounds of the injured persons treated in this city were consistent with the use of arms with high calibre and missiles.

164. **Nafusa Mountain area:** One person interviewed from the Kikla District of Nafusa mountain, informed the Commission that government forces had been firing mortars and Grad rockets into residential areas of the Nafusa Mountain since 13 April 2011, leading to many casualties and causing fear and panic amongst the community. The Grad rockets, he added, had been fired in a random and indiscriminate manner towards the mountainous area and had landed over a wide residential area, inflicting large-scale civilian casualties. Other witnesses confirmed that the Nafusa Mountain area had been under bombardment since the beginning of April 2011 with little apparent distinction being made between civilian and military targets. One witness referred to a bombardment in Kikla District, causing the death of at least 11 civilians, including women and children.

165. Borders and crossing points were identified as a particular site of indiscriminate shelling, including firing from the Libyan-Tunisian border towards Al-Dehiba crossing point. Medical staff from Zintan reported the death of 4 shepherds by members of the Sahab *Katiba*. The doctor reported that most of the seriously injured coming to the clinic where he worked in Zintan, suffered wounds from heavy weaponry such as anti-aircraft weapons, tank shells, Katyusha and Grad missile.

166. **Misrata:** The Commission received a number of accounts of indiscriminate attacks on civilians in Misrata. The exact number of civilian casualties is unconfirmed. In a statement on 11 April, UNICEF's Regional Director for the Middle East and North Africa stated that it had verified at least 20 deaths and many more injuries due to shrapnel from mortars and tanks and bullet wounds.<sup>212</sup> A senior medical doctor and an administrator of the city's main hospital was quoted in the media as stating that as of 18 April, about 1000 people had been killed and 3000 injured, with some 80% of the deaths being civilian.<sup>213</sup> Following an interagency assessment mission to Misrata on 21-22 May, the World Health Organization stated that "although medical records were very much affected during the conflict, figures collected suggest that an average of 70 people were injured and 12 killed everyday."<sup>214</sup> In many of the cases, while the Commission was able to establish that many civilians (including children) have been killed or injured, the Commission was not able to determine the full circumstances of the attacks in order to be able to evaluate whether the attacks were intentional, indiscriminate and/or disproportionate. There were numerous cases of shells hitting houses causing fires, as well as persons being killed when shots entered their cars. Many persons from Misrata reported that they had suffered injuries at check points as a result of rounds launched by government forces. Reports were also received of snipers taking aim and shooting at any and all persons who left their homes near the Bu Minyar building, which was one of the three tall buildings utilized by snipers, supporting the efforts of government forces in Misrata.

<sup>212</sup> Statement by UNICEF Executive Director Anthony Lake on situation of children in the Middle East and North Africa, New York, 20 April 2011.

<sup>213</sup> Mail and Guardian Online 18 April 2011

<sup>214</sup> Boosting humanitarian health support inside Libya, available from : [http://www.who.int/hac/crises/lby/highlights\\_may2011/en/](http://www.who.int/hac/crises/lby/highlights_may2011/en/)

**b) Attacks on Cultural Objects and Places of Worship**

167. In Libya, mosques are not just places of worship for Muslims who constitute the overwhelming majority of the population, they also have become, by default, the only gathering place of the population that is not under full control of the authorities. During the demonstration period, there were occasions in which authorities fired on persons as they came out of the mosque, after Friday prayers or after religious ceremonies for those who had died during the crisis. The Commission received credible reports, supported by photographs, that mosques were damaged by shelling during attacks by government forces on inhabited areas. More investigation would be required to determine if the attacks were intentional or incidental. Witnesses from the Nafusa Mountain told the Commission that mosques were intentionally targeted, with particular reference made to Takut Mosque, Al-Baruni Mosque in Yafran, Zintan Mosque, Kikla Mosque and Kut Mosque between March and April 2011. Human Rights Watch stated that government attacks hit four mosques in Zintan as of 21 April, namely, the Al-Khalil, Ali Hdibah, Al-Aswad, and Rahmah Mosques, as well as a Ghasro Mosque in Takut. Amnesty International reported that on 17 April rocket and mortar attacks in Misrata were ongoing and there was extensive damage to Omar Abdel Aziz al-Senusi Mosque.<sup>215</sup> The Commission did not receive any information suggesting the possible use of mosques for military purposes. Human Rights Watch, in their report on attacks on mosques, stated that the rebels had never used nor been present in the mosques or the surrounding neighbourhoods.<sup>216</sup>

168. The Commission also received specific information about a site considered of cultural importance by the Amazigh community of the Nafusa Mountain, “The Ben Niran Palace” (Ghasrow Majar in Tamazight language). The Palace was destroyed by Government forces with one witness putting the date as 2 or 3 April 2011.

**c) Destruction of objects indispensable to the survival of the civilian population**

169. The Commission received numerous accounts, particularly in the Nafusa mountain area, of the destruction of objects indispensable to the survival of the civilian population. In some cases, the allegation was of deliberate destruction. In others, it would appear that the damage may have been collateral. One witness spoke of livestock being deliberately killed by small firearms and agricultural land being burnt down. Another witness in the same area noted that “shelling has spared neither livestock nor agriculture lands, with reports of burning fields, and killing of livestock.”<sup>217</sup> A witness from Yafran also spoke of “*livestock, farms, and crop growing have been hit intentionally in Zintan in particular to ensure that people under the siege would be deprived of food leading to malnutrition and ultimately to starvation.*”

170. Another testimony referred to “Qadhafi forces entering villages, robbing belongings of residents, and burning down houses after killing what remains of the livestock.” Two witnesses mentioned the contamination of wells by Government forces.

<sup>215</sup> Amnesty International, *Libya: Misrata - under siege and under fire*, 6 May 2011 (Index number: MDE19/019/2011), p.15, available from <http://www.amnesty.org/en/library/info/MDE19/019/2011/en>.

<sup>216</sup> Human Rights Watch, “Libya: End Indiscriminate Attacks in Western Town”, 9 May 2011, available from: <http://www.hrw.org/en/news/2011/05/09/libya-end-indiscriminate-attacks-western-mountain-towns>.

<sup>217</sup> Article 14 AP II.

**d) Impeding Access to Humanitarian Relief and Attacks on Humanitarian Personnel**

171. There has been a long term siege of cities or entire areas by the Government forces in the Nafusa Mountain area and Misrata, and more briefly in Ajdabiya, Az-Zawiyah and Zuwarah. The Commission heard from witnesses particularly from the Nafusa Mountain area and Misrata, that the effect of such sieges has been to prevent food and other vital supplies being received. The blockading of cities, in particular the cutting of power and water supplies, as well as limiting food supplies has particular implications for the population's human rights, including their right to an adequate standard of living.<sup>218</sup> The United Nations Secretary-General and the Director General of the World Food Program called on 11 and 12 May respectively for a ceasefire to allow humanitarian access to Misrata and the western area but these calls have not been heeded by the Government.<sup>219</sup> On 27 May, the medical NGO Medecins Sans Frontieres announced it was withdrawing from Zintan, where it had been working for four weeks, due to the intensity of the fighting and the fact that "several rockets [had been] landing just 100 to 200 metres from the hospital."<sup>220</sup>

**e) Attacks on Humanitarian Personnel and Transport**

172. In Misrata, one boat conducting humanitarian activities was shelled by Government forces.<sup>221</sup> A number of humanitarian organizations conducting resupply (food and non food items, medical supplies and equipment) and evacuation missions by boat to Misrata<sup>222</sup> have been endangered by actions of Government forces. Reports have included fire coming from the mainland on 25 April<sup>223</sup> anti vehicle mines being dropped from shells over the port on 29 April and 5 May and seamines being placed without notice<sup>224</sup>. Reuters reported that Libyan government acknowledged the aforesaid shelling, on local television, but justified it by stating that the boats were breaching the arms blockade and carrying fighters.<sup>225</sup>

173. The Government of Libya transmitted information to the Commission which had been prepared originally at the request of OCHA. In the 21-page report received on 12 May the negative consequences of the implementation of Security Council Resolutions 1970 and 1973 on food production and import of foodstuff to Libya are detailed. The report points to difficulties in paying for the import of food, other imported goods and spare parts due to the imposition of financial sanctions. It also refers to the mass departure of foreign labor from the farming, fishing and industrial sectors (producing fertilizers, pesticides and animal feed) leading to the mass death of uncared for livestock as well as the impossibility of flying small aircrafts used in agriculture due to the no-fly-zone. The Government also refers to

<sup>218</sup> Article 11 ICESCR.

<sup>219</sup> Libya: UN Secretary-General urges immediate end to attacks against civilians, available from: <http://www.un.org/apps/news/story.asp?NewsID=38348&Cr=libya&Cr1=>, and Libya: UN official voices concern as fighting blocks aid delivery in west, available from: <http://www.un.org/apps/news/story.asp?NewsID=38352&Cr=Libya&Cr1=>

<sup>220</sup> MSF evacuates team from Zintan, Libya, available from: <http://www.msf.org/msf/articles/2011/05/msf-evacuates-from-zintan-libya.cfm>

<sup>221</sup> UN Press Release, "Libya: UN official voices concern as fighting blocks aid delivery in West", 12 May 2011, available from <http://www.un.org/apps/news/story.asp?NewsID=38352&Cr=Libya&Cr1.>

<sup>222</sup> See successive OCHA updates on Libya in April and May 2011.

<sup>223</sup> UN Press Release, "Libya: UN official voices concern as fighting blocks aid delivery in West", 12 May 2011, available from <http://www.un.org/apps/news/story.asp?NewsID=38352&Cr=Libya&Cr1.>

<sup>224</sup> Amnesty International, "Al-Gaddafi's forces carry out indiscriminate attacks in Misrata", 8 May 2011, available from [http://www.amnesty.org/en/for-media/press-releases/al-gaddafi%E2%80%99s-forces-carry-out-indiscriminate-attacks-Misrata-2011-05-08.](http://www.amnesty.org/en/for-media/press-releases/al-gaddafi%E2%80%99s-forces-carry-out-indiscriminate-attacks-Misrata-2011-05-08)

<sup>225</sup> Reuters, "Libya says shelled port to stop arms delivery to rebels", 1 May 2011, available from [http://www.reuters.com/article/2011/05/01/us-libya-misrata-port-idUSTRE74024120110501.](http://www.reuters.com/article/2011/05/01/us-libya-misrata-port-idUSTRE74024120110501)

the breakdown of communication between regions of the country preventing transport of inputs and food stuff, and to loss of access to water and suspension of work on several water supply projects. The report provides preliminary data on the drop in food production and makes alarming forecasts on the upcoming grain harvests.

**f) Attacks on Protected Medical Personnel, Transport and Facilities**

174. The Commission notes that the deteriorating security situation has had a deleterious effect on the health sector, as it has led to the exodus of many foreign medical workers from Libya. Major areas, including much of eastern Libya, Misrata and the Nafusa mountain area progressively lost access to the network of medicines for chronic disease distributed by the Ministry of Health. The Commission has also received reports of the intentional targeting of protected medical personnel, transport, unit and facilities. Several cases from Misrata were related to the Commission. A volunteer ambulance staff member in Misrata told the Commission that *“His ambulance team went out to collect two wounded persons who required assistance near the medical clinic compound. When he stepped out from the ambulance, shootings started and he said that “a sniper” shot the driver at the head and killed him. Another volunteer in the ambulance and himself were injured. A second ambulance arrived to rescue them, raising a white flag and negotiating the possibility to approach the wounded persons through a microphone.”*<sup>226</sup>

175. On 17 May the ICRC again stated that *“the Libyan Red Crescent reports that in the past four days, three of its ambulances have been hit in three separate incidents, resulting in the death of a nurse and injuries to a patient and three volunteers.”*<sup>227</sup> The responsible party in these three incidents can not be ascertained by the Commission without further investigation.

176. Reports from eastern Libya also mention shooting at ambulances. One witness told the Commission of seeing an ambulance being targeted at Ajdabiya, with another witness (a fighter with the NTC) reporting on the shooting of the ambulance carrying him and wounded fighters. A former fighter with the NTC in Yafran also stated that *“Government forces hit ambulances”*.

177. Attacks on hospitals have been repeatedly reported to the Commission. A fighter with the opposition forces from Yafran told the Commission that a mortar round had hit Yafran’s hospital in March 2011, leading to the destruction of main parts of the medical facility. A witness from Al Hikma Clinic in Misrata told the Commission that it had been targeted twice by Government forces but was still functioning. A doctor from Misrata told media that the Misrata hospital had been targeted by Government tanks.<sup>228</sup> In another media account on 6 March it was reported that in Az-Zawiyah pro-Qadhafi forces attacked the forecourt of the hospital where injured were being treated. On 23 March Reuters reported that Qadhafi forces bombarded the main hospital in Misrata as doctors were trying to move the wounded away from the hospital. *“The snipers are shooting at the hospital and its two entrances are under heavy attack. No one can get in or out”*, a Misrata resident, told Reuters by telephone. Amnesty International, in its report on the siege of Misrata, mentioned that on

<sup>226</sup> See also ICRC statement issued fifteen days before, on 3 March 2011, according to which *“two Libyan Red Crescent ambulances were shot at today [3 March] in Misrata, West of Benghazi, resulting in two volunteers being injured and one of the ambulances being completely burnt”*.

<sup>227</sup> ICRC, Operational Update No. 05/11, *“Libya: Red Crescent volunteers and medical personnel in danger”*, 17 May 2011, available from <http://www.icrc.org/eng/resources/documents/update/2011/libya-update-2011-05-17.htm>.

<sup>228</sup> Reuters, *“Rebels say 16 dead in Misrata, hospital attacked”*, 23 March 2011, available from <http://www.reuters.com/article/2011/03/23/us-libya-misrata-strikes-idUSTRE72M8BY20110323>.

16 April, the surroundings of a clinic were shelled at least three times according to eyewitnesses who were themselves wounded.<sup>229</sup> The Commission also received information from several witnesses concerning the destruction of hospital supplies including medications.

178. Similar to reports received during the demonstration period outlined in Section IV. A. (Excessive use of force against demonstrators) the Commission also received information concerning the abduction of patients from hospitals. On 16 March, Alkarama stated in a press release that “Injured rebel forces and innocent civilians are being kidnapped from hospitals, risking torture, even death. As a consequence, the wounded are refusing to seek medical assistance for fear of being kidnapped or killed.”<sup>230</sup> In Zintan, a doctor mentioned that the wounded treated at his hospital were not registered as there was a fear that the Government would regain control and detain the injured.

**g) Misuse of the Emblem**

179. The Commission heard evidence of several instances of misusing the Red Cross/Red Crescent emblem. In Nalut in the Nafusa mountain area, for instance, a witness told the Commission of ambulances being used “as a trick, to enter towns carrying soldiers, and then shoot at civilians in the street”, raising also the issue of perfidy. Similar stories emerged from Yafran. The Commission also notes the widely reported case on 8 May relating to sightings of one or several helicopters over Misrata port dropping mines in violation of the no-fly-zone on 5 May. The helicopters, according to some, but not all media sources, carried either the Red Cross or the Red Crescent. In a statement issued on 9 May the ICRC expressed its concern at what it considered “recent allegations of the red cross or red crescent emblem being used for military purposes in Libya” and added that “the alleged practices, if true, represent a serious misuse of the emblem.”<sup>231</sup> On 17 May the ICRC issued another statement on the dire situation in Misrata and mentioned receiving “allegations concerning the misuse of the red cross and red crescent emblems to support military operations and the use of ambulances to transport arms and weapon bearers.”<sup>232</sup>

**4. Conclusions**

180. Due to the circumstances of the current conflict, the Commission has not had access to full information allowing it to definitively evaluate allegations of all of these violations of international humanitarian law.<sup>233</sup> However, the Commission has received consistent information concerning the level of injuries and type of victims to suggest that there have been at least indiscriminate attacks against civilians by Government forces and a failure to take sufficient precautionary steps to protect civilians. Further investigation would be

<sup>229</sup> Amnesty International, Libya: Misrata - under siege and under fire, 6 May 2011 (Index number: MDE19/019/2011), p.14, available from <http://www.amnesty.org/en/library/info/MDE19/019/2011/en>.

<sup>230</sup> Alkarama, “Libya: Injured abducted from hospitals by pro-Gaddafi forces”, 16 March 2011, available from [http://en.alkarama.org/index.php?option=com\\_content&view=article&id=697:libya-injured-abducted-from-hospitals-by-pro-gaddafi-forces&catid=27:communiqu&Itemid=138](http://en.alkarama.org/index.php?option=com_content&view=article&id=697:libya-injured-abducted-from-hospitals-by-pro-gaddafi-forces&catid=27:communiqu&Itemid=138).

<sup>231</sup> ICRC, News Release 11/111, “Libya: much-needed humanitarian aid reaches Misrata”, 9 May 2011, available from: <http://www.icrc.org/eng/resources/documents/news-release/2011/libya-news-2011-05-09.htm>.

<sup>232</sup> ICRC, Operational Update No 05/11, “Libya: Red Crescent volunteers and medical personnel in danger”, 17 May 2011, available from: <http://www.icrc.org/eng/resources/documents/update/2011/libya-update-2011-05-17.htm>.

<sup>233</sup> The discussion in this segment has been structured around international humanitarian law guarantees. The Commission notes that many of the same actions violate international human rights law.



necessary to determine if there was intentional targeting of civilians. Protected objects such as mosques and cultural objects have certainly been damaged during conflict. The Commission at this point is unable to determine if attacks on such objects were intentional. The Commission is able to establish that there have been instances of the deliberate destruction of objects indispensable to the civilian population. The Commission considers that there have been some attacks on medical transports and facilities which appear to have been targeted attacks, with some other instances requiring further investigation. It is also considers that Libyan authorities have failed to facilitate access for humanitarian agencies to address the needs of civilian populations in Libya. It considers that there have been attacks on humanitarian units, though it is not able to establish whether intentional or not without further information. The Commission does conclude that there has been a failure to take precautionary steps to minimize damage to civilian/protected objects. The Commission is also satisfied that there has been misuse of the emblem by Government forces in Libya during the conflict. The Commission did not receive any first hand information concerning violations by the armed opposition force and as such is not in a position to determine whether any relevant violations occurred.

## G. Prohibited weapons

### 1. Introduction

181. Available information suggests that over the past few decades Colonel Qadhafi has acquired and stockpiled a large arsenal of weapons.<sup>234</sup> There have been allegations made about the use of weapons in a manner contrary to international law. The Commission has only had access to a limited number of victims and has not been able to access sites involved in reports of prohibited weapons to collect forensic evidence or to collect evidence from victims' wounds or other medical records in a comprehensive manner. However, the Commission's preliminary investigations indicate matters of concern worthy of further consideration. In this section the Commission considers both weapons prohibited as a matter of international law and the use of lawful weapons allegedly used in a manner so as to be unlawful under international law.

### 2. Applicable Law

182. International humanitarian law prohibits the use of means and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering.<sup>235</sup> As the ICRC Study on Customary International Humanitarian Law highlights, there are differing views as to whether this rule renders a weapon illegal or whether a weapon is illegal only if a specific treaty or customary rule prohibits its use.<sup>236</sup> The ICJ in the *Nuclear Weapons* case, however, undertook its analysis on the basis of the rule itself,<sup>237</sup> without requiring treaty law and this approach has been adopted by the Commission here. Other rules of general application in this area include the prohibition of the use of weapons which are by their

<sup>234</sup> Human Rights Watch, "Qaddafi's Great Arms Bazaar", 8 April 2011, available from <http://www.hrw.org/en/news/2011/04/08/qaddafis-great-arms-bazaar> and Philippe Gros, "De Odyssey Dawn a Unified Protector: bilan transitoire, perspectives et premiers enseignements de l'engagement en Libye", Fondation pour la Recherche Stratégique, note no. 04/11, available from <http://www.frstrategie.org/barreFRS/publications/notes/2011/201104.pdf>.

<sup>235</sup> See Rule 70, ICRC Study on Customary International Humanitarian Law, p. 237.

<sup>236</sup> See ICRC Study on Customary International Humanitarian Law, p. 242.

<sup>237</sup> *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons*, 1996 ICJ, p. 226, para. 238, as referred to in ICRC Study on Customary International Humanitarian Law, p. 243.

nature indiscriminate, arising out of the duty to direct hostilities to legitimate military objectives.

183. As noted in paragraph 73 of this report, Libya has ratified certain weapons conventions, but is not a party to the 1977 Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction (the Mine Ban Treaty) or to the 2008 Convention on Cluster Munitions. One thus must apply the general norms from customary international humanitarian law to these situations. In addition to the general principles noted above, there are some other specific rules of customary international humanitarian law relating to for instance, landmines (requiring particular care to minimize their indiscriminate effects),<sup>238</sup> and expanding bullets.<sup>239</sup>

### 3. Factual Findings

184. **Expanding Bullets:** Three doctors interviewed by the Commission in Benghazi and one in Al-Bayda gave accounts of wounds, that they had treated, whose cause may be consistent with the use of “expanding” bullets. Doctors as well as victims have described small entry wounds and larger exit wounds, a circle of seven or ten cm diameter in some cases.<sup>240</sup> Doctors have also described small entry wounds with various internal organs shredded by the bullet. Further investigation, including military and forensic pathologist expertise, is, however, required to confirm or deny the usage of expanding bullets.

185. **Cluster munitions.** The Commission is aware of reports of the use of cluster munitions by pro-Government forces in their attempt to regain control of the besieged city of Misrata. On 15 April 2011, HRW reported that Government forces had fired cluster munitions in residential neighborhoods of Misrata further specifying that the cluster munitions were Spanish produced MAT 120mm mortar projectile, which open in mid-air and release 21 submunitions over a wide area.<sup>241</sup> Other independent sources including Amnesty International have confirmed the incident and stated that Spain sold such munitions to Libya in 2007. Further investigation, including military and forensic pathologist expertise is, however, required to confirm or deny the usage of cluster munitions.

186. **Mines:** The Commission notes the rule of customary international humanitarian law requiring that where landmines are used, particular care must be taken to minimize their indiscriminate effects.<sup>242</sup> Information collected from various sources including Human Rights Watch indicates that anti-tank mines in Colonel Qadhafi hands are made mostly out

<sup>238</sup> See Rule 81 ICRC Study on Customary International Humanitarian Law: Where landmines are used, particular care must be taken to minimize their indiscriminate effects.

<sup>239</sup> Rule 77 of the ICRC Study on Customary International Humanitarian Law states that the use of bullets which expand or flatten easily in the body is prohibited in both international and non-international armed conflict. In 2010, the Rome Statute was amended to include Article 8(2)(e)(xv) specifically prohibiting the use of “employing bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions” This amendment is not yet in force, but will enter into force for a State Party one year after ratifying the amendment. There remains some debate as to whether customary international law includes a blanket prohibition on the use of expanding bullets in non-international armed conflict.

<sup>240</sup> The accounts of at least five injured persons interviewed in Alexandria match the description of wounds that may have been caused by expanding bullets.

<sup>241</sup> Upon exploding on contact with an object, each submunition disintegrates into high-velocity fragments to attack people and releases a slug of molten metal to penetrate armored vehicles. Human Rights Watch, “Libya: Cluster Munitions Target Misrata,” 15 April 2011, available from <http://www.hrw.org/en/news/2011/04/15/libya-cluster-munitions-strike-misrata>.

<sup>242</sup> Rule 81 ICRC Study on Customary International Humanitarian Law.

of hard-to-detect plastic and can be armed with an anti-lifting device that causes the mine to explode when attempts are made to remove it from the ground, making them particularly dangerous. On 24 March, Human Rights Watch confirmed the discovery of this type of anti-vehicle mines in the area around Ghar Yunis University in Benghazi. A United Nations demining expert located 12 warehouses filled with tens of thousands of anti-vehicle mines.<sup>243</sup> Though landmines in border areas are a legacy of the past<sup>244</sup> it has also been reported that anti-personnel and anti-vehicle landmines have been newly laid by Government forces, particularly in the outskirts of Ajdabiya<sup>245</sup> and in Benghazi.<sup>246</sup> Human Rights Watch reported that 24 anti-vehicle mines and roughly three dozen antipersonnel mines were found on the eastern outskirts of Ajdabiya that was held by Government forces between 17 and 27 March 2011. The mines through their location, HRW said, posed a direct threat to civilians.

187. **Use of Phosphorous Weapons:** The Commission received some information pertaining to the possible use of phosphorous weapons. A doctor in Benghazi who met with the Commission described injuries that might be consistent with those produced by explosive ordinances containing phosphorus. At Al-Jalaa' Hospital, Benghazi, the Commission was provided with photos of the bodies of nine persons who had been brought to the hospital during the second half of February. The bodies were burnt but were shrunk in such a way that may be consistent with the use of phosphorous weapons. A Human Rights Watch refers to the government forces having access to white phosphorous artillery projectiles.<sup>247</sup> Further investigation, including military and forensic pathologist expertise would be required to verify the usage of such weapons.

188. **Mortars:** Based upon the facts available to it, the Commission believes that Government forces of Libya utilized mortars in their attacks on Misrata and Zintan. Mortars are weapons that kill or maim whoever is within the impact zone after they explode and they are unable to distinguish between combatants and civilians. A decision to deploy them in a location where a large number of civilians is likely to be present, is a decision that a commander should know will result in the death and/or and injuries of some of those civilians.

#### 4. Conclusion

189. From the information available to it, the Commission is concerned that the Libyan authorities have not been undertaking appropriate and precautionary assessments which would, in the Commission's view, militate against the use of weapons, such as mortars, in densely urban areas. The Commission is also concerned about reports of the use of weapons

<sup>243</sup> Human Rights Watch "Government Use of Landmines Confirmed", 30 March 2011, available from <http://www.hrw.org/fr/news/2011/03/30/libya-government-use-landmines-confirmed>.

<sup>244</sup> Dating back to the Second World War and to the conflict with Egypt in 1977 and with Chad in 1980-1987.

<sup>245</sup> It was reported by Human Rights Watch and Amnesty International that on 28 March 2011 two antipersonnel mines detonated, one km from Ajdabiya town, when a truck of Eastern Libya Electricity Company was passing by. After the incident, a clearance operation was conducted by a civil defence team which reported having disarmed 24 anti-vehicles mines and more than 30 plastic antipersonnel mines.

<sup>246</sup> Human Rights Watch reported that during the retreat of Government forces on 19 March 2011 in Benghazi, anti-vehicle mines were left behind in the area around Ghar Yunis University.

<sup>247</sup> In an April report on Libya, Human Rights Watch confirmed the discovery of white phosphorous artillery projectiles in a weapons storage facility in Ajdabiya after opposition forces took control of the city. Human Rights Watch, "Libya: Abandoned Weapons, Landmines Endanger Civilians", 5 April 2011 available from <http://www.hrw.org/node/97835>.

such as expanding bullets, cluster munitions or phosphorous weapons within highly populated areas. Further investigation, however, including forensic analysis would be needed to confirm the usage of these ammunitions.

## H. Use of mercenaries

### 1. Introduction

190. Allegations concerning the use of mercenaries during the armed conflict in Libya have been widely reported.<sup>248</sup> The Security Council deplored the continued use of mercenaries by Libyan authorities.<sup>249</sup> The Government of Libya has referred to the Al-Qaida mercenaries operating within the ranks of opposition armed forces. As the Commission carried out its investigation, it also received reports of the use of mercenaries, including violations committed by mercenaries. In many cases, the term appears to be being used in a general term to refer to fighters on either side who are foreign nationals. While there is strong evidence of the participation of foreign nationals in the armed conflict, the precise route by which such persons came to be engaged remains unclear. In particular, the Commission has not had sufficient information as to whether foreign nationals were previously resident in Libya, whether they were engaged as part of an existing foreign military exchange, and the timing of their recruitment (e.g. if they were recruited in 2011, whether this was for the purpose of suppressing the demonstration or to take part in the armed conflict). These factors have an obvious importance for the classification of persons as “mercenaries.”

