# THE INTERNATIONAL COMMISSION OF INQUIRY ON LIBYA: A CRITICAL ANALYSIS

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## INTRODUCTION

This chapter provides a critical assessment of the International Commission of Inquiry on Libya, established by the United Nations Human Rights Council in February 2011 to investigate violations of international law committed in the Libyan Arab Jamahiriya.[2] The chapter is divided into four sections. Section I provides a brief summary of the Commission's creation, investigation, and findings. Section II assesses whether the Commission's mandate and methods satisfied international standards of independence and impartiality. Section III raises a number of questions about the legal framework the Commission applied. Finally, Section IV asks whether, in light of the law it applied and the facts that it found, the Commission's legal conclusions withstand analysis.

## I. SUMMARY

On 25 February 2011, the 15th Special Session of the Human Rights Council (HRC) created an "independent international commission of inquiry" to investigate rising violence against civilians in Libya. The mandate of the Commission was as follows:

> [T]o investigate all alleged violations of international human rights law in Libya, to establish the facts and circumstances of such violations and of the crimes perpetrated, and where possible identify those responsible to make recommendations, in particular, on accountability measures, all with a view to ensuring that those individuals responsible are held accountable.[3]

The President of the HRC appointed three individuals to the Commission: Canada's Philippe Kirsch, the first President of the International Criminal Court (ICC); Egypt's M. Cherif Bassiouni, a renowned international criminal law scholar who had served as the

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[2] *Situation of Human Rights in the Libyan Arab Jamahiriya*, A/HRC-S/15/1 (25 Feb. 2011), ¶ 11.
[3] *Id.*

Chair of the Security Council's Commission to Investigate Violations of International Humanitarian Law in the Former Yugoslavia; and Jordan's Asma Khader, a human-rights attorney who had been Jordan's Minister of State and Minister of Culture.

On 31 May 2011, after traveling to Libya to interview victims, witnesses, and representatives of the Qadhafi government, the National Transitional Council (NTC),[4] and Libyan civil society, the Commission filed its initial report with the HRC.[5] The Commission noted that its findings and conclusions were necessarily preliminary, because the unstable security situation in Libya had limited its ability to conduct an effective investigation. For example, although the Commission had interviewed hundreds of individuals during its field mission, the ongoing conflict had prevented it from visiting places such as Misrata and Ajdabiya.[6] The Commission thus concluded that "[f]urther investigation [was] critical in relation to fulfilling the mandate with respect to fully exploring the scope of the violations, identifying those with responsibility for the violations and crimes and making appropriate recommendations."[7]

In response to the first report, the HRC extended the Commission's mandate until March 2012.[8] The Commission intended to return to Libya in August 2011, but had to postpone its visit because it had lost its support staff. The Commission was thus forced to recruit "entirely new staff" for its second field mission, a process that lasted until mid-November 2011.[9] The Commission's ability to return to the field was also affected by the ongoing conflict in Libya. Tripoli did not fall to the *thuwar* until August 2011, and hostilities did not cease entirely until late October. As a result, the Commission was unable to return to Libya until October 2011 and could not conduct substantive investigations until December 2011.[10]

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[4] After publication of the Commission's Final Report, the NTC ceded power to the newly-elected General National Congress. This chapter only discusses events that took place during the conflict and under the NTC government.

[5] *Report of the International Commission of Inquiry to Investigate All Alleged Violations of International Human Rights Law in the Libyan Arab Jamahiriya*, A/HRC/17/44 (31 May 2011) ("First Report").

[6] *Id*., ¶ 11(c).

[7] *Id*., ¶ 13.

[8] *See Full Report of the International Commission of Inquiry to Investigate All Alleged Violations of International Law in Libya*, A/HRC/19/68 (8 Mar. 2012), ¶ 4 ("Final Report").

[9] *Id*., ¶ 9(a).

[10] *Id*., Summary, ¶ 7.

Despite its administrative and logistical problems, the Commission believes that its two field missions resulted in "a substantial body of material with respect to the violation of international human rights, international humanitarian law and international criminal law" that had taken place in Libya.[11] The Commission enjoyed much wider access to conflict sites during its second mission, which included visits to Misrata, Benghazi, Ajdabiya, Bani Walid, Nalut, Yafran, Zintan, Tripoli, Al Zawiyah, Zowara, Al Khums and Al Qalaa. Overall, during the course of the two missions, the Commission conducted more than 400 interviews,[12] examined extensive satellite imagery provided by UNOSAT, and reviewed more than 5,000 pages of documents, nearly 600 videos, and more than 2,000 photographs relevant to the conflict.[13]

The Commission filed its second and final report with the HRC on 8 March 2012. That report contains an overview of the Commission's work; provides an extensive background of the conflict in Libya; and explains the Commission's findings on a wide variety of legal issues, from the excessive use of force to pillaging. With respect to the Qadhafi government, the report concludes that the military is not only responsible for serious violations of international human rights law (IHRL) and international humanitarian law (IHL), but also committed war crimes and crimes against humanity, such as murder, torture, rape, enforced disappearance, and deliberate attacks on civilian objects, including protected buildings and medical units.[14] The report additionally states that the Commission has "been able to assign responsibility to specific individuals" for many of the violations and crimes and will provide a non-public list of their names to the High Commissioner for Human Rights.[15]

With respect to the *thuwar*, the Commission's final report concludes that various brigades committed both war crimes and crimes against humanity during the conflict – most notably murder, torture, enforced disappearance, indiscriminate attacks, and pillage – and continued to commit crimes against humanity "in a climate of impunity" under the NTC.[16] The Commission has been unable, however, to reach a definitive conclusion regarding the lawfulness of Muammar and Mutassim Qadhafi's deaths. The report thus recommends further investigation of those deaths and demands

[11] *Id*, ¶ 10.
[12] *Id*., ¶ 6(a).
[13] First Report, ¶ 9.
[14] Final Report, ¶¶ 808-09.
[15] *Id*., Summary, ¶ 14.
[16] *Id*., ¶ 810.

that, in general, the NTC conduct credible investigations of *thuwar* violations and crimes.[17]

Finally, with regard to NATO, the final report concludes that although NATO forces conducted "a highly precise campaign with a demonstrable determination to avoid civilian casualties," a few attacks targeted areas "showed no evidence of military utility" and resulted in "confirmed civilian casualties." The report recommends further investigation into those attacks, noting that NATO did not provide the Commission with sufficient evidence to support its claim that all of the questionable attacks but one[18] did, in fact, target legitimate military objectives.[19]

## II. INDEPENDENCE AND IMPARTIALITY

All scholars agree – and common sense indicates – that, to be credible, an international commission of inquiry must be both politically independent and procedurally impartial.[20] The question is what political independence and procedural impartiality require. In an influential article, Franck and Fairley identify five relevant factors: (1) choice of subject; (2) choice of fact finders; (3) terms of reference;(4) procedures for investigation; and (5) utilization of product.[21] The Libya Commission rates highly on some of those factors, but its record is mixed on others.

### A. Choice of Subject

"Choice of subject" refers to the decision to investigate certain situations instead of others. Given the large number of situations that deserve investigation and the small number of international commissions of inquiry, the decision to investigate a particular situation requires particular justification. As Franck and Fairley emphasize, "[a]ny suspicion of 'ad hoc-ery' undermines the efficacy of the fact-finding process."[22]

Franck and Fairley emphasize that the best defense against ad-hoc-ery would be for all human-rights fact-finding missions to be

[17] *Id*., ¶ 818(a).
[18] After initially claiming that its attack on Souq al-Jama was legitimate, NATO admitted that the attack was likely caused by a weapons malfunction. *Id*., ¶ 628.
[19] *Id*., ¶ 812.
[20] *See, e.g.* Thomas M. Franck & H. Scott Fairley, *Procedural Due Process in Human Rights Fact-Finding by International Agencies*, 74 AM. J. INT'L L. 308, 309.
[21] *Id*. at 311.
[22] *Id*. at 312.

conducted by one permanent and independent organization.[23] The most obvious candidate is the International Humanitarian Fact-Finding Commission (IHFFC), which was established in 1991 pursuant to the First Additional Protocol.[24] Given the politicized nature of the UN, it is highly likely that fact-finding missions authorized by the IHFFC would be viewed by the international community as more independent and impartial than international commissions of inquiry authorized by either the Security Council or – as in the case of Libya – the Human Rights Council.

That said, there are at least three reasons why the IHFFC does not provide a credible alternative to the UN. First, and most obviously, the international community has shown no interest in making use of the IHFFC's independent expertise; the IHFFC has never been asked to conduct an investigation in the two decades of its existence. Final, the IHFFC's mandate is limited to investigating violations of IHL; it cannot investigate violations of IHRL or ICL – two regimes that figure prominently in most international commissions of inquiry, as the Libya Commission demonstrates. Third, and finally, the IHFFC's services are strictly consensual: in an international armed conflict (IAC), both states must consent to an investigation; in a non-international armed conflict (NIAC), both the state and the organized armed group(s) must consent. The IHFFC was thus not a credible alternative to the-HRC created Libya Commission: the Qadhafi government would never have agreed to an independent international fact-finding investigation during the conflict, and it is unlikely that the NTC would have ever agreed to an investigation that examines *thuwar* crimes as well as the crimes of its predecessors.

