

# Report of the Independent Civil Society Fact-Finding Mission to Libya



Palestinian Centre for Human Rights (PCHR)



Arab Organization for Human Rights (AOHR)



International  
Legal Assistance  
Consortium

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## 1. Introduction

1. The Independent Civil Society Mission to Libya was established by the Arab Organization for Human Rights (AOHR),<sup>1</sup> in cooperation with the Palestinian Centre for Human Rights (PCHR),<sup>2</sup> who provided additional expertise and professional experience. The International Legal Assistance Consortium (ILAC)<sup>3</sup> subsequently joined the mission, providing further international expertise and insight. The Mission was established in response to allegations of widespread violations of international law, including international human rights law, international humanitarian law, and international criminal law, committed in Libya since 15 February 2011, and in light of the State's current transition away from authoritarian rule.
2. The purposes of the Mission were:
  - To investigate alleged violations of international law, in order to highlight and draw attention to incidents, or issues, of concern. In particular, the Mission sought to identify whether there was a need for investigations into international crimes, and if so, to identify any relevant issues for investigation;
  - To identify human rights-related issues necessitating attention by the Libyan authorities and/or the international community;
  - To conduct training for civil society, human rights defenders, lawyers, prosecutors, and judges;
  - To enhance institutional links with Libyan human rights defenders, lawyers, judges and prosecutors, in order to facilitate the growth and development of Libyan counterparts.
3. To facilitate the achievement of these objectives, the Mission consisted of two components: (i) a Fact-Finding Mission composed of leading international jurists and lawyers with expertise in international human rights law, international humanitarian law, international criminal law, transitional justice, and the development of legal systems in post-conflict environments, and (ii) a Training Team composed of experienced lawyers, human rights defenders, and trainers. These two components did not act as autonomous entities; members of the Fact-Finding Mission participated in training sessions, while members of the Training Team conducted interviews and investigations in support of the Fact-Finding Mission's work.
4. This Report is intended to contribute to efforts undertaken by the Libyan authorities, the international community, the International Criminal Court, and civil society, aimed towards promoting respect for international human rights and the rule of international law. In this regard the Mission wishes to highlight the fundamental importance of human rights, democracy, and the rule of law; these three principles must constitute the foundation of any State, and must serve as the guidelines by which

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<sup>1</sup> See: <http://www.aohr.net>.

<sup>2</sup> See: <http://www.pchrgaza.org>.

<sup>3</sup> See: <http://www.ilac.se>.

all future activities in Libya are evaluated. In this respect, the Mission highlights that accountability for violations of international law constitutes a fundamental component of the rule of law.

## 1.1. Terms of Reference

5. The Fact-Finding Mission was established with specific terms of reference:
  - (i) To investigate alleged violations of international law committed by:
    - a. The former Government of Libya;
    - b. The North Atlantic Treaty Organization (NATO), i.e. third States engaged in hostilities in Libya pursuant to Security Council Resolution 1973; and
    - c. Former opposition forces.
  - (ii) To identify human rights related issues necessitating the attention of the Libyan authorities and/or the international community.
6. The Mission decided to treat all information received from witnesses, victims, and other parties as confidential, unless such information already existed in the public domain.
7. The Fact-Finding Mission was not a judicial body, and did not attempt to make conclusive findings on issues of individual criminal responsibility. Information and facts were established and analysed from the perspective of international law in order to ascertain whether potential violations of international law were committed. Issues or incidents necessitating attention are identified herein to encourage effective investigation by the competent authorities, domestic or international.
8. The Fact-Finding Mission wishes to highlight the necessarily incomplete nature of this Report: it is not intended to be a comprehensive account of the recent conflict in Libya, or the violations of international law that may have occurred in that context. Rather, the Fact-Finding Mission wishes to convey the considered observations of its members, in order to facilitate, and prompt, the work of other bodies and authorities.

## 1.2. Methodology

9. The normative framework adopted by the Mission was international humanitarian law, international human rights law, and international criminal law. Work was based on an independent and impartial analysis of all parties' compliance with their obligations under international human rights law and international humanitarian law in the time period since 15 February 2011. Conclusions reached by the Mission were based primarily, and to the greatest extent possible, on information gathered first-hand. Secondary sources were used to corroborate findings, and as supporting evidence indicating potential patterns of behaviour.

10. The Mission adopted an inclusive approach to gathering information and seeking views. Information gathering methods included: interviews with victims, witnesses, and other individuals with relevant information; site visits to specific locations where violations of international law were reported as having occurred; meetings with a variety of interlocutors; and a review of public information, including UN and NGO reports, related to the conflict.
11. The Mission conducted on-site field investigations in, and around, Tripoli, Zawiyah, Sibrata, Khoms, Zliten, Misrata, Tawergha, and Sirte.
12. The Mission notes that it visited Libya during a transitional period, marked by the establishment of a new 24-member interim government on 22 March 2011. The Mission met with the then-Minister of Justice, Minister of Information, and the Minister of Local Councils.

### 1.3. Members of the Mission

13. The Fact-Finding Mission was composed of the following individuals:
  - (i) Raji Sourani is a lawyer and Director of the Palestinian Centre for Human Rights. He is also President of the Arab Organization for Human Rights, Vice-President of the International Federation for Human Rights (FIDH), a member of the Executive Committee of the International Commission of Jurists, a member of the Executive Committee of the International Association of Democratic Lawyers, and a Robert F. Kennedy Human Rights Award Laureate.
  - (ii) Dr. Amin Mekki Medani is a prominent Sudanese lawyer and former President of the Arab Organization for Human Rights. He has served as a Regional Representative for the UN Office of the High Commissioner for Human Rights, as Legal Advisor to the Special Representative of the UN Secretary-General in Afghanistan, and is a former cabinet Minister, magistrate, and lecturer in law. He has served as an expert member of International Evaluation Missions for the UN Office of the High Commissioner for Human Rights, the International Commission of Jurists, and the Ford Foundation.
  - (iii) Mohsen Awad is a former Secretary-General of the Arab Organization for Human Rights, and a member of the Egyptian Human Rights Council. He is a prominent human rights defender and researcher.
  - (iv) Amina Bouayach is the President of the Moroccan Organization for Human Rights, and a Vice-President of FIDH.
  - (v) Agneta Johansson is a lawyer, and the Deputy Director of the International Legal Assistance Consortium (ILAC).
  - (vi) William Meyer is a lawyer and the Chair of ILAC. He served as the initial Executive Director of the CEELI Institute in Prague, and has

worked extensively on technical legal assistance projects throughout the Middle East and Africa.

- (vii) Daragh Murray is a Government of Ireland IRCHSS Scholar, and Head of PCHR's International Unit. He acted as Rapporteur for the Mission.
- (viii) Hany Abu Nahla, is head of PCHR's Translation Unit, and acted as translator for the Mission.

#### 1.4. The Training Team

14. The Training Team was composed of: Iyad Al-Alami, Advocate, PCHR Deputy Director for Administrative and Legal Affairs, and Head of PCHR's Legal Unit; Bassam Al-Aqra, head of PCHR's Training Unit; Ibtissam Zarqout, head of PCHR's Field Work Unit; Mahmoud Franji, PCHR Democratic Development Unit; Mutaz Uthmann, Director AOHR Legal Unit; and Islam Abu Al-Enein, AOHR Researcher. Members of the Fact-Finding Mission also participated in a number of the training sessions.
15. The first training session conducted by the Mission targeted members of civil society, lawyers, and human rights defenders, and featured modules including: An Introduction to Human Rights; Human Rights Concepts, Terminology, and Instruments; Mechanisms of Human Rights Protection at the National Level; An Introduction to International Humanitarian Law and International Criminal Justice; The Rome Statute and the International Criminal Court; Transitional Justice; Prosecution of War Criminals; Monitoring and Documentation; Monitoring and Documentation in Practice; and the Preparation of Human Rights Reports.
16. The second training session conducted by the Mission targeted members of the judiciary, prosecutors, and members of the law enforcement agencies. Modules included: an introduction to human rights concepts, such as: terminology and instruments; International Bill of Human Rights; mechanisms of human rights protection at the national level; an introduction to international humanitarian law and international criminal justice; the Rome Statute and the International Criminal Court; transitional justice; prosecution of war criminals and universal jurisdiction; the rule of law; separation of powers; guarantees of fair trial; and the role of the lawyers and judiciary, including judges, members of the Office of the Prosecutor, and law enforcement officials in protecting human rights.

#### 1.5. Acknowledgments

17. The Mission wishes to express its appreciation to all those individuals and institutions in Libya who facilitated the Mission's work. In particular, the Arab Organization for Human Rights - Libya branch, and the Tripoli Bar Association. The Mission also wishes to thank all those witnesses and victims who took the time, and effort, to recount their story, and to relive often traumatic and harrowing experiences. Thanks

are also owed to the members of the National Transitional Council, and Local Councils who facilitated certain visits.

## 1.6. Structure of the Report

18. This Report is divided into a number of different Sections. Section 1 introduces the Independent Civil Society Mission to Libya. Section 2 provides a background to the conflict in Libya, in the form of a conflict chronology. Section 3 provides information on the parties to the conflict, specifically the former Government forces (3.1.), the current Government – former opposition – forces (3.2.), and third States engaged in hostilities pursuant to Security Council Resolution 1973 (3.3.). Section 4 specifies the applicable legal framework, discussing the provisions of international human rights law (4.1.), international humanitarian law (4.2.), and international criminal law (4.3.), the final subsection discusses the obligation to investigate, and if appropriate prosecute, serious violations of international law (4.4.). Section 5 details the findings and observations of the Fact-Finding Mission, again focusing on issues relating to the former Government of Libya (5.1.), the former opposition forces (5.2.), and third States operating under NATO command (5.3.). Section 6 then concludes with a number of recommendations, directed towards the Libyan authorities.

## 2. Conflict Chronology

19. In mid-February 2011, mass demonstrations against Colonel Gaddafi's rule broke out across Libya. Protests had initially been scheduled for 17 February 2011, a "day of rage" organised to commemorate the five-year anniversary of previous anti-Government protests.<sup>4</sup> However, the 15 February arrest in Benghazi of the prominent human rights lawyer Mr. Fathi Terbil – which constituted part of a wider anti-opposition crackdown<sup>5</sup> – sparked a spontaneous mass demonstration in the city. The authorities attempted to disperse the protest, causing a number of casualties, which in turn resulted in further public demonstrations. Protests in solidarity with Benghazi then broke out across the country, intensifying significantly on 17 February. It is this date that is now popularly recognised as the beginning of the revolution.
20. The UN Commission of Inquiry appropriately identified two phases of the revolution: phase 1, the demonstration phase, and phase 2, armed conflict.<sup>6</sup>

### 2.1. Phase 1: Peaceful Demonstrations

21. Phase 1 refers to the period from 15 February until the outbreak of a non-international armed conflict in Libya. In a number of different locations, beginning on 15 February 2011, large numbers of peaceful protestors assembled to demonstrate against Colonel Gaddafi's rule and against the suppression of other protests. These peaceful protests were met with escalating levels of violence. While there are reports of tear gas and batons being used to disperse initial protests, the use of force rapidly escalated, and by 16 February included live ammunition fired from small arms, and subsequently included heavy weapons, including heavy machine guns and anti-tank guns. From the information available to the Mission, and corroborated by other sources,<sup>7</sup> it appears that the phase 1 experience was broadly replicated across Libya.
22. The excessive force used in the attempted suppression of these protests indicates the commission of a number of violations of international law, including potential crimes

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<sup>4</sup> The 17 February 2006 protests were organised to denounce the Danish cartoon incident. However, the protest quickly transformed into anti-Gaddafi protest, and was violently suppressed. Media reports indicate that approximately 10-11 civilians were killed. See, BBC, Ten Die in Libya Cartoon Clash, 18 February 2011. Available at: <http://news.bbc.co.uk/1/hi/world/africa/4726204.stm>; Reuters, Libyan Protestors Prepare for 'Day of Rage', 17 February 2011. Available at: <http://www.guardian.co.uk/world/2011/feb/17/libyan-protesters-prepare-for-day-of-rage>.

<sup>5</sup> Other high profile arrests included Jamal Al-Hajji, on 1 February 2011, Farag Sharany on 15 February 2011, and brothers Farag, Al-Mahdi, Sadiq and Ali Hmeid on 16 February 2011. A policy of arrests intended to pre-empt protests was acknowledged by Saif Al-Islam Gaddafi in a 20 February 2011 speech, see: *Decision on the "Prosecutor's Application Pursuant to Article 58 as to Muammar Mohammed Abu Minya GADDAFI, Saif Al-Islam GADDAFI and Abdullah AL-SENUSSI"*, Pre-Trial Chamber 1, International Criminal Court, ICC-01/11, 27 June 2011, para. 28 ('ICC Decision on Prosecutor's Application')

<sup>6</sup> Report of the International Commission of Inquiry to investigate all alleged violations of international human rights law in the Libyan Arab Jamahiriya, Human Rights Council, U.N. Doc. A/HRC/17/44, 1 June 2011, para. 36.

<sup>7</sup> See, *inter alia*, Human Rights Watch, Libya: Security Forces Fire on 'Day of Anger' Demonstrations, 17 February 2011; Human Rights Watch, Libya: Security Forces Fire on Protestors in Western City, 26 February 2011; ICC Decision on Prosecutor's Application, paras. 36-41.

against humanity. It is on this basis that the International Criminal Court issued arrest warrants for Colonel Gaddafi,<sup>8</sup> Saif Al-Islam Gaddafi,<sup>9</sup> and Abdullah Al-Senussi.<sup>10</sup>

## 2.2. Phase 2: Armed Conflict

23. Phase 2 saw the establishment of armed opposition groups across Libya and the emergence of a non-international armed conflict.<sup>11</sup> There does not appear to have been a clear demarcation between peaceful protests and armed opposition, and the Mission received credible information indicating that protestors took up arms in the early stages of the revolution. In certain locations, such as Zawiya and Misrata, this may have occurred as early as 19/20 February. At this stage protestors armed themselves with weapons seized from, or left behind by, pro-Gaddafi forces; consequent to the overrunning of a city-centre barracks, for example.
24. The precise point at which these hostilities escalated to the level of a non-international armed conflict is unclear, however, and further analysis regarding the organisation of the opposition armed forces in particular is required.<sup>12</sup> The UN Commission of Inquiry noted 24 February 2011 as the date of commencement of the armed conflict,<sup>13</sup> the International Criminal Court referred to the potential perpetration of crimes against humanity – and not war crimes, which require a *nexus* to an armed conflict – between 15-28 February,<sup>14</sup> while the International Committee of the Red Cross' first reference to armed conflict was on 10 March 2011.<sup>15</sup>
25. It is the Mission's impression that the threshold of armed conflict was most likely crossed in early March, in conjunction with, *inter alia*, the establishment of the National Transitional Council and its associated military council, and the initial counter-offensive by pro-Gaddafi forces which was met with intense fighting.<sup>16</sup>
26. The non-international armed conflict ended with the capture of Sirte by opposition forces on 20 October 2011.