### 2. Applicable Law

191. The use of mercenaries is prohibited under two treaties Libya has ratified: the United Nations International Convention against the Recruitment, Use, Financing and Training of Mercenaries (UN Convention against Mercenaries) and the Organization of African Unity (OAU) Convention for the Elimination of Mercenarism in Africa (OAU

<sup>248</sup> For instance, Ali al-Essawi, former Libyan Ambassador to India, told Al-Jazeera that “People say they are black Africans and they don’t speak Arabic. They are doing terrible things, going to houses and killing women and children”. Al-Jazeera, “Libyan diplomat decries ‘massacre’”, 22 February 2011, available from <http://english.aljazeera.net/video/africa/2011/02/2011222165119717549.html>. One report suggested that nomadic Tuaregs from Mali were also entering into Libya to fight with the Governmental force, NPR, “Libya’s Gadhafi Accused Of Using Foreign Mercenaries”, 23 February 2011, available from <http://www.npr.org/2011/02/23/133981329/who-are-foreign-mercenaries-fighting-for-gadhafi>. Another report stated that about hundreds of elite sniper from Belorussia also participated in the governmental force with a monthly salary of £ 1,900, The Telegraph, “Libya: Belarus mercenary ‘paid £1,900 a month to help Gaddafi forces’”, 6 April 2011, available from <http://www.telegraph.co.uk/news/worldnews/africaandindianocean/libya/8432996/Libya-Belarus-mercenary-paid-1900-a-month-to-help-Gaddafi-forces.html>. According to The Telegraph a defected former Libyan army official has given details of the recruitment of 450 fighters from the disputed Western Sahara region with each of them paid \$1, 000 to fight for the governmental forces for two months, The Telegraph, “Libya: Col Gaddafi ‘has spent £2.1m on mercenaries’”, 20 April 2011, available from <http://www.telegraph.co.uk/news/worldnews/africaandindianocean/libya/8464254/Libya-Col-Gaddafi-has-spent-2.1m-on-mercenaries.html>. The New York Times reported how Libya recruited mercenaries from poor communities in Mali as well as in the nomadic Touaregs, who live cross borders among Algeria, Libya, Mali and Nigeria, paid 1,000 US\$ a day, The New York Times, “Libyan Oil Buys Allies for Qaddafi”, 15 March 2011, available from [http://www.nytimes.com/2011/03/16/world/africa/16mali.html?\\_r=1&ref=mali](http://www.nytimes.com/2011/03/16/world/africa/16mali.html?_r=1&ref=mali).

<sup>249</sup> S/RES/1973, Preambular para. 16.

Convention on Mercenarism). The definition of mercenary is very specific. Under the UN Convention Against Mercenaries, a mercenary is any person who:

- Is specially recruited locally or abroad in order to fight in an armed conflict;
- Is motivated to take part in the hostilities essentially by the desire for private gain and, in fact, is promised, by or on behalf of a party to the conflict, material compensation substantially in excess of that promised or paid to combatants of similar rank and functions in the armed forces of that party;
- Is neither a national of a party to the conflict nor a resident of territory controlled by a party to the conflict;
- Is not a member of the armed forces of a party to the conflict; and
- Has not been sent by a State which is not a party to the conflict on official duty as a member of its armed forces.<sup>250</sup>

192. Situations other than armed conflict fall within a second part of the definition of the UN Convention against Mercenaries. However, in these cases, there are additional requirements to show that the person is recruited for the purpose of participating in a concerted act of violence aimed at overthrowing a Government or otherwise undermining the constitutional order of a State or undermining the territorial integrity of a State. Under the OAU Convention, the definition of mercenaries is narrower: it is restricted to the armed conflict situation,<sup>251</sup> and has a further restriction in defining the crime of mercenarism as committed “by the individual, group or association, representative of a State and the State itself who with the aim of opposing by armed violence a process of self-determination stability or the territorial integrity of another State” that practises specific acts.<sup>252</sup>

### 3. Factual Findings

193. The Commission received confirmation from the Government of Libya that before the conflict, foreign military personnel were present in Libya through bilateral military cooperation arrangements, with other countries such, particularly in the area of air force training. It has also received numerous accounts which indicate the participation of foreign fighters in the conflict, mostly on the side of governmental forces.

194. In areas under the control of the opposition forces, the Commission found that the term “mercenaries” was most commonly used to connote persons with dark skin who had taken part either in the conflict, or in actions suppressing the demonstrations. Witnesses spoke of mercenaries as coming from Sub-Saharan countries and referred both to the skin colour and inability to speak Arabic. In a minority of cases, it was suggested that some fighters had come from Eastern European countries.

195. In Benghazi, the Commission was provided documents by the Office of the Prosecutor containing some transcripts of interrogations of alleged mercenaries who had not yet been brought to trial. According to the transcripts of interviews with one individual of Libyan nationality, “mercenaries” were used as snipers firing at demonstrators on 17 February. The transcript of another individual, a Nigerian-born Libyan disclosed that he was member of *Khamis Katiba*, and was transported on 2 March to Ras Lanuf military base. He stated that a military officer provided him with a military uniform as well as a rocket propelled grenade weapon. Documents collected by the Prosecutor’s Office from

<sup>250</sup> Article 1 International Convention against the Recruitment, Use, Financing and Training of Mercenaries

<sup>251</sup> Article 1 OAU Convention for the Elimination of Mercenarism in Africa.

<sup>252</sup> Article 1(2) OAU Convention for the Elimination of Mercenarism in Africa.

those questioned concerning involvement in events included some 24 photocopies of passports from four sub-Saharan countries.

196. The Commission visited a detention center in Benghazi where some of the detainees were said to have been arrested during hostilities, while others allegedly carried out missions in support of the Governmental forces. The majority of the 21 detainees were Libyan nationals. Only three were foreign nationals: one Syrian, one Algerian and one Ghanaian. However, the Commission was not able to verify further the background of these foreign nationals. Two of the foreign nationals interviewed denied any involvement with the security forces: One referred to instead having been a worker at a construction firm in Benghazi for several years.

197. 16 of the interviews conducted by the Commission included explicit reference to the use of mercenaries; in particular in Al-Bayda, Benghazi, Az-Zawiyah and Misrata. Doctors working at the Al-Bayda hospitals reported that out of 1,300 injured persons received by the hospital during the period 17 to 21 February, 26 were identified as “mercenaries”. The doctors reported receiving information from a colleague at the hospital that mercenaries had been paid 7000 Dinars each (found in their pockets) and that he had heard the mercenaries had come from African countries. One doctor told the Commission that some foreign identity cards had been collected from persons received at Al-Jalaa’ hospital in Benghazi.

198. The Commission also received information from participants in demonstrations in Az-Zawiyah that they had seen “mercenaries” from bordering countries who carried foreign currency including dollars, euros and old Libyan money being captured by opposition forces.

199. One witness stated to the Commission that the *“Governmental forces established voluntary recruitment offices across Surt and continue to recruit new comers in their ranks. Foreigners particularly are offered certain entitlements and privileges including provision of nationality. Those recruited receives Libyan citizenship, arms and 200 dinars at the spot. In addition to cigarettes, food and other things, they are also entitled to receive 250 dinars on a daily basis. They also promised them an apartment, a car and 30,000 dinars at the end of the conflict. He noted that many people who volunteered were already awarded cars but the risk of being killed is however very high. Governmental forces routinely deploy the new recruits to the frontline, particularly to Benghazi and Misrata, where the fighting has entered its intensified phase. Meanwhile some autonomous groups, apparently separate from Qadhafi and rebels, have also set-up parallel voluntary desks in Az-Zawiyah, inviting people to join the military campaign. These groups offer cash and arms to the volunteers.”*

200. The Commission has also received considerable information regarding serious violations committed against sub-Saharan Africans as a result of a generalized equation of these groups with “mercenaries,” a subject discussed further in Section IV. I (Migrant workers). The Government of Chad has issued a series of statements in February and April expressing its concern about reports of allegations of the involvement of Chadians in the conflict and the backlash against Chadians remaining in Libya.<sup>253</sup>

#### 4. Conclusion

201. The Commission considers it established that foreign nationals have taken part in the conflict, including perpetrating human rights violations, particularly on the side of the Government forces. However, further investigation would be required to determine whether those armed individuals fall into the category of “mercenaries” within the provisions of

<sup>253</sup> An information note was issued by the Permanent Mission of Chad to the United Nations Office in Geneva on 5 April 2011.

international law. In particular there is a need to receive more information concerning the residential status of foreign nationals and the means and purposes for which they were recruited.

## I. Migrant Workers

### 1. Introduction

202. A majority of those who have fled Libya since February are migrant workers who have left due to insecurity, conflict and economic hardship.<sup>254</sup> There have been a variety of allegations made concerning the mistreatment of migrant workers: whether in the form of being subject to arbitrary arrest or detention, being subject to arbitrary interference with privacy, being beaten and other forms of cruel and inhuman treatment. Reports of extrajudicial killings were received by the Commission. In carrying out its investigation upon this topic, the Commission has had access to first hand information from 35 migrant workers or members of their families,<sup>255</sup> meetings conducted with United Nations partners, in particular UNHCR and OCHA, and analysis of various reports.<sup>256</sup>

### 2. Applicable Law

203. The term “migrant worker” refers to any person who “is to be engaged, is engaged or has been engaged in a remunerated activity in a State of which he or she is not a national” as defined by Article 2 of the International Convention on the Protection of the rights of all Migrant Workers and Members of their Families (Convention on Migrant Workers). This Convention contains a range of human rights protections including general rights such as the right to life,<sup>257</sup> the prohibition of torture, cruel, inhuman or degrading treatment or punishment,<sup>258</sup> the right to liberty and security of person,<sup>259</sup> and the right to be treated with humanity when deprived of liberty,<sup>260</sup> as well as rights of more particular application to migrant workers.<sup>261</sup> The Convention explicitly includes an obligation for the State to protect migrant workers and their families from “violence, physical injury, threats and intimidation, whether by public officials or by private individuals, groups or

<sup>254</sup> The Commission received information regarding the economic difficulties faced by migrant workers in situations where contracts were terminated at short notice, sometimes without paying salaries due and the impact of loss of benefits associated with the jobs.

<sup>255</sup> Interviews were conducted with persons from Sudan (11), Chad (10), Palestine (5), Nigeria (3), Bangladesh (3), Ethiopia (1), Eritrea (1) and Iraq (1). In addition, group discussions were held with large numbers of foreign nationals, including other nationalities, such as Moroccans, Philippine, Malians and Somalis. All interviews were adults and 5 were women. Many accounts were of a second hand nature, with a smaller number of interviewees giving information of their personal experience.

<sup>256</sup> In particular, see OCHA Report, *Initial Assessment of Migrant Workers from Libya in Tunisia*, OCHA, Tunisia, 18 March 2011, available from [http://northafrica.humanitarianresponse.info/Portals/0/Reports/Assessment/IA%20Assessment%20Report-%20Choucha%20Camp%20%20March%202022,%202011\(f\).pdf](http://northafrica.humanitarianresponse.info/Portals/0/Reports/Assessment/IA%20Assessment%20Report-%20Choucha%20Camp%20%20March%202022,%202011(f).pdf).

<sup>257</sup> Article 9, Convention on Migrant Workers

<sup>258</sup> Article 10, Convention on Migrant Workers.

<sup>259</sup> Article 16, Convention on Migrant Workers.

<sup>260</sup> Article 17, Convention on Migrant Workers.

<sup>261</sup> Such specialized rights include the right not to be subject to unauthorized confiscation or destruction of identity cards (Article 21) or to be subject to collective punishment or expulsion (Article 22). The Convention also includes provisions with respect to equality of treatment with respect to a range of economic rights and additional rights for those who are documented or in a regular situation: Part IV of the Convention on Migrant Workers.

institutions”.<sup>262</sup> Importantly, obligations owed under international human rights law apply to migrant workers, including rights against racial discrimination under the ICCPR and CERD.<sup>263</sup> Migrant workers are also civilians entitled to the protections afforded to civilians under international humanitarian law and international criminal law.

### 3. Factual findings<sup>264</sup>

204. The Commission received information reporting that both Government forces and armed opposition forces raided houses of Sub-Saharan migrants, threatening them and giving them deadlines to leave Libya. The Commission also received information that armed civilians entered into private houses at night, mistreating and harassing the Sub-Saharan population. Migrant workers trying to leave Libya to the east and to the west reported facing the same difficulties, including being regularly stopped and violently harassed in multiple checkpoints.<sup>265</sup> Some reported being beaten and many stated they had property (such as mobile phones) taken from them at gunpoint.<sup>266</sup>

205. Of the accounts received, Chadian nationals seemed to be particularly targeted, suspected of being mercenaries. It was reported to the Commission that isolated incidents were intended to convey a message, to the broader Sub-Saharan African community, as to what would happen if they supported Government forces.

### 4. Violations committed by opposition groups<sup>267</sup>

206. The Commission received several accounts of attacks on migrant workers carried out by armed opposition groups. The majority of the cases took place in the immediate aftermath of the opposition taking control of Benghazi on 19 February.<sup>268</sup> In one case, it was reported that on 19 February armed supporters of the opposition took one of the persons “arrested” as a suspected mercenary and hung him by his feet, pulling him out of the window of the court house in Benghazi and hitting him with weapons and machetes.<sup>269</sup> Another case reported to the Commission related to the extra-judicial killing of five

<sup>262</sup> Article 16(2) Convention on Migrant Workers.

<sup>263</sup> Within the international instruments, a minority of human rights are not applicable to non-citizens: such as political rights under the ICCPR.

<sup>264</sup> This section of the report is focused on cases where the source identified the violation as being motivated by the person’s identity as a foreign national. Other cases of violations against migrant workers are included in other sections of the report.

<sup>265</sup> The number of checkpoints is reported to be much higher in the West. An OCHA Report has revealed that on average migrant workers were stopped 10 times during their travel and reported up to 100 checkpoints between Tripoli and Zuwarah on the way to Tunisia. OCHA Report, *Initial Assessment of Migrant Workers from Libya in Tunisia*, OCHA, Tunisia, 18 March 2011, p. 11, available from [http://northafrica.humanitarianresponse.info/Portals/0/Reports/Assessment/IA%20Assessment%20Report-%20Choucha%20Camp%20%20March%202022,%202011\(f\).pdf](http://northafrica.humanitarianresponse.info/Portals/0/Reports/Assessment/IA%20Assessment%20Report-%20Choucha%20Camp%20%20March%202022,%202011(f).pdf). No similar data is available for the Eastern part of Libya.

<sup>266</sup> This matter has also been addressed in Section IV. E. (Freedom of expression) of this report.

<sup>267</sup> This term “opposition groups” is being used to connote both supporters of the opposition in the period before an armed conflict was necessarily established, as well as the opposition armed group operating during the conflict.

<sup>268</sup> Given the preliminary view of the Commission in para. 65 of this report, these cases may predate the date at which an armed conflict started nationally. However, they have been included in this report as even if this is the case, the Commission notes the responsibility of Libya under the Convention on Migrant Workers to protect migrant workers and their families from attacks from private actors: see Article 16(2) Convention on Migrant Workers.

<sup>269</sup> Information received by an eyewitness of the incident reported to have happened on 19 February. The witness believes that the victim died as a consequence of the attack.



Chadian nationals who had been arrested on the basis of their nationality, and taken to the military barracks in Benghazi. Dozens of armed persons either in military style or civilian clothing were said to have poured kerosene on their bodies and burned them to death on 21 February.<sup>270</sup> A secondary source told the Commission that two Chadian nationals were subject to extra-judicial killing when they were shot by the sons of their employee who had joined the armed opposition forces on 21 February.<sup>271</sup> Another case of physical abuse and a mock execution of a Sudanese national was reported to have taken place on 24 February at a checkpoint in Misrata controlled by armed opposition forces.<sup>272</sup>

207. There were a number of cases received in which the attacks were carried out by civilians with no affiliation in areas under the control of the opposition forces. Health practitioners in As-Sallum referred to the case of four Chadian nationals with gunshot wounds (from close distance firing) who reported that they had been attacked in Benghazi after having been accused of being mercenaries.<sup>273</sup> Health workers also reported that a Chadian worker had recounted that his brother and two colleagues were “slaughtered” in the outskirts of Benghazi. Apparently the four of them were taken by armed civilians by force, cuffed and severely beaten before being killed.<sup>274</sup> One Chadian woman reported having been raped by armed civilians in Benghazi on 26 February.<sup>275</sup>

## 5. Violations committed by Government Forces

208. A smaller number of attacks were reported as having taken place at the hands of Government forces. The current conflict appears to have exacerbated pre-existing discriminatory attitudes within the society. Reports of the ill-treatment include one case of arbitrary arrest and ill-treatment of a Nigerian national by Government forces in Misalata (Arba Area).<sup>276</sup> The enforced disappearance of his wife in the same incident was reported. The incident allegedly occurred on 30 March when heavily armed Government forces violently entered the victim’s house, smashing him to the ground and beating him. He reported that he was hand-cuffed, blind-folded and taken in a military car to a place of detention. Another case concerned attacks by Government forces in Tripoli, including one case of a Sudanese man having been beaten by the *Katiba* of Saif al-Islam when they entered the camp of Sudanese and Egyptian workers in Tripoli.<sup>277</sup> One Palestinian source from al-Az-Zawiyah reported ill-treatment of migrant workers following a speech by Saif

<sup>270</sup> Information received by an eyewitness who was with the group of arrested persons and was able to escape the incident reported to have happened on 21 February.

<sup>271</sup> The incident was reported to have taken place on 21 February on the main street of Guarsha, Benghazi South. The witness mentioned that the killing of the men was motivated by the general animosity towards Sub-Saharan nationals who were believed to be mercenaries.

<sup>272</sup> It was reported that the incident occurred on 24 February, when the victim was leaving Misrata to Zliten.

<sup>273</sup> The cases were presented to the Commission by secondary sources which could not provide further details. Wounded persons arriving at the border were evacuated to other locations, meaning that they were not present at the transit point.

<sup>274</sup> The witness was able to escape, suffered from post-traumatic stress and was transferred to psychiatric care in Marsa Matruh, Egypt. No further details on the circumstances of the report incident were documented.

<sup>275</sup> The case is addressed in Section IV. J. (Sexual violence), para. 218.

<sup>276</sup> The witness mentioned having being in different detention places in Ziniti and Tripoli for 7 days and alleged ill-treatment.

<sup>277</sup> In the first incident, the victim reported that he was stabbed in the right leg when he was walking in the streets of Tripoli on 25 February 2011. In the second case the victim alleged being beaten on 22 February 2011 by the *Katiba* of Saif al-Islam when they entered the camp of Sudanese and Egyptian workers in Tripoli.

al-Islam Qadhafi calling them “traitors.” However, overall, it is not clear to the Commission whether attacks by Government forces were motivated by race or by perception of political allegiance with the opposition forces.

209. The Commission received a range of information regarding abuses suffered by Sub-Saharan Africans at the hands of civilians without apparent affiliation to one of the parties to the conflict in areas remaining under the control of the Government. In Tripoli, for instance, the Commission was told an Eritrean national had been ill-treated and subsequently denied medical treatment in the main hospital of the capital city.<sup>278</sup> The man reported having being attacked with arms and metal tools on 16 March by a group of civilians in the streets of Tripoli, causing a fractured leg, aggravated by the denial of medical care.

210. In the face of such threats posed, many sub-Saharan Africans have faced a particularly difficult time accessing necessities of life (such as food and water).

## 6. Conclusion

211. Consistent information was received by the Commission that migrant workers, in particular those from Sub-Saharan Africa, were subject to mistreatment, contrary to international human rights law and international humanitarian law. Mistreatment took many forms, including having their houses subject to arbitrary search, being beaten and being subject to other cruel and inhuman treatment. The most serious attacks on migrant workers appear to have been linked to a suspicion that such persons were “mercenaries” on the basis of their national origin or skin colour. Attacks were most frequently undertaken by persons associated with the opposition forces. There have also been cases of Government forces subjecting migrant workers to human rights violations including arbitrary arrest, physical attacks and other ill-treatment, which require further investigation. In many locations there have been reports of attacks by unaffiliated armed civilians. The failure of authorities to protect migrant workers from such attacks raises separate issues of responsibility. Further investigation is required on the reports received by the Commission of extra-judicial killings of migrant workers.

## J. Sexual violence

### 1. Introduction

212. Reports of rape committed by Government forces have been recounted by numerous persons with whom the Commission met. The Commission had the opportunity to speak with only one victim of rape, Ms. Iman al-Obeidi whose case of gang-rape by Government forces has been well publicized by the media. Allegations of rape committed by armed opposition forces and armed civilians were made to the Commission by other persons, including in some cases, family members. The number of cases reported was small. However, the Commission recognizes the difficulties in collecting evidence in cases of sexual violence, including a victim’s reluctance to disclose information due to the trauma, shame<sup>279</sup> and stigma linked to reports of sexual assault. In Libya, the fact that Libyan criminal law punishes by flogging sexual relations outside a lawful marriage<sup>280</sup> also

<sup>278</sup> It was reported that medical care had been denied because of discrimination based on nationality.

<sup>279</sup> Rape in a conservative and religious society, such as Libya is considered an affront to family honor.

<sup>280</sup> Article 2 of Law No. 70 of 1973 provides for the flogging penalty of 100 lashes for adultery (or zina) which is defined as sexual intercourse of a man and a woman who are not bound to each other by marriage (article 1 of Law No. 70 of 1973).

increases the reluctance of victims to report sexual violence. These factors thus need to be taken into account in evaluating the information received.

## 2. Applicable Law

213. Rape violates the prohibition on torture and cruel, inhuman or degrading treatment and also impairs other human rights including the right to the highest attainable standard of physical and mental health under the ICESCR. It is also expressly prohibited in armed conflict, with AP II prohibiting “rape, enforced prostitution and any form of indecent assault<sup>281</sup>.” Common Article 3 to the Geneva Conventions also covers the conduct through its prohibition of “violence to life and person, in particular cruel treatment and torture” and “outrages upon personal dignity, in particular, humiliating and degrading treatment.” Rape constitutes a war crime under the Rome Statute<sup>282</sup> as well as potentially constituting a crime against humanity if it is part of a widespread or systematic attack on civilians.<sup>283</sup> The Security Council has urged parties to armed conflict to protect women and children from sexual violence. Resolution 1325 (2000) calls on all parties to the conflict to take special measures to protect women and girls from rape and others forms of sexual abuse and Resolution 1820 (2008) stresses that “sexual violence, when used or commissioned as a tactic of war in order to deliberately target civilians or as part of a widespread or systematic attack against civilian populations, can significantly exacerbate situations of armed conflict.”

## 3. Factual findings

### a) Violations committed by Government Forces

214. The Commission received several reports of rape committed by Government forces. The Commission spoke with Ms. Iman al-Obeidi whose case has received international media attention. She reported that, after being stopped at a check-point, she was raped over two days by 15 Government security forces, and subject to further degrading treatment. Journalists present at the media conference in which she first recounted her story noted that, “she displayed a broad bruise on her face, a large scar on her upper thigh, several narrow and deep scratch marks lower on her leg, and marks from binding around her hands and feet”<sup>284</sup> In Benghazi, the father of a 30 year old Libyan woman informed the Commission that his daughter was detained in her house in Misrata for two days and raped by Government forces. She had returned to check on the safety and whereabouts of her brother when Government forces “*came and restrained them for two days, keeping them in separated rooms. They were raping her, while trying to extract information from my son about the ‘rebels.’*”

215. In another case, a relative of a Libyan woman informed the Commission that a woman was raped in Ajdabiya by Government forces trying to abduct her brothers. The woman was beaten and raped in front of them. A female photographer working for the New York Times was arrested on 15 March at a check point near Adjabiya and detained for 6

<sup>281</sup> Article 4 (2)(e) AP II

<sup>282</sup> Article 8(2)(e)(vi) Rome Statute. The Rome Statute was the first international criminal law treaty to explicitly include rape as a “war crime” though it had been recognized as a matter of customary international law and in jurisprudence relating to the ad hoc tribunals.

<sup>283</sup> Article 7(1)(g) Rome Statute.

<sup>284</sup> New York Times, “Libyan Woman Struggles to Tell Media of Her Rape”, 26 March 2011, available from [http://www.nytimes.com/2011/03/27/world/middleeast/27tripoli.html?\\_r=2](http://www.nytimes.com/2011/03/27/world/middleeast/27tripoli.html?_r=2). The Commission’s interventions with the Libyan Government on behalf of Ms. Obeidi are detailed in Section IV. J. para. 214.

days, during which period she was subjected to sexual assault by Government forces.<sup>285</sup> The Commission received accounts indicating that minors have been subject to sexual assault in Misrata, Ajdabiya and Ras Lanuf.<sup>286</sup> Several sources, for instance, spoke about a 10 year old girl raped in Misrata by Government forces who was later treated at al-Jamahiriya Hospital in Benghazi. More speculative information repeated was that members of the *Kata'eb* were found with condoms and Viagra pills, leading those recounting these occurrences to suggest that troops were given instructions to engage in rape and that they were supplied with both the pills and the condoms. A psychologist in Benghazi informed the Commission that out of 60,000 persons responding to a survey, 259 reported cases of sexual abuse.<sup>287</sup> However, the Commission has no further details of the methodology or the findings of this study.

216. Reports of the threat and fear of rape by Government forces were frequently raised by interviewees. Libyan interviewees in Tunisia, for instance, noted that they had received phone calls from their relatives in Az-Zawiyah and Zuwarah reporting collective rape of residents by Government forces and “alleged mercenaries” as well as some unidentified armed men. Other interviewees coming from Misrata, told the Commission that the main reason for fleeing was to safeguard family members from rape, whilst at least one witness from Nalut referred to threats being given on 18 February, by Government forces patrolling the streets, to the effect that residents of the district would face serious consequences, including rape, if they did not ally themselves with the regime. Media reports mention that there were a number of video recordings of rapes by government soldiers recorded on their mobile phones being circulated in Misrata.<sup>288</sup>

#### b) Rape by Opposition Armed Forces

217. The Commission also received reports of rape during raids conducted by armed opposition forces in Ajdabiya and Al-Marj area. One Iraqi and one Libyan woman spoke of being raped by armed opposition forces in Al-Tulatat Street in Ajdabiya during the raid of their houses in early March. The Commission collected other information, that a Syrian woman in the Benghazi area was also raped by armed opposition forces during the second half of February.

218. The Commission also received some reports of rapes being carried out by armed civilians in areas controlled by the armed opposition force, raising issues of failures to protect from non-State violence. In one case, it was reported that 8 heavily armed civilians gang raped a Chadian women on 26 February, “*eight armed civilians with grenades, AK47s and knives entered into the compound he was living with his family and with many other Chadian families in Majuri neighborhood in Benghazi. It was midnight and they entered in the compound, beaten the people with machetes and threaten people with their arms, asking them to leave the country and robbing their belongings. That night they entered into the*

<sup>285</sup> This case is addressed in the Section IV. E. (Freedom of expression) of this report, para. 151.

<sup>286</sup> A number of Sudanese persons interviewed by the Commission mentioned that several women and minors (7 to 10 years old) were rape in Ajdabiya by Government forces without providing further details. Moreover, an international NGO which conducted interviews with 200 children and 40 adults in four IDP camps in Benghazi reported that minors as young as eight were subject to sexual abuse. These reports were unconfirmed.

<sup>287</sup> Psychologist Siham Sergewa was interviewed by CNN on 23 May 2001, CNN “Psychologist: Proof of hundreds of rape cases during Libya's war”, available from <http://edition.cnn.com/2011/WORLD/africa/05/23/libya.rape.survey.psychologist/>. The Commission has not yet been able to receive further details in the methodology used in the survey and its results.

<sup>288</sup> See BBC News, “Libya: forced to rape”, 23 May 2011, available from <http://www.bbc.co.uk/news/world-africa-13502715>.

*room of his neighbor, a Chadian woman, 28 years old. Her husband was in Tripoli so she was alone that night. The eight armed civilian entered into her room, took her by force, took her clothes away and raped her, one after the other.”*

#### 4. Conclusions.

219. The Commission received but was unable to verify individual accounts of rape. However, the Commission notes there was sufficient information received to justify further investigation to ascertain the extent of sexual violence including whether cases were linked to incitement by the command of either side. It is evident that the reports of the rapes have had a major psychological and social impact and have spread fear among the population. Given accounts that rape was committed as part of a policy to spread such fear, further investigation would be warranted.

### K. Children in armed conflict

#### 1. Introduction

220. In its inquiry, the Commission has sought to investigate the situation of children within the conflict. As previous sections have demonstrated, children have often been among the victims of the armed conflict (through death and injury of themselves or their family members) and displacement. The Commission has also received allegations concerning the use of child soldiers by both sides to the conflict. The Secretary-General’s Special Representative on Children in Armed Conflict has spoken of having evidence of the recruitment and use of child soldiers.<sup>289</sup> The Commission has received accounts of the presence of children, but would need to undertake further investigation to verify the claims and evaluate the extent of such usage. Information received from other UN agencies and in particular the office of the Secretary-General’s Special Representative on Children in Armed Conflict also raises significant protection concerns relating to children affected by the ongoing conflict in Libya.