Because of the IHFFC's limitations, the ad-hoc-ery inherent in UN creation of international commissions of inquiry seems unavoidable. That does not mean, however, that commissions like the Libya Commission cannot be credible. Franck and Fairley argue that the credibility of an *ad hoc* fact-finding mission depends on the clarity of the international norms allegedly violated in the situation under investigation.[25] By that measure, the Libyan Commission seems more than justified: by the time the HRC created the Commission, the Qadhafi government's unprovoked attacks on civilians – acts that strike at norms fundamental to IHRL, IHL, and ICL – had already been well documented by the

[23] *Id*.
[24] *See Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts* (8 June 1977), art. 90 ("AP I").
[25] *Id*.

media[26] and by independent human-rights organizations.[27] Moreover, although critics have noted that the HRC praised the Qadhafi government's human-rights record not long before it created the Commission[28] – thus implicitly invoking the widely-accepted narrative that the HRC is "soft" on human-rights abuses committed by authoritarian governments in the Global South[29] – that seeming contradiction actually *supports* the credibility of the political process that culminated in the Commission's creation. If the HRC was overly sympathetic toward the Qadhafi government, it must have had particularly compelling evidence that crimes were being committed against civilians to undergo such a striking *volte-face*.

## B. Choice of Fact Finders

The credibility of an international commission of inquiry is affected by two aspects its fact finders. First, and most obviously, "the persons conducting an investigation should be, and should be seen to be, free of commitment to a preconceived outcome."[30] Final, fact-finders must be selected that have the expertise necessary to fulfill the Commission's mandate. In practice, that requires not only a multidisciplinary team – including "legal experts, human rights experts and/or IHL experts" – but also one that is familiar with the specific political, social, and cultural context of the situation being investigated.[31]

In general, the three members of the Libya Commission satisfied these requirements. Subject to one qualification discussed below, there is no evidence – nor has there been any suggestion – that Kirsch, Bassiouni, or Khader prejudged the responsibility of any party to the conflict prior to their investigation. Moreover, although the Commission would have been better served including their biographies in their reports – an absence that contrasts with those provided for the experts who served on the Independent Civil

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[26] *See, e.g.*, *Protesters 'Under Attack' in Benghazi, Libya*, BBC NEWS (18 Feb. 2011).
[27] *See, e.g.*, Amnesty International, Press Release, *Security Council and Arab League Must Act Decisively on Libyan Crimes* (23 Feb. 2011).
[28] *See, e.g.*, Tom Kuntz, *Libya's Late, Great Human Rights Record*, NEW YORK TIMES (5 Mar. 2011).
[29] *See, e.g.*, Paul Gordon Lauren, *To Preserve and Build on its Achievements and to Redress its Shortcomings": The Journey from the Commission on Human Rights to the Human Rights Council*, 29 HUM. RTS. Q. 307-45 (2007).
[30] Franck & Fairley, *supra* note 20, at 313.
[31] Theo Boutruche, *Credible Fact-Finding and Allegations of International Human Rights Law Violations: Challenges in Theory and Practice*, 16 J. CONFLICT & SECURITY L. 105, 118 (2011).

Society Fact-Finding Mission to Libya[32] – it is clear that the Commissioners had the necessary expertise in IHRL, IHL, and ICL, the three legal frameworks included in the Commission's mandate. Kirsch and Bassiouni are both ICL and IHL experts, and Khader is an expert in IHRL, with particular expertise in the human rights of women and children. Finally, both Bassiouni and Khader are from Islamic states, which made them particularly well-suited to navigating the complex political, social, and cultural context in Libya.

That said, the HRC's choice of Commissioners raises two important issues. First, given that many of the acts investigated by the commission took place during armed conflict, it is unfortunate that none of the Commissioners had expertise in military operations.[33] Military expertise was relevant to a variety of legal issues addressed by the Commission, such as whether Qadhafi and *thuwar* forces had deliberately or indiscriminately attacked civilian objects,[34] whether NATO's bombing targets were legitimate military objectives,[35] and whether Qadhafi or *thuwar* forces had either used prohibited weapons or used legitimate weapons in an unacceptable manner.[36] The Commissioners were advised by a military expert[37]; nevertheless, given the strong legal conclusions drawn by the Commission – including suggestions of individual criminal responsibility for war crimes – the better practice would have been to include a military expert among the Commissioners themselves, as was the case with the HRC-created United Nations Fact Finding Commission on the Gaza Conflict.[38] The absence of such an expert is far from fatal to the Libya Commission's credibility, but it does illustrate the wisdom of Boutruche's admonition that "[t]he increasing involvement of human rights law experts in fact-finding missions that relate to an armed conflict may also lead to distortion, with too much focus on human rights rather than on the lawfulness of the conduct of military operations."[39]

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[32] *Report of the Independent Civil Society Fact-Finding Mission to Libya* (Jan. 2012), at 7. The Mission was sponsored by the Palestinian Centre for Human Rights, the Arab Organization for Human Rights, and the International Legal Assistance Consortium.

[33] Bassiouni saw combat as a Lieutenant in the Egyptian armed forces, but he was a field officer, not a staff or operations officer.

[34] *See, e.g.*, Final Report, ¶¶ 546-602.

[35] *See*, e.g., *id*, ¶¶ 617-55.

[36] *See, e.g.*, *id*., ¶¶ 661-673.

[37] *See, e.g.*, *id*., ¶¶ 548.

[38] The Mission included Ireland's Desmond Travers, a former soldier and UN peacekeeper.

[39] Boutruche, *supra* note 31, at 107.

Second, given that the Commission's investigation operated in tandem with the ICC's investigation into the situation in Libya, it is unfortunate that two of the three Commissioners had been previously involved with the Court: Kirsch as the ICC's first President; Bassiouni as the Vice-Chairman of the Preparatory Committee and Chairman of the Drafting Committee at the Rome Conference. Kirsch and Bassiouni obviously have a vested interest in the Court's success; an observer might, therefore, reasonably suspect that they were predisposed to finding that the individuals they investigated – Qadhafi forces and *thuwar* alike – had not only violated IHL and IHRL, but had committed war crimes and crimes against humanity, as well. Indeed, the Commission's final report provides fodder for that suspicion when it notes that the Commissioners "consulted with the Office of the Prosecutor of the International Criminal Court, whose office has been investigating alleged international crimes committed in Libya since 15 February 2011."[40] The report insists that the two bodies are "committed to respecting appropriate confidentiality and independence requirements," but it provides no information whatsoever about what the Commission and the OTP discussed, making it impossible for an outside observer to assess the validity of that assertion. Moreover, although the ICC's Office of Public Counsel for the Defence (OPCD) repeatedly asked the Commission to provide it with any exculpatory evidence it found concerning its client, Saif Qadhafi, the Commission never formally responded to the OPCD's request.[41] That failure is inconsistent with the Commission's claim to have functioned independently of the OTP.

### C. Terms of Reference

"Terms of reference" refers to the scope of an international commission of inquiry's mandate[42] Two aspects of a commission's mandate are particularly relevant to its impartiality and independence. The first is whether the institution that created the commission did so merely to confirm a pre-existing belief that the investigated state had committed human-rights violations.[43] Such prejudgment has been a consistent problem for UN-created fact-finding missions; as Franck and Fairley point out with regard to investigations of Israel and South Africa, "[i]n each of these instances, the terms of reference – the resolution establishing a mission – included conclusory language that palpably interfered

[40] First Report, ¶ 18.
[41] Personal communication from Melinda Taylor, 8 Aug. 2012 (on file with author).
[42] Franck & Fairley, *supra* note 20, at 316.
[43] *Id.*

with the integrity of the fact-finding process by violating the essential line between political assumptions and issues to be impartially determined."[44] The final relevant aspect is then how the commission itself interpreted its mandate; as the recent United Nations Fact Finding Mission on the Gaza Conflict indicates, a commission can compensate for a biased mandate by expanding the scope of its investigation.[45]

There is little question that the HRC created the Libya Commission not to "impartially determine" whether the Qadhafi government was responsible for human-rights abuses involving civilians, but to confirm its belief that such abuses had already occurred. The very first paragraph of the resolution that created the Commission "[e]xpresse[d] deep concern with the situation in Libya" and "strongly condemn[ed] the recent gross and systematic human rights violations committed in Libya, including indiscriminate armed attacks against civilians, extrajudicial killings, arbitrary arrests, detention and torture of peaceful demonstrators, some of which may also amount to crimes against humanity."[46] Such conclusory language might have been justified by the facts then available, but it also left little doubt that the Commission's mandate – at least in the eyes of the HRC – was to document Qadhafi government abuses, not to determine objectively whether reports of those abuses were true. Indeed, the language in Res. S-15/1 almost perfectly parallels the tendentious rhetoric that Franck and Fairley decry in the UN's commission-creating resolutions concerning Israel and South Africa.[47]

Even worse, Res. S-15/1 made absolutely no mention of possible human-rights abuses committed by the *thuwar* attempting to overthrow the Qadhafi government. At that point in the conflict, the HRC certainly had reason to believe that the government was responsible for most of the abuses being committed in Libya. Nevertheless, by the time the HRC adopted the resolution – 25 February 2011 – nearly all of eastern Libya had already fallen under *thuwar* control and there were already reports that *thuwar* brigades were engaging in reprisal killings of captured government soldiers.[48] The absence of reference to the *thuwar* in Res. S-15/1 thus reinforces the idea that the HRC intended for the Libya

[44] *Id*.
[45] *See Report of the United Nations Fact Finding Mission on the Gaza Conflict*, A/HRC/12/48 (25 Sept. 2009), ¶ 152
[46] HRC Res. S-15/1, ¶ 1.
[47] Franck & Fairley, *supra* note 20, at 316.
[48] *See* Final Report, ¶ 81.