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<sup>8</sup> *Warrant of Arrest for Muammar Mohammed Abu Minyar Gaddafi*, Pre-Trial Chamber 1, International Criminal Court, ICC-01/11-13, 27 June 2011.

<sup>9</sup> *Warrant of Arrest for Saif Al-Islam Gaddafi*, Pre-Trial Chamber 1, International Criminal Court, ICC-01/11-14, 27 June 2011.

<sup>10</sup> *Warrant of Arrest for Abdullah Al-Senussi*, Pre-Trial Chamber 1, International Criminal Court, ICC-01/11-15, 27 June 2011.

<sup>11</sup> For further information on the applicable legal framework, see *infra* Section 4.

<sup>12</sup> See, *infra*, Section 4.1.2. Non-International Armed Conflict.

<sup>13</sup> Report of the International Commission of Inquiry to investigate all alleged violations of international human rights law in the Libyan Arab Jamahiriya, Human Rights Council, U.N. Doc. A/HRC/17/44, 1 June 2011, para. 65.

<sup>14</sup> ICC Decision on Prosecutor's Application, para 7.

<sup>15</sup> ICRC, Libya: Urgent to apply the rules of war, News Release 11/53, 10 March 2011. Available at: <http://www.icrc.org/eng/resources/documents/news-release/2011/libya-news-2011-03-10.htm>.

<sup>16</sup> See *infra* Section 4.1.2. Non-International Armed Conflict.

### 3. The Parties to the Conflict

27. The Parties to the conflict in Libya may be grouped into three distinct categories: the former Government of Libya, headed by Colonel Muammar Gaddafi; the former opposition forces, operating under the umbrella of the National Transitional Council (NTC), and associated entities; and third States engaged in hostilities pursuant to Security Council Resolution 1973, and falling under the command of the North Atlantic Treaty Organization (NATO).

#### 3.1. The Former Government of Libya

##### 3.1.1. Background

28. On 1 September 1969, a group of young military officers known as the 'Union of Free Unionist Officers' staged a bloodless coup d'état, removing the incumbent King Idris.<sup>17</sup> The Chairman of the Union of Free Unionist Officers was then-Captain Muammar Gaddafi. Although King Idris' rule was replaced by that of a 'Revolutionary Council', Gaddafi quickly asserted his authority and over the following years emerged as the new Head of State. The Pre-Trial Chamber of the International Criminal Court has noted that, since 1969 Colonel Gaddafi had "become the *de facto* head of the Libyan State; he is the internally and internationally recognised and undisputed leader of Libya and has since instituted a "one man rule" system."<sup>18</sup>

##### 3.1.2. Governmental Structure and Authority

29. In 1977, Gaddafi renamed Libya the Socialist People's Libyan Arab Jamahiriya. The Jamahiriya represented a new system of government built upon the principles of Gaddafi's 'Green Book', and professed to place power directly in the hands of the people; when translated, 'Jamahiriya' – which is a new word created and used exclusively in Libya – means 'State of the Masses'. The Jamahiriya system was implemented by means of a formal political structure at the apex of which sat the General People's Committee (fulfilling a role similar to that of a cabinet), led by the General People's Secretary (fulfilling a role similar to that of a Prime Minister). The General People's Committee was responsible for implementing the decisions of the General People's Congress (a form of parliament). In turn, the decisions of the General People's Congress were to be influenced by those of the 342 lower-level Basic People's Congresses (similar to local or municipal councils).<sup>19</sup> However, this delegation of authority turned out to be an elaborate facade, and in practice, Colonel Gaddafi constituted the sole authority in Libya.<sup>20</sup>

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<sup>17</sup> King Idris was the first, and only, Head of State in post-independence Libya.

<sup>18</sup> ICC Decision on Prosecutor's Application, para. 17.

<sup>19</sup> See further, International Crisis Group, *Popular Protest in North Africa and the Middle East (V): Making Sense of Libya*, June 2011, pp. 8-9.

<sup>20</sup> *Inter alia*, ICC Decision on Prosecutor's Application, para. 17; International Crisis Group, *Popular Protest in North Africa and the Middle East (V): Making Sense of Libya*, June 2011, p. 9.

30. The Jamahiriya system produced “a highly complex formal ruling system containing a plethora of congresses and committees, often with overlapping powers, that have contributed to a sense of orchestrated and perpetual chaos.”<sup>21</sup> This ‘organized chaos’ appears to have been the intended product of Gaddafi’s determination to assert complete individual control, while preventing the emergence of any individual or entity capable of challenging his rule. Autonomous entities were created, and positions of authority appointed by Gaddafi in an often *ad hoc* and informal manner,<sup>22</sup> in an apparent effort to avoid horizontal political structures which could facilitate opposition to his rule.
31. Significantly, Colonel Gaddafi himself did not hold any formal position of authority within the Libyan State.<sup>23</sup> Rather, he described his role as one of leader, or visionary, often adopting the title of ‘Brother Leader’. This lack of a formal position enabled Gaddafi to avoid accountability, and when necessary, to apportion responsibility for any perceived governmental failures or shortcomings on those holding formal positions. Nonetheless, absolute authority unquestionably rested with Gaddafi. For example, the Decree of Revolutionary Legitimacy of 9 March 1990 gave Gaddafi’s instructions the force of law, binding on all institutions, including the General People’s Congress and the Basic People’s Congresses.<sup>24</sup> Equally, under Law 71 of 1972 and article 206 of the Penal Code, the death penalty could be imposed for the establishment of groups, organizations or associations based on a political ideology contrary to the principles of the 1969 Revolution or calling for the establishment of such groups.<sup>25</sup>
32. A measure of power was delegated amongst Gaddafi’s inner-circle, comprised primarily of immediate family and in-laws. For example, one of Gaddafi’s sons, Saif Al-Islam – recognised as the unspoken heir apparent – was the most influential member of the inner circle, and acted as *de facto* Prime Minister. Amongst his other sons, Khamis Gaddafi headed the powerful “Khamis *Katiba*”,<sup>26</sup> allegedly responsible for Gaddafi’s personal security, while Moatassim Gaddafi controlled another powerful *Katiba*, and was appointed National Security Adviser in 2007. Abdullah Al-Senussi, the head of the Military Intelligence, is Gaddafi’s brother-in-law, while the daughter of General El-Khweldi El-Hamedi – the General Inspector of the Armed Forces – is married to Gaddafi’s son.
33. Over 42 years, Colonel Gaddafi established a pervasive system of authoritarian “one man rule”, thinly concealed behind a plethora of emaciated public bodies and institutions. His was the ultimate authority, epitomised by the slogan “Only God, Muammar, and Libya”. The International Criminal Court found that: “the Libyan State apparatus of power – including political, administrative, military and security

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<sup>21</sup> International Crisis Group, *Popular Protest in North Africa and the Middle East (V): Making Sense of Libya*, June 2011, p. 8.

<sup>22</sup> See, ICC Decision on Prosecutor’s Application, para. 73.

<sup>23</sup> ICC Decision on Prosecutor’s Application, para. 17.

<sup>24</sup> *Prosecutor’s Application Pursuant to Article 58 as to Muammar Mohammed Abu Minya GADDAFI, Saif Al-Islam GADDAFI and Abdullah AL-SENUSSI*, Pre-Trial Chamber 1, International Criminal Court, ICC-01/11-4-Red, 16 May 2011, para. 4.

<sup>25</sup> See, Concluding observations of the Human Rights Committee: Libyan Arab Jamahiriya, U.N. Doc. CCPR/C/LBY/CO/4, 15 November 2007, para 24.

<sup>26</sup> *Katiba* translates roughly as ‘brigade’. For more information on the *Katiba*, see *infra* Section 3.1.5. The *Katiba*.

branches – consists of a complex set of units and individuals, all of which are ultimately subject to the orders and control of the leader of the country, Muammar Gaddafi.”<sup>27</sup> A highly individualised power structure enabled Gaddafi “to transmit orders directly to every level of Libya’s State apparatus staff, ensuring their immediate implementation.”<sup>28</sup>

34. The product of Gaddafi’s rule was thus a ruthlessly enforced authoritarian State with power delegated to autonomous – sometimes overlapping – entities, typically headed by one of the inner-circle. As such, the formal characteristics of governmental hierarchy associated with more traditional State structures did not exist.

### 3.1.3. The Security Forces

35. The Libyan Security Forces are composed of a number of different entities; for the purposes of this Report, the most relevant are the Libyan Armed Forces, the *Katiba*, and the Revolutionary Committees.<sup>29</sup>
36. The Mission notes that the Libyan Security Forces do not appear to exhibit the institutional hierarchy or makeup traditionally associated with a State’s armed forces and law enforcement agencies. All components of the Security Forces appear to have existed autonomously and been characterised by a vertical command structure, with all components reporting directly to Colonel Gaddafi. It is believed that this is a continuation of the above-described logic, whereby Colonel Gaddafi sought to establish numerous distinct entities, directly subjected to his command, in order to prevent the emergence of horizontal structures or potential opposition to his rule.
37. Consequent to this system of direct control by Gaddafi, the Security Forces were not subject to any political or public oversight or accountability, and appear to have operated with complete impunity.

### 3.1.4. The Libyan Armed Forces

38. The Libyan Armed Forces are comprised of the Navy, the Air Force, and the Army. According to information received by the Mission, and corroborated by other sources,<sup>30</sup> the Libyan Armed Forces’ primary responsibility related to external security. The Army were thus stationed near the borders, or away from the cities in the desert; this positioning of army units away from city centres was also reported as a means of precluding the possibility of a coup. The Mission received information regarding the marginalization of the Armed Forces in favour of the *Katiba*.

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<sup>27</sup> ICC Decision on Prosecutor’s Application, para. 73.

<sup>28</sup> ICC Decision on Prosecutor’s Application, para. 74.

<sup>29</sup> Other entities include the Jamahiriya Security Organization, composed of the Internal Security Agency and the External Security Agency, the ‘People’s Militia’, and the Revolutionary Guard.

<sup>30</sup> See, for example, Global Security, Libyan Army – Order of Battle, available at: <http://www.globalsecurity.org/military/world/libya/army-orbat.htm>.

39. The Armed Forces possessed a traditional internal command and control structure, although positions of authority were reportedly allocated on the basis of loyalty or family ties. A 2010 report estimated that the Army comprised approximately 50,000 active personnel.<sup>31</sup>

### 3.1.5. The *Katiba*

40. The *Katiba* were autonomous military units distinct from the regular armed forces. They appear to have played a prominent role with respect to internal security, and were positioned primarily in, or around, population centres. According to available information, the *Katiba* were commanded by powerful individuals loyal to Gaddafi, and were allocated areas of geographic control. For example, during the revolution the *Katiba* commanded by Khamis Gaddafi operated in the west of Libya, in particular around Misrata, Zliten, Tripoli, and Zawiya, while the *Katiba* commanded by Moatassim Gaddafi operated in the East, around Ajdabiya, Brega, and ultimately, Sirte.
41. The *Katiba* were well trained and equipped military units, with heavy weaponry at their disposal. Some *Katiba* also contained heavy artillery units, tank units, and mechanized infantry. Internally, it was reported to the Mission that the *Katiba* adopted a typical military command and control structure.
42. The most prominent *Katiba* appears to have been the 'Khamis *Katiba*' (sometimes referred to as 'Brigade 32'), led by Gaddafi's son Khamis. According to information received by the Mission, the Khamis *Katiba* was considered an elite unit, members of which reportedly received advanced training in third States. Although precise figures were unavailable, the strength of this *Katiba* was consistently reported as between 25,000 – 30,000 active personnel.<sup>32</sup>

### 3.1.6. The Revolutionary Committees

43. The Revolutionary Committees were a paramilitary organisation established by Muammar Gaddafi in 1977, and charged with 'safeguarding the revolution.' They are composed of individuals loyal to Gaddafi, and are reportedly divided into 8 regional commandos, which are directly subordinated to Gaddafi's office.<sup>33</sup>
44. The Revolutionary Committee's three principal areas of responsibility have been reported as:
- Police functions, with respect to 'counter-revolutionary activity';

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<sup>31</sup> Global Security, Libyan Army – Order of Battle, available at: <http://www.globalsecurity.org/military/world/libya/army-orbat.htm>.

<sup>32</sup> It was reported to the Mission that the name Brigade 32, referred to the approximate strength of the *Katiba*, i.e. 32,000 active personnel.

<sup>33</sup> Hanspeter Mattes, Challenges to Security Sector Governance in Middle East: The Libyan Case, Geneva Centre for the Democratic Control of Armed Forces (DCAF) Conference Paper, 12-13 July 2004, p. 2.

- Guaranteeing internal stability; and
- The ‘elimination of enemies of the revolution’.<sup>34</sup>

45. The Revolutionary Committees were armed with light weapons, in particular Kalashnikov assault rifles, and were well equipped in terms of mobility and telecommunications. Their strength was reported as approximately 60,000 personnel.