#### 2. Applicable Law

221. All parties to a non-international armed conflict are under an obligation to provide children with the care and aid they require.<sup>290</sup> Measures are to be taken, if necessary, and whenever possible with the consent of their parents or persons responsible for their care, to remove children temporarily from the area in which hostilities are taking place to a safer area within the country.<sup>291</sup> Parties are under specific obligations not to recruit children who have not attained the age of 15 years of age into the armed forces or groups or allowed to take part in hostilities. Children are to be afforded special protection even if they take a direct part in hostilities and are captured.<sup>292</sup> Similar provisions are found within Article 38 of the CRC.<sup>293</sup> By ratifying the OPCRC-AC, and making a declaration Libya has declared 18 years of age as the age of voluntary recruitment. The Protocol also obliges Libya to take

<sup>289</sup> See remarks at “Press Conference to Launch Secretary-General’s Annual Report on Children and Armed Conflict”, 11 March 2011, available from [http://www.un.org/News/briefings/docs/2011/110511\\_Children.doc.htm](http://www.un.org/News/briefings/docs/2011/110511_Children.doc.htm).

<sup>290</sup> Article 4(3) AP II.

<sup>291</sup> Article 4(3)(e) AP II.

<sup>292</sup> Article 4(3) AP II.

<sup>293</sup> States are inter alia required to take all feasible measures to ensure persons under 15 do not take a direct part in hostilities, to refrain from recruiting those under 15, and within the age group 15-18, to give priority to the oldest. Article 38 CRC.

all feasible measures to prevent armed groups (separate from the armed forces) recruiting and using in hostilities those under 18.<sup>294</sup>

222. The Rome Statute also includes as a war crime the offence of conscripting or enlisting children under the age of 15 years into armed forces or groups or using them to participate actively in hostilities.<sup>295</sup>

### 3. Factual Findings

#### a) Use of Child Soldiers by Government Forces

223. Eye witnesses informed the Commission that many check points controlled by the Government are currently manned by child soldiers. An OCHA Report also contains reference to child soldiers having been reported to be patrolling in the streets, stopping people and asking for the identity cards of those travelling in the west towards the Tunisian borders.<sup>296</sup> According to those who have fled Libya, Governmental forces have distributed a large number of weapons to a wide range of civilians, including children. A 16 year old wounded soldier who spoke to the U.K based TV channel 4 stated that about 90 young boys between the ages of 15 and 19 were called to military barracks in Tripoli “for training” as soon as the 17 February when the anti-Governmental uprising began. Another young soldier captured by the armed opposition stated to the broadcaster that “we were kept locked in the camp and trained a little and then they took us to the battalion.”<sup>297</sup>

224. The presence of children among the opposition forces in both the west and east of the country also continues to be reported by different sources including United Nations staff, international NGOs and migrant workers who have fled Libya since late February 2011. One wounded member of the armed opposition force informed the Commission that a number of children from the age of 15 to 18 have been trained by rebel fighters in the mountains.

#### b) Children as Victims of Armed Conflict

225. The Commission received numerous accounts of children being killed and injured in the ongoing fighting in Libya, particularly in the context of attacks committed by Government forces. The situation for children, in the besieged Misrata, during the reporting period has been particularly dire, with children featured amongst the civilian victims of heavy shelling and bombardment, snipers and attacks on hospitals. As noted in Section IV.F, some injuries suffered appear to be consistent with Government forces undertaking indiscriminate attacks. Witnesses reported that on 11 March near Al-Abrak airport close to Tobruk, a girl under 10 years of age was killed while sleeping on the upper bed of a double deck-bed while her little brother was asleep on the lower bunk. She had been shot in the head by a single bullet, which may have been a stray round. On 4 May, media reports stated

<sup>294</sup> Article 4 OPCRC-AC.

<sup>295</sup> Article 8(2)(e)(vii) Rome Statute.

<sup>296</sup> OCHA Report, *Initial Assessment of Migrant Workers from Libya in Tunisia*, OCHA, Tunisia, 18 March 2011, available from [http://northafrica.humanitarianresponse.info/Portals/0/Reports/Assessment/IA%20Assessment%20Report-%20Choucha%20Camp%20%20March%202011\(f\).pdf](http://northafrica.humanitarianresponse.info/Portals/0/Reports/Assessment/IA%20Assessment%20Report-%20Choucha%20Camp%20%20March%202011(f).pdf).

<sup>297</sup> Channel 4 News, “Child soldiers sent by Gaddafi to fight Libyan”, 23 April 2011, available from <http://www.channel4.com/news/child-soldiers-sent-by-gaddafi-to-fight-libyan-rebels>.

that at least three members of a family, including two children, were hit and killed by a missile while they waited for their evacuation from Misrata.<sup>298</sup>

226. The Commission has also had concerns brought to its attention regarding the practice of the Government to systematically use children to participate in the organized pro-governmental demonstrations in Tripoli through payments to the family. Given the security situation in Tripoli, such a practice exposes children to additional risk within the conflict.

#### **4. Conclusion**

227. The Commission notes that the ongoing conflict is having a significant negative impact on the rights of children. In relation to the use and recruitment of child soldiers, the Commission considers that more investigation and research is required in close cooperation with relevant United Nations agencies, notably the UNICEF and the Office of the Secretary-General's Special Representative for Children in Armed Conflict as well as other non-governmental organizations.

### **L. NATO's use of force**

#### **1. Introduction**

228. The Commission received reports stating that NATO military action has involved indiscriminate attacks on civilians. Media reports have also referred to a few instances where NATO operations have resulted in the death of civilians. On 18 May 2011, the Commission wrote to NATO Headquarters asking for specific information about its operations in Libya. As the Commission is awaiting the response from NATO, this subsection reflects information gathered from other sources.

#### **2. Applicable Law**

229. The international humanitarian law rules applicable in international armed conflict govern international States' use of force in Libya. This comprises the four Geneva Conventions, plus Additional Protocol I to the Geneva Conventions in addition to norms of customary international humanitarian law. The base principles of needing to distinguish between civilian and military persons and objects, not directing attacks against civilians and civilian objectives, taking precautions related to ensuring appropriate targeting and not engaging in attacks which involve loss of civilian life disproportionate to the concrete military objective apply both in international and non-international conflicts and have been outlined in Section IV. F.<sup>299</sup> The Rome Statute includes a detailed listing of war crimes applicable in international armed conflict, including listed grave breaches of the Geneva Conventions and other serious violations of the laws and customs of war applicable in international armed conflict.<sup>300</sup>

#### **3. Factual Findings**

230. As of 30 March 2011, NATO has been in control of all military operations for Libya: that is for the three components of an arms embargo, a no-fly-zone and actions to

<sup>298</sup> The Guardian, "Gaddafi targets relief ship as it evacuates Misrata wounded in Libya", 4 May 2011, available from <http://www.guardian.co.uk/world/2011/may/04/gaddafi-targets-relief-ship-misrata-libya?INTCMP=SRCH>.

<sup>299</sup> See in particular Articles 48, 51 and 52 of AP I. Article 57 of AP I obliges States to take precautions.

<sup>300</sup> Article 8(2)(a) and Article 8(2)(b) Rome Statute.

protect civilians from attack or the threat of attack. Accordingly and on a daily basis, NATO conducts reconnaissance, surveillance and information-gathering operations to identify those forces which present a threat to civilians and civilian-populated areas. Acting on this information, NATO air and maritime assets engage targets on the ground or in the air.

231. Based on figures shown on NATO website, since the beginning of its operations up to 28 May 2011, a total of 8729 sorties, including 3327 strike sorties have been conducted. Targets struck to date have included command and control bunkers, tanks, armored personnel carriers, air-defense systems and artillery around and approaching key civilian areas such as Misrata and Al-Brega. With respect to Arms Embargo Activities, a total of 20 ships under NATO command are actively patrolling the Central Mediterranean. Since the beginning of the arms embargo operations, a total of 954 vessels have been hailed, with 41 boardings and 5 diversions conducted.

232. While in Tripoli, the Commission met with a Libyan Government health official who stated that 64 civilians have been killed by NATO bombardments. The Commission also received written reports from the authorities stating that NATO launched about 3,000 airstrikes on several civilian and military targets in Libya. According to the same reports, these strikes resulted in the death of 500 civilians and 2,000 injured. The same reports stated that NATO had targeted schools, universities, mosques, and others civilian locations. According to the same sources, 56 schools and three universities were directly hit by these strikes. Furthermore, it is claimed that NATO airstrikes have resulted in the closure of 3204 schools, leaving 437'787 students without access to education.

233. Despite the reports received, while in Tripoli, the authorities did not show to the Commission any evidence of civilian areas targeted by NATO forces. Libyan officials in charge of coordinating the visit explained that some of the NATO attacks occurred within the premises of the Bab al-Aziziyah" compound without providing the possibility to enter the compound. The Commission also notes that the Libyan Government did not provide the details of or show concrete evidence of alleged incidents, such as civilian objects which had been destroyed (e.g. schools).

234. Although statistics and information provided by NATO do not refer to air strikes resulting in the killings of civilians, numerous press articles and media reports have referred to specific incidents in which NATO air strikes resulted in the death of civilians. A NATO airstrike resulted in the killing of at least 13 rebels near Al-Brega on Friday 4 April 2011.<sup>301</sup> Another incident reported by Reuters on 13 May 2011 and shown on Libya TV indicated that a NATO air strike killed at least 16 civilians and wounded up to 40 civilians at a guest house in the eastern Libyan city of Al-Brega. It was reported by the State TV that the attack occurred at dawn and that most of the victims were clerics who had gathered for a religious ceremony. Following the departure of the Commission from Tripoli, it was further reported that on 1 May, NATO air strike in Tripoli resulted in the killing of Sayf al-Arab the youngest son of Colonel Mu'ammarr Gaddafi, his wife and three grandsons.

#### 4. Conclusion

235. The Commission is not in a position at this stage to assess the veracity of the information received. Furthermore, the Commission has not seen evidence to suggest that civilian areas have been intentionally targeted by NATO forces, nor that it has engaged in indiscriminate attacks on civilians.

<sup>301</sup> Rebels in eastern Libya reported that a NATO air strike hit their forces near the oil town of Al-Brega, killing at least 13 rebel fighter. The Guardian, "Nato air strike 'kills Libyan rebels'", 7 April 2011, available from <http://www.guardian.co.uk/world/2011/apr/07/nato-air-strike-libyan-rebels>.



## V. Assessment and findings

236. The Commission has been able to accomplish much in a relatively short period of time and particularly during the period of an ongoing conflict. However, much more needs to be done, particularly because the conflict continues and alleged violations of international human rights law and international humanitarian law, including those amounting to international crimes continue to be reported.

237. The quality of the evidence and information obtained by the Commission has varied in its accuracy and reliability. The Commission has opted for a cautious approach in this report by consistently referring to the information obtained as being distinguishable from evidence capable of being used in criminal proceedings, whether national or international. It has also been cautious in distinguishing between information and reports received and testimony it heard first-hand, as well as facts which it has observed first-hand. But this cautionary approach should not be read as an indication that the allegations of international human rights law and international humanitarian law violations contained in this report are not credible or sufficient in quality and quantity to cause concern among the international community.

238. It should be noted that the reports received by NGOs have been quite useful and also on their face reliable. Reports received by the Government sources as well as by NTC sources have not, however, reasoned to the same evidentiary qualitative standard. On the government side the reports have mainly been either general denials or specific allegations not supported by evidence. Both sides have supplied the Commission with broad statements based on unconfirmed reports and allegations or public rumours. The Commission has informed all sides of its evidentiary standards and has met with officials and NGOs on both sides, informing them on these standards as well as advising them on reporting requirements. Nevertheless, all such information, notwithstanding qualitative differences, has been taken into account.

239. Since the beginning of this situation in February 2011, media, including the international media, have been active in producing reports about events, including videotaped materials. Similarly, a large number of videos and still pictures have been given to the Commission by individuals, NGOs, the Government, and the NTC. While the Commission has taken into account these visual documentary sources, their genuineness will need to be ascertained once the sources such as the details with respect to time and place can be obtained. With time and resources, a visual/photographic record of certain events could be reconstituted by establishing a database project linking such visual imagery with written reports. Nevertheless, the high number of videos and pictures, as well as the high number of similar pictures obtained from different sources, tends to give credibility to the accuracy and genuine nature of these images, which in many cases amount to clear indications of international human rights law, international humanitarian law and international criminal law violations.

240. The present situation has to be viewed contextually in light of the regime's forty-two years, as described in Section II. (Background). The "jamahiriya" system of government instituted by Qadhafi's regime is a very particular one. By its very nature it is not susceptible to systems of governance based on the rule of law and whose aim includes the protection of human rights. Such fundamental rights as the right to freedom of association, the right to freedom of expression and association has been criminalized with penalties, including the death penalty and life imprisonment. The regime also prohibited private ownership and certain forms of retail trade, banned a free press, and for all practical purposes subverted the civil service, the police, military and paramilitary organizations to the achievement of the regime's purposes. In addition, the regime's record of disregard of international law, as well as the human rights of others in respect of its sponsorship and

support of international terrorism and subversive groups in different countries of the world over a prolonged period of time, is indicative of how the regime views both international law obligations as well as respect for human rights.

241. The historical background outlined in the report reveals a unique form of government which is dominated by one man rule who has governed by fear, intimidation and incentives based on loyalty. The repressive climate which has been established, coupled with the ability of the ruler to provide strong economic incentives to those supporting him and disincentives to those who do not, has also created opportunities for abuses of power leading to international human rights law violations, which in turn have led to the protests that escalated into the ongoing civil war. Moreover, the absence of an effective rule of law system and the existence of a judiciary that is not independent, as well as the dominance of a number of paramilitary and security apparatuses, have also led to the consolidation of a climate of fear and oppression.

242. The conflict in Libya is *sui generis*. In fact, every conflict is different if for no other reason than because of the diversity, inter alia, of its participants, goals, methods, and outcomes. On both sides of this conflict the Commission met protagonists which are not motivated against each other by ethnic, tribal or religious causes. They also do not wish to see their country break up. On both sides of the conflict, the common goal is to see a unified modern and progressive Libya with democracy, rule of law, and human rights prevailing.

243. The events that have occurred since February have produced a traumatic impact on the society as a whole. It is against this background that the patterns of violations outlined in this report are to be assessed. The ongoing Libyan conflict, which is characterised by a relatively small number of victims, has nonetheless produced a significant socio-psychological impact on the society as a whole, particularly in relation to reports of sexual violence. Moreover, previous violent experiences such as those involving the Abu Salim prison and the hanging of students<sup>302</sup> (paragraph 34 of this report) deemed to have opposing views to those of the government as explained have also impacted Libyan society as traumatic experiences.

244. What started as a series of peaceful demonstrations aiming at achieving reforms in governance and more particularly seeking to see the regime evolve into a democratic form of government based subject to the rule of law and upholding human rights was met with the opposition of the government and of those supporting it. Within a relatively short period of time this initial phase escalated to a civil war in which opposing forces fought battles in cities for the control of territory. The conflict thus acquired the legal characteristics of a conflict of a non international character under international humanitarian law. Thus the initial phase, which was subject to international human rights law, was transformed in the second phase, in which international humanitarian law applied alongside international human rights law.

245. The combination of the factors mentioned in the report has not only led to the impunity of those who committed violations of international law identified in the report but has also led them to feel emboldened in the continuation of their abuses against the civilian population. This in turn explains why during the two phases of this conflict, namely the phase of peaceful protests and demonstrations followed by the civil war phase, those on the government side have committed many violations of international human rights law and international humanitarian law.

---

<sup>302</sup> These incidents are referred to in para. 34 of this report.

246. The estimated number of violations committed by government forces, is an indication of certain patterns of behaviour which can logically be inferred to be either the product of established policies or the product of a single person directing multiple paramilitary and security organisations and groups for the accomplishment of the results referred to above and identified throughout this report. The assumption that these patterns of violence would have continued had they not met with opposing force was realistic. Certainly the resulting consequences in terms of human harm would have been significantly higher than what is estimated at the present stage of the conflict. It is not certain what the cumulative number of persons killed or injured has been to date, with government officials, National Transitional Council and NGO providing estimates ranging from 10.000 to 15.000 persons killed.

247. In relation to the Government's response to the demonstrations beginning on 15 February 2011, the Commission has concluded that there is sufficient evidence to suggest that the Government forces used excessive use of force against demonstrators, at least in the early days of the protests, leading to significant deaths and injuries. Such actions represented a serious breach of a range of rights under international human rights law including the right to life, the right to security of person, as well as freedom of assembly and freedom of expression. In relation to the latter days of protests as the situation escalated, more investigation would be required to assess the security forces' use of force, in particular more detail concerning actions taken by demonstrators to assess the response by Government authorities.

248. The Commission has also established that many persons were incarcerated by the Government without it being publicly known how many, for what reasons, where they were kept, in what conditions, and how they were being treated. Numerous allegations have been made concerning disappearances by the Government were received by the Commission either directly or through NGOs. The precise number of such cases is not currently able to be assessed. Access to medical treatment was impeded in the aftermath of the demonstrations and freedom of expression was significantly curtailed by the Qadhafi regime including through suppression of communication and attacks on journalists and other media professionals. Torture and inhuman and degrading treatment can be considered to have been committed on numerous occasions by both Government and Opposition actors.

249. In relation to the conduct of hostilities, the Commission has noted violations of international humanitarian law including attacks on protected medical staff, transport and facilities, the misuse of the emblem, and a failure to take sufficient precautionary steps to minimize damage to civilians and civilian objects. Further investigation is required in relation to determining if attacks on civilians (in general and in relation to specifically protected persons) and civilian objects (including mosques and humanitarian related objects) have been intentional or indiscriminate. The Commission did not receive any first hand information concerning violations by the armed opposition force and as such is not in a position to determine whether any relevant violations occurred. Other areas requiring further investigation include allegations concerning the use of child soldiers by both sides of the conflict.

250. In relation to the use of weaponry, the Commission is concerned that the Libyan authorities have not been undertaking appropriate and precautionary assessments which would, in the Commission's view, militate against the use of weapons such as mortars in densely urban areas. The use of munitions that are either unlawful or are being employed in an unlawful method such as expanding bullets, phosphorus shells, and cluster munitions needs to be confirmed, together with information as to whether any use was part of a ascertained as either being part of a governmental policy or the result of individual combatants or commanders' decision-making.

251. Whilst it is clear that foreign nationals have participated in the conflict in Libya, more investigation is required to determine whether these persons qualify as “mercenaries” within the meaning of the relevant international conventions. Significant mistreatment of migrant workers has occurred. Those coming from Sub-Saharan countries have been particularly targeted, due to a perception that they were “mercenaries” because of the colour of their skin and/or nationality. These attacks were mostly attributed to members of opposition forces.

252. Sexual violence is an area which requires further investigation to ascertain the extent of these violations, including whether cases were linked to incitement by the command of either side. It is evident that reports of rape have had a major psychological and social impact, spreading fears amongst the population. Given the sensitive nature of the subject, the Commission considers it important that further investigation employ specifically tailored methodologies which take into account the stigmatization of sexual violence.

253. The Commission is concerned with respect to reports of ongoing violations – not only in relation to new instances of violations, but also the continuing effect of past violations in particular those who have been disappeared and whose fate remains unknown.

254. The Commission is also concerned by a lack of apparent action to address the violations which have been the subject of considerable attention to date. Although some progress has been made in relation to the release of some persons from detention, including journalists and other media professionals, it has not received information about the many persons unaccounted for nor did it receive information indicating that credible investigations are being instituted into violations which have occurred.

255. The Security Council in its resolution 1970 referred the situation in Libya to the ICC Prosecutor pursuant to the Statute of the ICC. It has therefore vested primary jurisdiction with respect to the determination of criminal responsibility with the ICC. It is in this perspective that the Commission has consulted with the ICC as described above (paragraph 18 of this report) but has not to date shared information about its findings. At this point, however, the Commission feels that it is not in a position of identifying individual criminal responsibility or command responsibility for international humanitarian law violations as well other potential violations of international criminal law. This is due essentially to the need to complete and confirm the information and data that it has received from various sources.

256. Nonetheless, the Commission has identified a number of violations which have led to its reaching the conclusion that international crimes, specifically crimes against humanity and war crimes have been committed in Libya.

257. Government Forces: In relation to crimes against humanity, the Commission has found that there have been acts of murder, imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law, torture, persecution, enforced disappearance committed by Government forces within the context of a widespread or systematic attack against a civilian population, with knowledge of the attack.

258. The Commission has found that there have been many serious violations of international humanitarian law by Government forces which amount to war crimes. Within the listing of war crimes applicable to non-international armed conflict in the Rome Statute, the Commission has identified in Section IV. violations involving violence to life and person, outrages upon personal dignity in particular humiliating and degrading treatment, and intentionally directing attacks against buildings, materials medical units and transport using the distinctive emblems of the Geneva Conventions.

259. It has also received considerable information concerning possible indiscriminate attacks on civilians and civilian objects (including protected objects such as mosques and

buildings of cultural significance, hospitals) and attacks on humanitarian related personnel and transports. Nevertheless, further investigation would be required to determine if these attacks on civilians and civilian objects amounted to “intentional targeting” within the meaning of the Rome Statute. Further investigation would also be required in relation to whether there has been conscription or enlistment of children under the age of 15 years of age into armed forces or groups, or using them to participate actively in hostilities and in relation to the commission of rapes during the conflict.

260. The consistency of patterns of violations creates an inference that they were carried out as a result of policy decisions by Colonel Qadhafi and senior leadership. Further investigation is required in relation to making definitive findings in relation to the identity of those responsible for the crimes committed. The Commission has received some information concerning individual perpetrators of crimes, but on this topic more investigation is also required.

261. Opposition Armed Forces: The Commission received fewer reports of facts which would amount to the commission of international crimes by forces connected with the opposition. It has established that some acts of torture and cruel treatment and some outrages upon personal dignity in particular humiliating and degrading treatment have been committed by opposition armed forces, in particular against persons in detention and migrant workers. Those which occurred during the period of armed conflict constitute war crimes under the Rome Statute.

262. Further investigation would be required in relation to acts of rape and whether there has been conscription or enlistment of children under the age of 15 years of age into armed forces or groups, or using them to participate actively in hostilities. On the basis of the information currently before the Commission, it is not of the view that the violations committed by the opposition armed forces were part of any “widespread or systematic attack against” a civilian population such as to amount to crimes against humanity.

263. Notwithstanding the cautionary approach taken by the Commission as reflected in this report, it should be clear that a significant number of international human rights law violations have occurred as well as war crimes and crimes against humanity as described above. These violations and crimes have been committed in large part by the Government of Libya in accordance with the command and control system established by Colonel Qadhafi through the different military, para-military, security and popular forces that he has employed in the pursuit of a systematic and widespread policy of repression against opponents of his regime and of his leadership. There have also been violations by the opponents of the regime which are also described in the report. The Commission has expressed these concerns to both sides, urging them to cease and desist from these practices and to ensure their respective conduct conforms with the requirements of international law.

264. The Commission is aware of the challenges that lie ahead for Libya in relation to responding to the violations that have occurred. It is as yet unknown when or how the conflict will come to an end. The prospective transition to democracy, introduction of the rule of law, equitable allocation of national resources, restoration of public safety, reconstruction of public administration, social cohesion across clans and provinces, strengthening civil society, and opening the country to a new peaceful and democratic Libya will necessarily have to take into account the historic baggage left behind by Qadhafi regime, including the situation described in this report.

265. All of the above as well as this report should also be viewed in light of future post-conflict justice and transitional justice mechanisms designed to provide justice and reconciliation among the people of Libya in order to sustain peace in that country as well as between that country and the international community. Whilst post-conflict justice and transitional justice are not within the scope of this Report, its fact-finding work will

nevertheless be useful in connection with the goals of post-conflict justice and transitional justice.

266. Even though the contemporary political situation is unrelated to the Commission's mandate, it has a bearing on the continuation of the conflict and as a consequence on the ability of the Commission or any succeeding body's ability to continue the necessary investigations into both the human rights and humanitarian law situations in that country. In addition it should be noted that the identification of violations, how they occurred, and why they have occurred will necessarily have a bearing on post-conflict justice (transitional justice) after the conflict has ended.

267. Finally, the Commission has been able to accomplish its mandate in a relatively short period of time and particularly during the period of an ongoing conflict. It considers that further work needs to be done to fully investigate the numerous allegations it continues to receive at a time when the conflict is still ongoing. Future work would also permit to assess the genuineness of the allegations received particularly with respect to the use of mercenaries, the use of child soldiers, sexual violence and violations against migrant workers. Finally, the Commission feels that it is not at this stage in a position of identifying those responsible as requested in the resolution establishing its mandate.

## VI. Recommendations

### 268. The Commission calls on the Government of Libya:

- To immediately cease acts of violence committed against civilians in violation of applicable international humanitarian law and international human rights law;
- To conduct exhaustive, impartial and transparent investigations into all allegations of international human rights law and international humanitarian law violations, and in particular to investigate with a view to prosecuting cases of extrajudicial, summary or arbitrary executions; disappearances and torture with full respect of judicial guarantees.
- To unconditionally and immediately release of all those who are being held as a result of their participation in peaceful demonstrations or otherwise being arbitrarily detained.
- To reveal the names of all those within its custody as well as those who have died in its custody, in order to relieve the suffering of the relatives of the disappeared. In the cases of those who have died, the Government of Libya should produce evidence of their deaths together with the precise whereabouts of their gravesites;
- To grant adequate reparations to the victims or their families and take all appropriate measures to prevent the recurrence of violations.
- To ensure free, full and unrestricted access to all places of detention for humanitarian and human rights organizations, granting access to all facilities without prior notice, access to all premises of each detention centre, the possibility for repeat visits to the same place and the possibility to interview prisoners in private without any witnesses.
- To bring all Libyan's laws and policies into conformity with international human rights standards.

### 269. The Commission calls on the National Transitional Council:

- To ensure immediately the implementation of applicable international humanitarian law and international human rights law;
- To conduct exhaustive, impartial and public investigations into all allegations of international human rights law and international humanitarian law violations, and in particular to investigate with a view to prosecuting cases of extrajudicial, summary or arbitrary executions and torture with full respect of judicial guarantees;
- To grant adequate reparations to the victims or their families and take all appropriate measures to prevent the recurrence of such violations;
- To undertake further efforts to ensure strict control over weapons in possession of individual;
- To ensure free, full and unrestricted access to all places of detention for humanitarian and human rights organizations, granting access to all facilities without prior notice, access to all premises of each detention centre, the possibility for repeat visits to the same place and the possibility to interview prisoners in private without any witnesses.

270. With respect to the humanitarian situation, the Commission calls on the Government of Libya and the National Transitional Council:

- To fulfil their respective obligations under international humanitarian law, particularly those regarding the protection of civilians, including the facilitation of immediate, free and unimpeded access for humanitarian personnel to all persons in need of assistance.

271. The Commission recommends to the Human Rights Council:

- In view of the time frame within which it had to complete its work and considering the gravity and the complexity of the situation, the Commission considers it important that the Council remains seized about the situation through an extension of its mandate or the establishment of a succeeding mechanism with the ability to continue the necessary investigations into both the human rights and humanitarian law situations in the country for a one year period.