Commission to focus its investigation on the Qadhafi government to the exclusion of other parties to the conflict.[49]

Both aspects of Res. S-15/1 are problematic. There is no justification whatsoever for the HRC's failure to even mention possible human-rights abuses by the *thuwar*. The resolution's conclusory language concerning the Qadhafi government, however, is neither surprising nor completely unjustified. Franck and Fairley's condemnation of such language must be read against the backdrop of their belief that international fact-finding missions should be created by a permanent organization, not *ad hoc* by a political body like the UN. The UN has no reason to create an *ad hoc* international commission of inquiry unless it believes that the commission will, in fact, discover that the investigated state is responsible for human rights abuses. The conclusory language of Res. S-15/1, therefore, should be seen not merely as evidence that the HRC had prejudged the Qadhafi government's guilt, but also as rhetoric necessary for the HRC to justify the time and expense of creating the Libya commission in the first place.

Fortunately, the Libya Commission generally corrected the biases inherent in Res. S-15/1 when it interpreted its mandate. With regard to the HRC's prejudgment of the Qadhafi government's responsibility for violations of international law, the final report makes clear that the Commission took "a cautious approach in assessing the information gathered" throughout its work, refusing to find a party responsible for a particular violation of IHRL, IHL, or ICL unless a "balance of probabilities… supported a finding that a violation had in fact occurred."[50] Moreover – and perhaps more importantly – the Commission redefined its mandate to require it "to consider actions by all parties that might have constituted human rights violations throughout the territory of Libya," not simply the actions of the Qadhafi government.[51]

That said, although the Commission's investigation was admirably even-handed, its reports still evidence a problematic tendency to rationalize *thuwar* human-rights abuses as regrettable but understandable reactions to the repressiveness of the Qadhafi government. The following paragraphs in the final report's "Background" section are particularly revealing:

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[49] It is worth noting that the Security Council resolution that referred the situation in Libya to the ICC, adopted the day after the HRC adopted Res. S-15/1 also made no mention of possible *thuwar* crimes. *See* SC Res. 1970 (26 Feb. 2011).

[50] Final Report, ¶ 7.

[51] First Report, ¶ 4.

> As discussed in its first report, the Commission heard repeatedly during its investigation that past human rights violations have had a deep psycho-social impact on the community…. It is against this background of repression of rights that one has to assess the pent-up demand for democracy and the rule of law in early 2011 and the behaviour of individuals and units of those revolutionaries or *thuwar* who subsequently took up arms against the Qadhafi Government.
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> [A] significant amount of this report focuses on abuses by those who rose up against the Qadhafi Government. The Commission is mindful that such abuses are not to be excused. They must, however, be viewed in the context of systematic torture, murder and repression of the people of Libya by Muammar Qadhafi and his Government over four decades. It is also mindful of the fact that, while major abuses are still occurring, the significant difference between the past and the present is that those responsible for abuses now are committing them on an individual or unit level, and not as part of a system of brutality sanctioned by the central government. The Commission is cognizant of the challenges facing the new Libyan leadership in rebuilding a country left by the Qadhafi Government devoid of independent institutions, a civil society, political parties, and a judiciary able to provide justice and redress.[52]

Although the Commission is careful here to disclaim the idea that the Qadhafi government's violations of international "excuse" the *thuwar*'s violations, this statement – and the Commission makes others like it[53] – does not belong in a report whose sole purpose is to identify the various human-rights abuses committed by the parties to a conflict. A violation of IHRL, IHL, or ICL is a violation of IHRL, IHL, or ICL; it does not matter why a party committed it. As a result, by commenting on the "psycho-social" reasons that might explain the *thuwar*'s abuses, the Commission both minimizes their seriousness and creates the impression that the Commission was less objective than its laudable evenhandedness might otherwise suggest.

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[52] Final Report, ¶¶ 38-39.
[53] *See, e.g.*, *id*., ¶ 778.

Interestingly, the Commission's insistence on redefining its mandate led to significant conflict with NATO. In November 2011, the Commission sent the first of a series of letters to NATO asking it to justify a number of bombing attacks that had resulted in civilian casualties. Although NATO was willing to provide the Commission with some evidence regarding the attacks, it insisted that the Commission had no authority to investigate NATO's actions. Initially, it took the position that the Commission's mandate did not extend to violations of IHL and ICL, the HRC had created the Commission "to investigate all alleged violations of international human rights law in Libya" and the ICC was already investigating ICL violations.[54] It then argued later – even more bluntly – that "examination of the conduct of parties to the Libyan internal conflict" did not imply "expansion of the Commission's work to include 'investigation' of NATO's actions giving effect to the mandate contained in UN Security Council Resolution 1973."[55]

NATO's first argument was without merit. To begin with, NATO's reference to the "violations of international human rights law" language in Paragraph 11 of Res. S-15/1 conveniently ignored the fact that the very next clause directly referenced ICL, calling upon the Commission "to establish the facts and circumstances of such violations *and of the crimes perpetrated*… with a view to ensuring that those individuals responsible are held accountable." Had the HRC wanted to limit the Commission's mandate to violations of IHRL, it would not have included such language in Res. S-15/1. Moreover, the HRC specifically extended the Commission's mandate on 17 June 2011, well after hostilities between the Qadhafi government and the *thuwar* had given rise a non-international armed conflict, making IHL applicable. Although IHRL coexists with IHL during armed conflict, its reach is significantly cabined by the *lex specialis* nature of IHL.[56] It is difficult to believe that the HRC would have extended the Commission's mandate if had it wanted the Commission to avoid investigating IHL violations.

NATO's second argument – that the Commission's mandate to investigate "all alleged violations" did not include violations committed by NATO forces – was no more persuasive. Most obviously, although Res. S-15/1 was clearly directed at the

[54] Letter from Peter Olson, NATO Legal Advisor, to Judge Kirsch (20 Dec. 2011), Final Report, Annex II, at 26.
[55] Letter from Peter Olson, NATO Legal Advisor, to Judge Kirsch (23 Jan. 2012), *id*., Annex II, at 37.
[56] *See, e.g.*, ICJ, *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons*, Merits Judgment (8 July 1996), ¶ 25.

Qadhafi government, nothing in its language suggested that NATO's actions were beyond the purview of the Commission, much less formally excluded those actions from its consideration. Indeed, the resolution was equally silent on the *thuwar* – yet NATO had no problem with the Commission investigating *thuwar* violations of international law. Nor did NATO's reliance on the ICC's parallel investigation into ICL help its cause. On the contrary, the ICC investigation actually undermined its argument, because the Security Council resolution referring the Libyan situation to the ICC – unlike Res. S-15/1 – specifically excluded the nationals of NATO states not party to the Rome Statute from the Court's jurisdiction. Had the IRC intended to limit the Commission's mandate to violations of IHRL, violations of IHL and ICL committed by those nationals (which included all of the Americans involved in Operation Unified Protector) could not have been investigated. Such a desire on the part of the HRC seems unlikely.

### D. Procedures for Investigation

As Boutruche has pointed out, "one of the key components of credible fact-finding is a sound and elaborated methodology clearly explaining the standards and procedures that were followed."[57] Such a methodology is necessary for at least two reasons. First, and most obviously, facts found pursuant to such a sound and elaborated methodology are much more likely to be accepted by the international community than facts found pursuant to a methodology that is biased and opaque.[58] Final, a sound and elaborated methodology maximizes the likelihood that the investigated state will cooperate with the fact-finding mission.[59] Some states, of course, will refuse to cooperate with any international commission of inquiry, whether because they resent the intrusion upon their sovereignty or simply because they have something to hide. Nevertheless, "rules of procedure that manifest persuasively the fairness to all sides as well as the thoroughness of the fact-finding exercise" will help alleviate a state's procedural concerns – and will at a minimum make clear the political motivations of a state that refuses to cooperate with even a completely fair commission.[60]

What, then, qualifies as a "sound and elaborated" fact-finding methodology for an international commission of inquiry? The

[57] Boutruche, *supra* note 31, at 106-07.
[58] Franck & Fairley, *supra* note 20, at 318.
[59] *Id*. at 310.
[60] *Id*.

latter requirement is straightforward: it requires a commission to clearly and publicly explain the procedures it used to find facts, the law that it applied, and the rationale for the legal conclusions that it reached.[61] In that regard, the Libya Commission succeeded admirably both *ex ante* and *ex post*. Prior to beginning its work, the Commission went to great lengths to explain its methods to the parties to the conflict; the first report specifically notes that the Commission "informed all sides of its evidentiary standards and met with officials and NGOs on both sides, informing them of these standards and advising them on reporting requirements."[62] Moreover, after completing its work, the Commission produced a 200-page report that is a model of analytic clarity. Section I explains how the Commission interpreted its mandate, discusses the fact-finding methodology it applied, and identifies the specific challenges the Commission faced in conduct its work. Section II provides a detailed background of the conflict in Libya, including a discussion of the structure of both the Qadhafi and *thuwar* forces. Section III, the heart of the report, focuses on potential violations of IHRL, IHL, and ICL. For each category of violation, the report states the applicable law, discusses the Commission's factual findings, and explains the legal conclusions the Commission believes can be drawn from the law and the facts. Section IV offers a number of conclusions about the Commission's ability to fulfill its mandate and about the situation in Libya generally. Finally, Section V makes specific recommendations to the parties involved in the conflict, as well as to the HRC and the international community generally. As a result, however problematic some aspects of the Commission's work may be, it is impossible to argue that the Commission has failed to adequately explain how its work was carried out.