## 3.2. The Former Opposition Forces

### 3.2.1. The National Transitional Council

46. The National Transitional Council emerged as the foremost opposition group, and self-professed “sole representative of all Libya” on 2 March 2011.<sup>35</sup> Originally based in Benghazi, Council members were chosen to represent the majority of local councils throughout Libya. On 5 March 2011, the National Transitional Council held its first meeting at which it established an Executive Committee, representing the new government of Libya, and a Military Council, which was charged with coordinating armed activities.

47. The National Transitional Council is now internationally recognised as the Government of Libya. On 22 November 2011 a new 24 member government was announced to oversee the transition to representative democracy.

### 3.2.2. Armed Forces

48. From the information available to the Mission, it appears that local armed opposition groups emerged spontaneously in the early days of the revolution, perhaps as early as 20 February 2011. These groups were initially comprised predominantly of civilian protestors, and were armed with weapons seized from Gaddafi’s forces. Given their nature, such groups were primarily organized and commanded at a local – town or city – level. Over time these groups were augmented by defectors from Gaddafi’s armed forces, and a semblance of national coordination under the umbrella of the National Transitional Council emerged. However, an approximation of effective chain of command appears to have existed only at the local level.

49. The Mission notes that groups existed, and continue to exist, as distinct entities under the command of a local leader.<sup>36</sup>

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<sup>34</sup> It is reported that on 5 June 1996, Colonel Gaddafi “explicitly confirmed that the Revolutionary Committees had the right to commit extrajudicial killings of enemies of the revolution in order to “guarantee the revolutionary order.”” See, Hanspeter Mattes, Challenges to Security Sector Governance in the Middle East: The Libyan Case, Geneva Centre for the Democratic Control of Armed Forces (DCAF) Conference Paper, 12-13 July 2004, p.15.

<sup>35</sup> See, Founding Statement of the Interim Transitional National Council (TNC), 5 March 2011. Available at: <http://www.ntclibya.org/english/founding-statement-of-the-interim-transitional-national-council/>.

<sup>36</sup> The autonomous nature of these groups is underlined by the continuing factional fighting occurring between such groups in Libya. During the Mission’s visit to Libya, such hostilities occurred on a daily basis. See, for example, Chris Stephen, Libya: Tripoli airport closed after rogue militia attacks garrison, The Guardian, 11 December 2011.

50. Opposition armed groups did not exhibit the same level of organization, or command and control, as regular armed forces. From the information received by the Mission, it appears that the opposition forces can be categorised into two groups: those operating from opposition-held areas, and those operating from areas still under Gaddafi's control. By necessity, these groups operated, and were organized, on a different basis.
51. Groups operating from opposition-held areas appear to have been organized along more classical military lines, and divided into larger units, encompassing companies, battalions, brigades, and so on. It appears that these groups, located predominantly in Eastern Libya, would have received the most sophisticated training, including by members of western armed forces. However, during the conflict, opposition commanders were quoted in the media referring to difficulties in ensuring that fighters followed orders and adhered to military structures.<sup>37</sup>
52. In areas under Gaddafi's control, opposition groups appear to have been organized into small cell-like structures, coming under the overall command of a local – town or city level – leader. For security reasons, these cells often contained as few as 4-5 members, each with distinct competencies. For example, only some members of the cell possessed the contact information for other cells, or superiors, while other members possessed all information regarding armaments, and so on. Overall, these 'behind-the-lines' opposition forces were divided into two groups on the basis of function, either as fighters or members of administrative or logistical units.
53. During the course of the revolution some members of the armed opposition groups received training from defectors and/or NATO forces. This training appears to have occurred primarily in the 'liberated' areas of East Libya, and also in the mountains of Western Libya, particularly in and around Jabal Nafusa. Armed groups were also reinforced with weaponry received from third States.
54. None of the rebels interviewed by the Mission reported receiving training in the law of armed conflict, or human rights standards.<sup>38</sup> However, one rebel from Zliten did report receiving basic instructions from the front commander, prohibiting the killing of unarmed soldiers and the abuse of detainees.

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<sup>37</sup> See, Al Jazeera English, [http://www.youtube.com/watch?v=Lj1AKa11r8&feature=player\\_embedded#!](http://www.youtube.com/watch?v=Lj1AKa11r8&feature=player_embedded#!); Mark Urban, The task of forming a more effective anti-Gaddafi army, BBC, 15 April 2011, available at: [http://www.bbc.co.uk/blogs/newsnight/markurban/2011/04/the\\_task\\_of\\_forming\\_a\\_more\\_eff.html](http://www.bbc.co.uk/blogs/newsnight/markurban/2011/04/the_task_of_forming_a_more_eff.html); David Zucchini, Libya rebels flee eastward by the hundreds, Los Angeles Times, 31 March 2011, available at: <http://articles.latimes.com/2011/mar/31/world/la-fg-libya-rebels-retreat-20110331>; Kim Sengupta: The resistance has foundered on its own indiscipline and farcical ineptitude, The Independent, 24 March 2011, available at: <http://www.independent.co.uk/opinion/commentators/kim-sengupta-the-resistance-has-foundered-on-its-own-indiscipline-and-farcical-ineptitude-2251298.html>.

<sup>38</sup> The Mission wishes to highlight that interviews were only conducted as far east as Sirte. The situation further east, particularly around Benghazi which was under opposition control for the greatest period of time, may be different.

### 3.3. Third States Engaged in Hostilities Pursuant to Security Council Resolution 1973, and acting under NATO Command

55. Acting under Chapter VII of the UN Charter, UN Security Council Resolution 1973 established a no-fly zone over Libya,<sup>39</sup> authorised the enforcement of an arms embargo,<sup>40</sup> and authorised “all necessary measures” to protect civilians.<sup>41</sup> Consequently, on 19 March 2011, international forces commenced air operations against Libyan targets. These operations were initially carried out by France, the United Kingdom, and the United States. However, on 31 March NATO assumed control of all international forces under the name of ‘Operation Unified Protector’;<sup>42</sup> NATO assumed command over all contributing nations, including non-NATO member States.
56. According to information received by the Mission, NATO participation in the Libyan conflict can be broken down into 4 categories:
- NATO personnel were on the ground in Libya, providing logistical support and coordinating NATO air strikes. Credible sources reported the presence of approximately one NATO advisor per ‘front’.<sup>43</sup> Other observers have indicated that NATO personnel were also present in Libya providing training and acting as military instructors.<sup>44</sup>
  - NATO carried out air-strikes against installations selected and identified by opposition forces. Members of the opposition forces reported that GPS coordinates were passed to NATO, and that these targets were subsequently verified by NATO prior to attack.
  - NATO identified and attacked targets based on its own information and intelligence, i.e. without consulting opposition forces on the ground.
  - NATO forces actively participated in combat operations with opposition forces. It was reported that during both offensive and defensive operations, opposition forces would transmit ‘real-time’ information on the deployment of pro-Gaddafi forces, resulting in immediate action
57. The Mission viewed a wide variety of targets attacked by NATO, including: military installations; military objectives, such as tanks and armoured personnel carriers; and ostensibly civilian targets reportedly converted to military objectives by Gaddafi forces.

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<sup>39</sup> UN Security Council Resolution 1973, U.N. Doc. S/Res/1973 , 17 March 2011, para. 6.

<sup>40</sup> UN Security Council Resolution 1973, U.N. Doc. S/Res/1973 , 17 March 2011, para. 13.

<sup>41</sup> UN Security Council Resolution 1973, U.N. Doc. S/Res/1973 , 17 March 2011, para. 4.

<sup>42</sup> See further, ‘NATO and Libya’, <http://www.nato.int/cps/en/natolive/71679.htm>.

<sup>43</sup> For example, according to a number of sources, there were three NATO personnel on the ground in Misrata.

<sup>44</sup> See, for example, Al Jazeera Report available at: <http://www.youtube.com/watch?v=18NSa3fBAY4>.

## 4. Applicable Legal Framework

### 4.1. Classification of the post-15 February Situation in Libya

58. The Mission shares the UN Commission of Inquiry's conclusion that the situation in Libya post-15 February 2011 be most appropriately demarcated into 3 components, each regulated by a distinct legal framework: (i) peace-time protests, (ii) non-international armed conflict, and (iii) parallel international armed conflict.<sup>45</sup>

#### 4.1.1. Peace-Time Protests

59. The initial phase of the revolution occurred during what can be described as 'peace-time'. This phase covers the period from 15 February until the outbreak of the non-international armed conflict in early March; 'phase 1' as referred to above.<sup>46</sup> The Mission notes that this period includes armed hostilities, falling below the threshold of armed conflict. The applicable international legal framework is that of international human rights law.

#### 4.1.2. Non-International Armed Conflict

60. Non-international armed conflicts are those armed conflicts between a State and a non-State actor – in this instance the anti-Gaddafi opposition forces – or between two or more non-State actors. Treaty law divides non-international armed conflicts into two categories: conflicts regulated by common Article 3 to the four Geneva Conventions of 1949,<sup>47</sup> and slightly more sophisticated conflicts regulated by Additional Protocol II to the four Geneva Conventions of 1949.<sup>48</sup> The Mission notes, however, that customary international humanitarian law regulates both subsets of non-international armed conflict without distinction. Therefore, the Mission's analysis will be based primarily on the customary international humanitarian law applicable to non-international armed conflicts.

61. The Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY) held that "an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State."<sup>49</sup>

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<sup>45</sup> Report of the International Commission of Inquiry to investigate all alleged violations of international human rights law in the Libyan Arab Jamahiriya, Human Rights Council, U.N. Doc. A/HRC/17/44, 1 June 2011, para. 60.

<sup>46</sup> Libya returned to the 'peace-time' framework following the termination of the armed conflict on approximately 20 October 2011. See, *supra*, Section 2.1. Phase 1: Peaceful Demonstrations.

<sup>47</sup> Common Article 3 conflicts are defined as 'armed conflict not of an international character occurring in the territory of one of the High Contracting Parties'.

<sup>48</sup> The Additional Protocol II threshold refers to: "organized armed groups which, under responsible command, exercise such control over territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol."

<sup>49</sup> *Prosecutor v. Dusko Tadic*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Appeals Chamber, International Criminal Tribunal for the former Yugoslavia, IT-94-1, 2 October 1995, para. 70.

Two principal components may be extracted from this definition; in order to qualify as a non-international armed conflict, there must be (i) protracted armed violence,<sup>50</sup> involving (ii) organized armed groups.<sup>51</sup> As subsequently explained: “in order to distinguish from cases of civil unrest or terrorist activities, the emphasis is on the protracted extent of the armed violence and the extent of organisation of the parties involved.”<sup>52</sup>

62. To qualify as a non-international armed conflict, both the organisational and intensity of hostilities requirements must be satisfied. In the present instance, the Mission does not possess the level of information required to determine the precise date at which the hostilities in Libya escalated to that of a non-international armed conflict. However, a time period in, or around, 10 March 2011 – as identified by the ICRC<sup>53</sup> – seems appropriate. By this point armed hostilities had been occurring for approximately 18 days, and had escalated to involve heavy weaponry; Gaddafi had mobilised his *Katiba* and launched major offensives to retake a number of cities; the NTC and an associated Military Council had been established, and had issued press releases and communiqués; and the hostilities had involved significant urban fighting, causing damage to property, a significant number of casualties, and resulted in the displacement of civilian populations.

#### 4.1.3. Parallel International Armed Conflict

63. The air operations begun by third States on 19 March 2011 triggered the existence of an international armed conflict between the participating States and Libya. The Mission agrees with the assessment of the UN Commission of Inquiry that “the actions of NATO and other foreign States involved are not exercising control over the military action of either of the parties to the non-international armed conflict.”<sup>54</sup> Consequently, the international armed conflict between third States and Libya is legally distinct from the non-international armed conflict described above.

## 4.2. Applicable International Law

64. There are 3 bodies of international law relevant to the post-15 February 2011 situation in Libya: international human rights law, international humanitarian law, and international criminal law.

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<sup>50</sup> Article 1(2), Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977 (‘Additional Protocol II’). See further, Anthony Cullen, *The Concept of Non-International Armed Conflict in International Humanitarian Law* (Cambridge, 2010) p. 127.

<sup>51</sup> See further, Anthony Cullen, *The Concept of Non-International Armed Conflict in International Humanitarian Law* (Cambridge, 2010) p. 123.

<sup>52</sup> *Prosecutor v. Delalic et al*, Judgment, Trial Chamber, International Criminal Tribunal for the former Yugoslavia, IT-96-21-T, 16 November 1998, para. 184.

<sup>53</sup> ICRC, *Libya: Urgent to apply the rules of war*, News Release 11/53, 10 March 2011.

<sup>54</sup> Report of the International Commission of Inquiry to investigate all alleged violations of international human rights law in the Libyan Arab Jamahiriya, Human Rights Council, U.N. Doc. A/HRC/17/44, 1 June 2011, para. 66.

#### 4.2.1. International Human Rights Law

65. International human rights law applies at all times,<sup>55</sup> and is therefore relevant to the entire situation under consideration by the Mission. The Mission notes that the International Court of Justice has confirmed that during situations of armed conflict both international human rights law and international humanitarian law apply concurrently, regulated by the principle of *lex specialis*.<sup>56</sup>
66. Libya is a State Party to the major human rights treaties, including the International Covenant on Civil and Political Rights;<sup>57</sup> the International Covenant on Economic, Social, and Cultural Rights;<sup>58</sup> the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment;<sup>59</sup> the Convention on the Rights of the Child;<sup>60</sup> the Convention on the Elimination of Discrimination against Women;<sup>61</sup> the Convention on the Elimination of all forms of Racial Discrimination;<sup>62</sup> and the International Convention on the Protection of the Rights of all Migrant Workers and Members of their Families.<sup>63</sup> Libya did not notify the UN Secretary-General of any state of emergency and subsequent derogation with respect to the provisions of the ICCPR. The Convention therefore remains applicable in its entirety.
67. The Mission notes that as the new Government of Libya, the National Transitional Council is bound by Libya's pre-existing international obligations, including those international human rights law treaties to which Libya is a State Party.<sup>64</sup> International law also recognises that successful insurgent groups are bound by international law obligations from the inception of their insurgency.<sup>65</sup> However, the issues addressed in the substantive part of this Report relating to the conduct of opposition forces prior to their recognition as the Government of Libya, do not concern direct international human rights law obligations, but rather relate primarily to international humanitarian law.<sup>66</sup>

#### 4.2.2. International Humanitarian Law

68. International humanitarian law<sup>67</sup> applies to all situations of armed conflict, and is binding upon all parties to the conflict.<sup>68</sup> Libya has ratified the four Geneva

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<sup>55</sup> *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, International Court of Justice, 9 July 2004, para. 106.