## Annex I

### Programme of Work of the International Commission of Inquiry on Libya

#### 1. Geneva: 6 to 8 April 2011 and 18 to 20 May 2011

##### a) Meetings held with representatives of:

##### **OHCHR**

- The United Nations High Commissioner and the Deputy High Commissioner for Human Rights

##### **The Human Rights Council and the Regional Coordinators:**

- The President of the Human Rights Council
- Permanent Mission of Austria to the United Nations in Geneva
- Permanent Mission of Czech Republic to the United Nations in Geneva
- Permanent Mission of Costa Rica to the United Nations in Geneva
- Permanent Mission of Iraq to the United Nations in Geneva
- Permanent Mission of Nigeria to the United Nations in Geneva

##### **Other Permanent Missions:**

- Permanent Mission of China to the United Nations in Geneva
- Permanent Mission of Egypt to the United Nations in Geneva
- Permanent Mission of France to the United Nations in Geneva
- Permanent Mission of Germany to the United Nations in Geneva
- Permanent Mission of Italy to the United Nations in Geneva
- Permanent Mission of Qatar to the United Nations in Geneva
- Permanent Mission of Russian Federation to the United Nations in Geneva
- Permanent Mission of Tunisia to the United Nations in Geneva
- Permanent Mission of Turkey to the United Nations in Geneva
- Permanent Mission of United Kingdom of Great Britain and North Ireland to the United Nations in Geneva
- Permanent Mission of the United States of America to the United Nations in Geneva

##### **Former representatives of the Permanent Mission of the Libyan Arab Jamahiriya to the United Nations in Geneva**

##### **UN agencies**

- United Nations Office for the Coordination of Humanitarian Affairs (OCHA)



- Office of the United Nations High Commissioner for Refugees (UNHCR)

**Intergovernmental organizations**

- International Committee of the Red Cross (ICRC)
- The African Union
- The League of Arab States
- The Organization of the Islamic Conference

**Non-governmental organizations**

- Alkarama
- Amnesty International
- Cairo Institute for Human Rights
- Civicus
- Fédération Internationale des Droits de l'Homme
- Human Rights Watch
- Human Rights Solidarity
- International Commission of Jurists
- International Service for Human Rights
- Reporters sans Frontières

**2. Egypt: Cairo, Alexandria, Marsa Matruh and As Sallum, 11 to 15 April 2011**

**a) Meetings held with representatives of the following:**

**Government**

- Ministry of Foreign Affairs
- Ministry of Interior
- The League of Arab States
- National Transitional Council (NTC)

**UN officials and agencies**

- The Special Envoy of the Secretary-General for Libya
- United Nations Humanitarian Coordinator for Libya
- United Nations Resident Coordinator for Libya
- United Nations Development Programme (UNDP)
- United Nations Office for the Coordination of Humanitarian Affairs (OCHA)
- United Nations Office on Drugs and Crime (UNODC)
- United Nations Fund for Children (UNICEF)

- World Health Organization (WHO)
- United Nations Mine Action Service (UNMAS)
- Office of the United Nations High Commissioner for the Refugees (UNHCR)
- United Nations Department of Security and Safety (UNDSS)
- World Food Programme (WFP)

**Other intergovernmental organization**

- -International Organization for Migration (IOM)

**Professional and non-governmental organizations**

- Board of Trustees of the Arab Organization for Human Rights
- Arab Medical Union
- Human Rights Watch

**b) Sites visited**

- Cairo: Nasser Medical Institute, Cairo Specialized Hospital
- Alexandria: Al Asafra Hospital, Alexandria Vascular Centre
- As Sallum: Transit Point
- Eastern Libya: Tobruk, Benghazi and Al Bayda, 18 to 21 April 2011

**3. Eastern Libya: Tobruk, Benghazi and Al Bayda 12 to 21 April 2011**

**a) Meetings held with representatives of the following:**

- National Transitional Council (NTC)
- Special Envoy of French President Sarkozy
- Human Rights Watch

**b) Sites visited**

- Benghazi Medical Center
- Al Jalaa Hospital
- Benghazi Detention Center
- Benghazi Internally Displaced Persons' Camp
- The Office of the Prosecutor

**4. Tunisia: Tunis, Djerba, Ras Ejdair, Sfax, Sousse, Tataouine and Zarzis, 22 to 25 April 2011**

**a) Meetings held with representatives of:**

- Government
  - Ministry of Social Affairs

- Ministry of Foreign Affairs
- UN agencies
  - United Nations Resident Coordinator for Tunisia
  - Office of the United Nations High Commissioner for Refugees (UNHCR)
  - United Nations Office for the Coordination of Humanitarian Affairs (OCHA)
  - World Health Organization (WHO)
  - United Nations Fund for Children (UNICEF)
- Other intergovernmental organizations
  - The World Bank
  - International Committee of the Red Cross (ICRC)
  - International Organization for Migration (IOM)
- Non-governmental organizations
  - Amnesty International
  - Ligue Tunisienne des Droits de l'Homme (LTDH)

**b) Sites visited**

- Ramada Refugee camp
- Choucha Refugee camp
- United Arab Emirates Red Crescent Refugee camp (Ras Ejdair)
- Tunisian Red Crescent Refugee Camp (Ras Ejdair)
- Tataouine Regional Hospital
- Habib Bourguiba University Hospital
- Najda private Hospital
- Sahlul University Hospital

**5. Tripoli, Libya, 27 to 28 April 2011**

**a) Meetings held with representatives of the following:**

- Government
  - The General People's Committee for Justice
  - The General People's Committee for Foreign Liaison and International Cooperation
  - Secretary of Foreign Affairs, General People's Congress
  - Libyan National Human Rights Committee
- Non-governmental organizations
  - Waatasemu Society (Aisha Qadhafi Foundation)
  - General Union of Civil Society Organizations

**b) Site visited**

- Jdaydah Detention Center
- Az Zawiyah



## Annex II

### Glossary of Terms

**Abu Salim:** top security prison in Tripoli where over 1200 prisoners were killed in 1996 after a riot.

**Amazigh:** also known as Berbers though that term is not favored. They constitute the original population of North-west Africa before Arab populations arrived in the 7<sup>th</sup> century CE and the two populations are now largely mixed. Tmazight is their distinct language which has its own alphabet.

**Al-Amn al-Am:** Public Security Agency.

**Baltaji / Baltajiyah:** plain cloth individuals engaged in activities to disrupt demonstrations alongside security forces, sometimes using batons sometimes firearms or driving through crowds.

**Al-Haras al-Thawri:** Revolutionary Guard.

**Hayat Amn al-Jamahiriya:** Jamahiriya Security Organization (JSO).

**Ibadi Muslims:** heirs of a minority that refused the Sunni-Shi'a division in the early days of Islam. There are Ibadis in North and East Africa as well as Oman. Most of the Amazigh of Libya are Ibadis. They pray together with other Muslims.

**Jamahiriya:** literally the State of the masses, used in the official name of the Libyan Arab Jamahiriya.

**Jihaz al-Amn al-Dakhili:** Internal Security Agency (ISA).

**Jihaz al-Amn al-Khariji:** External Security Agency (ESA).

**Katiba / Kata'eb:** translates as brigade but in Libya it refers to special uniformed units under the sole command of Colonel Qadhafi's inner circle including his sons. They are separate from the regular army and some of these units are better equipped than the army.

**Al-Lajnah al-Thawriya / Al-Lijan al-Thawriyah :** Revolutionary Committee.

**Liwa al-Redah:** Deterrence Division, one of the Kataeb.

**Qabilah / Qabael:** tribe.

**Al-Qaida:** a radical Sunni Islamist group engaging in global political violence under the guise of religion. It was founded by Osama bin Laden in the late 1980s with Arab volunteer fighters in Afghanistan and then expanded to conduct numerous terrorist acts in many areas of the world. Its network comprises regional branches including one in the "Islamic Maghreb."

**Quryna:** a privately-owned Libyan newspaper published in print and on the internet, based in Benghazi, it was part of Al-Ghad Media Corporation owned by Saif al-Islam Qadhafi until the state took it over.

**Quwat al-Da'm al-Markazi:** Central Support Forces, specializing in crowd control.

**Thawrat al-Fateh:** Al-Fateh Revolution of 1 September 1969.

## Annex III

### Member States and Organizations that Submitted Information to the International Commission of Inquiry

#### Member States:

- Australia
- Italy
- Libya
- Morocco
- Spain
- Tunisia
- Turkey
- United Kingdom of Great Britain and North Ireland

#### Organizations:

- Alkarama
- Amnesty International
- Arab Organization for Human Rights
- DePaul University
- Human Rights Solidarity
- Human Rights Watch
- International Coalition Against War Criminals
- International Criminal Court
- International Federation for Human Rights (FIDH)
- International Medical Corps
- International Organization for Migration
- Libya Appeal Team
- Libyan General Union of Civil Society Organization
- Libyan National Human Rights Committee
- National Transitional Council
- Office for the Coordination of Humanitarian Affairs
- United Nations Educational, Scientific and Cultural Organization
- Office of the United Nations High Commissioner for Refugees
- United Nations Children's Fund
- United Nations Mine Action Service

- Waatasemu Organization (Aisha Qadhafi Foundation)
- World Engagement Institute



# LIBYA

THE FORGOTTEN VICTIMS  
OF NATO STRIKES

**AMNESTY**  
INTERNATIONAL





Amnesty International Publications

First published in March 2012 by  
Amnesty International Publications  
International Secretariat  
Peter Benenson House  
1 Easton Street  
London WC1X 0DW  
United Kingdom  
[www.amnesty.org](http://www.amnesty.org)

© Amnesty International Publications 2012

Index: MDE 19/003/2012  
Original Language: English  
Printed by Amnesty International, International Secretariat, United Kingdom

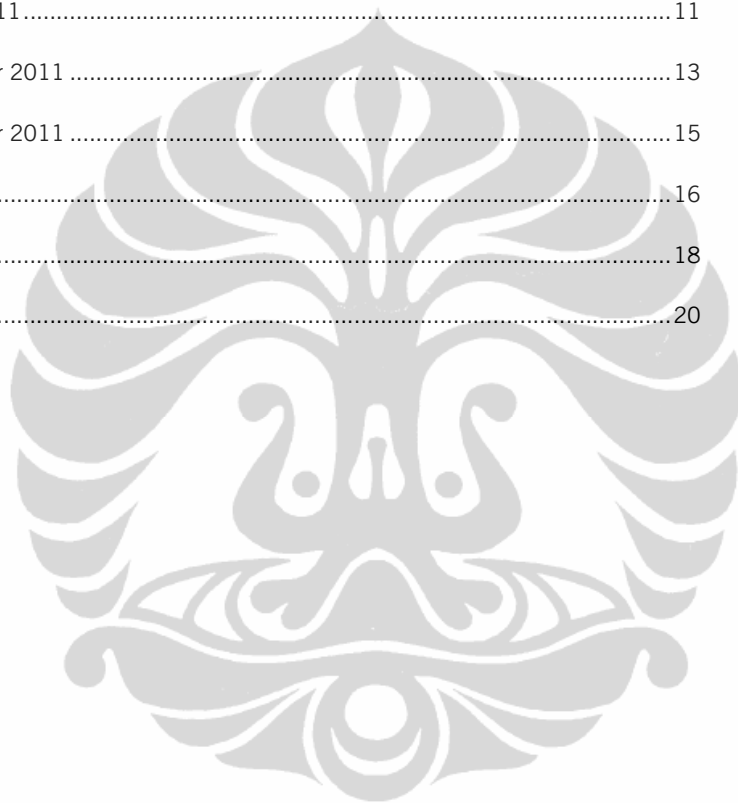
All rights reserved. This publication is copyright, but may be reproduced by any method without fee for advocacy, campaigning and teaching purposes, but not for resale. The copyright holders request that all such use be registered with them for impact assessment purposes. For copying in any other circumstances, or for reuse in other publications, or for translation or adaptation, prior written permission must be obtained from the publishers, and a fee may be payable. To request permission, or for any other inquiries, please contact [copyright@amnesty.org](mailto:copyright@amnesty.org)

**AMNESTY  
INTERNATIONAL**



# CONTENTS

Introduction .....	5
Airstrikes on homes .....	7
Tripoli, 19 June 2011 .....	7
Zlitan, 4 August 2011 .....	9
Majer, 8 August 2011 .....	11
Sirte, 16 September 2011 .....	13
Sirte, 25 September 2011 .....	15
Applicable law .....	16
Conclusion .....	18
Endnotes .....	20





# INTRODUCTION



Survivor of NATO airstrikes in Majer on 8 August 2011, which killed 34 civilians © Amnesty International

On 19 March 2011 several member states of the North Atlantic Treaty Organization (NATO), including the USA, the UK and France, launched a military campaign with air and naval strikes against Colonel Mu'ammarr al-Gaddafi's forces.<sup>1</sup> The strikes were launched pursuant to UN Security Council (UNSC) resolution 1973 (2011) of 17 March 2011, which authorized member states "to take all necessary measures (...) to protect civilians and civilian populated areas under threat of attack in the Libyan Arab Jamahiriya" and introduced a "no fly zone" above Libya.<sup>2</sup> The National Transitional Council (NTC), the emerging new authority which by then controlled eastern Libya, had called for and fully supported the imposition of a no-fly-zone and international military action against al-Gaddafi's forces.

On 23 March 2011 allied forces announced they were in control of Libyan air space, after having disabled Libya's air force.<sup>3</sup> Also on 23 March 2011 NATO decided to enforce the no fly zone and on 31 March 2011 it assumed control of all military operations conducted by its member states inside and around Libya under the name "Operation Unified Protector".<sup>4</sup> According to NATO, the seven-month air and sea military campaign comprised more than 9,700 strike sorties and destroyed over 5,900 military targets.<sup>5</sup>

In the pursuit of its military objectives NATO appears to have made significant efforts to minimize the risk of causing civilian casualties, including by its use of precision guided

munitions, and in some cases by conducting strikes at night and issuing prior warnings to inhabitants of the areas targeted. NATO officials have repeatedly stated their commitment to making efforts to avoid harming civilians in the context of “Operation Unified Protector”.<sup>6</sup>

However, scores of Libyan civilians who did not directly participate in hostilities were killed and many more injured as a result of NATO strikes. Regrettably more than four months since the end of the military campaign, NATO has yet to address these incidents appropriately, including by establishing contact and providing information to the victims and their relatives about any investigation which might have been initiated.<sup>7</sup>

In January and February 2012 Amnesty International delegates visited several locations of NATO airstrikes in or near Tripoli, Zlitan, Sirte and Brega where civilian casualties had been reported. They inspected the damage and remains of munitions, interviewed survivors and other witnesses and obtained copies of death certificates of victims. Amnesty International has documented a total of 55 named civilians, including 16 children and 14 women, who were killed in airstrikes in Tripoli (5), Zlitan (3), Majer (34) Sirte (9) and Brega (4)<sup>8</sup>. Twenty other civilians were reportedly killed in NATO strikes in Brega (2), Surman (13) and Bani Walid (5) according to UN experts, international NGOs and journalists who also carried out on-site investigations.<sup>9</sup> Additional incidents of civilian casualties have been reported to have occurred in circumstances where it has been difficult to distinguish between combatants and civilians. For example, Amnesty International was told by residents in Sirte that on 15 September 2011, NATO strikes killed several members of al-Gaddafi forces in their two vehicles, as well as more than 40 civilians, most of whom had rushed to the scene after the first vehicle was struck.<sup>10</sup>



Ruins of the home of Ali Ali Hamed Gafez in Majer, struck on 8 August 2011 © Amnesty International

## AIRSTRIKES ON HOMES

Dozens of civilians have been killed in NATO airstrikes on private homes in residential and rural areas where Amnesty International, UN experts, other international NGOs and journalists found no evidence of military objectives at the strike locations at the time of the strikes. In one incident, in Majer (Near Zlitan, west of Misratah), NATO claimed that the site was deliberately struck as a legitimate target, but failed to provide evidence that the site was being used for any military purpose at the time it was targeted, in an attack that cost the lives of 34 civilians, including eight children and eight women. Amnesty International's investigations into this and other incidents indicate that private homes may have been struck by mistake - possibly due to wrong intelligence, erroneous GPS coordinates or weapons system malfunction. In another incident, in Sirte, relatives of an army officer, three women and four children, were killed in their home in an attack which seemingly targeted their visiting relative.

Amnesty International is concerned that insufficient precautions were taken in attacks that targeted possible combatants staying at civilian homes. When planning an attack against a combatant, knowledge of the presence of several civilians inside the targeted house should rule out proceeding, as such circumstances are likely to result in an attack that is disproportionate. NATO should have applied particular high standards of precautionary measures when targeting civilian homes.

### TRIPOLI, 19 JUNE 2011



*"I just want to know why my home was struck. NATO should be honest and tell the truth. I lost my son, my daughter and her husband and their two children and I want to know why this happened. Three families in our extended family lived in the house and now we are all stranded with nothing and nowhere to go. My brother has found somewhere to stay in another part of town and I am staying in an insalubrious house near here where we are sleeping on the bare floor in the cold and my little boy is getting sick from this".*  
Mukhtar al-Gharari to Amnesty International, 8 February 2012

Mukhtar al-Gharari in his destroyed home © Amnesty International



Home of Mukhtar al-Gharari, in the Souq al-Juma'a district of Tripoli, struck on 19 June 2011 © Amnesty International

On 19 June 2011 at about 1.30 am the home<sup>11</sup> of Mukhtar al-Gharari, located in a densely built-up area of the Souq al-Juma'a district of Tripoli, was struck, killing five family members and injuring eight others. Those killed are Mukhtar al-Gharari's 48-year-old son Faraj; his 38-year-old daughter Karima; her 44-year-old husband 'Abdallah Nimr Shihab; and their two children, Jomana and Khaled, aged two years and seven months respectively. Surviving members of the family told Amnesty International that 18 family members were sleeping in the house at the time of the attack and that those who were killed had been sleeping on the upper floor.

In a letter to the UN International Commission of Inquiry on Libya (ICIL) of 23 January 2012, NATO referred to the above incident and acknowledged the possibility that "an errant weapon had caused such casualties".<sup>12</sup>

ZLITAN, 4 AUGUST 2011



Mustafa Naji al-Morabit by the ruins of his home in Zlitan, struck on 4 August 2011 © Amnesty International

*"My family has been destroyed; I lost my two little boys and my wife, Ibtisam, who was also my best friend. It is really difficult to go on, to get up every day and face life; I tell myself that I must find the strength for my son, the only child I have left. He can't forget the horror of that day, when his mum and his little brothers were blown to bits. How can I help him to overcome this trauma? I myself can't cope and there is no one to turn to. No one from NATO or from the authorities has got in touch to ask what happened or to offer any explanation or even one word of apology. We are living a miserable life; we have nothing left, our home and everything in it were destroyed".* Mustafa Naji al-Morabit to Amnesty International, 30 January 2012

On 4 August 2011 at about 6.30am the home<sup>13</sup> of Mustafa Naji al-Morabit, in Zlitan west of Misratah, was struck, killing his 37-year-old wife, Ibtisam, and two of his three children, three-year-old Mo'taz and six-year-old Mohammed, as well as injuring his 60-year-old mother, Fatima 'Omar Mansur. According to information provided by Mustafa Naji al-Morabit to Amnesty International, a nearby house (approximately 50 meters away) had been used, until 1 August 2011, for meetings by military officers. Because they feared that the nearby house may be attacked by NATO, Mustafa Naji al-Morabit and his family had not been sleeping in



their own home. They remained in the house during the day as it was common belief that NATO strikes were carried out at night. As opposition fighters were closing in on the area, the owner of the nearby house and others who had been meeting there fled by 2 August 2011, leaving the front gate wide open – a sign that they were not going to return. The al-Morabit family decided that it was therefore safe to return to their home and slept in their home for the first time on the night between 2 and 3 August 2011. The night passed without incident and the nearby house remained abandoned and the al-Morabit family again slept in their home the following night (between 3 and 4 August 2011), but the house was struck in the early hours of that morning.



Ibtisam al-Morabit and her two children, Mohammed and Mo'taz © Amnesty International

In its 15 February 2012 letter to the ICIL, NATO referred to the above incident stating that the site was in fact struck on 4 August 2011, because it had been identified as “a senior regime commander’s command and control node located within a residential property”.<sup>14</sup> Based on its examination of the site, interviews with witnesses and satellite images the ICIL found that “evidence suggests NATO hit the wrong building (and) that those killed were civilians”.<sup>15</sup> Amnesty International reached the same conclusions.

## MAJER, 8 AUGUST 2011



Ali Ali Hamed Gafez by the ruins of his home in Majer, struck on 8 August 2011 © Amnesty International

*"I can't understand why they bombed my home. We are civilians and had nothing to do with the war, politics or any such things. I lost my daughter Hanan, who was due to get married after Ramadhan [after the end of August]; and my nephew's little girl, Arwa, who was always laughing and running around; and my brother's daughter, Salima, and her three little children, and her sister-in-law, Mansiya, and her little twin girls had come to visit from Benghazi and got stuck here because of the war; They were all killed together with other relatives, and my wife, Fathiya sustained a serious head injury and her left leg had to be amputated. She is in Germany for medical care. Maybe the injuries can heal eventually but the heart can't. My home became a graveyard for my family and until today neither NATO nor the NTC have even contacted us, not even to say sorry or to ask about the victims. We have been forgotten". Ali Ali Hamed Gafez to Amnesty International, 25 January 2012:*

**On the evening of 8 August 2011 two houses were struck in Majer (near Zlitan, west of Misratah).** Munitions remnants found at the site contain the marking: "for MK82 bomb", an air-delivered munition which, according to Amnesty International's information, was used by participating forces in Operation Unified Protector in numerous other strikes. According to members of the family who survived the attack, 34 civilians, including eight children and eight women, were killed and several were injured in three separate attacks.

The first strike was launched shortly after 11pm and killed five women and seven children in the home<sup>16</sup> of Ali Ali Hamed Gafez, where his immediate family and other relatives displaced by the conflict were staying. Those killed were: Hanan Ali Ali Hamed Gafez; Salima Mohammed and her three young children, Aballah Mohammed al-Raqiq, Ahmed Mohammed al-Raqiq and Hana Mohammed al-Raqiq; Mansiya Khalif Hiblu (who was nine-months pregnant with twins) and her two young twin daughters, Hiyam and Riham Ali Ali al-Raqiq; Su'ad Salim Sultan, a mother of five young children; Salima Ahmed al-Raqiq and her seven-year-old grandson Abdel Muhimen Fathi al-Jarushi; and two-year-old Arwa 'Atiya Jweily.

A second strike, shortly after, against a nearby house,<sup>17</sup> belonging to Mu'ammam 'Aquil Salah al-Ja'arud killed his wife, Hanan al-Ferjani, their nine-month old baby girl, Salma, his mother, Salma Mohammed Abu Hasina al-Ja'arud, and his sister Fatima 'Aquil Salah al-Ja'arud.



Munitions remnants found at the home of Ali Ali Hamed Gafez bearing the marking: "for use on MK82 bomb" © Amnesty International

A subsequent strike, shortly after, killed 18 men, including several family members, who rushed to the house of Mu'ammam 'Aquil Salah al-Ja'arud to rescue the victims. Surviving members of the Gafez and al-Ja'arud families told Amnesty International that they had not been aware of the presence of any persons or of any activities near their homes which might have explained the attacks.

According to NATO's Operational Media Update one military facility and one communication system were hit in the vicinity of Zlitan on 8 August 2011.<sup>18</sup> In a media interview several days after the incident, the commander of the NATO operation was quoted as justifying the strikes on allegedly legitimate targets "that contained mercenaries, a command centre and 4x4 vehicles modified with automatic weapons, rocket launchers or mortars". He further denied claims of the Libyan authorities that 85 civilians were killed in the incident, but acknowledged that he could not rule out that the strikes caused civilian casualties.<sup>19</sup>

In a 15 February 2012 letter to the ICIL, NATO referred to the above incident stating that "these buildings had been identified as being used as staging area for regime forces".<sup>20</sup> Based on its examination of the site as well as satellite images of the area during the period of attack, the ICIL found "no evidence (...) that the site had a military purpose."<sup>21</sup> Amnesty International reached the same conclusions.

### SIRTE, 16 SEPTEMBER 2011



Apartment building struck on 16 September in Sirte © Amnesty International

On 16 September 2011, at about 6pm several strikes were carried out on a large apartment building, comprising some 90 apartments, in Sirte.<sup>22</sup> At least two residents were killed in two

apartments in different parts of the building. 'Aisha Abdul Jalil al-Mazughi, a mother of two, was killed as she, her husband, Mahmoud Zarruq Masa'ud, and their two young daughters were in their apartment on the fifth floor of the building. The two girls and their father sustained light injuries. Another resident, 27-year-old 'Ali 'Omar Mohammed Suleiman,



Apartment building struck on 16 September in Sirte © Amnesty International

whose family lived in an apartment on the third floor, was killed in the strikes. His father, 'Omar Mohammed Suleiman, told Amnesty International that it is not clear whether other residents were killed in the strike, as it has not been possible to establish how many residents were in the building at the time of the strikes. Many residents had fled the building in the days prior to the strike and the others, as well as many of the city's inhabitants, fled after the attack (the city remained under siege until the capture and killing of Colonel al-Gaddafi in the town's outskirts on 20 October 2011). Most residents had still not returned by February 2012, when Amnesty International visited the area. The bodies of the two victims were only recovered in mid-January 2012.

**SIRTE, 25 SEPTEMBER 2011**



Home of Salem Diyab in Sirte, where four children and three women were killed on 25 September 2011 © Amnesty International

On 25 September 2011 at about 4am, an airstrike against the home<sup>23</sup> of Salem Diyab, in Sirte, killed four children and three women: one-year-old Diyab 'Amrane and his 27-year-old mother Hanan 'Abdel Majid 'Amrane; two-year-old Ghurfran and her 75-year-old grandmother Marjuha Salem Zarruq; nine-year-old Ahmed 'Ali Diyab; 12-year-old Heba Mosbah Diyab; and 32-year old Intissar Ahmed Diyab. It is not clear whether another relative, Mosbah Ahmed Diyab, a Brigadier-General in al-Gaddafi's forces who lived in another area of the city, was in the house at the time of the attack. According to surviving relatives he had visited earlier that evening and may or may not have been in the house at the time of the NATO attack. If this civilian house was targeted because it was believed that Mosbah Ahmed Diyab was present,<sup>24</sup> NATO should have made sure it had information on the presence of any civilians there. The fact that at least seven civilians were in the home should have been reason enough to cancel or delay the attack out of concern that it would have been disproportionate.

## APPLICABLE LAW

NATO's military actions in Libya had to comply with the rules of international humanitarian law (IHL) applicable in international armed conflict.<sup>25</sup> IHL contains the rules and principles that seek to protect anyone who is not directly participating in hostilities: notably civilians and anyone, including those who were previously participating in hostilities, who are wounded, have surrendered or been captured, or otherwise incapacitated. It sets out standards of humane conduct and limits the means and methods of conducting military operations. Its central purpose is to limit, to the extent feasible, human suffering in times of armed conflict.

The four Geneva Conventions of 1949 and their two Additional Protocols of 1977 are among the principal IHL instruments. Many of the specific rules included in these treaties form part of customary IHL and are thus binding on all parties to any type of armed conflict, including on armed groups. Violations of many of these rules can constitute war crimes. All of the principles and rules cited in this briefing are part of customary international law and are binding on all parties to an armed conflict.

The following fundamental principles of IHL (which have been codified in Protocol I of 1977 as specific rules governing the conduct of hostilities) appear particularly relevant for assessing the civilian casualties caused by NATO strikes, namely:

(1) The *principle of distinction* requires that the parties to a conflict "shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives" (Article 48, Protocol I). Article 51(2) spells out unambiguously that the "civilian population as such as well as individual civilians, shall not be the object of attack." In addition to direct attacks on civilians, IHL also prohibits indiscriminate attacks, which are those "of a nature to strike military objectives and civilians or civilian objects without distinctions," (Article 51(4), Protocol I).

(2) The *principle of proportionality* prohibits disproportionate attacks which are those "which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated" (Article 51(5), Protocol I).

(3) The *principle of precaution* requires that "constant care must be taken to spare the civilian population, civilians and civilian objects" (Article 57(1), Protocol I); and that "all feasible precautions must be taken to avoid, and in any event to minimize, incidental loss of civilian life, injury to civilians and damage to civilian objects" (Rule 15, Customary IHL Study, Vol I; Rules, ICRC).

Article 57(2) of Protocol I specifies necessary precautions including that: everything feasible must be done to verify that targets are military objectives; means and methods of attack must be selected with a view to minimizing harm to civilians and civilian objects;<sup>26</sup> the proportionality of a planned attack must be assessed; an attack must be cancelled or

suspended if it becomes apparent it is wrongly-directed or disproportionate; and effective advance warning must be given of attacks which may affect the civilian population, unless circumstances do not permit. Where it is unclear whether an object is used for military purposes, "it shall be presumed not to be so used." (Article 52(3), Protocol I).

Carrying out direct attacks on civilians, indiscriminate attacks resulting in death or injury to civilians, or damage to civilian objects, or a disproportionate attacks (i.e. knowing that the attack will cause excessive incidental civilian loss, injury or damage in relation to the concrete and direct military advantage anticipated) constitute war crimes. (Rule 156, Customary International Humanitarian Law, Volume I: Rules, ICRC).





## CONCLUSION

### **NATO must be transparent about investigations and provide adequate reparations.**

Amnesty International is concerned that no information has been made available to the families of civilians killed and those injured in NATO strikes about any investigations which may have been carried out into the incidents which resulted in death and injury.

On 5 March 2012 Amnesty International wrote to NATO requesting information on any steps taken to investigate the incidents documented above and any other reports where it appears that NATO attacks resulted in the death of, and injury to, civilians. Further the organization called on NATO, if these investigations have not yet taken place, to take all necessary measures to ensure that independent, impartial and thorough investigations are conducted without further delay, that the findings be publicly disclosed, and that adequate reparation be afforded to all victims of any violations and their families.

On 13 March 2012 NATO responded to Amnesty International stating that "While NATO did everything possible to minimize the risk to civilians, in a complex military operation that risk cannot be reduced to zero. NATO deeply regrets any harm that may have been caused by those air strikes". The letter did not provide any information about the specific attacks raised by Amnesty International in its letters or details of any investigation into deaths of civilians. Furthermore, NATO appeared to suggest that it had limited means and responsibility to conduct investigations into reports of civilian casualties caused in NATO strikes. The letter states that NATO "has had no mandate to conduct any activities in Libya following OUP's (Operation Unified Protector) termination on 31 October 2011". However, NATO did not take any steps to conduct on site investigations into reports of death and injury of civilians resulting from its strikes in areas which had come under the control of the new Libyan authorities (the NTC) prior to 31 October 2011 and which were thus safely accessible. All the survivors and relatives of those killed in NATO strikes interviewed by Amnesty International said that they had never been contacted either by NATO or by the Libyan NTC.