The Commission also applied a sound fact-finding methodology, nearly always following best investigative practices and openly acknowledging when doing so proved logistically or administratively impossible. A complete analysis of those practices is beyond the scope of this chapter; suffice it for present purposes to focus on a number of best practices identified by scholars and NGOs that specialize in human rights fact-finding.

*A preference for direct evidence*. Although its reliability must always be corroborated, direct evidence – testimony concerning what a witness saw first-hand – is generally the most probative kind of evidence upon which an international commission of

[61] *See id.* at 317-23.
[62] First Report, ¶ 228.

inquiry can rely.[63] Indeed, Orentlicher notes that some human-rights experts categorically refuse to consider hearsay evidence on the ground that its reliability cannot be adequately assessed.[64] That position is arguably too extreme, given the practical obstacles commissions of inquiry often face when attempting to conduct interviews in a conflict situation, but there is no question that "information gathered by others must be carefully assessed in terms of credibility and objectivity" and "should not be given the same weight" as direct evidence.[65]

The Commission heeded this admonition. As it notes in its first report, "[i]n establishing its findings, the Commission sought to rely primarily and whenever possible on information it gathered first-hand."[66] It also openly acknowledges situations in which it was unable to gather as much direct evidence as it would have liked. The final report points out, for example, that the Commission "experienced some logistical difficulties in accessing detention centres" because of questions about who controlled them and had been unable to visit unacknowledged detention centres that it had reason to believe existed.[67] Similarly, the final report notes that the Commission's ability to investigate sexual violence was limited by the unwillingness of victims to discuss their experiences.[68]

*An adequate sample size*. An international commission of inquiry must interview as many individuals with first-hand knowledge of abuses as possible.[69] An adequate sample size is necessary for two reasons: "it ensures that allegations are reviewed from different angles and provides the opportunity for the fact-finder to confront alternate accounts of events," minimizing the effect of possible witness bias or unreliability[70]; and it provides the necessary evidentiary base for reliable conclusions about patterns of conduct.[71]

Here, too, the Commission deserves high marks. As noted earlier, it conducted more than 400 interviews during its two field

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[63] *See, e.g.*, Diane F. Orentlicher, *Bearing Witness: The Art and Science of Human Rights Fact-Finding*, 3 HARV. HUM. RTS. J. 83, 109 (1990); Boutruche, *supra* note 31, at 117.
[64] Orentlicher, *supra* note 63, at 109.
[65] Boutruche, *supra* note 31, at 117.
[66] First Report, ¶ 10.
[67] Final Report, ¶ 9(c), (d).
[68] *Id*., ¶ 499.
[69] Orentlicher, *supra* note 63, at 112.
[70] Boutruche, *supra* note 31, at 117.
[71] Orentlicher, *supra* note 63, at 112.

missions.[72] Those interviews included a wide variety of witnesses – 113 in hospitals (doctors, staff, patients), 30 detainees, and 148 refugees,[73] among others – and took place in more than a dozen cities.[74] The Commission was also careful to use its final field mission, conducted after the fall of the Qadhafi government, to compensate for the fact that "[t]he high number of security-related incidents" had "significantly curtailing the number and scope of meetings and interviews" during its first mission.[75] The final mission "benefited from wider geographical access and from a greater willingness of witnesses to speak out."[76]

*Interviewing witnesses in private*. Witnesses are obviously far more likely to be truthful when their testimony is not being monitored by third parties.[77] As a result, "[i]n order to ensure both the safety and privacy of the interviewees and the integrity of the information provided," the Commission attempted to conducted its interviews in private "to the greatest extent possible."[78] It generally succeeded, especially during its final field mission. That said, the Commission always had trouble interviewing detainees, because "detention centre guards sometimes interrupted these private interviews to insist that detainees tell the Commission how well they were being treated, or to demand they 'tell the truth'."[79]

*Corroborating direct evidence with physical evidence*. Although the distorting effect of a witness's biased or erroneous testimony can be minimized by comparing it to the testimony of other witnesses, an international commission of inquiry should always attempt to corroborate direct evidence whenever possible with physical evidence.[80] The Commission relied on a great deal of physical evidence, including dozens of site visits; analysis of videotapes, photographs, and official documents; satellite imagery, medical reports; and forensic analysis of weapons and ammunition.[81] More importantly, it was the Commission's standard practice to be skeptical of witness testimony unless it could be corroborated by physical evidence. With regard to victim testimony concerning torture by Qadhafi forces, for example, the final report stresses that the Commission was "able to

[72] Final Report, ¶ 6(a).
[73] First Report, ¶ 8(a).
[74] Final Report, ¶ 6(c).
[75] *Id*., ¶ 9(b).
[76] *Id*., ¶ 136.
[77] Orentlicher, *supra* note 63, at 113.
[78] Final Report, ¶ 6(a).
[79] *Id*., ¶ 9(d).
[80] Orentlicher, *supra* note 63, at 118; Boutruche, *supra* note 31, at 118.
[81] Final Report, ¶ 6.

independently verify many of these claims either by viewing the wounds and scars of the victims or through medical reports examined by the Commission's forensic pathologist. The Commission also visited several of the sites where the events allegedly occurred and found evidence consistent with these accounts."[82]

Indeed, the Commission was more than willing to reject facts that it could not corroborate with physical evidence. For example, it refused to accept witness claims that Qadhafi forces had poisoned the water system in Yafran because the wells had been drained and Human Rights Watch had previously tested the water and found no contamination.[83] Similarly, after leaving open the possibility in its first report, the Commission ultimately concluded that there was no physical evidence substantiating witness claims that Qadhafi forces had used expanding bullets[84] and white phosphorous[85] during the conflict. The Commission was also careful to disregard physical evidence whose reliability it could not verify. To take the most striking example, it refused to consider an audiotape of an intercepted phone call between government soldiers as evidence of a policy to rape civilian women because it was unable to authenticate it.[86]

*Relying on admissions against interest.* Statements that admit responsibility for abuses are both generally reliable and highly probative, because individuals are unlikely to wrongly implicate themselves or the institutions they represent in misconduct.[87] The Commission made liberal use of admissions against interest, relying on – *inter alia* – the testimony of a high-level military commander that Qadhafi had instructed him to crush demonstrations with "any mean necessary" to establish a government policy of excessive force[88]; on the admissions of two prison guards that they had participated in executions at a detention centre in Yarmouk to establish the Qadhafi government's responsibility for unlawful killings[89]; on statements by Misratan *thuwar* that the Tawerghans "deserved to be wiped off the face of the planet" to establish that the Tawerghans were the victims of a

[82] *Id*., ¶ 329.
[83] *Id*., ¶ 571.
[84] *Id*., ¶ 662.
[85] *Id*., ¶¶ 671, 673.
[86] *Id*., ¶ 521.
[87] Orentlicher, *supra* note 63, at 122.
[88] Final Report, ¶ 111.
[89] *Id*., ¶ 181.

widespread and systematic attack[90]; and on the admission of a security official in Al Zawiayah that "of course" Grad rockets "are indiscriminate" to establish the Qadhafi government's responsibility for indiscriminate attacks on civilians.[91]

*Relying on information in secondary sources.* Information in secondary sources has a variety of uses for an international commission of inquiry: helping the commission understand the larger context in which particular events occurred; directing the commission to new witnesses; and corroborating potentially unreliable witness testimony.[92] Such information is particularly useful when it comes from a wide variety of sources, because the diversity helps minimize potential organizational biases.