<sup>56</sup> See, for example, *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, International Court of Justice, 19 December 2005, para. 216.

<sup>57</sup> Acceded 15 May 1970.

<sup>58</sup> Acceded 15 May 1970.

<sup>59</sup> Acceded 16 May 1989.

<sup>60</sup> Acceded 15 April 1993.

<sup>61</sup> Acceded 16 May 1989.

<sup>62</sup> Acceded 3 July 1968.

<sup>63</sup> Acceded 18 June 2004.

<sup>64</sup> See, Antoni Cassese, *International Law* (Oxford, 2<sup>nd</sup> edition, 2005) p. 77.

<sup>65</sup> Article 10, *Responsibility of States for Internationally Wrongful Acts*, International Law Commission, U.N. Doc. A/56/10, 2001.

<sup>66</sup> Nonetheless, international human rights law remains relevant to the understanding of certain international humanitarian law provisions, based on the principle of *lex specialis*.

<sup>67</sup> Also known as the 'Law of Armed Conflict'.

Conventions of 1949, Additional Protocol I and Additional Protocol II to the 1949 Geneva Conventions, and the Convention on the Protection of Cultural Property in the Event of Armed Conflict.<sup>69</sup> Libya has not, however, ratified the Convention on Cluster Munitions, or the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction.

69. **Non-International Armed Conflict:** Treaty law provisions applicable to the non-international armed conflict in Libya – and binding on all parties – include common Article 3 to the 1949 Geneva Conventions, and Additional Protocol II to the Geneva Conventions. All parties are also bound by the customary international humanitarian law applicable to non-international armed conflicts. This corpus of law contains specific rules relating to, *inter alia*, the principle of distinction, the treatment of civilians and persons *hors de combat*, methods and means of warfare, and the status of protected persons and objects.<sup>70</sup>
70. **International Armed Conflict:** The international armed conflict between Libya and third States engaged in hostilities pursuant to Security Council Resolution 1973 is regulated by, *inter alia*, the four Geneva Conventions of 1949, and the customary international humanitarian law applicable to international armed conflicts.

#### 4.2.3. International Criminal Law

71. International criminal law ensures that individuals may be held accountable for serious violations of international humanitarian law and gross violations of international human rights law. Due to the fact that such violations are deemed to affect the interests of the international community as a whole,<sup>71</sup> they are typically referred to as ‘international crimes’.<sup>72</sup> The International Criminal Court currently has jurisdiction over war crimes, crimes against humanity, and genocide. Although Libya is not a State Party to the Rome Statute of the International Criminal Court, operative paragraph 4 of Security Council Resolution 1970 activated the Court’s jurisdiction in accordance with Article 13(b) of the Rome Statute.<sup>73</sup>
72. There is no suggestion that genocide was committed in Libya. However, the Mission has received credible information indicating the potential commission of war crimes, and crimes against humanity.
73. **War Crimes:** War crimes may only be committed in the context of an armed conflict. Article 8 of the Rome Statute contains a detailed listing of acts considered to be war crimes in both international and non-international armed conflicts. With respect to

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<sup>68</sup> See, for example, the text of Article 3 common to the four Geneva Conventions of 1949: “In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, *each Party to the conflict* shall be bound to apply, as a minimum, the following provisions”. Emphasis added.

<sup>69</sup> See, ICRC, Libyan Arab Jamahiriya: Ratifications/ Accessions, available at: <http://www.icrc.org/ihl.nsf/Pays?ReadForm&c=LY>.

<sup>70</sup> See further, Jean-Marie Henckaerts & Louise Doswald-Beck, Customary International Humanitarian Law: Volume 1: Rules (International Committee of the Red Cross, Cambridge University Press, 2009).

<sup>71</sup> Gerhard Werle, *Principles of International Criminal Law*, Second Edition, 2009, p. 64.

<sup>72</sup> For a listing of international crimes see: Articles 6, 7, and 8 of the Rome Statute of the International Criminal Court.

<sup>73</sup> UN Security Council Resolution 1973, U.N. Doc. S/Res/1973 , 17 March 2011, para. 4.

non-international armed conflict, acts which give rise to individual criminal responsibility include “serious violations of article 3 common to the four Geneva Conventions”,<sup>74</sup> and other “serious violations of the laws and customs applicable in armed conflicts not of an international character”.<sup>75</sup> With respect to international armed conflict, acts which give rise to individual criminal responsibility include grave breaches of the 1949 Geneva Conventions,<sup>76</sup> and “other serious violations of the laws and customs applicable in international armed conflict”.<sup>77</sup>

74. **Crimes against Humanity:** Crimes against humanity may be committed in times of peace as well as armed conflict. Crimes against humanity are perpetrated when certain prohibited acts are committed as part of either a widespread or systematic attack against a civilian population.<sup>78</sup> The underlying acts of crimes against humanity include: murder, extermination, enslavement, deportation or forcible transfer, imprisonment or other severe deprivation of liberty in violation of fundamental rules of international law, torture, rape, persecution, enforced disappearance, apartheid, and other inhumane acts of a similar character.<sup>79</sup>

#### 4.3. The Obligation to Investigate and, where appropriate, Prosecute Serious Violations of International Law

75. A number of respected commentators, including the International Committee of the Red Cross, contend that the obligation to investigate, and if appropriate prosecute, those suspected of committing international crimes arises directly from customary international law.<sup>80</sup> For example, with respect to serious violations of international humanitarian law (i.e. Article 8 war crimes), the ICRC contend that customary law holds that all “States must investigate war crimes allegedly committed by their nationals or armed forces, or on their territory, and, if appropriate, prosecute the suspects. They must also investigate other war crimes over which they have jurisdiction and, if appropriate, prosecute the suspects.”<sup>81</sup> Equally, it is argued the *jus cogens* nature of crimes against humanity gives rise to an obligation to investigate and prosecute such crimes at the international level under customary international law.<sup>82</sup> This approach is adopted by the Mission as indicative of the current situation with respect to customary international law.

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<sup>74</sup> Article 8(2)(c), Rome Statute of the International Criminal Court.

<sup>75</sup> Article 8(2)(e), Rome Statute of the International Criminal Court.

<sup>76</sup> Article 8(2)(a), Rome Statute of the International Criminal Court.

<sup>77</sup> Article 8(2)(b), Rome Statute of the International Criminal Court.

<sup>78</sup> *Prosecutor v. Kordic and Cerkez*, Judgment, Appeals Chamber, International Criminal Tribunal for the former Yugoslavia, IT-95-14/2-A, 17 December 2004, para. 93.

<sup>79</sup> See Article 7, Rome Statute of the International Criminal Court.

<sup>80</sup> See further, Palestinian Centre for Human Rights, *Genuinely Unwilling: An Update* (August 2010).

<sup>81</sup> Rule 158, Jean-Marie Henckaerts & Louise Doswald-Beck, *Customary International Humanitarian Law: Volume 1: Rules* (International Committee of the Red Cross, Cambridge University Press, 2009). Based, *inter alia*, on the treaty obligation found in Article 146 of the Fourth Geneva Convention.

<sup>82</sup> See, M.C. Bassiouni, *International Crimes: Jus Cogens and Obligatio Erga Omnes*, 59 *Law and Contemporary Problems*, 1996. The ICTY confirmed the customary law status of crimes against humanity in: *Prosecutor v. Dusko Tadic*, Judgment, Trial Chamber, International Criminal Tribunal for the former Yugoslavia, IT-94-1-t, 7 May 1997, para. 937.

76. In this instance, the primary responsibility to investigate and prosecute suspected international crimes lies with Libya. However, should Libya prove genuinely unwilling or unable to carry out the required investigations and prosecutions, mechanisms of international justice – such as the International Criminal Court or third States acting in accordance with the principle of universal jurisdiction – are empowered to exercise jurisdiction.
77. International humanitarian law does not regulate how investigations of international crimes are to be conducted. In keeping with the *lex specialis* doctrine advanced by the International Court of Justice,<sup>83</sup> the Mission suggests that the detailed standards of international human rights law should apply. The jurisprudence of the European Court of Human Rights has consistently identified four components essential to conducting a genuine investigation.<sup>84</sup> A ‘genuine’ investigation must be: effective, independent, prompt, and involve an element of public scrutiny.<sup>85</sup> These components are reflective of the findings of other international human rights bodies, and the requirements of international criminal law.

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<sup>83</sup> See, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, International Court of Justice, 9 July 2004, para. 106; and *Armed Activities on the Territory of the Congo, (Democratic Republic of Congo v. Uganda)*, Judgment, International Court of Justice, 19 December 2005, para. 216.

<sup>84</sup> Such requirements are also evidenced in, *inter alia*, the jurisprudence of the Inter-American Court of Human Rights, and the Human Rights Committee.

<sup>85</sup> See, for example, *Hugh Jordan v. the United Kingdom*, European Court of Human Rights, Application No. 24746/94, 4 August 2001; *Finucane v. the United Kingdom*, European Court of Human Rights, Application No. 29178/95, 1 October 2003; *Nachova and Others v. Bulgaria*, European Court of Human Rights, Application Nos. 43577/98, 43579/98, 6 July 2005.

## 5. Findings and Observations of the Fact-Finding Mission

78. In keeping with the established Terms of Reference, the Fact-Finding Mission investigated alleged violations committed by: (i) the former Government of Libya, led by Colonel Muammar Gaddafi; (ii) the former opposition forces; and (iii) third States engaged in hostilities in Libya pursuant to Security Council Resolution 1973. The Mission addressed any incidents occurring on, or after, 15 February 2011.

### 5.1. Potential Violations Committed by the Former Government of Libya

#### 5.1.1. General Observations

79. Virtually all individuals interviewed by the Mission painted a harrowing picture of life in pre-revolutionary Libya. It is apparent that Colonel Gaddafi's Libya was characterised by a climate of fear, in which individuals were afraid to speak their mind, where opposition – real or perceived – was ruthlessly crushed, and where security forces committed apparently widespread and systematic abuses with total impunity. The Mission was also struck by the lack of Governmental investment in public infrastructure, given the significant oil revenues generated during the Gaddafi era.
80. One incident apparently illustrative regarding the nature of Gaddafi's rule is the Abu Salim massacre of June 1996. Abu Salim is a major prison in Tripoli, and at the time of the incident it was reported to hold approximately 1,600 – 1,700 inmates.<sup>86</sup> Following a revolt by prisoners over detention conditions, and subsequent to apparently successful negotiations, the prisoners were assembled in the prison's courtyards. It is reported that security forces under the command of Abdullah Al-Senussi then opened fire on the prisoners, killing approximately 1,200 inmates. Families of the prisoners were not informed of the death of their relatives, and many continued to visit the prison, leaving gifts and provisions, for many years.
81. The incident has never been subject to effective investigation, and those responsible continued to hold positions of authority in Libya until the overthrow of Gaddafi's government in 2011. It is noted that Mr. Fathi Terbil, the lawyer whose arrest sparked the 15 February 2011 protests in Benghazi, was a representative of a number of the Abu Salim victims.
82. Although falling outside the Mission's Terms of Reference, it is apparent that extensive investigations into potential international crimes committed during Gaddafi's rule must be undertaken. Issues consistently reported to the Mission include torture, killings, and disappearances. The truth of all such incidents must be uncovered, the victims' right to a remedy upheld, and those responsible held to account.

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<sup>86</sup> See, Human Rights Watch, *Libya: Junen 1996 Killings at Abu Salim Prison*, 27 June 2006.

### 5.1.2. The Use of Excessive Force against Demonstrators

83. The Mission interviewed numerous witnesses – specifically in Tripoli, Zawiya, and Misrata – who detailed the use of excessive force against peaceful protestors in the early days of the revolution, particularly in the period from 15 February – 24 February 2011.
84. The Mission heard consistent, credible reports of live ammunition being used to disperse and suppress peaceful protests. The excessive force utilised appears to have initially involved small arms fire, for example from Kalashnikov assault rifles, but to have rapidly escalated to include heavy weapons such as heavy machine guns, and anti-aircraft guns. In Zawiya, commencing on 17 February 2011, running battles appear to have occurred between protestors camped in and around the mosque in the main square of Zawiya, and Gaddafi forces who attacked protestors with anti-aircraft and heavy machine guns.
85. Similar patterns of excessive force by Libyan authorities in February 2011 have been consistently documented by a number of other entities, such as Human Rights Watch,<sup>87</sup> Amnesty International,<sup>88</sup> and the UN Commission of Inquiry.<sup>89</sup> In addition to Misrata, Tripoli, and Zawiya, the use of excessive force against protestors has also been documented in Benghazi, Al-Bayda, Derna, Tobruk, and Ajdabiya.<sup>90</sup>
86. Precise casualty figures are unavailable. However, it is apparent that large numbers of civilians were killed or injured. The International Criminal Court noted the deaths of approximately 755 individuals between 15 – 25 February 2011.<sup>91</sup>
87. Furthermore, such conduct appears to have been conducted pursuant to a policy devised at the highest levels. As noted by the Pre-Trial Chamber of the International Criminal Court, on 20 February 2011, Saif Al-Islam Gaddafi declared that “the army from now [on] will have a key role in imposing security and in returning things to normal *at any price*”.<sup>92</sup> Equally, on 23 February 2011, Muammar Gaddafi stated: “we shall move and [sic] the millions to sanitize Libya an inch at a time, a home at a time, a house at a time, an alley at a time, one by one until the country is rid of the filth and uncleanness”,<sup>93</sup> and that: “[o]fficers have been deployed to their tribes and their areas to lead these tribes and these areas, secure them, clear them of these rats.”<sup>94</sup>
88. The use of such excessive force against peaceful protestors raises clear concerns regarding the violation of a number of fundamental human rights, including the right

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<sup>87</sup> Human Rights Watch, Libya: Governments Should Demand End to Unlawful Killings, 20 February 2011; Human Rights Watch, Libya: Security Forces Kill 84 Over Three Days, 18 February 2011.