Moreover, the end of its mandate to conduct operations in Libya does not prevent NATO from investigating the conduct of its own forces, notably the bases on which orders were given to launch specific attacks, the measures taken to verify the accuracy of the information it received about the targets and the precautions taken to minimize the potential risk to civilians.

In its letter, NATO also contends that the Libyan authorities "have the primary responsibility for responding to any possible local request for investigations and claims". However, the responsibility of the Libyan authorities to conduct investigations into suspected violations that occurred in its jurisdiction does not absolve NATO members of their obligation to redress any violations of IHL that its forces have committed, including by paying compensation to the victims as required by Article 91 of Protocol I. NATO cannot fulfil this obligation without properly investigating attacks in which civilians were killed or injured.

NATO should clarify which measures it took to ensure adherence to the rules of IHL in carrying out these particular attacks, particularly with regard to distinction, proportionality and precaution. Wherever sufficient admissible evidence of any violations of IHL is found, those responsible should be brought to justice.

The NTC, for its part, should also promptly initiate its own investigation into all reported cases of killings and injury to civilians which resulted from NATO strike so as to ensure justice and reparation for victims and their families.

The stated purpose of NATO's military operations in Libya, which were carried out at the request of and with the full support of the NTC, was to protect the civilian population from grave human rights violations which were being perpetrated by the former regime with impunity. It is imperative that both NATO and the NTC take the necessary measures to ensure that there is no impunity for any violation of international humanitarian law which may have been perpetrated in the course of NATO's operations. To this end the necessary investigations must be carried out without further delay.

**Amnesty International calls on NATO to:**

- Ensure that prompt, independent, impartial and thorough investigations are conducted into any allegations of civilian casualties in NATO strikes, including in the cases mentioned in this briefing;
- Ensure that prompt, independent, impartial and thorough investigations are conducted into any allegations which may arise of serious violations of international law by participants in Operation Unified Protector and that the findings be publicly disclosed, and wherever there is sufficient admissible evidence, ensure that suspects are prosecuted in proceedings that fully comply with international fair trial standards;
- Ensure that victims of violations of international humanitarian law, and their families, receive full reparations.

**Amnesty International calls on the NTC to:**

- Ensure that prompt, independent, impartial and thorough investigations are conducted into any allegations of civilian casualties in NATO strikes, including in the cases mentioned in this briefing;
- Ensure that victims of violations of international humanitarian law, and their families, receive full reparations.

## ENDNOTES

---

- <sup>1</sup> French Ministry of Defence: Libya: French air operations begin (<http://www.defense.gouv.fr/english/content/view/full/111943>).
- <sup>2</sup> UNSC resolution 1973 (2011) of 17 March 2011 followed UNSC resolution 1970 (2011) of 26 January 2011; the latter referred the situation in Libya to the International Criminal Court (ICC) and imposed an asset freeze and travel ban on Colonel al-Gaddafi and his close associates as well as an arms embargo on the country.
- <sup>3</sup> BBC, "Libya crisis: Gaddafi's air force 'unable to fight'", 23 March 2011 ([www.bbc.co.uk/news/world-africa-12837330](http://www.bbc.co.uk/news/world-africa-12837330)).
- <sup>4</sup> NATO, NATO Secretary General's statement on no-fly zone over Libya, 23 March 2011 ([http://www.nato.int/cps/en/natolive/news\\_71722.htm?mode=pressrelease](http://www.nato.int/cps/en/natolive/news_71722.htm?mode=pressrelease)); NATO, NATO takes command in Libya air operations ([http://www.nato.int/cps/en/natolive/news\\_71867.htm?mode=pressrelease](http://www.nato.int/cps/en/natolive/news_71867.htm?mode=pressrelease)).
- <sup>5</sup> "Strike sorties are intended to identify and engage appropriate targets, but do not necessarily deploy munitions each time." See NATO, Operation Unified Protector, "Final Mission Stats", 2 November 2011 ([www.nato.int/nato\\_static/assets/pdf/pdf\\_2011\\_11/20111108\\_111107-factsheet\\_up\\_factsfigures\\_en.pdf](http://www.nato.int/nato_static/assets/pdf/pdf_2011_11/20111108_111107-factsheet_up_factsfigures_en.pdf)).
- <sup>6</sup> Lieutenant General Charles Bouchard, Commander of NATO Military Operations in Libya stated on 31 March 2011: "NATO aviators and controllers will do everything they can to deny any use of air power against civilians. They will do so with care and precision and to avoid harming the people of Libya." See NATO, "Press Briefing", 31 March 2011: [www.nato.int/cps/en/natolive/opinions\\_71897.htm?selectedLocale=en](http://www.nato.int/cps/en/natolive/opinions_71897.htm?selectedLocale=en)
- <sup>7</sup> The NATO operation ended on 31 October 2011. See: NATO, NATO Secretary General statement on end of Libya mission, 28 October 2011 ([http://www.nato.int/cps/en/natolive/news\\_80052.htm?mode=pressrelease](http://www.nato.int/cps/en/natolive/news_80052.htm?mode=pressrelease)).
- <sup>8</sup> A reported NATO strike on an ambulance on 1 April 2011 in Brega which caused the deaths of four civilians is not detailed in this report but the case has been raised with NATO.
- <sup>9</sup> UN Human Rights Council, *Report of the International Commission of Inquiry on Libya*, 2 March 2012, Annex I, pp167-168 ([http://reliefweb.int/sites/reliefweb.int/files/resources/A\\_HRC\\_19\\_68\\_en%201.pdf](http://reliefweb.int/sites/reliefweb.int/files/resources/A_HRC_19_68_en%201.pdf)); Chivers, C J and Schmitt, Eric, "In Strikes on Libya by NATO, an Unspoken Civilian Toll", *The New York Times*, 17 December 2011 ([www.nytimes.com/2011/12/18/world/africa/scores-of-unintended-casualties-in-nato-war-in-libya.html?pagewanted=all](http://www.nytimes.com/2011/12/18/world/africa/scores-of-unintended-casualties-in-nato-war-in-libya.html?pagewanted=all)); Campaign for Innocent Civilians in Conflict (CIVIC) "Libya: NATO's time drawing to a close, but protection work unfinished", 27 October 2011: [www.civicworldwide.org/healing-the-wounds/libya](http://www.civicworldwide.org/healing-the-wounds/libya)
- <sup>10</sup> See also: Arab Organization for Human Rights, Palestinian Centre for Human Rights and International Legal Assistance Consortium, *Report of the Independent Civil Society Fact-Finding Mission to Libya*, January 2012, pp44-46: [www.pchrgaza.org/files/2012/FFM\\_Libya-Report.pdf](http://www.pchrgaza.org/files/2012/FFM_Libya-Report.pdf)
- <sup>11</sup> GPS coordinates: N 32° 49' 56" – E 013° 5' 7".

---

<sup>12</sup> UN Human Rights Council, *Report of the International Commission of Inquiry on Libya*, Annex II. Amnesty International wrote to NATO on 2 August 2011 and 5 March 2012 requesting information regarding the NATO airstrikes documented in this report. NATO's responses did not provide any further information on such incidents and in its response to Amnesty International of 13 March 2012 NATO referred to its answers given to the ICIL as published in Annex II of the *Report of the International Commission of Inquiry on Libya*.

<sup>13</sup> GPS coordinates of location: N 32° 28' 22.75" – E 014° 29' 21.24".

<sup>14</sup> *Report of the International Commission of Inquiry on Libya*, Annex II.

<sup>15</sup> *Report of the International Commission of Inquiry on Libya*, Annex I, p167.

<sup>16</sup> GPS coordinates of location: N 32° 22' 27.35" – E 014° 34' 30.03".

<sup>17</sup> GPS coordinates of location: N 32° 22' 24.18" – E 014° 34' 42.94".

<sup>18</sup> NATO, "Operational media update for 8 August", 8 August 2011 ([www.nato.int/nato\\_static/assets/pdf/pdf\\_2011\\_08/20110809\\_110809-oup-update.pdf](http://www.nato.int/nato_static/assets/pdf/pdf_2011_08/20110809_110809-oup-update.pdf))

<sup>19</sup> Agence France-Presse (AFP), "Gadhafi Unable to Launch Offensive: NATO commander", 11 August 2011 ([www.defensenews.com/print/article/20110811/DEFSECT01/108110306/Gadhafi-Unable-Launch-Offensive-NATO](http://www.defensenews.com/print/article/20110811/DEFSECT01/108110306/Gadhafi-Unable-Launch-Offensive-NATO))

<sup>20</sup> *Report of the International Commission of Inquiry on Libya*, Annex II.

<sup>21</sup> *Report of the International Commission of Inquiry on Libya*, Annex I, p165.

<sup>22</sup> GPS coordinates of location: N 31° 12' 25.64" – E 016° 34' 58.71"

<sup>23</sup> GPS coordinates of location: N 31° 22' 20.83" – E 016° 35' 39.28"

<sup>24</sup> NATO stated in a letter of 13 March 2012 to Amnesty International that "As explicitly directed by the North Atlantic Council, no civilians, and no specific individual, civilian or military, were ever intentionally targeted in our operation".

<sup>25</sup> For further details and referencing of applicable IHL rules see Amnesty International, *The Battle for Libya: Killings, Disappearances and Torture* (Index: MDE 19/025/2011), 13 September 2011, pp27-30 ([www.amnesty.org/en/library/info/MDE19/025/2011/en](http://www.amnesty.org/en/library/info/MDE19/025/2011/en))

<sup>26</sup> Article 52(1) of the 1977 Additional Protocol I (Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts -Protocol I, 8 June 1977) defines civilian objects as "all objects which are not military objectives".



[www.amnesty.org](http://www.amnesty.org)



HUMAN  
RIGHTS  
WATCH

# Unacknowledged Deaths

Civilian Casualties in NATO's Air Campaign in Libya





## Summary and Recommendations





# UNACKNOWLEDGED DEATHS

Civilian Casualties in NATO's Air Campaign in Libya

## NATO AIR STRIKES INVESTIGATED BY HUMAN RIGHTS WATCH

### TRIPOLI

An air strike hit the al-Gherari family home on June 19, 2011, killing five people. NATO conceded a “weapons system failure.”

### SORMAN

Multiple air strikes hit the large, walled farm of the el-Hamedi family, headed by a former member of Gaddafi’s Revolutionary Council, on June 20, 2011. The strikes killed eight family members and five staff.

### ZLITEN

An air strike hit the home of Mustafa al-Morabit on August 4, 2011, killing his wife and two of their children.

### MAJER

Multiple air strikes hit the compounds of the Gafez and al-Jarud families on August 8, 2011, killing 34 people.

### BANI WALID

Air strikes hit two houses owned by the Jfara family, on the night of August 29 or early morning of August 30, 2011, killing five members of the family, including a nine-year-old girl.

### SIRTE

A series of air strikes hit the seven-story Imarat al-Tameen apartment building on September 16, 2011. Many of the apartments were abandoned but one man and one woman were killed.

### AL-GURDABIYA

An air strike hit the Gidwar family home on September 23, 2011, killing one man and two girls, and wounding at least four people.

### SIRTE

An air strike struck the home of the Dyab family on September 25, 2011, killing three women and four children, and possibly Brig. Gen. Musbah Dyab.

EGYPT

*“I just need an answer from NATO:  
Why did you destroy my home  
and kill my family?”*

FAIZ FATHI JFARA, BANI WALID, JANUARY 23, 2012

**This report documents civilian casualties in the air campaign by the North Atlantic Treaty Organization (NATO) in Libya in 2011. NATO says it took extensive measures to minimize civilian harm, and those measures seem to have had a positive effect: the number of civilian deaths in Libya from NATO strikes was low given the extent of the bombing and duration of the campaign. Nevertheless, NATO air strikes killed at least 72 civilians, one-third of them children under age 18. To date, NATO has failed to acknowledge these casualties or to examine how and why they occurred.**



International humanitarian law, also known as the laws of war, requires that all attacks be directed at military targets. Civilians are immune from deliberate attack. While not all civilian casualties indicate a violation of the laws of war, attacks cannot be indiscriminate or cause disproportionate civilian loss.

In some cases, the presence of a lawful military target at NATO bombing sites where civilians died is in doubt. Extensive field investigations by Human Rights Watch uncovered no or only possible indications of Libyan government forces, such as military weaponry, hardware or personnel, or communications equipment, at seven of eight



(above) A NATO air strike hit the Gidwar family home in al-Gurdabiya, east of Sirte, on September 23, 2011, killing an elderly man and two girls aged 8 and 10.

(right) Abdulhamid Gidwar, 15, lost his left leg below the knee when the NATO air strike hit his family's house.

© 2012 Sidney Kwiream/Human Rights Watch



NATO air strikes struck the Imarat al-Tameen apartment complex in downtown Sirte multiple times on September 16, 2011, killing one man and one pregnant woman.

© 2012 Sidney Kwiram/Human Rights Watch

sites. The circumstances raise serious questions about whether these areas struck were valid military targets at the time of attack.

NATO contends that all of its targets were military objectives, and thus subject to attack, but it has not provided adequate information to support those claims, despite repeated requests from Human Rights Watch, a United Nations Commission of Inquiry, and others.

International humanitarian law obligates a party to an armed conflict to investigate credible allegations of serious laws-of-war violations. Such an investigation would entail a determination as to whether the target was a valid military objective and whether the attacking force took all feasible precautions to minimize civilian casualties. NATO should make the results of its investigations public. Where NATO believes it has conducted an attack resulting in civilian casualties in accordance with the laws of war but evidence of

a military objective is in doubt, it should make public information on the target.

As required under international law, in the event of wrongdoing, NATO should provide prompt and suitable compensation to families for civilian deaths and injuries and loss of property. Where possible, NATO should also investigate incidents resulting in high civilian casualties as part of efforts to minimize harm to civilians in future campaigns.

For this report Human Rights Watch investigated eight NATO air strikes hitting residential homes in which 28 men, 24 children, and 20 women lost their lives. Dozens of other civilians were wounded.

Based on extensive field investigations throughout Libya from August 2011 to April 2012, the report looks at all sites known to Human Rights Watch in which NATO strikes killed civilians. Strikes that resulted in no civilian fatalities—though civilians were wounded or property destroyed—were not included. Altogether, NATO conducted roughly 9,700 strike sorties and dropped over 7,700 precision-guided bombs during the seven-month campaign.

To research these eight cases, Human Rights Watch visited the sites, in some cases multiple times, inspected weapons



(above) Omar Emhamid Suwaysi lost his son, Ali Omar Suwaysi, in a NATO air strike on the Imarat al-Tameen apartment complex in Sirte on September 16, 2011. The writing says “The grave of the martyr, Ali Omar Suwaysi.”

© 2012 Sidney Kwiram/Human Rights Watch

(right) Dyab Omran, 15 months old, was killed with three other children and three women when a NATO air strike struck the Dyab family home in Sirte on September 25, 2011.

Photo courtesy of the Dyab family



debris, interviewed witnesses, examined medical reports and death certificates, reviewed satellite imagery, and collected photographs of the wounded and dead. Detailed questions were submitted to NATO and its member states who participated in the campaign, including in a meeting with senior NATO officials involved in targeting.

In two of the eight incidents, Human Rights Watch was unable to find any evidence of a valid military target. That is, in one or more visits to each of these bombing sites Human Rights Watch found no remains of weapons, military hardware, or communications equipment to suggest military



A NATO air strike hit the Dyab family home in Sirte on September 25, 2011, killing three women and four children. A military officer may have also been killed.  
© 2012 Sidney Kwiram/Human Rights Watch







(above) A NATO air strike hit the al-Morabit house in Zliten on August 4, 2011, killing Ibtessam Ali al-Barbar, 37, and her children Moatez and Mohamed.

© 2011 Fred Abrahams/Human Rights Watch

(right) Mustafa al-Morabit and his two children, Moatez, 3, and Mohamed, 5.

*Photo courtesy of the al-Morabit family*



deployment or activity at the site. At five of the sites, Human Rights Watch found only possible signs of a military presence, such as a military-style shirt or coat amidst the rubble. In the eighth incident, a person believed to be a high-ranking military commander may have been killed along with seven civilians.

In all of these incidents, separate interviews with survivors and other witnesses provided details of the situation at the time of the strike, but no indication of nearby military activity. Satellite imagery taken before the strikes at five of the sites revealed no signs of military presence that would have rendered the areas struck as lawful military targets.

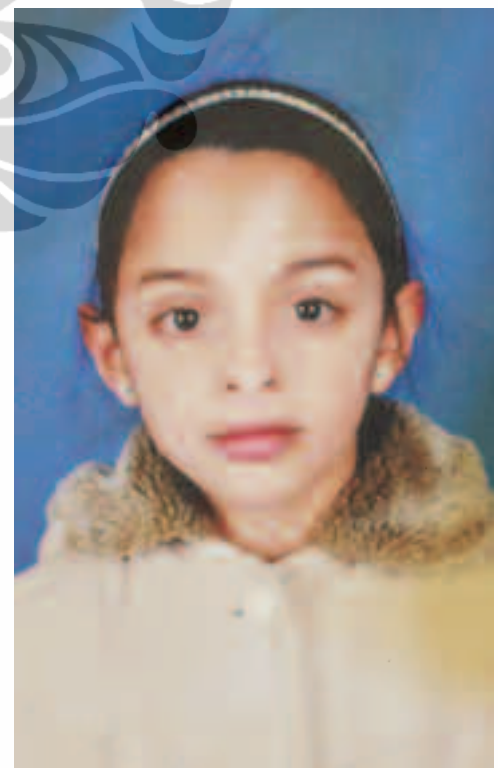


(above) Farid Fathi Jfara pointing to where family members found the body of Farah Jfara, 9, killed with four relatives in a NATO air strike on August 29 or 30, 2011 in Bani Walid.

© 2012 Sidney Kwiram/  
Human Rights Watch

(right) Fadwa Fathi Jfara, 30, and Farah Jfara, 9 (far right), were killed when a NATO air strike struck their home in Bani Walid on August 29 or 30, 2011.

Photo courtesy of the Jfara family





A tail fin from a 500 pound laser-guided bomb (GBU-12) found in Majer, where NATO air strikes killed 34 civilians and wounded more than 30 on August 8, 2011.

© 2011 Fred Abrahams/Human Rights Watch

Human Rights Watch recognizes that places bombed could have been cleaned up by Gaddafi forces and local residents, who would have an interest in denying the military nature of a bombing site. While fighting was ongoing, the Gaddafi government did use several sites for propaganda purposes, adding “evidence” of civilian life and possibly removing military material. One incident investigated by Human Rights Watch but not included below was clearly a valid military target, and the victims were combatants. However, the incidents in the report raise sufficient questions about the lawfulness of the strikes that Human Rights Watch believes NATO should provide more information on the alleged targets or conduct an investigation into the lawfulness of the attack.

NATO told Human Rights Watch that it “did everything possible to minimize risks to civilians,” including the exclusive use of precision-guided munitions. The alliance’s strikes were on legitimate military targets, NATO said, and “no

target was approved or struck if we had any reason to believe that civilians would be at risk.”

The most serious incident in this report occurred in the rural village of Majer, south of the town of Zliten, 160 kilometers east of Tripoli, on the night of August 8, 2011, killing 34 people and wounding more than 30. NATO bombs hit two family compounds, one of them hosting dozens of displaced persons. This attack was followed by another bomb that struck outside one of the compounds as neighbors and relatives were retrieving the wounded and dead. NATO says the compounds were a “staging base and military accommodation” for Gaddafi forces but it has not provided specific information to evaluate that claim. During four visits to Majer, including one the day after the attack, Human Rights Watch found no evidence of military activity at either of the compounds. A single military-style shirt was in the rubble of one of the three houses that were struck.

Of particular concern is the second attack outside one of the compounds while people were searching for victims, which killed 18 men. At the site Human Rights Watch found remnants of GBU-12 laser-guided bombs, which have an infrared system to guide the bomb to its target. As such, the pilot may have seen people around the wreckage of the house as they were



trying to rescue survivors. If the pilot could not determine that those people were valid military targets, then all feasible steps should have been taken to cancel or suspend the attack.

In the town of Zliten on August 4, 2011 NATO ordnance struck the home of Mustafa al-Morabit, killing his wife and two of their three children. Human Rights Watch found no signs of military activity at the house one week after the attack, and al-Morabit and his neighbors said the home had served no military purpose. Al-Morabit believed the intended target was his neighbor's home, which he said Gaddafi forces had used and vacated two days before the attack. NATO said it had hit a "command and control node" but provided no details.

On June 19 a NATO bomb hit a family home in a residential neighborhood of Tripoli, killing five civilians and wounding at least eight. This is the only case in which NATO admitted a mistake, saying it missed its intended target due to a "weapons system failure which may have caused a number of civilian casualties." NATO has not explained the cause of the failure, beyond "laser guidance problems," or taken action on behalf of the victims.

On August 29 or 30 in Bani Walid, 170 kilometers southeast of Tripoli, a NATO strike hit two homes and killed five members

(above) The funeral in Majer for 34 victims of a NATO air strike on two rural compounds on August 8, 2011.

© 2012 Sidney Kwiram/Human Rights Watch

of the Jfara family—two men, two women, and a nine-year-old girl. Family members and witnesses said there was no military activity in the vicinity at the time. At the site, Human Rights Watch found remnants of a GBU-12 laser-guided bomb and a single military-style winter coat. NATO has not provided details of the strike but said that on August 29 it struck a "major command and control node which was reliant on non-traditional/informal methods to carry out that function."

On September 25, 2011, NATO struck the home in Sirte, 450 kilometers east of Tripoli, of the brother of a senior military officer, Brig. Gen. Musbah Ahmed Dyab, who some family members say was killed in the attack. Three women and four children from the family lost their lives in the strike. While General Dyab was a legitimate military target, NATO has not provided information on the intended target of the attack. NATO said it had a policy of not targeting individuals. At the site Human Rights Watch found several empty ammunition boxes for small arms, which the family said had not been there at the time of the strike.



(above) A NATO air strike on the al-Gherari house in Tripoli on June 19, 2011 killed five members of the family. NATO said the strike was due to a “weapons system failure.”

© 2011 Fred Abrahams/Human Rights Watch

Human Rights Watch’s findings are consistent with the reporting of others who have examined civilian deaths in Libya resulting from NATO’s air campaign, namely the Commission of Inquiry appointed by the United Nations Human Rights Council and the nongovernmental organizations Amnesty International and the Campaign for Innocent Victims in Conflict (CIVIC). The New York Times published a lengthy investigative article that included six sites with civilian deaths, all of which are covered in this report.

In its March 2012 report, the UN Commission of Inquiry documented 60 civilian deaths and 55 injuries at five sites where the commission found no evidence of military activity. The commission called on NATO to conduct an investigation to determine the number of civilian casualties and to review its procedures.

Human Rights Watch, along with the UN Commission of Inquiry and others, repeatedly sought information from NATO

about the precautions the alliance took to protect civilians and specific incidents where civilian deaths occurred. NATO was forthcoming on the former, explaining its strict target selection and review process and its exclusive use of precision-guided munitions. However, NATO has not provided sufficient information on the intended targets in individual cases to demonstrate that the strikes documented in this report were legally justified.

NATO has also not conducted field inquiries into any civilian casualties that resulted from its strikes or included civilian casualties in an internal lessons learned report. NATO says it has no mandate to conduct investigations in Libya after the conflict, but it will “cooperate fully” with efforts by the Libyan authorities to review incidents.

The Libyan government has taken initial steps by forming an inter-ministerial task force to investigate civilian deaths caused by NATO. Given that NATO played a critical role in the defeat of the Gaddafi government, however, the task force is likely to avoid serious criticism of NATO’s air campaign. As of late April, the task force had apparently not begun its work.

International humanitarian law holds a state responsible for attacks carried out by its forces or by forces acting under its instructions, directions, or control. Fifteen countries partic-



Posters of victims of NATO air strikes seen on June 20, 2011 outside the large el-Hamedi family farm in Sorman. A guard walks in the background.

© 2011 Sidney Kwiram/Human Rights Watch

ipated in the NATO air campaign, with eight of them reportedly dropping ordnance: Belgium, Canada, Denmark, France, Italy, Norway, the United Kingdom, and the United States. Any particular attack likely would have involved personnel and possible command authority from militaries beyond those of the aircraft used in the attack. To date, NATO has been unwilling to provide information on the nationality of the aircraft involved in specific operations, including the incidents in this report.

Human Rights Watch also sought information about the incidents in this report from the governments of the eight countries that dropped ordnance. Seven of them replied with an identical letter, referring questions to NATO. Italy did not respond.

NATO had a mandate from the UN Security Council to protect civilians in Libya and the relatively few civilian casualties during a seven-month campaign attests to the care

NATO took in minimizing civilian harm. However, the low number of civilian casualties does not obviate the need to provide information that would demonstrate a legitimate military target in circumstances where there have been civilian casualties and to make that information public. NATO is also obligated to investigate credible allegations of laws-of-war violations, appropriately punish those responsible, and provide compensation to victims of unlawful attacks.

At the same time, some governments that have been critical of NATO's air campaign in Libya have exaggerated claims of civilian deaths in NATO air strikes. Such claims have no basis in fact and serve to politicize the issue of civilian casualties, rather than encourage prompt and impartial investigations, and bring about changes to improve civilian protection.

# RECOMMENDATIONS

## TO NATO

---

- Conduct transparent and impartial investigations into credible allegations of laws-of-war violations during NATO's air war in Libya. Make public the findings and include recommendations for disciplinary measures or criminal prosecutions where violations are found;
- Make public information on intended military targets in air strikes in which civilians were wounded or killed;
- Conduct field investigations into air strikes in which there were high numbers of civilian casualties even where there was no evidence suggesting violations of the laws of war;
- Provide prompt and appropriate compensation to families suffering deaths, injuries, and property damage resulting from wrongful NATO strikes;
- Consider providing assistance to families in Libya that have suffered harm from NATO air strikes in accordance with NATO's "Non-Binding Guidelines for Payments in Combat-Related Cases of Civilian Casualties or Damage to Civilian Property";
- Conduct a general investigation into NATO strikes that resulted in civilian casualties with the aim of minimizing civilian casualties in future armed conflicts.
- Brief the UN Security Council, which provided the mandate for NATO's military operation in Libya through resolution 1973, on the findings of the investigation into civilian casualties caused by NATO air strikes.

## TO PARTICIPATING STATES OF NATO'S LIBYA OPERATION

---

- Conduct transparent and impartial investigations into credible allegations of laws-of-war violations in Libya involving your national forces. Make public the findings and include recommendations for disciplinary measures or criminal prosecutions where violations are found;
- Provide prompt and appropriate compensation to families suffering deaths, injuries, and property damage resulting from wrongful strikes committed by your national forces;
- Consider providing assistance to families in Libya that have suffered harm from air strikes committed by your national forces in accordance with NATO's "Non-Binding Guidelines for Payments in Combat-Related Cases of Civilian Casualties or Damage to Civilian Property."

## TO THE LIBYAN TRANSITIONAL GOVERNMENT

---

- Request that NATO and countries that participated in NATO's Libya operations provide detailed information about intended military targets of air strikes in which civilians died. Make that information publicly available and press for compensation where there is a finding of wrongdoing.





# Unacknowledged Deaths

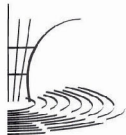
## Civilian Casualties in NATO's Air Campaign in Libya

This report documents civilian casualties in the air campaign by the North Atlantic Treaty Organization (NATO) in Libya in 2011. NATO says it took extensive measures to minimize civilian harm, and those measures seem to have had a positive effect: the number of civilian deaths in Libya from NATO strikes was low given the extent of the bombing and duration of the military campaign. Nevertheless, NATO air strikes killed at least 72 civilians, one-third of them children under age 18. To date, NATO has failed to acknowledge these casualties or to examine how and why they occurred.



*Relatives and neighbors search for survivors in the rubble of the Gafez family home in Majer on August 9, 2011, one day after NATO strikes on this and another compound killed 34 people and wounded more than 30.*

*© 2011 Sidney Kwiram/ Human Rights Watch*



## EMBARGO UNTIL 02h00 CET, THURSDAY 29 MARCH

Provisional version – as adopted in committee on 29.03.2012

# Lives lost in the Mediterranean Sea: who is responsible?

## Report

Committee on Migration, Refugees and Displaced Persons

Rapporteur: Ms Tineke STRIK, Netherlands, Socialist Group

## Summary

The starting point for this report is that at least 1 500 people are known to have lost their lives attempting to cross the Mediterranean in 2011. This report however focuses on one particularly harrowing case in which a small boat left Tripoli with 72 people on board and after two weeks at sea drifted back to Libya with only nine survivors. No one went to the aid of this boat, despite a distress call logged by the Italian Maritime Rescue Coordination Centre, which pinpointed the boat's position. There were also a number of alleged direct contacts between the boat in distress and other vessels, including a helicopter that dropped biscuits and water, but never returned, two fishing vessels, both of which refused to provide assistance, and a large military vessel which came into close contact with the boat, but ignored obvious distress signals.