The Commission relied heavily on secondary sources in its work, issuing a "public call" for written submissions from NGOs and interested individuals[93] and then reviewing "reports of international organizations, including the United Nations; reports and statements produced by non-governmental and civil society organizations (Libyan and international); media reports; and writings of academics and analysts on the conflict."[94] The Commission used that information on a number of occasions to confirm witness allegations. One example – relying on Human Rights Watch's testing of the water in Yafran – was mentioned above. Another example is the Commission's reliance on the contemporaneous reports of human rights organizations to resolve "small discrepancies" in the testimonial and physical evidence of the massacre in the Yarmouk detention centre.[95]

*Applying an appropriate standard of proof.* A recent HRC expert report suggests that a commission of inquiry should apply a "balance of probabilities" standard to its factual findings and legal conclusions unless it publicly identifies individuals suspected of being responsible for international crimes, in which case it should apply a "clear and convincing" standard.[96] The Commission appropriately applied the former standard, because it did not publicly identify perpetrators. Instead, its final report replaces the

[90] *Id*., ¶¶ 447-48.
[91] *Id*., ¶ 557.
[92] Orentlicher, *supra* note ,63 at 125-26.
[93] First Report, ¶ 8(i).
[94] Final Report, ¶ 6(b).
[95] *Id*., ¶ 182.
[96] Human Rights Council, *Commissions of Inquiry Conference Brief* (1 Dec. 2011), at 3.

names of the individuals referred to the HRC for potential prosecution with anonymizing numbers.[97]

*A conservative approach to finding facts and drawing legal conclusions.* In order to minimize controversy, an international commission of inquiry should take a conservative approach to its work, refusing to find a particular fact or draw a particular legal conclusion unless it is clear that the evidence as a whole clearly satisfies the applicable standard of proof.[98] The Commission did exactly that, repeatedly giving all of the parties the benefit of the doubt when one of its factual findings or legal conclusions could be reasonably disputed. For example, the Commission refused to infer the intent to attack civilian objects from maps left behind by retreating Qadhafi forces that identified where those objects were located. As the Commission pointed out, "it is also possible that the Qadhafi forces were simply using the civilian objects as a reference point, particularly as *thuwar* headquarters and legitimate military objectives such as an arms depot were in proximity to the civilian objects."[99] Similarly, the Commission refused to find that the *thuwar* had killed Muammar Qadhafi in custody, despite the suspicious circumstances, because it "had not been able to obtain a first-hand account of the circumstances of his death and… received inconsistent accounts from secondary sources."[100]

## E. Utilization of Product

The final factor relevant to the independence and impartiality of an international commission of inquiry is the utilization of its product. As Franck and Fairley note, "how states and the public perceive a mission's product will inevitably depend… upon the process by which the facts found are enunciated, publicized, and used."[101]

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[97] *See, e.g.*, Final Report, ¶ 172. The Libya Commission's use of a "balance of probabilities" standard, it is worth noting, contrasts favorably with the Commissions for Syria, Lebanon, and Darfur. Neither the Lebanon Commission nor the Syria Commission made any mention of the standard of proof they applied in their reports, and the Darfur Commission applied a lower standard: "a reliable body of material consistent with other verified circumstances, which tends to show that a person may reasonably be suspected of being involved in the commission of a crime." *Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General* (25 Feb. 2005), ¶ 14 ("Darfur Report"). The "reasonable suspicion" standard is generally understood to require less than a balance of probabilities. *See, e.g.*, MICHAEL MANDELSTAM, SAFEGUARDING VULNERABLE ADULTS AND THE LAW (2008), at 85.

[98] Boutruche, *supra* note 31, at 113.

[99] Final Report, ¶ 565.

[100] *Id.*, ¶ 248.

[101] Franck & Fairley, *supra* note 20, at 321.

The Libya Commission generally deserves high marks on the first two factors. Its reports studiously avoid the kind of hyperbolic rhetoric that has undermined the reception of many previous fact-finding reports sponsored by the Human Rights Council.[102] There is also no indication (though it is obviously impossible to be certain) that the reports conceal disagreements between the Commissioners concerning facts and/or legal conclusions – another traditional problem with HRC fact-finding missions.[103] On the contrary, the Commission appears committed to being as transparent as possible about its work; its first report specifically notes that "[t]he Commission's records, including records of interviews, have been maintained and will be handed over to OHCHR at the end of its functioning, in accordance with established rules and procedures."[104]

That said, there is reason to suspect that the Commission intentionally downplayed the *thuwar*'s responsibility for crimes against humanity in its final report. As discussed in Section IV, that report contains a wealth of evidence that suggests the Misratan *thuwar* both forcibly transferred and persecuted the racially-distinct inhabitants of Tawergha, a city used by Qadhafi forces as a base of operations against Misrata. Nevertheless, despite providing the Rome Statute's definitions[105] of forcible transfer and persecution in the "Applicable Law" section of Part E – "Targeted Communities" – Part E's "Conclusions" section is completely silent concerning those crimes.[106] Had the Commission considered but rejected the idea that the Misratan *thuwar*'s treatment of the Tawerghans qualified as either the crime against humanity of forcible transfer or the crime against humanity of persecution, it would have said so – as indicated by its explicit rejection of the idea that the *thuwar* had committed crimes against humanity against other targeted communities.[107] It is thus reasonable to infer that, for whatever reason, the Commission did not want to publicly describe the Misratan *thuwar*'s treatment of the Tawerghans as forcible transfer or persecution.

There is also cause for concern with the international community's use of the Commission's reports. On 1 March 2011, two weeks before the Libya Commission was created, the General Assembly took the unprecedented step of suspending Libya's membership in

[102] *Id*.
[103] *Id*. at 331.
[104] First Report, ¶ 9.
[105] Final Report, ¶¶ 385, 386.
[106] *Id*., ¶¶ 485-88.
[107] *Id*., ¶ 494.

the HRC.[108] Six months later, on November 11, the General Assembly reversed course and readmitted Libya – then being governed by the NTC – to the Council.[109] In reaching that decision, the General Assembly emphasized:

> [T]he commitments made by Libya to uphold its obligations under international human rights law, to promote and protect human rights, democracy and the rule of law, and to cooperate with relevant international human rights mechanisms, as well as the Office of the United Nations High Commissioner for Human Rights and the International Commission of Inquiry established by the Human Rights Council in its resolution S-15/1 of 25 February 2011.[110]

That was a remarkably selective statement. Although the Commission's first report did indeed praise the NTC for its cooperation,[111] it also concluded that "some acts of torture and cruel treatment and some outrages upon personal dignity in particular humiliating and degrading treatment have been committed by opposition armed forces, in particular against persons in detention and migrant workers," acts that in some cases qualified as "war crimes under the Rome Statute."[112] The General Assembly's casual disregard of that conclusion is troubling, because it suggests that the Assembly was always committed to reinstating a post-Qadhafi Libyan government in the HRC and simply used the Commission's first report as rhetorical cover for doing so. That said, as discussed earlier, the Commission invited such misuse by making statements in its first report that downplayed the seriousness of the *thuwar*'s abuses by implying that they were, in large part, an understandable (if unjustifiable) reaction to decades of repression at the hands of the Qadhafi regime.

## III. QUESTIONS ABOUT THE LAW

Because the Libya Commission was willing to conclude that the actions of the parties to the conflict – especially Qadhafi's forces and the *thuwar* – violated international human rights law, international humanitarian law, and international criminal law, it is important to determine whether the Commission accurately

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[108] GA Res. 65/265, 1 March 2011.
[109] GA Res. A/66/L.9, 15 November 2011
[110] *Id.*
[111] First Report, ¶ 19.
[112] *Id.*, ¶ 252.

characterized those legal frameworks. The final report openly acknowledges that "the legal regimes applicable to the crimes and violations under review here comprise a complex arena of international law and the jurisprudence on some issues is not altogether settled" and insists that "the findings and conclusions with respect to specific crimes and violations must be read in that light."[113] Unfortunately, the final report never identifies *which* legal issues are unsettled; instead, it simply states the rules of IHRL, IHL, and ICL as the Commission understands them. Moreover, although the final report characterizes IHRL accurately, a number of the Commission's statements concerning IHL and ICL are either incorrect or at best debatable.

## A. International Humanitarian Law

The Libya Commission's understanding of IHL raises four important issues: two concerning the principle of distinction; one concerning the principle of military necessity; and one concerning the principle of humanity.