<sup>88</sup> Amnesty International, The Battle for Libya: Killings, Disappearances and Torture, 2011.

<sup>89</sup> Report of the International Commission of Inquiry to investigate all alleged violations of international human rights law in the Libyan Arab Jamahiriya, Human Rights Council, U.N. Doc. A/HRC/17/44, 1 June 2011, paras. 85-98.

<sup>90</sup> ICC Decision on Prosecutor’s Application, para. 41.

<sup>91</sup> ICC Decision on Prosecutor’s Application, paras. 36-39.

<sup>92</sup> ICC Decision on Prosecutor’s Application, para. 26.

<sup>93</sup> ICC Decision on Prosecutor’s Application, para. 26.

<sup>94</sup> ICC Decision on Prosecutor’s Application, para. 26.

to life,<sup>95</sup> the right to freedom of expression,<sup>96</sup> and the right to peaceful assembly.<sup>97</sup> Such attacks, which appear to have been committed in a widespread and systematic manner, may also constitute the underlying acts of crimes against humanity, particularly the crime against humanity of murder and the crime against humanity of persecution.

89. On 27 June 2011, the International Criminal Court issued warrants of arrest for Muammar Gaddafi, Saif Al-Islam Gaddafi, and Abdullah Al-Senussi on charges of the crimes against humanity of murder and persecution, for their role in the suppression of protests between 15 – 28 February 2011.<sup>98</sup>
90. The Mission believes that these allegations warrant further investigation.

### 5.1.3. Arbitrary Detention: A Campaign of Mass Arrest

91. The Mission received consistent credible reports regarding the mass arrest of real or perceived political opponents during the course of the revolution. In particular, reports received by the Mission reported mass arbitrary arrests in Tripoli, Zawiya, Zliten, Khoms, and Misrata. These arrests appear to have begun in late January and early February 2011<sup>99</sup> – in an attempt by the then-Government to pre-empt planned demonstrations – but to have escalated significantly in the aftermath of 17 February 2011. It appears that this campaign of arrest and detention continued until at least mid-August 2011. The Mission notes that arrests appear to have escalated significantly in areas such as Zawiya and Misrata, following their total or partial re-capture by Gaddafi forces.
92. A number of witnesses and victims reported that individuals were arrested from their homes, following their inclusion on a ‘list’ prepared by security forces.
93. The Mission wishes to highlight its finding that arrests and detention appear to have been systematically accompanied by acts of torture, and cruel, inhuman, or degrading treatment.<sup>100</sup>
94. The prohibition of arbitrary arrest constitutes a fundamental right under international human rights law, as codified in Article 9 of the International Covenant on Civil and Political Rights. The Mission believes that the widespread and apparently systematic nature of this campaign of mass arbitrary arrest of perceived political opponents may also constitute an underlying act of the crimes against humanity of imprisonment in violation of international law,<sup>101</sup> and persecution.<sup>102</sup>

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<sup>95</sup> Article 6, International Covenant on Civil and Political Rights.

<sup>96</sup> Article 19, International Covenant on Civil and Political Rights.

<sup>97</sup> Article 21, International Covenant on Civil and Political Rights.

<sup>98</sup> See, *supra*, para. 22.

<sup>99</sup> See *supra*, Section 2. Conflict Chronology.

<sup>100</sup> See, *infra*, Section 5.1.7. Torture, Cruel, Inhuman and Degrading Treatment, and Abuses in Detention.

<sup>101</sup> Article 7(1)(e), Rome Statute of the International Criminal Court.

95. The Mission believes that these allegations warrant further investigation.

#### 5.1.4. Conduct of Hostilities: Indiscriminate attacks in Zawiya and Misrata

96. The Mission received reports relating to indiscriminate attacks and violations of the principle of distinction by Gaddafi forces, both in Zawiya and Misrata. Witnesses consistently reported the shelling of urban areas with mortars and heavy artillery, and the extensive firing of rockets by Gaddafi forces into urban areas. In Zawiya, the extensive use of such tactics is reported to have begun in early-March, in advance of the large scale counter-offensive by Gaddafi forces.

97. The Mission was shown remnants of mortars, heavy artillery shells, and rockets – including Grad rockets – which were reported as being fired by Gaddafi forces into populated urban areas. The Mission also observed extensive damage consistent with the use of such weapons.

98. These observations of the Mission were corroborated by reports of international organisations, which detailed indiscriminate attacks against Misrata,<sup>103</sup> and the Nafusa mountains.<sup>104</sup>

99. In Misrata the Mission also received reports relating to pro-Gaddafi snipers targeting civilians from high buildings, including an Insurance Building on Tripoli Street.<sup>105</sup> Such allegations were also reported by Amnesty International,<sup>106</sup> and Human Rights Watch.<sup>107</sup>

100. Customary international humanitarian law unequivocally prohibits indiscriminate attacks; those attacks which by their nature strike military objectives and civilians, or civilian objects, without distinction.<sup>108</sup> The direct targeting of civilians or civilian objects is also unequivocally prohibited under customary international humanitarian law.<sup>109</sup>

101. The prohibition of indiscriminate attacks is distinct from the prohibition of directly targeting civilians, or civilian objects. In practice, however, the two prohibitions often merge. In *Galic*, the Trial Chamber of the International Criminal Tribunal for the former Yugoslavia held that “attacks which strike civilians or civilian objects without

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<sup>102</sup> Article 7(1)(h), Rome Statute of the International Criminal Court.

<sup>103</sup> Amnesty International, *Misratah – Under Siege and Under Fire*, 2011.

<sup>104</sup> Amnesty International, *Libya: Disappearances in the Besieged Nafusa Mountains as Thousands Seek Safety in Tunisia*, 2011.

<sup>105</sup> It was reported that this building housed a significant number of snipers from approximately 18 March to 16 April 2011.

<sup>106</sup> Amnesty International, *Misratah – Under Siege and Under Fire*, 2011, p. 10.

<sup>107</sup> Human Rights Watch, *Libya: Government Attacks in Misrata Kill Civilians*, 10 April 2011. Available at: <http://www.hrw.org/news/2011/04/10/libya-government-attacks-misrata-kill-civilians>

<sup>108</sup> Rule 12, Jean-Marie Henckaerts & Louise Doswald-Beck, *Customary International Humanitarian Law: Volume 1: Rules* (International Committee of the Red Cross, Cambridge University Press, 2009).

<sup>109</sup> Rule 1, Jean-Marie Henckaerts & Louise Doswald-Beck, *Customary International Humanitarian Law: Volume 1: Rules* (International Committee of the Red Cross, Cambridge University Press, 2009).

distinction, may qualify as direct attacks against civilians”.<sup>110</sup> This was reiterated in *Martić*, where the Trial Chamber held that “the shelling of Zagreb was a widespread attack against the civilian population. It reached this conclusion on the basis of the large scale nature of the attack and the indiscriminate nature of the M-87 Orkan.”<sup>111</sup>

102. The Mission notes that rockets are inherently indiscriminate weapons which should not be used against residential areas. Such use of indiscriminate weapons violates the principle of distinction and amounts to the direct targeting of civilians and civilian objects.
103. Equally, the Mission notes that artillery and mortars are not precision weapons; they cannot be used to target a specific objective – in the same manner as a tank round, for example – as a number of corrective shots (known as ‘bracketing’, and used to bring the target into range) are required. This bracketing process, an inherent component of artillery and mortar strikes, will inevitably result in death, injury, or damage to any individuals or objects in the vicinity of the target. It is reported that the lethal radius of a 155mm high explosive projectile – remnants of which were observed by the Mission – is between 50m and 150m, while the casualty radius is 100m – 300m.<sup>112</sup> The use of such weapons in, or near, populated residential areas cannot effectively discriminate between civilians, civilian objects, and military objectives, and therefore, *prima facie*, violates the prohibition on indiscriminate attacks.
104. Indiscriminate attacks, and the direct targeting of civilians or civilian objects in non-international armed conflicts are war crimes, as codified in Articles 8(2)(i) and (ii) of the Rome Statute of the International Criminal Court.<sup>113</sup> If committed as part of a widespread or systematic attack against a civilian population, such acts may also amount to the crime against humanity of murder.
105. The Mission believes that these allegations warrant further investigation.

#### 5.1.5. Use of Human Shields

106. The Mission conducted separate interviews with 2 witnesses who reported being used as human shields by Gaddafi forces. Both individuals were arrested, separately, on 18 August 2011 in Zliten. That evening, both reported being transported to an area East of Zliten where they were placed in a container between two military vehicles which were actively engaged in hostilities.<sup>114</sup> Witnesses reported that approximately 20 individuals were held in the container. Other witnesses also reported being used as

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<sup>110</sup> *Prosecutor v. Galic*, Judgment, Trial Chamber, International Criminal Tribunal for the former Yugoslavia, IT-98-29-T, 5 December 2003, para. 57.

<sup>111</sup> *Prosecutor v. Martić*, Judgment, Appeals Chamber, Criminal Tribunal for the former Yugoslavia, IT-95-11-A, 8 October 2008, para. 253.

<sup>112</sup> Human Rights Watch, *Israel: Stop Shelling Crowded Gaza City*, 16 January 2009. Available at <http://www.hrw.org/ar/news/2009/01/16/israel-stop-shelling-crowded-gaza-city>

<sup>113</sup> See also, Rule 12 and Rule 156, Jean-Marie Henckaerts & Louise Doswald-Beck, *Customary International Humanitarian Law: Volume 1: Rules* (International Committee of the Red Cross, Cambridge University Press, 2009).

<sup>114</sup> One witness reported being placed between two tanks, the other between 2 rocket launchers.

human shields in Zawiya; in this instance, detainees were also kept in shipping containers placed near military objectives.

107. Media,<sup>115</sup> and international NGOs,<sup>116</sup> also reported the use of human shields by Gaddafi forces.
108. The prohibition on the use of human shields forms part of customary international humanitarian law.<sup>117</sup> The International Criminal Tribunal for the former Yugoslavia has recognised the use of human shields as a war crime in non-international armed conflicts, either as a form of cruel treatment,<sup>118</sup> or an outrage upon personal dignity.<sup>119</sup>
109. The Mission believes that these allegations warrant further investigation.

#### 5.1.6. Allegations of Rape

110. During its investigation, the Mission heard numerous reports regarding allegations of widespread rape perpetrated by Gaddafi forces, particularly in Misrata. These reports often included information relating to the seizure of stockpiles of Viagra, and its distribution to Gaddafi fighters.
111. The Director of the Legal Team for the Documentation of International Crimes in Misrata recounted receiving reports of rape from physicians and psychiatrists, and from one victim directly. Reports of rape committed by both Gaddafi fighters and opposition forces were also detailed in the Report of the UN Commission of Inquiry.<sup>120</sup>
112. The Mission was unable to independently verify these claims.
113. The Mission wishes to raise two pressing issues regarding allegations of rape and sexual violence. First, the Mission understands the sensitivity associated with such crimes, particularly in a conservative society such as Libya. However, the Mission emphasizes that allegations regarding such crimes must be addressed, irrespective of the context. These crimes are no less crimes than murder, torture, or other forms of physical attack. Such crimes must be thoroughly investigated, and prosecuted when sufficient evidence is found, regardless of the sensitivity of the topic. Such thorough investigations are especially important where, as here, rumours of rape and sexual violence – without any solid factual investigation into their truth – trigger non-judicial

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<sup>115</sup> Chris Stephen, Gaddafi forces using human shields, Libya rebels claim, *The Guardian*, 28 August 2011; Rob Crilly, Libya: Gaddafi loyalists 'using prisoners as human shields to protect Sirte', *The Telegraph*, 11 September 2011.

<sup>116</sup> Amnesty International, Libya: Attacks against Misrata residents point to war crimes, 5 May 2011.

<sup>117</sup> Rule 97, Jean-Marie Henckaerts & Louise Doswald-Beck, *Customary International Humanitarian Law: Volume 1: Rules* (International Committee of the Red Cross, Cambridge University Press, 2009).

<sup>118</sup> *Prosecutor v. Blaskic*, Judgment, Trial Chamber, International Criminal Tribunal for the former Yugoslavia, IT-95-14-T, 3 March 2000, para. 716; *Prosecutor v. Kordic and Cerkez*, Judgment, Trial Chamber, International Criminal Tribunal for the former Yugoslavia, IT-95-14/2-T, 26 February 2001, para. 256.

<sup>119</sup> See, for example, *Prosecutor v. Aleksovski*, Judgment, Trial Chamber, International Criminal Tribunal for the former Yugoslavia, IT-95-14/1-T, 15 June 1999, para. 229.

<sup>120</sup> of the International Commission of Inquiry to investigate all alleged violations of international human rights law in the Libyan Arab Jamahiriya, Human Rights Council, U.N. Doc. A/HRC/17/44, 1 June 2011, paras. 214-218.

“justice” by those seeking to avenge the rumoured abuses.<sup>121</sup> Second, the Mission notes that investigations into allegations of rape and sexual violence can and should be conducted by qualified and specially trained personnel, and be accompanied by counselling and other forms of physical and psychological assistance. Trained investigators can approach these issues in a culturally sensitive manner, while still separating fact from rumour. Moreover, experience in other similar societies has demonstrated that silence – rather than benefiting victims – can deepen their suffering.

114. Rape is recognised as a war crime in non-international armed conflict, as codified in Article 8(2)(e)(vi) of the Rome Statute of the International Criminal Court. If committed as part of a widespread or systematic attack against a civilian population, rape may also constitute a crime against humanity.<sup>122</sup>
115. The Mission believes that allegations of rape necessitate effective further investigation.