From this story, a catalogue of failures became apparent: the Libyan authorities failed to maintain responsibility for their Search and Rescue zone, the Italian and Maltese Maritime Rescue Coordination Centres failed to launch any search and rescue operation, and NATO failed to react to the distress calls, even though there were military vessels under its control in the boat's vicinity when the distress call was sent (including the *Mendez Núñez* which was estimated to have been 11 miles away although this distance is disputed by Spain) The flag States of vessels close to the boat also failed to rescue the people in distress. Furthermore, two unidentified commercial fishing vessels also failed to respond to the direct calls for assistance from the boat in distress. Alongside these failures, a number of shortcomings contributed to the distress calls not being answered, including gaps in the maritime legal framework and a failure by NATO and the individual States militarily involved in Libya to anticipate adequately for an exodus of asylum seekers and refugees. Perhaps of most concern in this case is the alleged failure of the helicopter and the naval vessel to go to the aid of the boat in distress, regardless of whether these were under national command or the command of NATO.

In this case, many opportunities for saving the lives of the persons on board the boat were lost. A series of recommendations are made in the draft resolution to reduce the likelihood of similar tragedies in the future. There is also a request for further information from NATO and relevant member States to identify or carry out an investigation into the identity of the helicopter and ship that allegedly failed to go to the rescue of the boat in distress.

## A. Draft resolution

1. In 2011, at least 1 500 persons lost their lives attempting to cross the Mediterranean Sea.
2. One tragedy, revealed by the British newspaper *The Guardian*, involved a small rubber boat which left Tripoli on 26 March 2011 with 72 people on board. It was washed up on the shores of Libya 15 days later with only nine survivors. What made this case different, beyond the simple tragedy of the lives lost, was that the boat's distress calls would appear to have been ignored by a range of fishing vessels, a military helicopter and a large naval vessel. Whereas many people were reported missing, the people involved in this boat tragedy could have been rescued if all those involved had complied with their obligations.
3. Concerned about the implications of these allegations, the Parliamentary Assembly launched its own investigation, in order to establish what happened and who might be responsible for failing to go to the rescue of the people in the boat.
4. From the survivors' testimonies and other sources, a credible story emerges. It takes place during the conflict in Libya and at a time when NATO's Operation Unified Protector was ongoing off the shores of Libya. The Sub-Saharan passengers, 50 men, 20 women and two babies, were accompanied to the boat by Libyan militia. They were boarded by the smugglers who removed most of their water supplies and food in order to get more people into the boat. After over 18 hours at sea with almost no petrol, little food and water and no sight of land, the "captain" called an Eritrean Priest living in Italy by satellite phone, sending a distress alert. The Italian Maritime Rescue Coordination Centre (MRCC) was immediately informed and it had the position of the boat plotted by the satellite provider and sent out a large number of calls to the ships in the area to look out for the boat. Some of these messages clearly indicated that the boat was in distress. It was from this point that things went seriously wrong.
5. Within a few hours of the first distress signal, a military helicopter hovered over the boat and provided water and biscuits and indicated to the passengers that it would return. It never did. The boat also encountered at least two fishing vessels, neither of which came to its assistance. The boat drifted for several days. With no water and food, people started to die. On about the tenth day of its voyage, when half of the passengers were dead, a large aircraft carrier or helicopter-carrying vessel sailed near to the boat, close enough for the survivors to see the sailors on board looking at them with binoculars and taking photos. Despite obvious distress signals, the naval vessel sailed away. The boat eventually washed up on the Libyan shores after 15 days at sea. The ten survivors were imprisoned, where one of them died from lack of medical care. Eventually nine survivors were released after which they fled the country.
6. From this tragedy a catalogue of failures becomes apparent. The Libyan authorities were responsible for what was a *de facto* expulsion of the Sub-Saharan passengers and they failed to maintain responsibility for their Search and Rescue (SAR) zone. The smugglers showed reckless disregard for the lives of the passengers, overloading the boat and failing to provide adequate provisions.
7. Although the Maritime Rescue Coordination Centre verified the position of the boat and made a general broadcast of the distress calls, it did not ensure that the passengers were rescued. It failed to contact the vessels which were close to the boat in distress and to request them to rescue the boat people. Since it was known that the Libyan SAR zone was not covered, Italy, as the first State to receive the distress call, should have taken responsibility for the co-ordination of the SAR operation.
8. NATO had declared the region a military zone under its control, but failed to react to the distress calls sent out by the Rome Maritime Rescue Coordination Centre. According to a reliable source, at least two military vessels involved in NATO's operations were in the boat's vicinity when the distress call was sent, namely the Spanish Navy frigate *Méndez Núñez* (11 miles away) and an Italian vessel, the *ITS Borsini* (37 miles away). Both had helicopter-carrying facilities. Although the Spanish vessel was under NATO command, the flag State of this ship and other ships in the area also failed to act in accordance with their search and rescue obligations.
9. Of particular concern to the Assembly was the worrying failure of a military helicopter and a large military vessel to intervene and rescue the boat after they had come into contact with it. The same applies to at least two fishing vessels. None of these have as yet been identified with any certainty.
10. There was also a failure of the maritime legal framework, which left it unclear who was responsible for an SAR zone when a country was unable to fulfil its obligations.

11. Finally, there was a failure by NATO and individual member States involved in planning Operation Unified Protector off the Libyan coast. It was foreseeable that there would be an exodus of people fleeing the country, including by the dangerous sea route. In the present case, NATO did not fully take up its responsibilities, with communications about the boat in distress not being forwarded by NATO headquarters in Naples to vessels under its control.

12. In short, there were failures at different levels and many opportunities to save the lives of the people on board the boat were lost. In the light of information from reliable sources, it has become apparent that NATO was not very approachable with regard to requests for SAR operations. Although it was known that many refugees were leaving Libya by the Mediterranean Sea route in order to reach Europe, there seemed to be no working agreement between the SAR authorities and NATO headquarters in Naples. This non-communication contributed to the situation in which those on the boat were denied help.

13. While the investigation focused on a single incident, the lessons learnt have implications for the way in which search and rescue should be carried out in the future. As a consequence, the Assembly recommends that member States:

13.1. fill the vacuum of responsibility for an SAR zone left by a State which cannot or does not exercise its responsibility for search and rescue, such as was the case for Libya. This may require amending the International Maritime Search and Rescue Convention (SAR Convention). In the case in question, two Maritime Rescue Coordination Centres (Rome and Malta) were aware that a boat was in distress, but neither took the responsibility to start a search and rescue operation. Rome, being the first MRCC informed of the distress situation, had a greater responsibility to ensure the boat's rescue;

13.2. ensure that there are clear and simple guidelines, which are then followed, on what amounts to a distress signal, so as to avoid any confusion over the obligation to launch a search and rescue operation for a boat in distress;

13.3. avoid differing interpretations of what constitutes a vessel in distress, in particular as concerns overloaded, unseaworthy boats, even if under propulsion, and render appropriate assistance to such vessels. Whenever safety requires that a vessel be assisted, this should lead to rescue actions;

13.4. tackle the reasons why commercial vessels fail to go to the rescue of boats in distress. This will require dealing with:

13.4.1. the economic consequences for the rescuing vessel and its owners, and the issue of compensation;

13.4.2. the disagreement between Malta and Italy as to whether disembarkation should be to the nearest safe port or to a port within the country of the SAR zone. The International Maritime Organization should be urged to find a solution to the matter and step up its efforts towards a harmonised interpretation and application of international maritime law;

13.4.3. the fear of criminalisation (trafficking or aiding and abetting irregular migration) by those who go to the rescue of boats carrying irregular migrants, asylum seekers and refugees;

13.4.4. legislation to criminalise private shipmasters who fail to comply with their duty under the law of the sea, as is already the case in certain Council of Europe member States;

13.5. ensure that, in accordance with the *Hirsi v. Italy* judgment of the European Court of Human Rights, after the rescue operation, people are not pushed back to a country where they risk being treated in violation of Article 3 of the European Convention on Human Rights;

13.6. tackle the issue of responsibility sharing, particularly in the context of rescue services, disembarkation, administration of asylum requests, setting up reception facilities and relocation and resettlement, with a view to developing a binding European Union protocol for the Mediterranean region. The heavy burden placed on frontline States leads to a problem of saturation and a reluctance to take responsibility;

13.7. respect the families' right to know the fate of those who lose their lives at sea by improving identity data collection and sharing. This could include the setting up of a DNA file of the remains of those retrieved from the Mediterranean Sea. In this context, the ongoing work of the International Committee of the Red Cross (ICRC) and other organisations should be acknowledged and supported;

- 13.8. follow up Assembly Resolution 1821 (2011) on the interception and rescue at sea of asylum seekers, refugees and irregular migrants;
- 13.9. ensure that the lack of communication and understanding between the Rome Maritime Rescue Coordination Centre and NATO, which led to no one taking responsibility for the boat, is not reproduced in future NATO operations, and ensure that NATO introduces a mechanism to co-ordinate its assets in SAR operations in direct contact with relevant Maritime Rescue Coordination Centres wherever possible.
14. In the light of the seriousness of the allegations that vessels under national or NATO command failed in their duty to rescue a boat in distress, the Assembly recommends that:
- 14.1. NATO and the member States involved in NATO's operation provide a comprehensive reply to the Assembly's outstanding requests for further information on the involvement of their respective assets. This is in order to identify the alleged military helicopter that dropped provisions and never returned, as well as the large military vessel that allegedly ignored the boat's distress calls after half the passengers had already died;
- 14.2. NATO, including its Parliamentary Assembly, conduct an inquiry into this incident, and take whatever steps are required in the light of the findings of that inquiry;
- 14.3. NATO, when preparing its operations, takes into account possible refugee movements and reaches agreement with neighbouring countries to ensure that refugees are protected;
- 14.4. national parliaments, or their relevant committees, on the basis of relevant leads, launch parliamentary inquiries into the possible responsibility of their respective countries;
- 14.5. the European Parliament makes use of its institutional power to request and obtain further information, including relevant satellite imagery, so that the full facts concerning this incident can be brought to light.
15. Finally, the Assembly recommends that, in view of the ordeal of the survivors, member States use their humanitarian discretion to look favourably on any claims for asylum and resettlement coming from these persons.

## B. Explanatory memorandum by Ms Tineke Strik, rapporteur<sup>1</sup>

### Contents

1. 2011 – The deadliest year in the Mediterranean Sea
2. Methodology - steps of a still on-going investigation
3. The left-to-die boat – a 15 day fatal journey
4. The issues – 7 questions of responsibility
  - 4.1. *Was there a failure in the co-ordination of search and rescue?*
  - 4.2. *Was there a failure of the legal norms?*
  - 4.3. *Was there a failure to intervene?*
  - 4.4. *Was there a failure by NATO?*
  - 4.5. *Was there a failure to prepare for the consequences of the Libyan conflict by the UN and NATO?*
  - 4.6. *Was there a failure on the side of the Libyan authorities?*
  - 4.7. *Was there a failure on the side of the smugglers?*
5. Who is responsible?
  - 5.1. *A collective failure*
  - 5.2. *Which helicopter left the boat to die?*
  - 5.3. *Which naval vessel ignored the calls for assistance?*
6. Conclusions
7. Post script on the survivors

### 1. 2011 – The deadliest year in the Mediterranean Sea

1. When we talk about the Mediterranean, we are not talking about a deserted sea. On the contrary, we are talking about a sea with a complex and dense network of maritime traffic, with a developed system of monitoring movements and dealing with boats in distress. During and in the aftermath of the Arab Spring, and in the framework of NATO's Operation Unified Protector off the Libyan shores, the monitoring of the Mediterranean was, if anything, even more closely monitored. During that period, it was often referred to as the sea with the best surveillance in the world and as an Italian official rightly described it, "I expect that sailing from Libya towards Italy should be a bit like doing a slalom between military ships".

2. Paradoxically, 2011 set a record for being one of the deadliest years for boat people in the Mediterranean.

3. While we are aware of many tragedies in these waters, one particular incident shocked the Parliamentary Assembly of the Council of Europe to such an extent that it considered it essential to carry out an inquiry. In May 2011, a British newspaper, *The Guardian*, published an article entitled "Aircraft carrier left us to die, say migrants".<sup>2</sup> The article recounted the story of a boat that left Tripoli and floundered at sea for two weeks before being washed up on the Libyan shores of Zlitan, near Misrata. The article told of how 72 people attempted to escape the ongoing Libyan conflict and reach Europe. The boat never made it to Europe, and by the time it grounded on Libyan soil there were only nine survivors. According to the survivors, their calls for help were ignored by various vessels, including at least one military helicopter, various commercial fishing vessels and even a large military vessel.

4. The President of the Assembly reacted immediately to the article, expressing distress and deep concern, saying that if the allegations were true, then it was a dark day for Europe as a whole.<sup>3</sup> On the basis of this concern, the President called for an inquiry.

5. This report is the consequence of that call for an inquiry and it has been prepared on the basis of an in-depth investigation into what happened to the "left-to-die boat". The report shows the failures – human, institutional and legal – that contributed to the death of 63 people and makes recommendations to avoid such tragedies happening in the future. These deaths could have been avoided, as, undoubtedly, could many of the hundreds of other deaths at sea in 2011.

6. This story is singular in two ways: we know what happened to the boat because of the testimonies the survivors were able to give us, and we know that their request for help had been registered by several

<sup>1</sup> Ms Strik has a doctorate in European migration law and is a member of the Dutch Senate for the Greens.

<sup>2</sup> 8 May 2011, [www.guardian.co.uk/world/2011/may/08/nato-ship-libyan-migrants](http://www.guardian.co.uk/world/2011/may/08/nato-ship-libyan-migrants).

<sup>3</sup> "President calls for an inquiry into Europe's role in the deaths of 61 boat people", 9 May 2011, [http://assembly.coe.int/ASP/NewsManager/EMB\\_NewsManagerView.asp?ID=6619](http://assembly.coe.int/ASP/NewsManager/EMB_NewsManagerView.asp?ID=6619).

competent authorities. They did not go missing, they were located and observed, which implies that their deaths could have been avoided if one of the informed actors had come to their rescue. But their story is unfortunately in no way unique as a number of silent tragedies occur every year in the Mediterranean. Based only on confirmed cases, it is estimated that more than 1 500 lives have been lost in the Mediterranean in 2011.<sup>4</sup> The real number will be much higher.

## 2. Methodology - Steps of a still ongoing investigation

7. It was clear from the outset that it was essential to have in-depth interviews with the survivors. I collected the direct testimonies of four of the survivors and obtained transcripts of the testimonies of the other five survivors from different sources.

8. I carried out three fact-finding visits. The first was to Rome on 6 and 7 September 2011 where I met three of the survivors along with Father Zerai, the Eritrean Priest who raised the initial alarm with the Italian Coast Guard after having been contacted by the boat. On 28 November 2011, in Brussels, I met with NATO officials at their headquarters, and also with a number of EU officials. On 15 and 16 December 2011, I met, in Malta, members of the Armed Forces responsible for search and rescue operations at sea. Meetings with representatives of international organisations and civil society also took place in the context of these three fact-finding visits.

9. To better understand the relevant international maritime, humanitarian, human rights and refugee law, the Committee on Migration, Refugees and Displaced Persons organised a hearing with invited experts and specialists on 29 November 2011 in Paris. On the same day, a restricted round table discussion took place with others investigating the incident in question. These included an investigative journalist Emiliano Bos, who was making a documentary for Swiss television on the “left-to-die boat”,<sup>5</sup> and representatives of a collective of associations (including Migreurop and the International Federation for Human Rights (FIDH) as well as Goldsmiths, University of London) investigating this case with a view to lodging complaints against member States and/or NATO.<sup>6</sup>

10. I also requested written information from NATO, Frontex, the European Union, the International Maritime Organization and the Ministers of Defence of countries involved in NATO operations with vessels with aircraft-carrying facilities (Canada, France, Greece, Italy, Romania, Spain, Turkey, the United Kingdom and the United States). To date, despite reminders, not all these letters have been responded to.

11. Notwithstanding the disappointing lack of response and lack of information from certain quarters, I am grateful for the professional help and assistance provided to me by those who have met with me and responded to my requests for information. While criticisms will be raised in my report, nothing should detract from the respect I have for those people who have worked and continue to work to save lives in dangerous conditions at sea.

12. I would also like to thank Mr Neil Falzon for his extensive work as a consultant assisting in the drafting and research of the report.<sup>7</sup>

## 3. The “left-to-die boat” – a 15-day fatal journey

### 3.1. *Early Spring 2011: Migrants, asylum seekers and refugees had no choice but to leave Libya*

13. In mid-February 2011, inspired by the uprisings in neighbouring Tunisia and Egypt, large segments of the Libyan population started a dramatic process of social and political change which ultimately led to the removal of the Libyan leader Colonel Muammar Gaddafi. Within weeks, the situation deteriorated into a violent conflict between pro-government forces and anti-government militia. This conflict adversely affected a large number of refugees, migrant workers and other migrants living in Libya. Left unprotected with nowhere

<sup>4</sup> <http://www.unhcr.org/4f27e01f9.html>

<sup>5</sup> The documentary “MARE DESERTO” (“Deserted Sea”) can be viewed in the following link:  
<http://la1.rsi.ch/falo/welcome.cfm?idg=0&ids=0&idc=42593>

<sup>6</sup> Since June 2011, Migreurop, FIDH, CIRE (Centre d’information des résidents étrangers), GISTI (Groupe d’information et de soutien des immigrés) and the LDH (Ligue des droits de l’Homme) have been carrying out research with a view to possibly lodging complaints against NATO and States with a military presence in the Mediterranean in Spring 2011 in relation to their actions or inactions. In this, they are receiving technical support from the Centre for Research Architecture of Goldsmiths, University of London.

<sup>7</sup> Mr Neil Falzon is a Human Rights Advocate and Academic with particular expertise in the area of asylum and interception and rescue at sea.

to turn for assistance, hundreds of thousands of these people were forced to flee Libya. Many left by land, but a large number were trapped and could only escape by sea.

14. By 19 March, with the first air strikes on Libyan territory taking place, the situation seriously deteriorated. The United Nations Security Council Resolution 1973 of 17 March expressed concern about “the plight of refugees and foreign workers forced to flee the violence”, and the Office of the United Nations High Commissioner for Refugees (UNHCR) reported its concerns on 29 March that violence was “being specifically targeted towards the large groups of foreigners in the country, including refugees and asylum-seekers.”<sup>8</sup> Sub-Saharan Africans were in particular being targeted as they were suspected of being pro-Gaddafi mercenaries.<sup>9</sup>

15. By 23 March, the UNHCR estimated that a total of 351 673 persons had fled Libya, escaping to Tunisia (178 262), Egypt (147 293), Niger (11 949) and Algeria (9 168).<sup>10</sup>

16. In the midst of this chaos, blocked in the city of Tripoli, groups of sub-Saharan men, women and children were faced with a difficult choice: stay in Tripoli and risk becoming scapegoats or being caught in the fighting, or attempt the perilous and expensive journey across the Mediterranean, the escape to Tunisia over land also being very dangerous. Smugglers took advantage of the situation and made money by ‘organising’ journeys by sea to Lampedusa.

### *3.2. Day 1 - Departure from Tripoli on what would be for most of them a fatal journey*

17. At night, either in the very early hours or late in the evening of what was probably Saturday 26 March, a group of 72 sub-Saharan men, women and children boarded a small inflatable rubber dinghy, possibly not much more than 7 meters long, in order to escape from Libya. Ghirma Halefom, Bilal Yacoub Idris, Abu Kurke Kebato and Dan Haile Gebre, the persons I interviewed, were four of the 50 men travelling with 20 women. Some of the women were pregnant, and there were also two babies crammed into the dinghy. The 70 adults were between 20 and 25 years of age. They were from Ethiopia (47), Nigeria (7), Eritrea (7), Ghana (6) and Sudan (5). A Ghanaian, travelling with his wife, was the designated “captain”.

18. Some of the survivors recounted that a few days before their fateful trip they had met on the coast intending to leave, but they were discovered and prevented from leaving by the Libyan military. On the day of their departure, however, Libyan soldiers did not prevent them from leaving and even accompanied them to their rubber dinghy.

19. When the passengers boarded the dinghy, their provisions were taken away from them by the smugglers who wanted to fit as many people as possible into the boat. Bilal said, “it was completely overcrowded. Everyone was sitting on everybody else. I had someone sitting on top of me, and this person had someone sitting on top of him. They don’t really care how many people can fit into the boat all they want is to get the money from each person”. It seems that amongst the passengers they only had a box of biscuits and a few bottles of water. Once the dinghy was fully inflated it left in the darkness of the night.

20. They were told by the smugglers that 18 hours of navigation would take them to Lampedusa. Despite a rough sea, the first day passed smoothly.

### *3.3. Day 2 - A small aircraft flies over the dinghy*

21. On Sunday 27th, after well over 18 hours of navigation, Lampedusa was nowhere to be seen. People started to become increasingly sea sick, the mood changed and worry set in.

22. At this point, they noticed an aircraft flying high above them. This raised hope of being rescued. Ghirma said the aircraft was white, and not a helicopter but rather a small patrolling aircraft.

### *3.4. The boat calls Father Zerai – Rome Maritime Rescue Coordination Centre (MRCC) is informed*

<sup>8</sup> UNHCR, *Protection considerations with regard to people fleeing from Libya – UNHCR’s recommendations (as at 29 March 2011)*. Update No. 1, 29 March 2011, <http://www.unhcr.org/4d67fab26.html>.

<sup>9</sup> UNHCR, *UNHCR fears for the safety of refugees caught in Libya’s violence*, 22 February 2011, <http://www.unhcr.org/4d6393e06.html>.

<sup>10</sup> UNHCR, *Update No 13: Humanitarian Situation in Libya and the Neighbouring Countries*, 24 March 2011, <http://www.unhcr.org/4d8b6a1f9.html>.



23. It was not long, however, before the men and women aboard the boat started to panic with the rough sea tossing them around and dark clouds looming overhead. In view of the situation, they decided to use a satellite phone to call Father Zerai, an Eritrean Priest living in Rome, whose number had been given as a contact person in case of an emergency. The “captain” had the phone, but nobody knew where he had got it from or who had added Father Zerai’s number to it. In a short conversation Father Zerai was informed that they were having problems, that there were women and children on board, that they were running out of fuel and that the sea was getting increasingly rough.

24. The Priest informed them that he would contact the Italian authorities to request assistance. Father Zerai subsequently contacted the Italian Coast Guard at the Rome Maritime Rescue Coordination Centre (MRCC) explaining the difficulty the boat was in: drifting, without fuel and taking in water. He also provided them with the number of the satellite phone on board. Father Zerai’s initial call, which was logged and recorded by the Rome MRCC, took place on 27 March at 18:28. After further contacts with the boat, Father Zerai kept the Rome MRCC updated, first informing them that the boat still had a very small amount of fuel but was no longer taking in water, and later, after a further contact with the boat, informing the Rome MRCC that he did not know what exactly was happening, but that those on board the boat kept on shouting over the phone “we have an emergency, we have an emergency” and “help, help, be quick, be quick!”.

25. Father Zerai and the Italian Coast Guard sent the boat an SMS with instructions on how to trigger the satellite phone’s GPRS, to enable the Coast Guard to establish their precise location on the basis of satellite data. However, the attempt to trigger the GPRS did not succeed. Following the exchange with Father Zerai, the “captain” received a call from the Italian Coast Guard asking him to provide details of their location. This was the last telephone contact with the boat, as the phone’s battery died as the request was being made.

26. The calls made from the satellite phone nevertheless enabled the Italian Coast Guard, via the satellite provider Thuraya, to establish the boat’s location at around 60 miles off the shore of Tripoli.

### *3.5. Hope for rescue: a military helicopter drops water and biscuits to the boat*

27. With no means of communication, the 72 people drifted with the current, saving the little amount of petrol left in the tank. A number of hours after their exchange with Father Zerai, a military helicopter appeared and hovered above them. The helicopter was described as being relatively small, dark grey-green military in colour and, according to more than one survivor, with the writing “ARMY” on the side. They remember that there were at least two people inside the helicopter and that they were dressed in military uniform and were carrying weapons.

28. Many people on board the boat started singing and clapping for joy, holding the babies above their heads and pleading for rescue and assistance. The helicopter then left the boat. It, or another helicopter returned within a short time and used a rope to lower down small bottles of water, in a six-pack format, together with packets of biscuits.

29. Some of the survivors described the plastic bottles as having the word “ACQUA” (“water” in Italian) written on them, and Dan Haile insisted that the biscuit packaging showed they had come from Italy. Ghirma told us that the biscuits had green packaging. The biscuits and water were distributed to the women and children. Elias, interviewed in Tunisia by journalist Emiliano Bos, recalled reading the numbers ‘+39’ in front of what seemed to be a telephone or fax number (the dialling prefix for Italy).

30. The military personnel in the helicopter indicated to the people on the boat that they would return, and instructed those on the boat not to change their current position.

### *3.6. The “captain” throws the compass overboard and the boat runs out of fuel*

31. The “captain” reassured everyone that a ship would come to their rescue within hours. The engine was turned off and everyone aboard started praying and waiting.

32. After several hours, an argument broke out between the “captain” and other passengers. The “captain” insisted on remaining in the same position, while some passengers who had lost hope of being rescued urged the “captain” to return to the original instructions given to him by the smugglers. However, in the meantime, the “captain” had thrown the compass and the satellite phone overboard when he thought the helicopter was going to rescue them. He explained that he did not want to be arrested for possession of the telephone and the compass. He feared that these items would be used as evidence of his involvement in a smuggling network.

33. When several more hours passed and there was no sign of a rescue, they decided to attempt the onward journey, in a north-westerly direction. The “captain” managed to navigate for a number of hours using the sun to provide direction.

34. The boat soon ran out of fuel. At this point it was stranded in the middle of the Mediterranean. There was no food and almost no drinking water left.

35. This point, although still at an early stage of the trip, marked a dramatic turn in the general mood on the boat. Fits of panic broke out. The wind became stronger and the waves larger. The stormy weather tossed the boat around, filling it with seawater. Some persons were thrown into the sea by the rough weather, and attempts to rescue them failed.

### 3.7. *Encounter with fishing boats*

36. The survivors also remember encountering a number of fishing boats at about the time they ran out of fuel. They saw at least one fishing boat flying the Italian flag and another flying a Tunisian flag. As they attempted to approach the Italian boat the fishermen drew in their nets and sailed away.

37. The Tunisians told them that they were navigating in the wrong direction and gave them new directions for Lampedusa. When the people on the boat told the fishermen that they had run out of fuel, the fishermen replied that they had none to give them. They then just “*ran away from us.*”

38. There is no indication that any of the fishermen called or warned any national coast guard about the boat in distress that they had encountered. If they had done this, many lives could have been saved.

### 3.8. *“People started to die, one after the other”*

39. The situation on board the boat deteriorated quickly. Some people were hallucinating and speaking incoherently, perhaps because of drinking seawater. Many could not sleep, and one young woman threw herself into the sea in a panic attack.<sup>11</sup> “Every day, there were more and more people who would die.”

40. The survivors all recounted how, at this stage, roughly the fifth or sixth day at sea, many people started dying, including the children. By the tenth day, around half of the people had died and had to be thrown overboard due to the smell. The fact that they had to do this further compounded the desperation and sense of hopelessness of the survivors.

### 3.9. *Approximately Day 10 – A large military vessel comes close to the boat*

41. The survivors all concur that on what could have been day 10 of their trip they drifted close to a very large military vessel. It was possibly an aircraft carrier or at least a vessel with helicopter facilities, with helicopters on board and possibly also fighter jets. The ship was of an off-white or light grey colour and the boat was close enough for them to see people on board wearing different coloured military uniforms.

42. “Some were looking through binoculars and others were taking pictures of us.” Ghirma told me. The ship remained at a distance, so the people in the boat started shouting and waving their hands. “They’re just watching that there are dead children and other bodies.”

43. In an attempt to approach the ship, some of the survivors jumped into the sea and started pushing their boat in its direction. These efforts were, however, in vain. None of the survivors could remember seeing the ship’s flag. They held up the dead babies and the sick women, and also the empty fuel tanks. There was no communication from the ship and no assistance was provided. After a short while, the military vessel sailed away, abandoning the stranded boat.