### 1. Principle of Distinction

The principle of distinction provides that "[i]n order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives."[114] In an international armed conflict, the rules governing targeting are straightforward: conventional IHL[115] specifically distinguishes between combatants and civilians[116] and permits the use of force against combatants at any time,[117] unless they have been rendered *hors de combat*.[118] By contrast, the rules governing targeting in a non-international armed conflict are anything but clear: conventional IHL does not specifically distinguish between combatants and civilians; instead, Common Article 3 of the Geneva Conventions simply prohibits the mistreatment of "[p]ersons taking no active part in the hostilities." It is thus an

[113] Final Report, ¶ 8.
[114] AP I, art. 48.
[115] The four Geneva Conventions and the two Additional Protocols.
[116] *See Geneva Convention Relative to the Treatment of Prisoners of War* (12 Aug. 1949), art. IV ("GC III") (defining the various categories of combatants).
[117] *See, e.g.*, IAN HENDERSON, THE CONTEMPORARY LAW OF TARGETING (2009), at 79.
[118] *See* AP I, art. 41(1).

open question whether customary IHL deems some individuals who participate in a NIAC (rebels, terrorists) to be the functional equivalent of combatants in an IAC, making them targetable at any time, or considers all individuals in a NIAC to be civilians, making them targetable only "for such time as they take a direct part in hostilities."[119] The ICRC has officially adopted the former position, distinguishing between individuals who assume a "continuous combat function" (CCF) in an organized armed group and individuals who only intermittently participate in hostilities (DPH).[120] As Jens Ohlin has pointed out, though, the ICRC's position has been criticized both for being too permissive regarding targeting and for being too restrictive:

> The ICRC standard of engaging in a continuous combat function was (and remains) highly controversial when it was adopted by the Red Cross working group. Some scholars disapproved of the membership-oriented nature of the concept and believed that the concept of direct participation in hostilities ought to remain transitory and based solely on the actions of the individual at each moment in time. Furthermore, these scholars rejected the rationale that armed groups of a non-state party to an armed conflict ought to have a functional analogue to membership in a state's military organization. On the other hand, other scholars, including some who participated in the ICRC working group that developed the continuous combat function standard, criticized the proposal from the opposite direction, that is, sacrificing the principle of military necessity for the principle of humanity.[121]

Interestingly, the Commission appears to agree with the ICRC that some individuals who participate in a NIAC qualify as members of an organized armed group – those who assume a CCF – making them targetable at any time, not simply while they directly

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[119] *Id*., art. 51(3).

[120] INTERNATIONAL COMMITTEE OF THE RED CROSS, INTERPRETIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW (2009), at 1007 ("ICRC Interpretive Guidance").

[121] Jens David Ohlin, *Targeting Co-Belligerents*, in CLAIRE FINKELSTEIN ET AL., TARGETED KILLINGS: LAW AND MORALITY IN AN ASYMMETRICAL WORLD (2012), at 83.

participate in hostilities. Here is what the final report says concerning an attack on Yafran by Qadhafi forces:

> Prior to 18 April 2011, when Yafran fell to Qadhafi forces, it had been surrounded for several weeks. During this time very little in the way of supplies reached Yafran. The residents had laid in supplies in anticipation both of a siege and also of IDPs coming from other areas. Water tanks were positioned under houses. There was bombardment by Qadhafi forces before the occupation in April and it resumed after the liberation, as Qadhafi forces retreated. There were reportedly 200-250 *thuwar* in Yafran, *although not all were participating in the hostilities*.[122]

Although the final report specifically notes that not all of the alleged *thuwar* in Yafran were "participating in the hostilities" when they were attacked, the Commission nevertheless declined to conclude that Qadhafi forces had intentionally attacked a civilian population. Indeed, it drew a categorical distinction between the thuwar in Yafran and civilians who had previously evacuated the city.[123] The Commission has thus necessarily adopted a view of NIAC in which at least some individuals are targetable at any time, regardless of whether they are directly participating in hostilities – the ICRC position.

There is nothing wrong with the Commission embracing the idea that IHL applicable in NIAC distinguishes between members of an organized armed group and civilians who directly participate in hostilities. Nevertheless, it should have at least acknowledged the controversy – especially as its position directly affected one of its key legal conclusions. Had the Commission rejected the notion of a continuous combat function, it would almost certainly have concluded that Qadhafi forces violated the principle of distinction in Yafran by attacking civilians who were not directly participating in hostilities.

The Commission has also taken a contentious position concerning the distinction between civilian objects and military objectives. According to Article 52(2) of the First Additional Protocol, "[i]nsofar as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or

[122] Final Report, ¶ 572 (emphasis added).
[123] *Id*., ¶ 573.

partial destruction, capture or neutralization . . . offers a definite military advantage." As a result, a civilian object loses its civilian character and becomes a targetable military objective if combatants use it in such a way that it makes "an effective contribution to military action."

The Commission relied heavily on that principle in the final report, consistently concluding that an otherwise civilian object became a legitimate military objective because a party to the conflict used it for military purposes. For example, it rejected witness claims that Qadhafi forces had deliberately targeted civilian buildings in Misrata on the ground that, at the time of the attacks, *thuwar* had been using them to fire down at Qadhafi forces on the street.[124] Similarly, although the Commission acknowledges that mosques are generally protected from attack, it refused to condemn attacks on a mosque in Al Zawiyah because the *thuwar* had retreated into it during a fire-fight with Qadhafi forces and had previously used the mosque as a weapons depot.[125]

These conclusions are consistent with IHL. In at least one instance, however, the Commission relied on an overbroad definition of "use" to conclude that a civilian object lost its civilian status. In March 2011, during its assault on Zintan, Qadhafi forces deliberately shelled a mosque located just outside of the town. The Commission refuses to condemn the attack, pointing out in the final report that "[w]hile not a military position per se, witnesses said the mosque was nevertheless broadcasting 'encouragement' to the *thuwar* over its loudspeaker."[126] In its view, the mosque "could be said to have taken on a military character by encouraging or supporting combat operations by *thuwar*. As such [its] targeting would not necessarily violate international law."[127]

That conclusion is legally incorrect. As James Stewart has pointed out with regard to a 2006 Israeli attack on a Hezbollah-backed Lebanese television station, using a civilian building to encourage military forces does not make the "effective contribution to military action" required by Article 52(2):

> The principle of distinction would be diluted to vanishing point if the term "effective contribution to military action" were interpreted as including mere propaganda. As Oeter points out, "[i]f the intention

[124] *Id*., ¶ 552.
[125] *Id*., ¶ 560.
[126] *Id*., ¶ 568.
[127] *Id*., ¶ 574.

> to directly influence the enemy population's determination to fight were recognized as a legitimate objective for military force, then no limit to warfare would remain." Similar reasoning during the negotiating of Additional Protocol I led states to adopt the phrase "effective contribution to military action" in the definition of military objects instead of the broader "war-sustaining capacity," precisely in order to exclude the targeting of objects that merely sustain an enemy regime.[128]

Stewart acknowledges that such an attack might be lawful if the encouragement came from a source that had been formally integrated into a belligerent's "command, control, and communication structures."[129] There is no suggestion in the Commission's final report, however, that the mosque had been so integrated into the *thuwar*.

### 2. Principle of Military Necessity

The Commission's most problematic legal claim concerns the principle of military necessity, which "permits a belligerent, subject to the laws of war, to apply any amount and kind of force to compel the complete submission of the enemy with the least possible expenditure of time, life and money."[130] According to the Commission, there are at least some situations in armed conflict in which that principle is limited by IHRL, making the use of lethal force against a legitimate target an unlawful killing:

> The noted international human rights law standards differ to a degree from those applicable to fighters/combatants during an armed conflict under international humanitarian law. For example, one would not expect soldiers to warn their enemies before an attack. Still, international human rights law obligations remain in effect and operate to limit the circumstances when a state actor – even a soldier during internal armed conflict – can employ lethal force. This is particularly the case where the circumstances on the ground are more akin to policing than combat. For example, in encountering

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[128] James G. Stewart, *The UN Commission of Inquiry on Lebanon: A Legal Appraisal*, 5 J. INT'L CRIM. JUST. 1039, 1049 (2007).
[129] *Id*. at 1048.
[130] *The Hostage Case*, XI TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10 (1949), at 1253.

> a member of the opposing forces in an area far removed from combat, or in situations where that enemy can be arrested easily and without risk to one's own forces, it may well be that the international humanitarian law regime is not determinative. In such situations, combatants/fighters should ensure their use of lethal force conforms to the parameters of international human rights law.[131]

This is, to put it mildly, a radical position. The ICRC has concluded that IHL does not always permit the use of lethal force against a combatant, because "[i]n addition to the restraints imposed by international humanitarian law on specific means and methods of warfare… the kind and degree of force which is permissible against persons not entitled to protection against direct attack must not exceed what is actually necessary to accomplish a legitimate military purpose in the prevailing circumstances."[132] The ICRC's position, however, is based solely on IHL; the Interpretive Guidance specifically notes that although some of the participants in its expert meeting on direct participation in hostilities "suggested that the arguments made in Section IX should be based on the human right to life," the prevailing view was that "the Interpretive Guidance should not examine the impact of human rights law on the kind and degree of force permissible under IHL."[133] Moreover, the ICRC's reading of IHL has been persuasively criticized as being *de lege ferenda* instead of *de lege lata*.[134]

The Commission, by contrast, explicitly claims that the right to life *under IHRL* limits the rules of IHL governing the use of lethal force against legitimately-targeted combatants. There is no question that IHRL continues to apply in armed conflict; the ICJ held as much nearly two decades ago in its *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons*.[135] As noted earlier, though, it is equally clear that IHL is *lex specialis* in armed conflict, displacing IHRL when there is a specific conflict between

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[131] Final Report, ¶ 145.
[132] ICRC INTERPRETIVE GUIDANCE, Principle IX, *supra* note 120, at 1040.
[133] *Id*. at 1044 n. 22.
[134] *See, e.g.*, W. Hays Parks, *Part IX of the ICRC "Direct Participation in Hostilities" Study: No Mandate, No Expertise, and Legally Incorrect*, 42 N.Y.U. J. INT'L L. & POLITICS 769, 797 (2010).
[135] *See* ICJ Advisory Opinion, *supra* note 56, at ¶ 25.

their substantive rules.[136] The use of lethal force is the paradigmatic example of such a conflict: whereas IHRL permits such force only when "absolutely necessary," IHL permits such force whenever the individual killed is a legitimate target.[137] It is thus uncontroversial that the IHL rule completely displaces the IHRL rule. That was the conclusion of the ICJ in its Advisory Opinion,[138] and that is the conclusion of nearly all IHL scholars, including ones who adopt a maximalist position concerning the impact of IHRL on IHL. Peter Rowe, for examples, writes the following concerning armed conflict:

> In this… situation the *lex specialis* (international humanitarian law) permits a lawful combatant to kill another lawful combatant providing the means of doing so are not, themselves, prohibited under that law. There is clearly no requirement that under international humanitarian law the force used should be "absolutely necessary"…. To apply these terms consistently with the obligations and this 'right' to attack individuals in international humanitarian law is quite unrealistic.