#### 5.1.7. Torture, Cruel, Inhuman and Degrading Treatment, and Abuses in Detention

116. The Mission received consistent, credible reports of widespread and systematic abuse committed against individuals detained by Gaddafi forces. The Mission heard first-hand reports in Zawiya, Tripoli, Zliten, Khoms, and Misrata, while other bodies have reported similar abuses across Libya. The Director of the Legal Team for the Documentation of International Crimes in Misrata reported documenting approximately 300 such cases in Misrata alone.
117. All individuals interviewed reported similar patterns of abuse, involving violent beating – often amounting to torture – during the initial arrest and interrogation phases, and ill-treatment in the subsequent detention phase. The Mission received consistent credible reports of ostensibly systematic physical abuse involving beatings with fists, electric or plastic cables, gun butts, and so on. Individuals also reported instances of electrical shock torture. It appears that medical treatment was routinely denied to injured detainees, and the Mission received credible reports from witnesses of detainees dying as a result of torture inflicted during detention.
118. One witness, arrested in Zawiya on 8 June 2011 and subsequently transferred to Tripoli, reported what appears to have been typical treatment: “Our hands were cuffed to the back, we were blindfolded and we were subjected to beating. There was a wounded person with us, who lost consciousness due to harsh beating. They took us one by one out of the vehicles and were pushing us to the ground. They covered us with blankets and started firing around and between us to terrorize us. Moreover, we were subjected to electric torture, in addition to all forms of beating.”<sup>123</sup> Similarly, a witness detained in Khoms on 20 May 2011 reported: “In the interrogation room they violently beat me. It started with plastic hoses and electric cables. Later, they used

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<sup>121</sup> See further, *infra*, Section 5.2.1. General Observations: Retaliatory Acts and the apparent Extrajudicial Execution of Muammar Gaddafi.

<sup>122</sup> Article 7(1)(g), Rome Statute of the International Criminal Court.

<sup>123</sup> Witness interviewed in Tripoli, 22 November.

electric shocks all over my body. I don't know how many people were beating me, I was blindfolded the whole time."<sup>124</sup>

119. Many of the witnesses interviewed still bore the marks of such torture, and reported ongoing physical and psychological problems as a result of their treatment in detention.
120. The prohibition of torture, and cruel, inhuman or degrading treatment is a *jus cogens* norm of international law.<sup>125</sup> International human rights law explicitly prohibits torture and other forms of cruel, inhuman, or degrading treatment, *inter alia*, in Article 7 of the International Covenant on Civil and Political Rights, and in the UN Convention against Torture. With respect to international humanitarian law, torture and other forms of ill-treatment are explicitly prohibited in common Article 3 to the four Geneva Conventions of 1949. Torture or inhuman treatment is recognised as a war crime in non-international armed conflict,<sup>126</sup> and may form an underlying act for a crime against humanity.<sup>127</sup>
121. The Mission is of the belief that allegations of torture and ill-treatment necessitate further investigation.

#### 5.1.7.1. The 'Container Detention Facility' in Khoms

122. On 17 November 2011, the Mission visited the 'container detention facility' in Khoms. The facility was a former construction site operated by a British construction company. According to information received by the Mission, the site was seized by the Khamis Brigades on approximately 15 March 2011. It was used as a detention centre from this date until opposition forces gained control of Khoms between 21 and 23 August 2011.
123. From witness testimony it appears that the facility was divided into 3 separate units: an interrogation unit; a container detention unit; and a further detention unit housed in a regular building in which a large number of detainees were held. Detainees were kept only temporarily in the interrogation unit, where they were subject to violent beatings amounting to torture. Detainees were then held in one of the 2 containers, or in the larger room. The Mission heard reports confirming the use of the containers as detention units from March on, but was only able to verify the use of the larger room from approximately mid-August.
124. The container detention unit consisted of one red, and one white shipping container positioned side by side. There was no light or ventilation in the containers, apart from that available as a result of a limited number of bullet holes shot into the sides of the container. The containers were placed in the open, and were not protected from the elements in any manner. In particular, the Mission notes that temperatures in the

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<sup>124</sup> Witness interviewed in Khoms, 17 November 2011.

<sup>125</sup> See, *Prosecutor v. Furundzija*, Judgment, Trial Chamber, International Criminal Tribunal for the former Yugoslavia, IT-95-17/1-T, 10 December 1998, para. 139.

<sup>126</sup> Article 8(2)(c)(i), Rome Statute of the International Criminal Court.

<sup>127</sup> Article 7(1)(f), Rome Statute of the International Criminal Court.

containers would have been exceptionally high during the summer months, when average outside temperatures routinely exceed 30 degrees centigrade.

125. A number of credible witnesses reported horrific treatment within this facility, which in the Mission's opinion amounts to the war crimes of torture<sup>128</sup> and murder.<sup>129</sup> Abuse, including violent beatings and other forms of mistreatment, appears to have been routine.
126. Over a period covering 20 May to 5 June 2011, it was reported that approximately 10 individuals were held in the red container, and 19 in the white container. Detainees were denied access to adequate food, water, or toilet facilities, while those who were injured were denied access to medical care.
127. Due to the limited water supplies – reported as approximately 1.5 litres per day between the 19 detainees in the white container – detainees were forced to resort to drinking their own urine and sweat. The temperature outside the shipping containers was reported as approximately 40 to 45 degrees centigrade; the temperature within the containers themselves would have been far higher, and conditions must have been suffocating given the lack of ventilation. Witnesses reported repeatedly banging on the container walls to attract the attention of the guards, to no avail. As a result of these conditions, a number of detainees fainted, and ultimately died. In total, 9 of the 10 individuals in the red container died, and 9 of the 19 individuals in the white container died. A 10<sup>th</sup> individual from the white container was later shot.
128. Abuse continued at the container detention facility until it was seized by opposition forces on or around 21 August 2011. The Mission interviewed a number of individuals arrested by Gaddafi forces in mid-August, all of whom were subject to torture or other forms of ill-treatment. One witness interviewed by the Mission was arrested on 15 August 2011. He was subject to intense, violent beating in the 'interrogation centre' before being transferred to the red container, where violent abuse continued. The witness reported being held down while a burning plastic bag was dripped on to his head; the scars remain clearly evident.
129. A number of witnesses interviewed by the Mission reported that guards often appeared drunk.
130. Those victims interviewed by the Mission still bore the physical marks of torture, and reported related health problems. In addition, a number of those interviewed appeared to be psychologically scarred as a result of their experiences.
131. The Mission believes that this and other similar incidents amount to the crime of torture, and demand effective investigation.

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<sup>128</sup> Article 8(2)(c)(i), Rome Statute of the International Criminal Court.

<sup>129</sup> Article 8(2)(c)(i), Rome Statute of the International Criminal Court.

### *5.1.7.2. Mass Killings: Yarmouk Detention Centre.*

132. The Mission received a number of credible first-hand witness reports regarding an apparent mass killing at Yarmouk Detention Centre to the South of Tripoli, on 23 August 2011. The Detention Centre was reportedly operated by the Khamis Brigade.
133. According to information received, approximately 150-160 individuals were detained together in a large room at the Detention Centre. At approximately 9 am on 23 August they were told they would be released that day. However, a number of witnesses reported receiving this news with a 'bad feeling', as they had not yet been interrogated. The subsequent arrival of 3 new detainees at noon appears to have confirmed these fears.
134. Shortly after sunset, a number of guards entered the room and ordered all former members of the military to leave with them. Approximately 17-20 detainees were taken from the room; soon after, those remaining heard a number of shots, which they took to mark their execution. Guards then opened the door to the large room and opened fire with light machine guns, while a number of hand grenades were also thrown into the room. This procedure was repeated a number of times, apparently until the guards ran out of ammunition. At this point a number of survivors attempted to flee, but were shot as they left the room.
135. Witnesses estimated the dead at approximately 100. The Mission was unable to verify this number, but did receive a list noting the death of 30 individuals from Zliten alone in this incident.<sup>130</sup>
136. Similar mass killings perpetrated around the time that opposition forces seized control of Tripoli have been reported by Human Rights Watch.<sup>131</sup>
137. The Mission believes that these allegations warrant further investigation.

## **5.2. Potential Violations Committed by the former Opposition Forces and associated entities**

### **5.2.1. General Observations: Retaliatory Acts and the apparent Extrajudicial Execution of Muammar Gaddafi**

138. The Mission is particularly concerned by the apparent prevalence of retaliatory and revenge attacks perpetrated by the former opposition forces. The Mission has also received reports regarding the appropriation of property, and other acts of intimidation, targeting perceived 'pro-Gaddafi' individuals.

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<sup>130</sup> The list, which was incomplete, also noted the deaths of 4 other individuals in Yarmouk; 3 from Misrata, and one from Khoms.

<sup>131</sup> Human Rights Watch, Libya: Evidence Suggests Khamis Brigade Killed 45 Detainees, 28 August 2011.

139. In this regard, the Mission believes that the circumstances surrounding the death of Muammar Gaddafi following his capture must be effectively investigated. Should any evidence of illegality emerge, all suspects should be prosecuted in accordance with international standards.
140. The Mission believes that effective action in this regard is essential as part of a broader accountability message. The Libyan authorities must clearly demonstrate that revenge attacks will not be permitted, and that the rule of law will be consistently enforced. In this regard, international human rights law guarantees all individuals the right to a fair trial,<sup>132</sup> and to the equal protection of the law.<sup>133</sup>

### 5.2.2. General Observations: The Libyan Judicial System

141. The Mission notes that – at least up until the time of the Mission’s departure from Libya – the local and national courts in Libya were not functioning. The Mission received testimony indicating that the operation of the Libyan judicial system during the Gaddafi era failed to comply with the requirements of international human rights law, in particular those requirements relating to the independence and impartiality of the judiciary.<sup>134</sup>
142. The reestablishment of the Libyan judicial system is an essential, and urgent, priority. Without a functioning judicial system operating in compliance with the requirements of international human rights law, the establishment of the rule of law and the effective protection of human rights will prove impossible.
143. The Mission’s investigations indicate that extensive investment in the Libyan judicial system will be required, both with respect to resources and training. In particular, effective training in international standards and international human rights law is of fundamental importance given the realities of the judicial system during the Gaddafi era. Such training must target judges, the office of the prosecutor, lawyers, and the Bar Associations. It is also important that investment in other, often neglected areas of the judicial system – such as the training of clerks and court reporters – be made.
144. The effective training of the new law enforcement agencies, armed forces, and prison officials is also essential, if an effective rule of law system is to be established.
145. The Mission reiterates the necessity of enforcing the rule of law, and the fundamental importance of accountability and public scrutiny in this regard.

### 5.2.3. Killing of Persons *Hors de Combat*

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<sup>132</sup> Article 14, International Covenant on Civil and Political Rights.

<sup>133</sup> Article 26, International Covenant on Civil and Political Rights.

<sup>134</sup> Article 14, International Covenant on Civil and Political Rights.

146. During its time in Libya, the Mission heard repeated reports regarding the execution of detained pro-Gaddafi fighters, including from the then-Minister of Justice, and active members of the opposition forces.
147. Certain witnesses reported the calculated execution of pro-Gaddafi fighters ‘involved in killings’, either of civilians or opposition fighters; it was claimed that such executions were made consequent to an analysis of available ‘evidence’. Others reported more indiscriminate and retaliatory murders, including the ‘slaughter’ (i.e. throat slitting) of former combatants.
148. The killing of persons *hors de combat*<sup>135</sup> and other forms of extrajudicial execution are explicitly prohibited by customary international humanitarian law,<sup>136</sup> and international human rights law.<sup>137</sup> Such acts are recognised as war crimes under Article 8(2)(c)(iv) of the Rome Statute of the International Criminal Court, and if committed in a widespread or systematic manner may constitute the crime against humanity of murder.<sup>138</sup>
149. The Mission believes that these allegations warrant further investigation.

#### 5.2.4. Torture, Cruel, Inhuman and Degrading Treatment, and Abuses in Detention

150. International human rights law prohibits arbitrary detention,<sup>139</sup> and details specific obligations relating to fair-trial provisions,<sup>140</sup> including the right of detainees to “be informed promptly and in detail”<sup>141</sup> of the charge against them, and the right to be tried without undue delay.<sup>142</sup> Furthermore, all detainees must have their detention reviewed by a judge,<sup>143</sup> and are entitled to challenge the legality of their detention.<sup>144</sup>
151. The prohibition of torture, and cruel, inhuman or degrading treatment is a *jus cogens* norm of international law.<sup>145</sup> International human rights law explicitly prohibits torture and other forms of cruel, inhuman, or degrading treatment, *inter alia*, in Article 7 of the International Covenant on Civil and Political Rights, and the in the UN Convention against Torture. With respect to international humanitarian law, torture and other forms of ill-treatment are explicitly prohibited in common Article 3 to the four Geneva Conventions of 1949. Torture or inhuman treatment is recognised as a

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<sup>135</sup> Common Article 3 to the four Geneva Conventions of 1949, Article 4 Additional Protocol II.

<sup>136</sup> Rule 47, Rule 89, Jean-Marie Henckaerts & Louise Doswald-Beck, Customary International Humanitarian Law: Volume 1: Rules (International Committee of the Red Cross, Cambridge University Press, 2009).

<sup>137</sup> *Inter alia*, Articles 6, 14, 26 International Covenant on Civil and Political Rights.

<sup>138</sup> Article 7(1)(a), Rome Statute of the International Criminal Court.

<sup>139</sup> Article 9, International Covenant on Civil and Political Rights.

<sup>140</sup> *Inter alia*, Article 9 and Article 14, International Covenant on Civil and Political Rights.

<sup>141</sup> Article 14(3), International Covenant on Civil and Political Rights.

<sup>142</sup> Article 14(3)(c), International Covenant on Civil and Political Rights.

<sup>143</sup> Article 9(3), International Covenant on Civil and Political Rights.

<sup>144</sup> Article 9(4), International Covenant on Civil and Political Rights.

<sup>145</sup> *Prosecutor v. Furundzija*, Judgment, Trial Chamber, International Criminal Tribunal for the former Yugoslavia, IT-95-17/1-T, 10 December 1998, para. 139.

war crime in non-international armed conflict,<sup>146</sup> and may form an underlying act for a crime against humanity.<sup>147</sup>

152. The Mission visited two current detention facilities run by either the National Transitional Council, or the Local Council.