44. “But instead they wandered off, their ship sailed off. Initially, we thought that this vessel was pointing in the right direction by sailing off, expecting us to follow; they were trying to show us the way. But then, you know, they kept wandering off and we kept following, and in spite of our many gestures, they were not

---

<sup>11</sup> Reported effects of drinking seawater include excessive thirst, increased heart rate, headaches, dizziness and nausea, vomiting, brain damage, impairment of judgment and dehydration. For summary information, see MarineInsight, *10 Effects of Drinking Salt Water of the Sea*, 20 September 2011, [www.marineinsight.com/misc/marine-safety/10-effects-of-drinking-salt-water-of-the-sea/](http://www.marineinsight.com/misc/marine-safety/10-effects-of-drinking-salt-water-of-the-sea/).

*responding at all. And gradually, they just disappeared, and we realised that they were not responding, replying to our distress calls at all.” Ghirma recalled.*

### 3.10. After day 10 – “We were just waiting for our own time or turn to die”

45. The boat drifted with the current and with the wind. To survive they drank their urine mixed with the little toothpaste they had managed to bring with them. The death toll kept rising, and on about the fifteenth or sixteenth day of their trip only 11 persons were still alive. “We were just waiting for our own time or turn to die.” remembered Ghirma. Bilal recalled how the group shrunk. “While we were talking to one another, four of us just died, four of the people in that group, talking, just passed away ...”

46. On 10 April, their boat was washed up on the rocks close to Zilten, a Libyan town situated 160 km east of Tripoli and 60 km west of Misrata. By then only 11 people were left from the group of 72. One woman died when they landed ashore. They were immediately arrested. Their possessions were confiscated, including wedding rings, necklaces, photos, documents and SIM cards. At this stage, the survivors were so exhausted that most lost consciousness.

47. The survivors were imprisoned for 24 hours and given tea and bread. Due to the lack of appropriate medical assistance, one of the survivors died in prison. They were then transferred from one prison to another. Their medical condition deteriorated and their open wounds from the trip became infected.

48. Eventually, with outside assistance, they managed to bribe their way out of prison and made their way to the Tripoli Catholic church, where they received some medical assistance. Since the situation in Libya remained dangerous, the survivors sought a way to escape. Some of them found refuge in Tunisia while others, once again, decided to attempt the maritime trip to the Italian island of Lampedusa. Ghirma, for example, reached Lampedusa on 11 June 2011.

49. The credibility of the story: I am aware of minor variations in the stories told by the survivors. I must, however, underline that there is nothing in these variations which undermines the overall credibility of the testimony. For the most part, the survivors were interviewed separately. Many of them had not seen each other since fleeing Libya, yet they all had the same basic story. For the sake of the investigation, the survivors interviewed had to relive traumatic events. The interviews were therefore moments of emotional intensity and I am grateful to the survivors for sharing their stories with me in all honesty.

50. The credibility of their testimonies is also confirmed by Father Zerai’s account, as well as by objective elements gathered in the course of the investigation. In addition, the Rome Maritime Rescue Coordination Centre (Rome MRCC) provided me with extensive information and evidence supporting key elements of the story.

## 4. The issues – Seven questions of responsibility

51. Before looking at the question of responsibility it is necessary to clarify the legal framework in place.<sup>12</sup> The principal international maritime law instrument, containing core definitions, jurisdiction issues and rights and duties of States and other seafarers, is the 1982 United Nations Convention on the Law of the Sea (UNCLOS).<sup>13</sup> Article 98 of UNCLOS (Duty to render assistance) contains two State obligations, both relevant to the present case:

– All States should take all necessary steps to ensure that shipmasters of ships flying their flags assist persons in distress, proceed to the rescue of persons and render assistance in collision situations.

This obligation is not limited to coastal States and essentially requires that legislation is adopted at the national level obliging shipmasters to act as required by UNCLOS;

– Coastal States are required to “promote the establishment, operation and maintenance of an adequate and effective search and rescue service.”

52. These obligations are further expanded in two international legal instruments: the 1974 International Convention for the Safety of Life at Sea (SOLAS) and the 1979 International Convention on Search and Rescue (SAR). The two instruments complement UNCLOS insofar as they strengthen the duty to render

<sup>12</sup> For a detailed description of the relevant legal framework, see Assembly [Doc. 12628](#), report on the interception and rescue at sea of asylum seekers, refugees and irregular migrants (rapporteur: Mr Arcadio Díaz Tejera).

<sup>13</sup> Full text available at [www.un.org/depts/los/convention\\_agreements/texts/unclos/unclos\\_e.pdf](http://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf).

assistance. They do this by, *inter alia*, clarifying that the duty is to be fulfilled without consideration of the nationality, status or circumstances of the persons in distress, and spelling out the operational details regarding the establishment by coastal States of search and rescue services.

53. The spirit of SOLAS and SAR is also reflective of UNCLOS' aim, namely that search and rescue activities should be conducted within a co-operative framework between neighbouring States. SOLAS and SAR together create the so-called SAR (search and rescue) regime, within which the world's seas are divided into defined areas within which coastal States provide their search and rescue services: SAR zones. The definition by a coastal State of a SAR zone entails the triggering of SAR responsibilities, including the establishment of appropriate rescue coordination centres (RCC) tasked with ensuring the operational fulfilment of SAR obligations.

54. Essentially, the SAR regime does not require that coastal States actually conduct search and rescue operations for every vessel in distress in their SAR zone, but rather that the State co-ordinates such operations to ensure their efficiency in saving lives.

55. Furthermore, as also emphasised by NATO officials in their meeting with me, the obligation to rescue applies to all masters of ships and makes no distinction on the basis of the nature of the ship or the purpose of the ship's presence in the maritime region. Military vessels are therefore equally bound under international law "to render assistance to any person found at sea in danger of being lost; to proceed with all possible speed to the rescue of persons in distress, if informed of their need of assistance, in so far as such action may reasonably be expected of him [shipmaster]"<sup>14</sup>.

#### 4.1. Was there a failure in the co-ordination of search and rescue?

##### 4.1.1. Rome Maritime Rescue Coordination Centre

56. On 27 March at 18:28, Father Zerai made the first of several calls to the Rome Maritime Rescue Coordination Centre (Rome MRCC) to report that the boat was in distress.

57. Following that phone conversation, the Rome MRCC undertook several steps.

58. The Rome MRCC first tried to contact the boat. From the audio records, it is clear that the conversation was interrupted before any substantial exchange could take place. This confirms the survivors' story that their satellite phone ran out of battery at the moment they were called.

59. On 27 March at 18:40, the Rome MRCC contacted Thuraya, the satellite provider, requesting it to provide the boat's co-ordinates based on the last call made from the boat's satellite phone. The co-ordinates obtained were:

Latitude:	33 degrees, 58.2 minutes North
Longitude:	12 degrees, 55.8 minutes East.

60. The Rome MRCC then sent out a number of messages, using different networks and satellites, to make sure they reached a maximum number of vessels in the area.

– On 27 March at 19:54, the Rome MRCC launched a DISTRESS call on the Inmarsat<sup>15</sup>-C Gateway Enhanced Group Call (EGC) addressed to all ships transiting in the Sicily Channel. I should stress that "Distress" is the highest emergency phase foreseen in the SAR Convention.

"PRIORITY: DISTRESS FM MRCC ROME – ITALIAN COAST GUARD TO ALL SHIPS TRANSITING IN SICILY CHANNEL BT
---

<sup>14</sup> Article 98.1.a and b, UNCLOS.

<sup>15</sup> Inmarsat is a digital satellite communication system facilitating the fulfilment by maritime vessels of their obligations under the Global Maritime Distress and Safety system (GMDSS); primarily, those obligations relating to satellite communications requirements. Inmarsat-C EGC is one of the services available within the Inmarsat network, allowing authorised maritime safety information providers, particularly MRCCs to broadcast messages and alerts to all ships within a specified geographic area. For more information see information on the Inmarsat site, [www.inmarsat.com/Support/Inmarsat\\_C/FAQs/default.aspx?language=EN&textonly=False](http://www.inmarsat.com/Support/Inmarsat_C/FAQs/default.aspx?language=EN&textonly=False), and, [www.inmarsat.com/Support/Inmarsat\\_C/FAQs/00022710.aspx](http://www.inmarsat.com/Support/Inmarsat_C/FAQs/00022710.aspx).

ON 27 MARCH 2011 SICILY CHANNEL SEA IN POSITION LAT 33°58'.2"N – LONG 012°55'.8"E AT 16:52 GMT A BOAT WITH ABOUT 68 POB PROBABLY IN DIFFICULT. ALL SHIPS TRANSITING IN THE AREA ARE REQUESTED TO KEEP A SHARP LOOKOUT AND REPORTING ANY SIGHTING URGENTLY AT MRCC ROME AT THE FOLLOWING (...)"

– the Rome MRCC then informed Malta MRCC by phone. The call was followed up by a fax alert sent at 20:40:

"FROM: MRCC ROMA  
TO: RCC MALTA  
SUBJECT: BOAT WITH APPROX. 68 P.O.B. PROBABLY IN DIFFICULT  
TEXT: DEAR SIR,  
FOR ANY APPROPRIATE ACTION, PLEASE BE INFORMED THAT TODAY WE RECEIVED THE INFORMATION ABOUT A BOAT WITH 68 P.O.B. PROBABLY IN DIFFICULT IN POS. LAT 33°58.2'N – LONG 012°55.8'E (16.52 UTC) ON BOARD THERE IS A THURAYA SAT PHONE (NUMBER 0088 216 21256157). NO OTHER INFORMATION IS AVAILABLE AT THE MOMENT."

– At 21:40, the Rome MRCC sent a fax to NATO headquarters allied command in Naples:

"FROM: MRCC ROMA  
TO: NATO HEADQUARTER ALLIED COMMAND – NAPLES  
SUBJECT: BOAT WITH APPROX 68 P.O.B. PROBABLY IN DIFFICULT IN POS. LAT 33°58.2'N – LONG 012°55.8'E (16.52 UTC)  
TEXT: DEAR SIR/MADAMS  
FOR ANY APPROPRIATE ACTION, PLEASE BE INFORMED THAT TODAY THIS MRCC RECEIVED THE INFORMATION ABOUT A SMALL BOAT WITH ABOUT 68 P.O.B. IN DIFFICULT IN THE SOUTH MEDITERRANEAN SEA. ON BOARD THERE IS THE THURAYA SAT PHONE WITH THE NUMBER 008821621256157.  
WE CARRIED OUT SOME INVESTIGATION ABOUT THIS CASE WITH THE PURPOSE TO LOCATE THE CALLER. "THURAYA" COMPANY INFORMED US THAT THE POSITION OF THE SATELLITE DEVICE AT 16.52 UTC WAS LAT 33°58.2'N – LONG 012°55.8'E.  
PLEASE KEEP US UPDATED IN CASE OF SIGHTING OF THE ABOVE MENTIONED BOAT BY ANY NATO NAVAL ASSETS."

– FRONTEX, at the time involved in an operation in the vicinity of Lampedusa, was also specifically informed.

– On 28 March at 06:06, the Rome MRCC sent out to all vessels another form of alert message, a Hydrolant<sup>16</sup> navigational warning (Warning number 512/2011):

"EASTERN MEDITERRANEAN SEA.  
VESSEL, 68 PERSONS ON BOARD, IN NEED OF ASSISTANCE IN 33-58.8N. 012-55.8E AT 271652Z MAR. VESSELS IN VICINITY REQUESTED TO KEEP A SHARP LOOKOUT, ASSIST IF POSSIBLE, REPORTS TO MRCC ROME,  
INMARSAT-C: 424744220"

61. All maritime vessels, be they private, commercial or military, are supposed to be equipped to receive these messages. The Inmarsat message was not just sent once, but the Rome MRCC – probably nevertheless aware of the seriousness of the situation – kept sending this distress message every 4 hours for 10 days. Many boats must therefore have received it.

62. It is clear that all maritime vessels in the region were alerted to the situation of the boat. The hydrolant message, in particular, is unambiguous on the degree of distress of the boat "in need of assistance ... assist if possible".

#### 4.1.2. *Void of responsibility*

63. The boat was clearly within Libya's Search and Rescue (SAR) zone. The launching and co-ordination of a search and rescue operation was therefore, in principle, the responsibility of Libya's Maritime Rescue Coordination Centre (MRCC). A State's responsibilities with regard to its Search and Rescue zone (SAR zone) is primarily to ensure, through co-ordination, that all persons in distress within the zone are promptly rescued and disembarked at a place of safety.

64. A standard SAR procedure would have seen the Rome MRCC handing over responsibility for the incident to Tripoli MRCC. Libya, as we know, was in a situation of internal armed conflict and upheaval.

<sup>16</sup> For information on Hydrolant see: [http://msi.nga.mil/NGAPortal/MSI.portal?\\_nfpb=true&\\_pageLabel=msi\\_portal\\_page\\_63](http://msi.nga.mil/NGAPortal/MSI.portal?_nfpb=true&_pageLabel=msi_portal_page_63); and for a map indicating the Mediterranean as falling within Hydrolant's geographical coverage see: <http://msi.nga.mil/MSISiteContent/StaticFiles/Images/navwarnings.jpg>.

While the boat was in Libya's zone, it is clear that there was nobody on the Libyan side capable of co-ordinating a search and rescue operation.

65. At this stage, two MRCCs were informed of the boat's situation: Rome and Malta. No search and rescue mission was initiated however.

66. Indeed, there is no evidence that Libya MRCC was actually informed about the boat in distress and its position. None of the over 40 analysed telephone recordings provided by the Rome MRCC refer to such a notification to Tripoli. On the contrary, the reference to Tripoli MRCC in these calls seems to indicate that forwarding the distress alert to Libya was either not necessary or, more likely, a futile exercise. I have sought clarification on this issue and the Rome MRCC has confirmed to me that Tripoli MRCC at the relevant time did not respond to attempts by the Rome MRCC to communicate or to have an exchange of information.

67. Notwithstanding that Rome and Malta's MRCCs knew, or should have known that there was no Libyan search and rescue capacity, neither felt an obligation to mount a full search and rescue operation as the ship in distress was not within their SAR zone. The boat in distress was thus left floating in a responsibility vacuum.

68. During my visit to Malta, Malta MRCC noted that its helicopters, being one-engine assets, were not able to travel such long distances and get back and that its boats usually required around 20 to 24 hours to reach the end of its SAR zone. The Maltese search and rescue authorities told me they had never considered starting a search and rescue operation, as they considered the Rome MRCC, the first MRCC informed, to be responsible on the basis of maritime law, and indeed the Rome MRCC had not requested them to start a search and rescue operation. Malta did, however, verify the location of the boat, which was slightly different from the location provided by the Rome MRCC, and informed the Rome MRCC accordingly. It should be noted that according to the Goldsmiths analysis of the reconstruction of the boat's drifting, it is possible the boat could have entered into the Maltese SAR zone before moving back into the Libyan SAR zone (see Appendix 1).

69. The Rome MRCC stated that during the period in question their assets were working around the clock, with between 20 to 25 incidents requiring attention on just one day. Between 26 and 28 March, the Italian authorities were engaged in incidents involving approximate 4 300 people. Over 2 200 of these people were assisted at sea and around 2 000 were rescued from distress situations. From the Rome MRCC's perspective, priority needed to be given to the large number of incidents occurring within Italy's SAR zone rather than incidents occurring elsewhere. The Italian authorities did not consider themselves as the responsible authority, as the boat was not located in their SAR zone. They explicitly let me know that if this had been the case, they would have certainly co-ordinated the SAR operation. At the same time, they remarked that they did not interpret the message from Father Zerai as an explicit request to be rescued, and that they lacked precise information on the situation of the boat. To illustrate that this had influenced their attitude, the boarder guards told me about an SAR action they undertook in the Libyan SAR zone in response to a call for help with detailed information provided by a tug boat in August 2011.

70. Furthermore, some of the information available to the Rome and Malta MRCCs indicated that the boat was not adrift but that it was moving ahead with the use of its engines, possibly implying that the call was not an urgent distress call.

71. In this context, I am worried by this narrow interpretation of distress, according to which as long as the boat is still moving it is not in distress. I should like to recall here the definition of distress as stated in the SAR Convention: "Distress phase: A situation wherein there is a reasonable certainty that a vessel or a person is threatened by grave and imminent danger and requires immediate assistance".

72. That this boat was in distress and thus triggered an obligation to assist is clear to me. The "captain" had signalled distress, the boat was an overloaded rubber dingy in the middle of the sea with little or no food, water or fuel aboard. I would also like to stress that while virtually all migrant boats may, according to SAR standards, be considered to be in distress, this in no way means that a higher threshold should apply to such vessels.

73. Based on the analysis of the telephone recordings provided by the Rome MRCC, it appears that the Rome MRCC tried to find a solution but did not seem able to request proper assistance from the military assets involved in NATO's operations. At the same time, the Rome MRCC did not explicitly request anybody's direct intervention, be it Malta, NATO or any other party. I find this hard to understand as the Rome MRCC was aware that no one would take responsibility for the search and rescue operation. This attitude may be the result of the sensitive handling of defence matters and the unclear relationship with

NATO. NATO should have introduced a mechanism to co-ordinate its assets in search and rescue operations in direct contact with the relevant Maritime Rescue Coordination Centres.

#### 4.2. Was there a failure of the legal norms?

74. While a standard Search and Rescue (SAR) procedure would have seen the Rome MRCC handing over responsibility for the incident to Tripoli MRCC, it is clear that Libya's Search and Rescue (SAR) zone was not being controlled by Libya. While the obligation to rescue at sea is crystal clear, the institutional obligations of neighbouring countries for a non-functioning or inadequately functioning SAR are not so clear.

75. Apparently this situation is not foreseen in the existing legal framework. The SAR Convention merely foresees that in the event of a boat in distress at an unknown position, an MRCC "shall, unless it is aware that other centres are taking action, assume responsibility for initiating suitable action and confer with other centres with the objective of designating one centre to assume responsibility" (Article 4.5.4).

76. In the case in question, the boat's location was known. Based on the International Aeronautical and Maritime Search and Rescue (IAMSAR) manual,<sup>17</sup> jointly published by the International Maritime Organization and the International Civil Aviation Organization, the Rome MRCC, as the first MRCC informed, should have maintained SAR responsibility over the incident in view of Tripoli's inability and failure to assume responsibility. The IMO Guidelines on the treatment of persons rescued at sea<sup>18</sup> confirms this. Article 6.7 states "When appropriate, the first RCC contacted should immediately begin efforts to transfer the case to the RCC responsible for the region in which the assistance is being rendered. When the RCC responsible for the SAR region in which assistance is needed is informed about the situation, that RCC should immediately accept responsibility for co-ordinating the rescue efforts, since related responsibilities, including arrangements for a place of safety for survivors, fall primarily on the Government responsible for that region. The first RCC, however, is responsible for co-ordinating the case until the responsible RCC or other competent authority assumes responsibility."

77. These standards contain operational guidelines but they are of a non-binding character. Insofar as the SAR Convention does not explicitly provide a clear solution to scenarios involving 'absent' or 'inactive' SAR States, it could be suggested that a legal vacuum exists requiring specific provisions in order to avoid similar incidents in the future.

78. As one of the very purposes of the system of applicable international laws is to preclude the possibility of people finding themselves in a legal no-man's land, the rule to provide assistance therefore takes precedence over any contractual relations between the different parties. One can conclude that not being responsible on the basis of SAR zones, doesn't relieve another State which is informed about an incident at sea of its responsibility to ensure the rescue operation.

79. Furthermore, one of the negative aspects of the international law of the sea as it stands, is that it does not penalise those who fail to exercise their responsibility.

80. What also transpires from this incident is the apparent lack of clarity as to what amounts to distress. It should be ensured that there are clear and simple guidelines, which are then followed, on what amounts to a distress signal, so as to avoid any confusion over the obligation to search for and rescue a boat in distress.

81. In 2004, a series of amendments were adopted to the SAR and SOLAS conventions, coming into force two years later in 2006. The amendments, *inter alia*, provided further guidance on the locations where such rescued persons ought to be disembarked.

82. It should be noted that the 2004 amendments are the subject of ongoing disagreements between the Italian and Maltese authorities owing to the fact that Malta exercised its sovereign right to object to the set of amendments, including by not ratifying them. Malta's understanding of the 2004 amendments is that they would oblige Malta to accept the disembarkation within its ports of all persons rescued within its very large SAR zone.<sup>19</sup>

<sup>17</sup> IAMSAR's primary purpose is "to assist States in meeting their own search and rescue (SAR) needs, and the obligations they accepted under the Convention on International Civil Aviation, the International Convention on Maritime Search and Rescue, and the International Convention for the Safety of Life at Sea. Mission Coordination volume (volume II) assists personnel who plan and co-ordinate SAR operations and exercises".

<sup>18</sup> See Annex 34, Resolution MSC.167(78) (adopted on 20 May 2004):

[www.imo.org/OurWork/Facilitation/IllegalMigrants/Documents/MS.167\(78\).pdf](http://www.imo.org/OurWork/Facilitation/IllegalMigrants/Documents/MS.167(78).pdf)

<sup>19</sup> See Doc. 12628, op. cit., paragraph 49.

83. The main impact of the situation where neighbouring coastal States are regulated by two different sets of legal obligations is the consequential lack of legal certainty with regard to the most appropriate place of disembarkation for persons rescued in the central Mediterranean Sea.

84. This situation has led to a number of incidents where migrants, asylum seekers and refugees rescued on the high seas, including by fishermen or by military assets, were left waiting for days for the relevant States to decide where they ought to be disembarked. I am concerned that such situations contribute to the increasing unwillingness of private, commercial vessels, but also possibly of military vessels, to fulfil their legal obligation and rescue persons found to be in distress, a failure also witnessed by the persons on the “left-to-die boat”.

#### 4.3. Was there a failure to intervene?

##### 4.3.1. The French aircraft

85. Information provided by the Rome MRCC indicated a sighting of a boat full of migrants by a French aircraft on 27 March at 14:55, just a couple of hours before the migrants made their first call to Father Zerai. According to the French sighting, the boat was a rubber dinghy, had about 50 persons on board and was under propulsion, as opposed to drifting. A photograph taken by the aircraft was also provided to me by the Rome MRCC, showing distinctly a blue boat packed with people and steadily moving ahead.

86. The boat’s position at this time, as recorded by the French aircraft, was not far away from Thuraya’s estimate of the boat just a few hours later.

Latitude:	33 degrees, 40 minutes North
Longitude:	13 degrees, 05 minutes East

87. The boat in the picture was identified as the boat in question by one of the survivors. Another survivor recalled that it was blue. Taking these facts into account, I am convinced that this is indeed a picture of the “left-to-die boat”.

88. I was not provided with the name of the French aircraft.

89. I have written to the French authorities with questions relating to this picture, including one regarding the identity of the aircraft from which the photograph was taken and one regarding the identity of the vessel from which the aircraft was operating and its location. I also requested them to respond to my earlier requests concerning the location and activities of their assets at the time.

90. On 5 March 2012, I received a reply from the French Minister of Defence stating that, according to information provided by the French military, no such event occurred off the Libyan shores during the NATO operations. The Minister added that the French vessel “*Meuse*” encountered a vessel carrying migrants on 28 March 2011 approximately 12 nautical miles south of Malta, which could not have been the boat in question. The Minister went on to say that all other French assets were operating in the Gulf of Sidra, therefore not in the area of concern. While this reply is interesting, it fails to provide any concrete answers as to the identity of the French aircraft that took a picture of the boat and transmitted it to the Rome MRCC.

91. In relation to this specific incident, NATO’s written reply to my letter of 8 December states that “based on a review of existing records in NATO operational headquarters, there is no record of any aircraft or ship under NATO command having seen or made contact with the small boat in question”.

##### 4.3.2. The helicopter

92. The military helicopter that came and lowered a few bottles of water and biscuits to the boat did so after Father Zerai had informed the Italian Coast Guard of the boat in distress.

93. It is likely, but not certain, that the distress call and the intervention of the helicopter were linked.

94. The helicopter must have understood that the lives of the persons on the boat were in danger. The survivors recalled that the soldiers in the helicopter made gestures to them to wait. They were then confident that someone would come back and rescue them.



95. Why did this not happen? This is hard to understand. Perhaps the engine of the boat was running at the time and it was therefore not adrift? While this might have been an indication that the boat was not in immediate distress, the other characteristics of the boat (a simple dinghy, overcrowded, miles from the coast, people on board showing clear signs of distress) should have been clear. Furthermore, the message of the Rome MRCC was significant, and even if the helicopter had not considered the boat to be in distress it should have contacted the Rome MRCC and kept them informed of the reported sighting and intervention.

96. I therefore conclude that there was a clear failure of the helicopter and its command to take appropriate follow-up action linked to the boat and the people in distress.

#### 4.3.3. *The large military vessel*

97. Having established the credibility of the survivors' story, I have no reason to doubt that at one point during their journey they did encounter a large military vessel and that this vessel did not provide them with any assistance. In the light of NATO's statements regarding States' commitments vis-à-vis their international obligations at sea, and a number of Search and Rescue (SAR) activities which took place successfully involving NATO assets, it is difficult to understand why no assistance was offered to the boat, regardless of whether the naval vessel was under NATO command or not.

98. It should be noted that at the time of the sighting of the large military vessel (around day 10 of the boat's journey, therefore well after 31 March), NATO had taken sole command of the international military effort concerning Libya and it is my understanding that all military vessels in the region were under the command of NATO. My request to NATO for clarification on this point has, however, remained unanswered. In the reply from the French Minister of Defence, I was informed that the aircraft carrier *Charles de Gaulle* (explicitly mentioned in *The Guardian* article) was never operating closer than 150 nautical miles from Tripoli at the time of concern and could therefore not have been the large vessel encountered by the boat. I was also informed by NATO that the Italian aircraft carrier, *ITS Garibaldi* was also 120 to 150 miles away at this time.

99. According to the survivors' accounts, the situation on board their boat when they encountered the ship was very different to the situation when they encountered the helicopter. When the ship came across them, many persons had already died and there was no food and water. It should have been clear to onlookers that the survivors and the boat were in distress and required immediate rescue. In these circumstances there was a clear failure to intervene.

#### 4.3.4. *Commercial shipping*

100. There are also serious concerns about the failure of the fishing boats to take any action when coming into contact with the boat in distress.

101. According to the survivors, the Tunisian fishermen pointed them in the direction of Lampedusa. It is clear that the fishermen failed to go to their aid and did not provide any material form of assistance. What is of particular concern is that the fishermen failed to inform any maritime authority of the boat's presence and distress.

102. Fishing boats have a radio on board. It would have been simple for a call to have been made indicating the location of the boat in distress.

103. It is also unclear why the Cypriot supply vessel *Sea Cheetah* did not intervene. From the analysed telephone recordings provided by the Rome MRCC, I understand that it was not far from the boat's location on 27 March 2011. However, apparently the *Sea Cheetah* took no action, nor did the Rome MRCC ask it to do so.

104. In their meeting with me, UNHCR officials highlighted a number of concerns about measures being taken by coastal States that negatively affect the willingness of fishing vessels and other commercial shipping to fulfil their obligation of rescue at sea. Such measures include the criminalisation of irregular migration and problems of delays and agreeing a place of disembarkation. For commercial vessels, this can lead to serious financial losses and also the threat of criminal sanctions for aiding and abetting irregular migrants. It is clear that commercial vessels, including small fishing vessels, seem to be increasingly reluctant to rescue mixed flows of migrants in distress at sea.<sup>20</sup>

---

<sup>20</sup> Specific examples include: the prosecution by Italy of seven Tunisian fishermen who rescued 44 migrants at sea, the Cap Anamur incident (<http://news.bbc.co.uk/2/hi/8295727.stm>), the Francisco y Catalina incident

#### 4.4. Was there a failure by NATO?

105. As previously explained, NATO was informed of the situation of the boat via a fax sent by the Maritime Rescue Coordination Centre (MRCC):

"FOR ANY APPROPRIATE ACTION, PLEASE BE INFORMED THAT TODAY THIS MRCC RECEIVED THE INFORMATION ABOUT A SMALL BOAT WITH ABOUT 68 P.O.B. IN DIFFICULT IN THE SOUTH MEDITERRANEAN SEA. ON BOARD THERE IS THE THURAYA SAT PHONE WITH THE NUMBER 008821621256157. WE CARRIED OUT SOME INVESTIGATION ABOUT THIS CASE WITH THE PURPOSE TO LOCATE THE CALLER. "THURAYA" COMPANY INFORMED US THAT THE POSITION OF THE SATELLITE DEVICE AT 16.52 UTC WAS LAT 33°58.2'N – LONG 012°55.8'E. PLEASE KEEP US UPDATED IN CASE OF SIGHTING OF THE ABOVE MENTIONED BOAT BY ANY NATO NAVAL ASSETS."