Given the scholarly and judicial consensus on this issue, the Libya Commission's insistence that IHRL limits the principle of military necessity in IHL is curious, to say the least. Not surprisingly, it does not provide even a single legal citation in defense of its position.

### 3. Principle of Humanity

According to the Commission, "[c]ustomary law prohibits the use of means and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering. Under this provision, the use of bullets that expand or explode upon impact with the body, for example, or poisons, chemical and biological weapons and weapons that cause blindness are unlawful."[139] Although the Commission is on firm ground regarding expanding or exploding

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[136] *See* PETER ROWE, THE IMPACT OF HUMAN RIGHTS LAW ON ARMED FORCES (2006), at 134.
[137] *See* HENDERSON, *supra* note 117, at 85.
[138] ICJ Advisory Opinion, *supra* note 56, at ¶ 25 ("In principle, the right not arbitrarily to be deprived of one's life applies also in hostilities. The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities.").
[139] Final Report, ¶ 659.

bullets, poisons, and chemical and biological weapons,[140] its belief that customary international law also prohibits blinding weapons is problematic – especially with regard to non-international armed conflict. The Commission relies solely on the ICRC's study of customary international law, which does indeed conclude that "[t]he use of laser weapons that are specifically designed, as their sole combat function or as one of their combat functions, to cause permanent blindness to unenhanced vision is prohibited" in both IAC and NIAC.[141] The ICRC's conclusion, however, rests on the assumption that the Protocol on Blinding Laser Weapons[142] and the amendment to the Convention on Certain Conventional Weapons (CCCW) that extended the Protocol to NIAC has generated a new rule of customary international law.[143] To be sure, the ICJ has held that the "widespread and representative" ratification of a treaty can create such a new customary rule.[144] But it is an open question whether the Protocol and the amendment to the CCCW satisfies that test: the Protocol has been ratified by less than 100 states, even though it was opened for signature in 1995, and the amendment has been ratified by only 76 states, even though it was opened for signature in 2001.[145]

This chapter is not the place to debate difficult methodological issues regarding the formation of custom. The Commission's position is hardly frivolous, even if it is contestable. The important point is that the Commission's discussion of blinding weapons is indicative of two particularly troubling aspects of its work: its willingness to adopt the most progressive interpretation of international law possible; and its consistent failure to identify when it is doing so. Indeed, the Commission had no reason to

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[140] *See, e.g.*, ROBERT CRYER ET AL., INTRODUCTION TO INTERNATIONAL CRIMINAL LAW AND PROCEDURE (2d ed. 2010), at 304.

[141] INTERNATIONAL COMMITTEE OF THE RED CROSS, I CUSTOMARY INTERNATIONAL HUMANITARIAN LAW: RULES (2009), Rule 86, 292 ("Customary IHL Study").

[142] *Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effect* (10 Oct. 1980), Protocol IV.

[143] Customary IHL Study, Rule 86, *supra* note 141, at 293-94.

[144] ICJ, *North Sea Continental Shelf Cases*, Merits Judgment (20 Feb. 1969), ¶ 73.

[145] It is also worth noting that the Rome Statute does not criminalize the use of blinding weapons in either IAC or NIAC. Attempts to criminalize their use were rejected both during the drafting of the Rome Statute, *see* WILLIAM SCHABAS, THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY ON THE ROME STATUTE (2010), at 245-46, and at the recent conference in Kampala that criminalized the use of exploding bullets in NIAC. *See* Roger S. Clark, *Amendments to the Rome Statute of the International Criminal Court Considered at the First Review Conference on the Court, Kampala, 31 May-11 June 2010*, 2 GOETTINGEN J. OF INT'L L. 689, 709-10 (2010).

discuss blinding weapons in the final report – there were no allegations that any of the parties to the conflict in Libya had used them. That discussion thus seems to be represent a conscious effort by the Commissioners to push international law in its preferred direction.

## B. International Criminal Law

The Libya Commission's understanding of ICL raises six important issues: two concerning state obligations to prosecute international crimes; two concerning the contextual elements of crimes against humanity; one concerning the *actus reus* of torture; and one concerning command responsibility.

### 1. Prosecuting International Crimes

In its final report, the Commission claims that "[a] duty to prosecute crimes against humanity, war crimes and genocide constitutes a part of customary law, which can be seen in the preamble of the Rome Statute."[146] That is a dubious proposition. Some scholars endorse the existence of such a duty[147] – most notably, and clearly not coincidentally, Bassiouni himself.[148] Most scholars, however, insist that although customary international law may oblige states to prosecute certain kinds of international crimes – such as grave breaches of the Geneva Conventions[149] – the relevant *opinio juris* and state practice fall well short of establishing such an obligation for all international crimes. Gilbert's statement is representative:

> [T]he better view is that the principle *aut dedere aut judicare* still only applies, at present, when expressly formulated in multilateral conventions on international criminal law. It may be that the provision in a particular treaty has become declaratory of customary international law with regard to the relevant crime, but there is no generic

[146] Final Report, ¶ 769.
[147] *See, e.g.*, Colleen Enache-Brown & Ari Fried, *Universal Crime, Jurisdiction and Duty: The Obligation of Aut Dedere Aut Judicare in International Law*, 43 MCGILL L. J. 613 (1998).
[148] *See* M. CHERIF BASSIOUNI & EDWARD M. WISE, AUT DEDERE AUT JUDICARE: THE DUTY TO EXTRADITE OR PROSECUTE IN INTERNATIONAL LAW (1995), at 17.
[149] *See, e.g.*, CLAIRE MITCHELL, AUT DEDERE, AUT JUDICARE: THE EXTRADITE OR PROSECUTE CLAUSE IN INTERNATIONAL LAW (2009), ¶ 69.

> duty in international law, at least so far, of *aut dedere aut judicare.*[150]

The ILC has consistently taken the same position. In its most recent report, for example, the Special Rapporteur concluded that it is "difficult in the present circumstances to prove the existence of a general customary obligation to extradite or prosecute" and suggested "that focus should rather be on identifying those particular categories of crimes which seemed to create such an obligation, on account, inter alia, that they were serious crimes of concern to the international community as a whole."[151] Even more recently, in *Belgium v. Senegal*, the ICJ specifically reserved judgment on the existence of a general customary duty to prosecute.[152]

The Commission also appears to believe that Libya is obligated to incorporate international crimes into is domestic law:

> Libya's existing Criminal Code does not adequately define crimes under international law such as genocide, crimes against humanity, war crimes, enforced disappearances and extrajudicial killings. Unless filled, this gap in the law may prevent the authorities from prosecuting those responsible for international crimes. The Commission is concerned that perpetrators will be prosecuted for crimes under the Libyan Criminal Code, (for example abduction instead of enforced disappearance), which will not adequately hold perpetrators accountable for very serious crimes and could result in them receiving inappropriately lenient punishment if they are found guilty.[153]

The final report thus "calls upon" the Libyan government to "[u]ndertake legislative reform to incorporate international crimes into the Libyan Criminal Code."[154]

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[150] GEOFF GILBERT, TRANSNATIONAL FUGITIVE OFFENDERS IN INTERNATIONAL LAW: EXTRADITION AND OTHER MECHANISMS (1998), at 322; *see also* MITCHELL, *supra* note 149, at ¶ 72. Even Bassiouni, admits that "if the question is whether state practice in this sense supports the assertion that the principle *aut dedere aut judicare* has become a customary norm, the answer may well be no." BASSIOUNI & WISE, *supra* note 148, at 413.

[151] International Law Commission, *Report on the Work of Its Sixty-Third Session* (2011), Chapter X, ¶ 303.

[152] ICJ, *Belgium v. Senegal*, Merits Judgment (20 July 2012), ¶ 54.

[153] Final Report, ¶ 771.

[154] *Id*., ¶ 819(b).