#### *5.2.4.1. Sibrata Detention Facility*

153. The first detention centre visited by the Mission was based in Sibrata, and operated by the Local Council. The building had been used as a prison in the Gaddafi era, and appeared reasonably clean with adequate lighting. The unit housed 28 prisoners who appeared to be in reasonable health.
154. These detainees appear to have been 'low-level' figures associated with the Gaddafi regime, but who did not take part in the hostilities. Some prisoners appeared nervous, and – when present – guards occasionally interrupted to 'clarify' answers. Nonetheless, the prisoners seemed reasonably well treated, and the Mission viewed an on-site basic medical facility. The prisoners had been visited by the International Committee of the Red Cross on two occasions.
155. None of the detainees had access to a lawyer, or had their detention reviewed by a judge; many had not been informed of the charges against them. Prison officials reported that a committee comprised of members of the Local Revolutionary Council determined which prisoners would be released.
156. The Mission notes that participation in hostilities, or association with a regime, are not crimes in and of themselves, and may not form the basis of detention.

#### *5.2.4.2. Zawiya Detention Facility*

157. The second detention facility visited by the Mission was operated jointly by the NTC and the Zawiya Local Council. Precise figures are unavailable, but the Mission estimates that approximately 140 individuals were in detention. Those detained may be categorised as 'high-level' figures, and included a number of senior commanders, and a significant number of former combatants. The facility had served as a detention centre during the Gaddafi era.
158. As the Mission waited to enter the detainees' area, men were seen exiting the facility with bags of garbage and, upon entry, the Mission observed a number of guards hurriedly cleaning the central (indoor) courtyard area. It was also apparent to the Mission that the toilets in individual rooms had been freshly cleaned.
159. Detainees in this facility were visibly scared and apprehensive, and initially refused to engage with the Mission. There was a palpable sensation of fear within the cells. A number of the detainees were visibly injured and/or ill. Detainees reported a lack of

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<sup>146</sup> Article 8(2)(c)(i), Rome Statute of the International Criminal Court.

<sup>147</sup> Article 7(1)(f), Rome Statute of the International Criminal Court.

adequate medical care and food. Rooms were relatively clean, but overcrowded, and it was the Mission's impression that there were not enough beds for the detainees.

160. Outside the presence of the guards, detainees reported abuse and ill-treatment in an often panicked and desperate manner. Detainees recounted receiving frequent beatings by guards, and showed bruises and other marks consistent with prolonged and recent abuse. These bruises and marks typically appeared on the torso and upper thigh area of the detainees, and consequently were hidden from casual observation by clothing. Beatings were reportedly carried out using fists, and electric and plastic cables. Detainees also reported 2 recent deaths in custody, but the Mission was unable to verify this claim.
161. Detainees expressed fear that they would be beaten following the Mission's departure, and were visibly distressed.
162. A number of detainees reported being detained on retaliatory grounds, and claimed to be civilians who had not participated in hostilities.
163. The detainees indicated that they had been visited by the International Committee of the Red Cross on two occasions. However, the detainees stated that they were not given access to a lawyer, had not had their detention reviewed by a judge, and had not been informed of the charges against them.
164. The Mission notes that this finding of abuse in detention is consistent with similar findings by Human Rights Watch<sup>148</sup> and Amnesty International.<sup>149</sup>
165. The Mission believes that these instances of detainee abuse should be thoroughly investigated. It is imperative that detainees be treated in accordance with the clear requirements of international human rights law.

#### **5.2.5. The Treatment of Suspected Mercenaries**

166. The Mission received consistent reports regarding the use of suspected mercenaries by Gaddafi forces, and their role both with respect to the fighting and the alleged perpetration of violations of international law. The Mission interviewed a number of suspected mercenaries, primarily Malian and Chadian nations, in detention in Zawiya.
167. The Mission is concerned that non-nationals, particularly those with dark skin, are being detained as presumed mercenaries. In such instances, there appears to be a presumption of guilt. The alleged mercenaries interviewed by the Mission in detention claimed to have been migrant workers, some of whom had been resident in Libya for over five years prior to the revolution.

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<sup>148</sup> Human Rights Watch, Libya: Cease Arbitrary Arrests, Abuse of Detainees, 30 September 2011.

<sup>149</sup> Amnesty International, Detention Abuses Staining the New Libya, October 2011.

168. Other organisations have expressed similar concerns regarding the arrest, and subsequent abuse, of migrant workers suspected of being mercenaries.<sup>150</sup>
169. The Mission believes that this issue demands immediate attention from the Libyan authorities. All detainees must have the right to challenge the legality of their detention, and to have their detention reviewed by a judicial authority.

#### 5.2.6. Forcible Displacement of Suspected 'Enemies of the Revolution': The Case of Tawergha

170. Tawergha is a town situated approximately 38 miles east of Misrata, along the main Misrata-Sirte road. The town, which is composed of a number of distinct compounds, had a reported pre-revolution population of approximately 30,000. Tawergha is a former slave-trading outpost which was settled by freed slaves following emancipation; as a result, and as recounted to the Mission, Tawerghans are physically distinct from the population of Misrata.
171. During the revolution, Gaddafi forces used Tawergha as a base from which to attack Misrata, and a detention centre for individuals arrested from Misrata was located here. Residents of Misrata allege that Tawerghans joined Gaddafi's militia, and participated in the fighting in Misrata, during which they are accused of committing numerous atrocities, including rape, and killings. For example, it was reported to the Mission by numerous sources that Tawerghans sold girls from Misrata for 7,000 dinars. The Mission believes that while some of these allegations may be based in fact, and must be investigated accordingly,<sup>151</sup> Tawergha and its inhabitants also appear to be the victims of rumour and urban myth. The town, and its population, have clearly been classified as 'loyalist'.
172. Opposition forces seized control of Tawergha between 12-13 August 2011. Reports indicate that some residents left Tawergha between 10-12 August to escape the fighting, but the Mission does not regard as credible reports recounted by opposition forces that the entire population left willingly. For example, residents interviewed by Human Rights Watch reported being forced to leave their homes by local militia.<sup>152</sup>
173. Human Rights Watch quoted a military commander from Misrata as "arguing passionately that Tawerghans should never return after "what they did in Misrata""<sup>153</sup> while a report in the Sunday Telegraph quoted Adbul el-Mutalib Fatateh, the commander of the Tawergha garrison, as stating: ""We gave them thirty days to leave [... ]We said if they didn't go, they would be conquered and imprisoned. Every single one of them has left, and we will never allow them to come back."<sup>154</sup> Credible sources

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<sup>150</sup> Human Rights Watch, Libya: Stop Arbitrary Arrest of Black Africans, 4 September 2011; Amnesty International, Detention Abuses Staining the New Libya, October 2011.

<sup>151</sup> See, *supra*, Section 5.1. Potential Violations Committed by the Former Government of Libya.

<sup>152</sup> Human Rights Watch, Libya: Militias Terrorizing Residents of 'Loyalist' Town, 30 October 2011.

<sup>153</sup> Human Rights Watch, Libya: Militias Terrorizing Residents of 'Loyalist' Town, 30 October 2011.

<sup>154</sup> Andrew Gilligan, Gaddafi's ghost town after the loyalist retreat, Sunday Telegraph, 11 September 2011.

report that a senior imam in Misrata has issued a *fatwa* stating that Tawerghans should not be allowed to return home for a minimum of two years.

174. The Mission visited Tawergha on 20 and 21 November 2011. On both occasions the area was completely deserted, and no signs of life were evident.
175. It was apparent that significant fire had been directed towards Tawergha from the main road. The side of the road was littered with anti-aircraft and heavy machine gun shell casings, and buildings facing the road were bullet scarred. Light poles along the main road showed evidence of having been struck by small arms fire, which may have originated in Tawergha.<sup>155</sup> The compounds visited by the Mission displayed damage, primarily in the form of bullet scarring – principally from the direction of the main road, but also to a lesser extent from other directions – but showed no evidence of fighting. All discarded shells were found outside the compound – indicating that they had been fired from outside, in – while no shell casings were found in any of the houses investigated by the Mission. Furthermore, bullet holes in doors, gates, and so on, all indicated that the source of fire was from outside in.
176. The houses were completely deserted. In the homes investigated by the Mission, many personal belongings – including photos, scrapbooks and other mementos – remained, suggesting that the inhabitants left in extreme haste, without time to pack. Moreover, while many belongings had been strewn about or broken, many potentially valuable and useable items remained, suggesting that the homes were vandalized rather than looted.
177. In at least some sectors, earthen barriers had been erected to prevent vehicular access into the compound from the main highway. In some portions of the town, sequential numbers (different than the original house numbers) were written with chalk on the exterior walls of each home.
178. On 21 November 2011, shortly after sunset, the Mission passed through Tawergha following a visit to Sirte. As the Mission approached from the east, a number of apartment buildings and houses in separate compounds throughout the town began to burn. It was apparent that these fires were intentional, and there was a strong smell of petrol in the air. As the Mission watched from the road, the fires spread and began to consume entire buildings. The Mission was unable to determine the identity of the persons who started the fires.
179. Human Rights Watch has detailed reports of attacks against residents of Tawergha, including acts of wilful killing, and torture and other forms of ill-treatment in detention.<sup>156</sup>

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<sup>155</sup> The Mission notes however that there was evidence of indiscriminate fire along the Misrata-Sirte road, such as signs with bullet holes, and trees which had been shot. The light poles may have been struck in a similar manner.

<sup>156</sup> Human Rights Watch, Libya: Militias Terrorizing Residents of 'Loyalist' Town, 30 October 2011. Available at: <http://www.hrw.org/news/2011/10/30/libya-militias-terrorizing-residents-loyalist-town>.

180. A senior military commander interviewed by the Mission in Tripoli confirmed that a number of other 'loyalist' villages throughout Libya had met a similar fate to Tawergha.
181. The forcible displacement of a civilian population in non-international armed conflict is prohibited under both treaty law,<sup>157</sup> and customary international humanitarian law.<sup>158</sup> Forcible displacement is also recognised as a war crime, in accordance with Article 8(2)(e)(viii) of the Rome Statute of the International Criminal Court. If committed on either a widespread or systematic basis, forcible transfer may also amount to a crime against humanity,<sup>159</sup> and may form the underlying act of a crime against humanity of persecution.<sup>160</sup>
182. The Mission believes that the situation in Tawergha, and the treatment of still-displaced Tawerghans, demands effective and immediate investigation and remedy. Similarly, the displacement of other 'loyalist' towns must also be immediately investigated, and steps taken to resolve any abuses.

### 5.3. Potential Violations Committed by Third States Engaged in Hostilities Pursuant to Security Council Resolution 1973

183. As noted in Section 3.3 above, from 31 March 2011 third States engaged in hostilities pursuant to Security Council Resolution 1973 operated under NATO command. All incidents investigated by the Mission related to attacks occurring after this date. The Mission also notes its finding that NATO forces operated in Libya in one of four ways:<sup>161</sup>
- NATO personnel were on the ground in Libya, providing logistical support and coordinating NATO air strikes. Credible sources reported the presence of approximately one NATO advisor per 'front'.<sup>162</sup>
  - NATO carried out air-strikes against installations selected and identified by opposition forces. It was reported that these targets were verified by NATO prior to attack.
  - NATO identified and attacked targets based on its own information and intelligence, i.e. without consulting opposition forces on the ground.
  - NATO forces actively participated in combat operations with opposition forces. It was reported that during both offensive and defensive operations, opposition forces would transmit 'real-time' information on the deployment of pro-Gaddafi forces, resulting in immediate action.

<sup>157</sup> Article 17, Additional Protocol II.

<sup>158</sup> Rule 129, Jean-Marie Henckaerts & Louise Doswald-Beck, Customary International Humanitarian Law: Volume 1: Rules (International Committee of the Red Cross, Cambridge University Press, 2009).

<sup>159</sup> Article 7(1)(d), Rome Statute of the International Criminal Court.

<sup>160</sup> Article 7(1)(h), Rome Statute of the International Criminal Court.

<sup>161</sup> See further, *supra* Section: 3.3. Third States Engaged in Hostilities Pursuant to Security Council Resolution 1973, and acting under NATO Command.

<sup>162</sup> For example, according to a number of sources, there were three NATO personnel on the ground in Misrata.

### 5.3.1. General Observations

184. Because of the lack of technical and forensic capabilities, the Mission experienced difficulty in effectively investigating a number of sites targeted by forces operating under NATO command. Presented herein are general observations, a number of which raise concerns that the Mission believes warrant further scrutiny by trained investigators.
185. The principal subject of these observations are static sites targeted by NATO, as distinct from targets attacked during 'real time' combat operations. One 'real time' incident – a 15 September 2011 attack in Sirte – is addressed at the end of this section.<sup>163</sup>
186. Of the sites visited by the Mission, it is apparent that those structures targeted were precisely destroyed, with munitions appropriate to the task. There was virtually no, or *de minimus*, collateral damage. The Mission notes that this is not a comment on the legitimacy of classifying such targets as military objectives. Rather, from the Mission's observations, it appears that those sites targeted were destroyed in a manner proportionate to the task.
187. At numerous sites targeted by NATO and investigated by the Mission, rebel officials stated that the attacks resulted in zero casualties, either injured or killed, military or civilian. This outcome was reportedly due to warnings issued by NATO prior to an attack, which led to the evacuation of targeted sites. According to rebel fighters and officials, these warnings were given via air-dropped pamphlets or radio broadcasts over known Libyan military channels, with some targets receiving warnings up to 4 days prior to an attack. In other instances, rebels reported that dummy munitions, such as a 'dud' missile or 'flash bombs',<sup>164</sup> were used as a warning in the minutes preceding an attack.<sup>165</sup>
188. Even when accounting for the possibility of advance warning, the Mission finds it difficult to believe that such strikes – which often completely destroyed multi-story buildings – consistently resulted in zero casualties, including of military personnel. In this regard, the Mission was struck by two observations: first, the deep appreciation among National Transitional Council, Local Councils, and members of the opposition forces regarding NATO's role in the conflict, and second, an apparent desire to 'protect' NATO, or avoid any direct or indirect criticism.
189. The Mission's third, and final, general observation relates to the choice of targets. A significant percentage of the sites visited by the Mission were clearly civilian objects. The Mission was informed that such sites were transformed into military objectives by

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<sup>163</sup> See, *infra*, Section 5.3.4. NATO Strike on Military Vehicles, and Follow up Attack on Civilians: Sirte.