106. NATO did not reply to the Rome MRCC's fax. However, no reply would have been expected unless maritime assets were in the vicinity of the vessel, the subject of the alert. Interestingly, however, on 28 March at 11:58, NATO replied to another alert the Rome MRCC had disseminated, informing them that no NATO assets were in the vessel's vicinity. It is not clear why NATO replied to that particular alert and not to the alert relating to the "left-to-die boat".

107. NATO's responses to this incident were inconsistent, as illustrated by NATO's initial comments to the media:

- "It had not logged any distress signals from the boat and had no records of the incident";<sup>21</sup>
- "There is no absolute evidence of NATO ships being involved in such events";<sup>22</sup>
- "I have no evidence of having received such alerts";<sup>23</sup>
- "The only aircraft carrier attached to the NATO mission at the time in question, which is the 29<sup>th</sup> and the 30<sup>th</sup> of March, was an aircraft carrier which was operating more than 100 nautical miles away from the possible location of the migrant vessel";<sup>24</sup>
- "NATO units at sea neither saw nor heard any trace of distress calls from that area";<sup>25</sup>
- "Basically, NATO was not involved because it had no signs, okay?"<sup>26</sup>

108. During my meeting with NATO officials in Brussels, I was informed that NATO's closest asset to the boat was 24 miles away. Despite my official and repeated request, NATO has not disclosed the name of the vessel in question.

109. However, I have gathered evidence that NATO assets were indeed in close proximity to the boat at that time, namely one only 11 miles from the boat.

110. On 27 March at 20:07 the Italian Naval Fleet Command (CINCNAV) made a call to the Rome MRCC where the boat in distress was discussed. Importantly, the CINCNAV officer confirms that a military vessel under NATO command was located around 11 miles away from the boat in distress: the Spanish naval vessel *Méndez Núñez*.

111. Given the *Méndez Núñez's* distance from the boat, it seems that it could have reached the boat in distress in less than two hours. It remains unclear why NATO, or the *Méndez Núñez* itself, failed to provide this information to the Rome MRCC following the launch of the distress alert. What is clear is that no attempt was made by the Spanish vessel to approach the boat. Furthermore, the *Méndez Núñez* is a naval vessel with the capacity to carry a helicopter. If it had a helicopter on board it would have been an even simpler operation to check on the boat in distress.

112. During the above-mentioned telephone conversation between the CINCNAV and the Rome MRCC, shortly after referring to the *Méndez Núñez*, mention is made of the Italian vessel *ITS Etna* as being within the specified region as well as the *ITS Borsini*. In information provided by NATO, it is confirmed that the *ITS Borsini* was 37 nautical miles away, but that the *ITS Etna* was much further away (155 miles). The presence

---

(<http://news.bbc.co.uk/2/hi/europe/5205084.stm>), and the long-standing disagreement between Italy and Malta on their respective interpretations of SAR responsibilities.

<sup>21</sup> Spokesman for NATO, in *The Guardian* article of 8 May.

<sup>22</sup> Brigadier General Claudio Gabellini, NATO, *Press briefing on Libya*, 10 May 2011, [www.nato.int/cps/fr/natolive/opinions\\_73660.htm](http://www.nato.int/cps/fr/natolive/opinions_73660.htm)

<sup>23</sup> *Ibid.*

<sup>24</sup> NATO Deputy Spokesperson Carmen Romero, during the press briefing referred to above.

<sup>25</sup> *Ibid.*

<sup>26</sup> *Ibid.*

of an Italian naval vessel within the specified region could provide a link to the origin of the water and biscuits dropped by the helicopter to the boat in distress. The *ITS Borsini* has a helicopter capacity. More information is needed from the authorities to establish whether or not this vessel was aware or involved in the incident.

113. It also transpires from the aforementioned conversation between the Rome MRCC and the CINCPAC officer that the CINCPAC officer left it to NATO to deal with its own assets which were “*the nearest of all in absolute terms*”.

114. It is not clear whether the NATO vessel located at 24 miles from the boat was the *Méndez Núñez*, or another military vessel. It can be noted that 24 miles is a relatively close sailing distance. Indeed, I was told by the Malta MRCC that when organising a Search and Rescue operation they look for assets in a 100-mile radius. As one NATO official said: “it would have been a piece of cake” to sail to the boat.

115. NATO officials have confirmed in a meeting, in follow-up written communications, as well as in several press briefings, that NATO’s operations are fully aware of their international maritime law responsibilities. Their active involvement in a number of SAR operations during this period resulted in the saving of hundreds of lives. This is clear evidence of their general readiness to assist when and as required.<sup>27</sup> Yet despite this understanding of international maritime law rules and a willingness to save lives at sea, no asset known to be close to the boat headed to its rescue.

116. According to NATO, the contents of the message they received from the Rome MRCC in the evening of 27 March were unclear. NATO told us that the message was not sent in the required format, standardised for ease of comprehension, and that it was therefore not a clear distress call requesting specific action. NATO specified that the message’s text “did not convey a sense of seriousness or urgency”.

117. Whilst the indication that the vessel was in difficulty appears to be clear, the message does not request any prompt specific action and the word “DISTRESS” is not used. The Malta MRCC also commented on the nature of the alert, saying that there was no specific query as to availability of assets.

118. This possible lack of clarity on the alert level is not seen in the Inmarsat-C Enhanced Group Call (EGC) launched by Rome (27 March 2011 at 19:54), which clearly indicated the alert’s priority as “DISTRESS”. The Hydrolant Warning Message launched on 28 March at 06:06 specifically stated that the persons were in need of assistance, requesting all vessels in the vicinity to keep a sharp lookout and to “ASSIST IF POSSIBLE.”

119. It is my understanding that the messages were sufficiently clear to indicate that action was necessary and that they should not be ignored. If authorities were considering not intervening because of the lack of clarity, asking for clarification from the Italian border guards would have been the most appropriate step to take.

120. In order to understand the situation better, I wrote to the Ministry of Defence of Spain with respect to the *Méndez Núñez* and to NATO with respect to the *ITS Etna* (which I was informed was under NATO command) seeking the following information:

- The specific location of the *Méndez Núñez* and the *ITS Etna* at the time of the Rome MRCC’s fax alert to NATO, as well as the logs of their respective aircrafts/helicopters;
- The name and nationality of the military vessel located at around 24 miles from the boat;
- The details of any communications between NATO Naples Headquarters and the *Méndez Núñez* and the *ITS Etna*, and also the vessel 24 miles away. Most importantly, I am attempting to ascertain the specific considerations and decision-making processes that led to these vessels taking no action.

121. On 8 March 2012, I received a reply from the Spanish Minister of Defence assuring me that the *Méndez Núñez* “never had any contact at all with [the] vessel adrift” and that it “never was at the distance of 11 nautical miles” referred to in my letter. Furthermore, the Ministry added that “this frigate did not receive

---

<sup>27</sup> See for example statements made during NATO’s 13 May 2011 press briefing on Libya: “In accordance with the Safety of Life at Sea, the SOLAS convention, all NATO ships will maintain a constant lookout for vessels in distress. Captains of ships will follow international law and responsibilities in rendering assistance to any known ship to be in distress. Furthermore, NATO is working with the maritime authorities of neighbouring countries and with the commercial shipping industry in order to spot and assist vessels whenever necessary.” [www.nato.int/cps/fr/natolive/opinions\\_74038.htm](http://www.nato.int/cps/fr/natolive/opinions_74038.htm). On 26 March, the Italian vessel *Etna* was involved in a SAR operation seeing the rescue of around 300 migrants, photos available here [www.nato.int/cps/en/natolive/photos\\_73676.htm](http://www.nato.int/cps/en/natolive/photos_73676.htm). Other examples include: Reuters Africa, NATO answers refugee boat’s mayday off Libya, 10 July 2011, <http://af.reuters.com/article/libyaNews/idAFL6E71A06W20110710>.

any fax from MRCC Rome or any other communication” regarding the matter mentioned in my letter. Finally, the Ministry underlined that the helicopter from the frigate “did not overfly, and consequently had no chance to provide any assistance to the boat”.

122. While I was aware that the Rome MRCC did not contact the military vessels directly, I have to conclude that NATO Naples Headquarters did receive the distress fax. Whether they passed it on to vessels operating under its command is unclear and contradictory. NATO confirms to me that they did while the Spanish authorities contradict this saying that they did not receive the message. I also have difficulties in understanding how the *Méndez Núñez*, and other vessels could not have received the general Inmarsat and Hydrolant distress messages which were sent to all vessels in the area.

123. The letter from the Spanish Minister of Defence, while stating that the *Méndez Núñez* was never at a distance of 11 nautical miles from the boat, does not provide me with its exact position. It is highly likely that it was nevertheless extremely close to the boat.

124. Without full information on this matter it is difficult to conclude on the responsibility of NATO or boats under national command. It is, however, clear to me that there was a failure by NATO to react to the distress signals. Bearing in mind that the Italian MRCC had no independent way of identifying military vessels in the area or having direct contact with them, it was up to NATO to take action. Furthermore, the helicopter that went to the aid of the boat and then disappeared had to be attached to some naval vessel. No explanation has come forward from any quarter recognising the role of the helicopter or explaining the lack of follow-up to its mission, including the lack of communication with the MRCC about this flight.

#### *4.5. Was there a failure to prepare for the consequences of the Libyan conflict by the United Nations and NATO?*

125. “Before starting a war, you have to know: Where do you put the prisoners? Where do you put the dead? What do you do with the refugees?”<sup>28</sup>

126. This statement sums up my concern with the overall manner in which the exodus of migrants, asylum seekers and refugees from Libya was handled by the international community.

127. United Nations Security Council Resolution 1970, adopted on 26 February 2011, followed by Security Council Resolution 1973 on 17 March 2011, created the basis for the agreement to launch NATO’s Operation Unified Protector. Surprisingly, these resolutions contain minimal references to persons forced to leave Libya as a result of the conflict and violence.

128. For several years Libya was known to be one of the main departure points for thousands of refugees, asylum seekers and migrants trying to reach Europe. Furthermore, there were public threats by Colonel Gaddafi that Europe would be flooded with immigrants. The exodus was therefore not a surprise and should have been catered for, including in terms of preparations for rescue at sea, particularly in Libya’s SAR zone. There should have been greater clarity in terms of responsibilities for co-ordination and co-operation, particularly between Maritime Rescue Coordination Centres, NATO and States with naval vessels in the region. Adequate resources should also have been made available for sea rescue operations and reception of mixed flows of migrants, asylum seekers and refugees.

129. NATO’s extensive presence in the region seems to have been planned and implemented with insufficient consideration of search and rescue structures. I understand that the Rome MRCC did not consider that its SAR responsibilities extended to military vessels operating under NATO command. When informed of the *Méndez Núñez’s* location, the Rome MRCC concluded that it must have received the Inmarsat-C alert, but stopped short of taking further specific action.

#### *4.6. Was there a failure on the side of the Libyan authorities?*

130. Even in times of war, a State has the responsibility for the safety of civilians, be this on land or at sea. Libya can therefore not be absolved of all responsibility on this matter.

131. Furthermore, Libya breached all international obligations by encouraging and even forcing the migrants, asylum seekers and refugees to take the dangerous sea route. Not only did Colonel Gaddafi threaten Europe that he would put these people to sea, it actually happened. In the case in question the survivors told me how the military accompanied them to the boat. On other occasions, I have listened to vivid

---

<sup>28</sup> Statement by the Italian navy during our meeting of 7 September 2011.

testimonies of people being forced at gunpoint to embark on unseaworthy boats heading towards Lampedusa. There is no doubt that there was a massive failure on the side of Colonel Gaddafi's Libyan authorities and that they therefore also carry a heavy share of the responsibility for the deaths on this boat. At the same time, Gaddafi also threatened the refugees in Libya by forcing them to support his regime. As the rebels suspected the refugees originating from Sub-Saharan Africa of supporting Gaddafi, many of them chose to flee.

#### 4.7. *Was there a failure on the side of the smugglers?*

132. The conclusion here is simple. The smugglers showed reckless disregard for the lives of the migrants. To make money they overloaded the boat, they took away food and water, they did not provide sufficient fuel and they did not provide adequate means of communication in case of distress. Furthermore, the so-called "captain" of the boat was clearly unqualified to get the boat to Lampedusa.

### 5. Who is responsible?

#### 5.1. *A collective failure*

133. As can be seen from the answers to the seven questions posed: there were failures at every step of the way and by all key actors. There was a collective failure of NATO, the United Nations and individual States in planning the Libyan military operations and preparing for an expected exodus by sea. There was a failure in co-ordinating the specific rescue of the boat, despite the fact that a distress signal had been sent and the co-ordinates of the boat had been logged. This failure was in part due to the lack of clarity for responsibility under Maritime Law and in part due to lack of co-ordination by the Italian or the Maltese Maritime Rescue Control Centres with other actors in the region in the absence of a functioning Libyan MRCC. The Rome MRCC broadcast an emergency call over a long period of time, but failed to ensure that the boat was rescued. Yet, as the first authority to be informed about their difficulties, and in view of the obviously ineffective Libyan SAR, the Rome MRCC can be regarded as the first authority responsible for ensuring their rescue. The *Méndez Núñez* and the *ITS Borsini*, although in the near vicinity of the boat, failed to go to its assistance, thereby engaging the responsibility of both NATO and their respective flagship countries (Spain and Italy). The Libyan authorities were responsible not only for what they didn't do (maintain responsibility for their SAR zone), but more worryingly for what they did do (directly or indirectly forcing persons to climb in the boats and flee Libya). The smugglers showed reckless disregard for the lives of the persons who boarded the boat. The boat was spotted and photographed by a plane. The existence of a packed rubber dingy in the middle of the Mediterranean, even if under propulsion, should have been a signal for high alert.

134. What concerns me most, however, are the allegations that the boat was ignored by a helicopter and a naval vessel. A helicopter provided food and water and then disappeared. Neither NATO nor any State has come forward to provide information as to the identity of the helicopter and the actions taken by it and its command. Similarly no one has come forward with the possible identity of the naval vessel which ignored the calls for assistance from the survivors of the boat in distress about ten days into its trip.

135. At the time of writing, there exist a number of information gaps and certain questions remain unanswered.

136. Some information is not available because of the passage of time and the unavailability of data. In other cases, information gaps exist because specific questions to specific agencies and authorities remain unanswered, despite the gravity of the incident. At the core of these gaps are three of the investigation's most fundamental questions. The first is the State responsible for the helicopter that first assisted the boat in distress. The second is the State responsible for the military vessel that ignored the plight of the survivors and thirdly, a question which should be simple to answer, whether the naval and air vessels concerned were under national or NATO command.

#### 5.2. *Which helicopter left the boat to die?*

137. All of the survivors, including those interviewed by other agencies and individuals, corroborate the story that a military helicopter approached them and lowered water and biscuits onto the boat using a rope. Although the survivors' accounts are almost all consistent in recalling Italian writing on the water bottles and possibly also on the biscuit packaging, this information, while pointing a finger towards an Italian vessel is not conclusive. For example, the water and biscuits could have been loaded onto a foreign vessel in an Italian port. Every military asset should in principle maintain a detailed log of all material boarded, transported and distributed. I am certain that if a military helicopter distributed water and biscuits, the log would show this.

Access to these logs would therefore facilitate the determination of whether or not helicopters operating in the region were or were not involved in the incident.

138. The helicopter must almost certainly have come from a ship. From the information I gathered, I can state that at least two military ships under NATO or national command were in close proximity to the boat at the time the distress call was made. These boats were the Spanish ship *Méndez Núñez* and the Italian ship *ITS Borsini*; both have aircraft facilities, which means that they are capable of launching helicopters.

139. As noted above, NATO's written reply to my letter of 8 December states that "based on a review of existing records in NATO operational headquarters, there is no record of any aircraft or ship under NATO command having seen or made contact with the small boat in question".

140. In the light of the information I have received concerning the whereabouts of the *Méndez Núñez*, the *ITS Etna*, I have sent a further letter to NATO and Spain asking for information on the precise location of these boats and the detailed logs of their respective helicopters. As stated above, the Spanish Minister of Defence replied to me that the helicopter from the *Méndez Núñez* "did not overfly, and consequently had no chance to provide any assistance to the boat". NATO replied, as already mentioned, that the *ITS Etna* was not in the region but that the *ITS Borsini* was 37 miles away. No mention is made in this reply of the helicopter activities or rescue activities of the *ITS Borsini*.

### 5.3. Which naval vessel ignored the calls for assistance?

141. To try and identify the large military vessel I sought the co-operation of the European Union, whose Satellite Centre (EUSC) gathers a great deal of data and pictures across the globe. A letter was therefore sent to Lady Ashton, the High Representative of the European Union for Foreign Affairs and Security Policy and Vice-President of the European Commission.

142. On 19 March, I received Lady Ashton's reply which states that the European Union Satellite Centre does not have archived products available for the indicated area and the indicated time frame. It continues stating that "Considering that the area of interest for which your requested imagery is located less than 130 km from the Libyan shores and that the period under investigation coincides with the NATO operation "Unified Protector", the envisaged investigation could involve classified "NATO CONFIDENTIAL" information. I would therefore suggest that the Committee requests assistance from NATO, including through the NATO Parliamentary Assembly." This implies that satellite data and imagery might be available, but only to NATO.

143. Access to satellite imagery of the area would be an invaluable tool to identify the location of ships and assets at the time. Military vessels are certainly large enough to be spotted, and possibly identified from such data. There is little doubt that a region in which NATO military operations were ongoing was monitored by satellite and NATO must have access to this information.

144. I asked the Rome and Malta MRCCs' assistance in trying to reconstruct as accurately as possible the drifting itinerary of the boat. While Rome replied that the backtracking calculation of the itinerary is very difficult considering the high number of variables and unknown elements, Malta did not reply.

145. I was nevertheless provided with a drift model by Goldsmiths, Centre for Research Architecture (see Appendix 1). It gives a rather precise indication of the whereabouts of the boat during its drifting back to Libya.

146. A number of States have responded saying that they had no military vessels in the area during the specific time frame in question. These replies were received from Canada, Greece, France, Italy, Romania and Turkey. However, in the Italian Ministry of Defence's reply, I was invited to contact NATO concerning Italian assets under its command. This was the case for the *ITS Etna* and I thus addressed NATO specifically to obtain clarification. I have received clarification on the *ITS Etna*, but a number of questions are now outstanding about the *ITS Borsini*. This illustrates how responsibility is easily shifted back and forth at national and supranational level.

147. The United Kingdom and the United States have not yet replied to my letters.

148. The replies I have received so far do not allow me to identify the vessel. However, I have no doubt that this information is available. NATO certainly has access to the detailed logs of the vessels participating in its operations. Until I receive adequate replies, I have no option but to reach the conclusion that one of these States' vessels could be responsible for ignoring the calls for assistance from the boat in distress. Whatever the nationality of the vessel, it must have been under the command of NATO, as at that time all

vessels in the area were under NATO command. NATO must therefore take responsibility for the boat's ignoring the calls for assistance from the "left-to-die boat".

149. Here again, NATO's reply states that it has no record of any ship under NATO command having seen or made contact with the boat.

## **6. Conclusions**

150. As stated at the beginning of this report, I have an immense respect for those persons who work to save lives in dangerous conditions at sea. Thousands of lives have been saved and will continue to be saved as a result of their courage and dedication.

151. At no point during the preparation of my investigation and report did anyone question the basic obligation to rescue at sea. This obligation is known to every shipmaster, professional or amateur.

152. Nevertheless, too many persons have lost their lives in circumstances similar to the 63 persons on board the "left-to-die boat". With this investigation, it is hoped that this striking story will also draw attention to the many other tragedies of this kind.

153. Things went terribly wrong for the passengers of the boat which is the subject of this investigation. These people did not need to die. If different actors had intervened or had intervened correctly, they could have been rescued on several occasions. More has to be done to avoid people dying in their desperate attempts to reach Europe.

154. In the specific case in question, I will continue to look for answers. Those responsible have to be called to account and the incident needs to serve as a reminder that there are gaps in both law and practice concerning rescue at sea which need to be remedied.

155. The Mediterranean is one of the busiest seas in the world, and at the same time one of the best monitored. Yet, in 2011, the Mediterranean was also the sea in which the most people disappeared. I am not talking about somewhere in the middle of the Pacific, but about the Canal of Sicily which is full of ships, with many radars and with satellite imagery available. This boat could and should certainly have been rescued and not left to wash up on the shores of Libya with only a handful of survivors.

## **7. Post script on the survivors**

156. Without the willingness of the survivors to share their stories, this investigation would have no foundation. Some of them have lost loved ones on their journey, all of them have to live with physical and psychological scars from the traumatic trip and build new lives.

– Bilal Yacoub Idris, 30 years old, is Ethiopian. He took another boat and reached Italy, where he now lives in a centre for asylum seekers. His claim for asylum is still pending.

– Ghirma Halefom is Eritrean. He arrived in Lampedusa in June 2011 and now lives in a Centre for asylum seekers near Turino. His claim for asylum is still pending.

– Dain Haile Gebre is Eritrean. He now lives in Italy, where he has been granted asylum.

– Abu Kurke Kebato, 23 years old, claimed asylum in Italy. Later he moved to the Netherlands together with his wife, where he made a further claim for asylum, which is still pending.

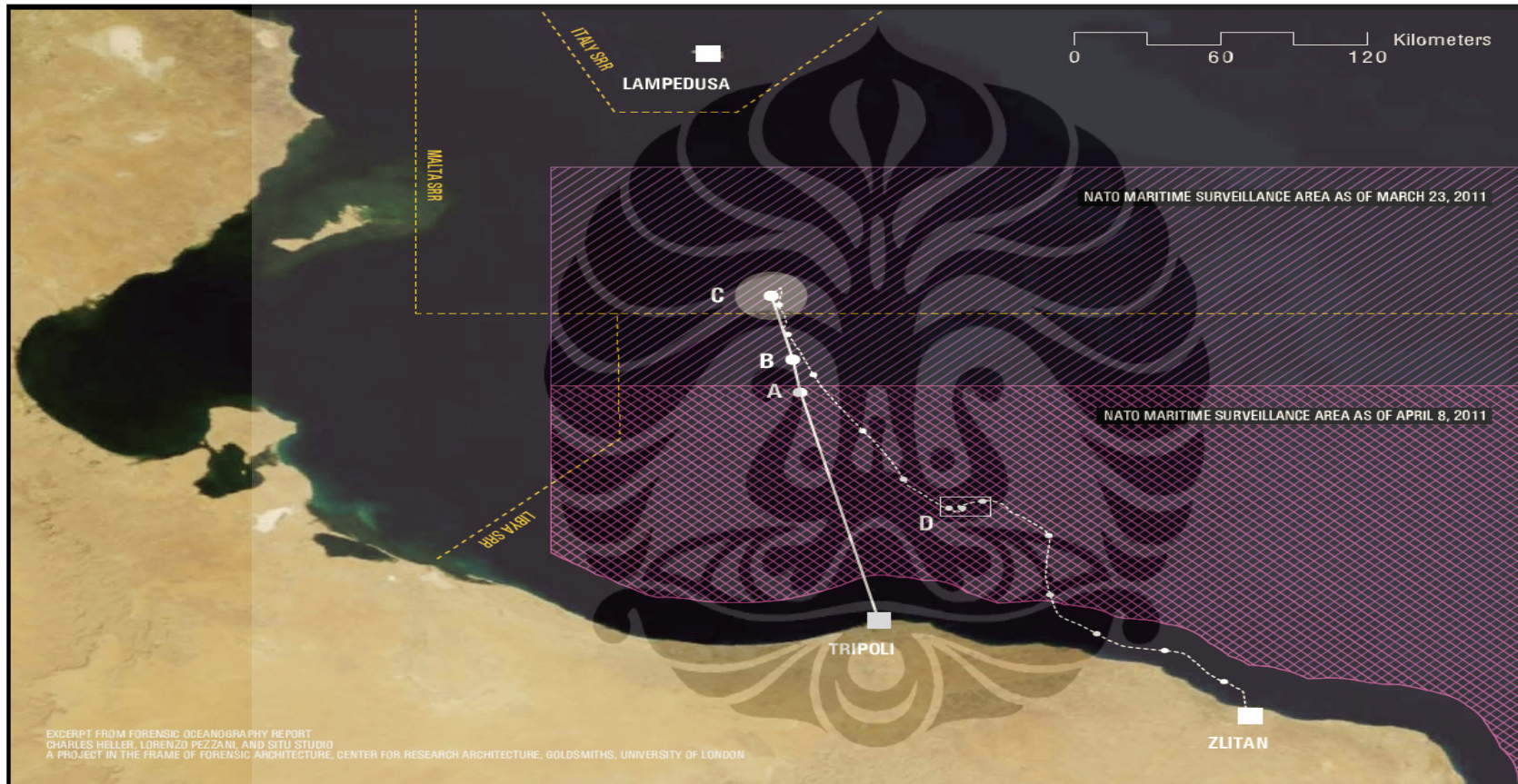
– Mahmmud Ahmed Ibrhaim, 23 years old, Kabbadi Asfao Dadi, 19 years old and Elias Mohammed Kadi, 23 years old, are Ethiopian. They live in the Choucha refugee camp in Tunisia and have been granted asylum and will be resettled to Australia.

– Filmon Weldemichail Teklegergis, who used to call himself Johannes, is Ethiopian. He lives in Norway where his first claim for asylum has been rejected. The appeal procedure is pending.

– Mariam Moussa Jamal, 22 years old and Ethiopian, is the only female survivor of the tragedy. After having spent several months in the Choucha refugee camp in Tunisia, she was resettled to Norway by the International Organization for Migration (IOM).

## Appendix

### Reconstruction of the itinerary and of the drifting of the “left-to-die” boat<sup>29</sup>



<sup>29</sup> FORENSIC OCEANOGRAPHY: Charles Heller, Lorenzo Pezzani and Situ Studio.

Drift Model: Richard Limeburner, Woods Hole Oceanographic Institution (WHOI).

This work is produced in the framework of the ERC funded Project “Forensic Architecture” – Goldsmiths, Centre for Research Architecture and towards a report that will be published in April 2012.

DRIFT MODEL CREDITS: Ocean currents were obtained from the MyOcean website

(<http://www.myocean.eu.org/index.php/products-services/catalogue>). MyOcean provides data mainly from EuroGOOS Regional alliances which have deeply contributed to structure the European Operational Oceanography community. The ocean currents were actually provided by the Istituto Nazionale di Geofisica e Vulcanologia (INGV) in Italy. INGV uses NEMO (Nucleus for European Modeling of the Ocean), a state-of-the-art modeling framework for oceanographic research, operational oceanography, seasonal forecasts and climate studies. See <http://www.nemo-ocean.eu/>. Wind data at the Lampedusa Island airport was obtained from EuroWeather (<http://www.eurometeo.com/english/home>). Weather data at Libyan meteorological stations was unreliable in early 2011.



**Figure caption:**

Trajectory followed by the “left-to-die” boat with indication of key events:

- The migrant’s vessel leaves the Port of Tripoli between 00:00. and 02:00 UTC on 27 March 2011 with 72 people on board.
- (A) After proceeding in the direction of Lampedusa for 15-18 hours, the migrants place a distress call by satellite phone. The GPS location of the vessel is located at 16:52 GMT on 27 March, 2011 at position LAT 33 58.2 N – LON 12 55.8 E by the satellite phone provider Thuraya. Shortly after this call, the Italian Coast Guard publishes an Enhanced Group Call alert that a vessel is in distress and provides its geographic co-ordinates.
- (B) The boat proceeds for around 2 hours until it is overflown by a helicopter. After this encounter, the satellite phone is thrown into the water. The last signal detected by the satellite phone provider is LAT 34 07.11 N – LON 12 53.24 E at 19:08 GMT on 27 March 2011. This location thus presumably corresponds to that of the encounter with the helicopter. The vessel remains in approximately the same area for 4-6 hours before it is visited for a second time by a military helicopter that drops biscuits and water before leaving. Still without moving very much from the location of the last signal, the migrants encounter several fishing vessels, which do not provide assistance. They then decide to move again between 00:00 and 01:00 GMT and continue presumably NNW towards Lampedusa for 5 to 8 hours with an estimated speed of 4.43 kt (the average speed held during the navigation from Tripoli to point A).
- (C) The vessel runs out of fuel and begins to drift within a 8 nm radius (indicated with a white shade) of position 34 24.792 N – 12 48.576 E at approximately 07:00 GMT on 28 March.
- (D) The boat drifts (the estimated vessel drift was more strongly dominated by the south-eastwards winds) and between 3 and 5 April the migrants encounter a military ship that fails to assist them in any way.
- On the 10 April 2011, the boat lands back at Zlitan. Upon landing 11 migrants are still alive. Two die shortly after landing.