<sup>164</sup> i.e. a device that provides a flash of light and loud sound, but no explosive impact.

<sup>165</sup> For further, critical, analysis of this technique, sometimes referred to as "roof knocking" see, Report of the UN Fact-Finding Mission on the Gaza Conflict, U.N. Doc. A/HRC/12/48, 25 September 2009, paras. 532-535.

Gaddafi forces, and witness testimony leads the Mission to the conclusion that this was a plausible scenario in certain instances.

190. However, in a number of instances the Mission was informed that Gaddafi forces had used civilian sites as weapons storage or military communications facilities, and that this usage formed the basis of their classification as military objectives. In many such instances, site investigations conducted by the Mission failed to reveal any traces of weapons, munitions, military or communications equipment, or secondary explosions, other than the remnants of the ordinance used in the destruction of the site. The Mission accepts that such sites may have been cleaned or sanitized in the months since the strikes, but regards it as implausible that all Libyan military debris was cleared, particularly in light of the presence of fragments of NATO ordinance.
191. Witnesses and members of the former opposition forces indicated that such sites were targeted both as a result of information supplied to NATO by opposition forces, and on NATO's own initiative.
192. A number of targeted sites visited by the Mission which failed to reveal the reported military presence played key roles in civilian life, including schools, colleges, and a regional food warehouse.

### 5.3.2. Questions concerning Security Council Resolution 1973

193. Security Council Resolution 1973 authorised States "to take all necessary measures [...] to protect civilians and civilian populated areas under threat of attack in the Libyan Arab Jamahiriya."<sup>166</sup> Debate exists regarding the precise meaning of the term 'all necessary measures'.
194. From first-hand information available to the Mission, and secondary sources, it appears that NATO participated in what could be classified as offensive actions undertaken by the opposition forces, including, for example, attacks on towns and cities held by Gaddafi forces. Equally, the choice of certain targets, such as a regional food warehouse, raise *prima facie* questions regarding the role of such attacks with respect to the protection of civilians.
195. The Mission believes that NATO's compliance with the terms of Security Council Resolution 1973 must be evaluated in light of the requirements of international law and the UN Charter; of particular concern in this regard, is the ambiguity present in the text of the Resolution. This is an issue of critical concern given the implications for future Security Council mandated operations.

### 5.3.3. Questions Concerning Target Classification

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<sup>166</sup> UN Security Council Resolution 1973, U.N. Doc. S/Res/1973 , 17 March 2011, para. 4.

196. As noted, a number of the NATO-targeted sites visited by the Mission were ostensibly civilian objects. Following on-site investigations, the Mission was unable to find any convincing physical evidence demonstrating that these sites had been used for military purposes. These sites included a number of schools in Zliten, a Zliten-region food warehouse, the house of Khaled El-Hamedi, and the Office of the Administrative Controller in Tripoli.
197. The principle of distinction has been recognised by the International Court of Justice as one of the “cardinal principles”<sup>167</sup> of international humanitarian law, and one of the “intransgressible principles of customary law”.<sup>168</sup> This rule requires that civilians and civilian objects at all times be distinguished from combatants and military objectives.<sup>169</sup> Under no circumstances may civilians or civilian objects be directly targeted.<sup>170</sup> A civilian object may, by its nature or use, be transformed into a military objective;<sup>171</sup> however, to be classified as such, the otherwise-civilian object must be making “an effective contribution to military action.”<sup>172</sup>
198. In cases of doubt, international humanitarian law explicitly requires that ostensibly civilian objects must be presumed civilian,<sup>173</sup> and may not be attacked.
199. The above observations of the Mission, which are consistent with other reports,<sup>174</sup> raise concerns about the criteria and procedures used by NATO to classify these civilian objects as military objectives prior to strikes. These concerns should be addressed in an open and transparent manner, to ensure both past and future compliance with international law.
200. The Mission believes that the criteria and procedures used to classify civilian objects as military objects raises concerns and warrants effective further investigation.

#### 5.3.4. NATO Strike on Military Vehicles, and Follow up Attack on Civilians: Sirte

201. On 21 November 2011, the Mission interviewed two principal witnesses in Zone 2, a western residential area in Sirte which was one of the last holdouts of Gaddafi supporters in the country. These two witnesses reported a NATO attack which resulted in the death of 57-59 individuals, of whom approximately 47 were civilian.

<sup>167</sup> *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, International Court of Justice, 8 July 1996, para. 78.

<sup>168</sup> *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, International Court of Justice, 8 July 1996, para. 79.

<sup>169</sup> See, Rule 1 and Rule 7, Jean-Marie Henckaerts & Louise Doswald-Beck, *Customary International Humanitarian Law: Volume 1: Rules* (International Committee of the Red Cross, Cambridge University Press, 2009).

<sup>170</sup> The direct targeting of civilians and/ or civilian objects is recognised as a war crime in both international and non-international armed conflicts. See, Articles 8(2)(b)(i), 8(2)(b)(ii), and 8(2)(e)(i) of the Rome Statute of the International Criminal Court.

<sup>171</sup> See, Article 52(2), Additional Protocol I.

<sup>172</sup> *Prosecutor v. Galic*, Judgment, Trial Chamber, International Criminal Tribunal for the former Yugoslavia, 5 December 2003, para. 51.

<sup>173</sup> Article 52(3), Additional Protocol I.

<sup>174</sup> See an interactive article on the New York Times website entitled *Errant NATO Airstrikes in Libya: 13 Cases*, available at <http://www.nytimes.com/interactive/2011/12/16/world/africa/nato-airstrikes-in-libya.html?ref=world#page/warehouses>.

The Mission found these witnesses to be credible, and their report was confirmed by unrelated witnesses.

202. According to witness reports, on 15 September 2011, opposition forces seized control of the western part of Sirte but were subsequently driven out of the area in a counterattack by Gaddafi forces. Following the counterattack, two jeeps fitted with mounted weapons,<sup>175</sup> each holding approximately 5 combatants, took up position at the below mentioned GPS coordinates. The jeeps were positioned on an open road, with beach to one side, and houses to the other; there are unobstructed views of the area.
203. The witnesses reported that, just after sunset but while still light, both trucks were targeted and destroyed by aircraft attacking from the south. Each truck was hit by one weapon – what the witnesses described as a ‘rocket’ – and the trucks were destroyed, with their occupants killed or injured.
204. According to the witnesses, a crowd gathered at the scene to assist the wounded and retrieve the corpses of the dead combatants. The witnesses indicated that the crowd was exclusively civilian, though it is unknown how these individuals were dressed or if they were involved in the hostilities as part of the Gaddafi forces in Zone 2. According to the reports, approximately 5 minutes after the initial missiles struck, a third missile struck the area, killing a large number of the gathered civilians.
205. The witnesses reported that these strikes killed 57-59 persons, including 10 combatants in the trucks and approximately 47 civilians.
206. The Mission was directed to the site, which was located at the extreme western edge of Sirte at approximately 32° 12' 35"N, 16° 33' 27"E. By late November when the Mission arrived, the debris had been moved, apparently as part of the general effort within Sirte to reopen the streets to traffic. However, the Mission observed three impact craters with blast patterns in the street which were consistent with an air attack from the south. Some debris from what appeared to be trucks was present, but had been cleared to the side of the road, along with other debris generated in the attack. The Mission observed remnants of a rocket motor for a RPG-7 munition; it is possible that the presence of munitions in the trucks may have caused secondary explosions. It was also apparent that some debris had been removed prior to the Mission's arrival, either as part of general post-war street cleaning or otherwise.
207. The Mission is aware that missiles fired from an aerial platform are typically fired ‘eyes-on’. This means that, at the time of firing, NATO forces should have had the target area under visual observation.

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<sup>175</sup> Apparently these vehicles were so-called ‘technicals’, pick-up trucks fitted with a mounted machine gun, light anti-aircraft gun, or some similar form of weaponry.

208. NATO's operational media update for 15 September notes the destruction of 2 armed vehicles in Sirte.<sup>176</sup>
209. Apart from the operational media update mentioned above, the Mission has not been able to determine if NATO was aware of these reports or had investigated this incident. The Mission believes that these reports raise significant questions concerning the events surrounding this incident, which should be addressed and further investigated in an open and transparent manner, to ensure both past and future compliance with international law

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<sup>176</sup> NATO, Operational Media Update for 15 September, 16 September 2011. Available at: [http://www.nato.int/nato\\_static/assets/pdf/pdf\\_2011\\_09/20110916\\_110916-oup-update.pdf](http://www.nato.int/nato_static/assets/pdf/pdf_2011_09/20110916_110916-oup-update.pdf).

## 6. Conclusions

210. The Mission's investigation in Libya revealed significant evidence concerning possible violations of international law. The Mission was unable to reach definitive legal conclusions regarding individual incidents. However, from its observations potential violations of international law may include war crimes and possibly crimes against humanity.
211. The Mission emphasizes that the evidence of possible violations, as detailed in Section 5 above, necessitate effective investigation, including, where appropriate, the prosecution of those responsible. The Mission stresses that the duty to effectively investigate such allegations constitutes a binding obligation arising from customary international law.<sup>177</sup>
212. The primary obligation to conduct effective investigations falls upon the Libyan authorities. However, should the Libyan authorities proves unwilling or unable to conduct the necessary investigations and prosecutions, the interests of justice demand that recourse be had to mechanisms of international justice.
213. In this regard, the Mission reiterates its finding that – at least up until the time of the Mission's departure from Libya – the local and national courts in Libya were not functioning. The Mission received testimony indicating that the operation of the Libyan judicial system during the Gaddafi era failed to comply with the requirements of international human rights law, in particular those requirements relating to the independence and impartiality of the judiciary.<sup>178</sup>
214. The reestablishment of the Libyan judicial system is an essential, and urgent, priority. Without a functioning judicial system operating in compliance with the requirements of international human rights law, the establishment of the rule of law and the effective protection of human rights will prove impossible.
215. The Mission's investigations indicate that extensive investment in the Libyan judicial system will be required, both with respect to resources and training. In particular, effective training in international standards and international human rights law is of fundamental importance given the realities of the judicial system during the Gaddafi era. Such training must target judges, the office of the prosecutor, lawyers, and the Bar Associations. It is also important that investment in other, often neglected areas of the judicial system – such as the training of clerks and court reporters – be made.
216. The effective training of the new law enforcement agencies, armed forces, and prison officials is also essential, if an effective rule of law system is to be established.

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<sup>177</sup> See further, *supra*, Section 4.3. The Obligation to Investigate and, where appropriate, Prosecute Serious Violations of International Law.

<sup>178</sup> Article 14, International Covenant on Civil and Political Rights.

217. The Mission is particularly concerned by allegations concerning ongoing abuses in detention, the treatment of suspected mercenaries, and the forced displacement – and related mistreatment – of perceived loyalists. The Mission believes that the forcible displacement of perceived loyalists, as evidenced by the situation with respect to Tawergha, may amount to a violation of international law. The Mission urges the National Transitional Council and associated forces to immediately act to halt ongoing violations, and to investigate all past abuses to ensure compliance with international law.
218. The Mission is struck by the statement of a senior military commander in Tripoli: “what I fear most now are the revolutionaries themselves.” After significant sacrifice, Libya is emerging from 42 years of authoritarian rule and governance characterised by injustice, the denial of fundamental human rights, and impunity. The Mission firmly believes that the process of building a new Libya must be firmly grounded in the core principles of human rights, democracy, and the rule of law. In this regard, accountability is key: all those suspected of violating international and domestic law must be investigated and, where appropriate, prosecuted. The rule of law, and respect for human rights, must be re-established. Public scrutiny, or public awareness, is an essential component of this process. The maxim that “justice must not only be done, it must also be seen to be done” is particularly relevant to Libya’s transition.

## 7. Recommendations

### 7.1. To the Libyan Authorities

219. The following recommendations are submitted to the Libyan authorities:

- To effectively investigate all potential violations of international law – including those presented in this Report – in compliance with international standards;
- To immediately address the situation in Tawergha, and other loyalist towns;
- To eradicate arbitrary detention, and ensure that all detainees are brought before a judge, and given the opportunity to challenge the legality of their detention;
- To investigate, and address, the mistreatment of suspected mercenaries;
- To order a review of detention standards and practices;
- To ensure that all detention centres fall under governmental control;
- To promote the training of detention centre personnel;
- To ensure that international standards relating to detention are adhered to, and enforced;
- To promote and conduct training in international law, including international human rights law, for lawyers and members of the judiciary;
- To invest in the Libyan judicial system, including training for clerks and court reporters;
- To incorporate international human rights law instruments into Libya's domestic legal system;
- To accede to the Rome Statute of the International Criminal Court.

### 7.2. To the United Nations

220. The following recommendations are submitted to the United Nations:

- Through United Nations Support Mission in Libya (UNSMIL), to immediately begin implementation of its mandate set forth in §12 of Security Council Resolution 2009, including:
  - promotion of the rule of law;
  - promotion and protection of human rights, particularly for those belonging to vulnerable groups; and
  - support for transitional justice.
- As part of this process, to provide training, support and other assistance to Libyan authorities and civil society to implement the goals set forth in the preceding paragraph.

### 7.3. To the Member States of the International Community

221. The following recommendations are submitted to the International Community:
- To provide training, support and other assistance to Libyan authorities and civil society to implement the goals set forth above; and
  - As in set forth in §12(f) of Security Council Resolution 2009, to work with Libyan authorities and civil society and other international actors to coordinate such assistance;
  - To avoid competition among international actors concerning such assistance; and
  - To investigate in an open and transparent manner the actions by third states engaged in hostilities pursuant to Security Council Resolution 1973.