To be fair, it is not completely clear whether the Commission views incorporating international crimes as a duty or merely as a *desideratum*. It appears to see it as a duty that flows from Libya's obligation to prosecute all international crimes. If so, the questionable status of the duty to prosecute also calls into question the existence of a duty to incorporate. Moreover, although the Commission cites the Preamble to the Rome Statute in defense of the obligation to prosecute, the Rome Statute does not itself require States Parties to incorporate international crimes. The Appeals Chamber recently held that, to satisfy the principle of complementarity, a national prosecution must "cover the same person and substantially the same conduct as alleged in the proceedings before the Court."[155] The "same conduct" test is incompatible with the idea that States Parties are obligated to incorporate international crimes; if the Appeals Chamber believed that such an obligation existed, it would have required a prosecution to encompass the same person and the same (international) crime.[156]

It is possible, of course, that the Commission simply believes that Libya would be better off incorporating international crimes into its Criminal Code. As I have argued elsewhere, however, the legal and evidentiary complexity of international crimes means that states without well-developed criminal-justice systems should normally limit themselves to prosecuting "ordinary" domestic crimes, because international-crime prosecutions are unlikely to succeed.[157] That argument has particular force in the context of Libya, whose judicial system "collapsed in the aftermath of the conflict"; as the Commission freely admits, "[t]he absence of a functioning court system in most places prevents those whose rights are violated from holding perpetrators accountable" and the system as a whole "currently lacks investigators, forensics experts, judicial police and other trained staff. "[158] Given those limitations, asking Libya to prosecute international crimes as international crimes is simply unrealistic.

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[155] *Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta, and Mohammed Hussein Ali*, Case No. ICC-01/09-02/11 OA, Judgment on Defence Appeal Challenging Admissibility of Case (Aug. 30, 2011) , ¶ 39.

[156] For a fuller discussion of this issue, *see* Kevin Jon Heller, *A Sentence-Based Theory of Complementarity*, 53 HARV. INT'L L. J. 85 (2012).

[157] *See id.* at 100-07.

[158] Final Report, ¶¶ 780, 781.

### 2. Contextual Elements of Crimes Against Humanity

The Commission makes two puzzling statements concerning the contextual elements of crimes against humanity. The first concerns its definition of "widespread or systematic." After concluding that the Misratan *thuwar* committed crimes against humanity against civilians from Tawergha, the Commission declined to reach a similar conclusion regarding other civilian populations – such as Arabs in Abu Kammesh and sub-Saharan Africans – on the ground that the attacks against those populations were *less* widespread and systematic:

> In these cases, while there were clear indications that the communities were targeted and the consequences for individuals were severe, *the Commission did not find the necessary evidence to indicate that the attacks against these communities were as widespread or as systematic as is the case with the Misrata thuwar and Tawergha*. However, insofar as these acts took place with a nexus to the armed conflict they constitute war crimes; where they have occurred since the armed conflict ceased, they constitute a violation of international human rights law.[159]

This statement suggests that the widespread and systematic nature of an attack on a civilian population admits of degrees – and that only certain degrees of "widespreadness" and "systematicity" satisfy the contextual elements of crimes against humanity. International tribunals, however, have always treated the two factors in a binary fashion: either an attack is widespread or it is not; either an attack is systematic or it is not. The idea that an attack can be widespread or systematic but *insufficiently* widespread or systematic is foreign to ICL jurisprudence.[160]

It is possible, of course, that the Commission simply believes that the *thuwar* attacks in question, though unacceptable, did not rise to the level of widespread or systematic attacks – the normal binary inquiry. But it seems unlikely, because the Commission obviously knew how to offer a binary conclusion regarding the existence of a widespread or systematic attack. It refused to hold Qadhafi forces

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[159] *Id*., ¶ 494 (emphasis added).

[160] *See, e.g.*, *Prosecutor v. Deronjić*, Case No. IT-02-61-A, Judgment on Sentencing Appeal (20 July 2005), ¶ 109: "[I]n order to constitute a crime against humanity, the acts of an accused must be part of a widespread or systematic attack directed against any civilian population."

responsible for rape as a crime against humanity, for example, because it "did not find documented evidence to substantiate claims of widespread sexual violence or a systematic attack or overall policy against a civilian population such as to amount to crimes against humanity."[161] The difference in language is striking.

The Commission's second problematic statement concerns the Rome Statute's *sui generis* approach to the contextual elements of crimes against humanity. Here is how the Commission summarizes Article 7:

> Under the Rome Statute, crimes against humanity occur where certain acts are undertaken as part of a widespread or systematic attack against a civilian population where the perpetrator has knowledge of the attack.[162]

This statement simply omits the Rome Statute's requirement that the widespread or systematic attack be carried out "pursuant to or in furtherance of a State or organizational policy to commit such attack."[163] That is a bizarre omission – after all, Bassiouni was the chair of the drafting committee that adopted the policy requirement.[164] The omission is also anything but harmless; as discussed in the next section, the policy requirement may limit the *thuwar*'s responsibility for crimes against humanity.

### 3. Torture

There are also questions concerning the Commission's understanding of the *actus reus* of torture as a war crime or crime against humanity:

> The definition provides that "severe" pain must be inflicted. International tribunals and human rights bodies have, to date, found the following acts constituted torture: kicking, beating, hitting, "falaqa," (beating on the soles of the feet), flogging, shaking violently, inflicting electric shocks, burning, subjecting the victim to "water treatment," extended hanging from hand and/or leg chains, and suffocation/asphyxiation. Mental torture has been

[161] Final Report, ¶ 536.
[162] *Id*., ¶ 25.
[163] Rome Statute, art. 7(2)(a).
[164] *See* M. CHERIF BASSIOUNI, CRIMES AGAINST HUMANITY: HISTORICAL EVOLUTION AND CONTEMPORARY APPLICATION (2011), at 204.

> found where the perpetrator threatened the victim with death or simulates an execution, while having the means to carry it out. These acts have been held to constitute torture irrespective of any subjectively experienced pain of the victim.[165]

The Commission's claim that each of the listed acts qualifies as torture *per se* under ICL is significantly overbroad. Both the ICTY and ICTR distinguish between acts that constitute torture *per se* and acts that constitute torture only if they involve suffering of "substantial gravity."[166] The former category is far more limited than the Commission suggests; it includes only rape,[167] mutilation,[168] watching the rape of an acquaintance,[169] and watching the serious mistreatment of a family member.[170] All of the other acts mentioned by the Commission may be highly likely to constitute torture, but whether they do must be assessed on a case by case basis.[171] Moreover, with regard to those "lesser" acts, "subjective criteria" are indeed relevant to whether they rise to the level of torture.[172]

### 4. Command Responsibility

As the final report makes clear, the Commission's conclusions regarding individual criminal responsibility rely heavily on the doctrine of command responsibility:

> The Commission has also gathered information linking individuals to human rights violations or crimes, either directly or through command responsibility, that is, persons who knew of, or should have known of human rights violations or crimes, failed to take any action to prevent them, failed to investigate or failed to punish those responsible.[173]

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[165] Final Report, ¶ 325.
[166] Cristoph Burchard, *Torture in the Jurisprudence of the Ad Hoc Tribunals: A Critical Assessment*, 6 J. INT'L CRIM. JUST. 159, 164-65 (2008).
[167] *Prosecutor v. Kunarac, Kovač, and Vuković*, Case No. IT-93-23 & IT-96-23/1-A, Appeals Judgment (12 June 2002), ¶¶ 150-151.
[168] *Prosecutor v. Kvočka et al*., Case No. IT-98-30/1-T, Trial Judgment (2 Nov. 2001), ¶ 144.
[169] *Id*. at ¶ 149.
[170] *Id*.
[171] *See, e.g.*, *Prosecutor v. Limaj et al*., Case No. IT-03-66-T, Trial Judgment (30 Nov. 2005), ¶ 237.
[172] Kvočka et al., *supra* note 168, at ¶ 143.
[173] Final Report, ¶ 759.

Despite this statement, the Commission never provides a comprehensive legal definition of command responsibility. That oversight is surprising, given the Commission's general precision concerning the rules of ICL. It is also problematic, because the Rome Statute – which provides nearly all of the law on which the Commission relies – holds military commanders to a higher standard of command responsibility than civilian superiors: whereas a military commander is responsible for his subordinates' crimes if he "knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes" (a negligence standard), a civilian superior is responsible for his subordinates' crimes only if he "knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes" (a recklessness standard).[174] Indeed, the one statement that the Commission does make about the elements of command responsibility overlooks precisely that distinction. The final report claims that "commanders are… individually criminally responsible if they knew, or had reason to know, that the subordinates were about to commit or were committing such crimes,"[175] thereby ignoring the distinction between military commanders and civilian superiors entirely.

## IV. QUESTIONS ABOUT LEGAL CONCLUSIONS

Because the Libya Commission's legal conclusions depend on the law that it applied, some of its conclusions are undermined by the issues identified in the previous section. Even where the Commission applied the law accurately, however, some of its legal conclusions are problematic.

### A. Criminal Responsibility of the *Thuwar*

As noted earlier, the Commission corrected a basic deficiency in its mandate when it chose to investigate violations of international law committed by the *thuwar* as well as by the Qadhafi government. Unfortunately, that admirable even-handedness did not extend to one aspect of the Commission's work: its identification of individuals potentially responsible for war crimes and crimes against humanity. The final report identifies 80 individuals associated with the Qadhafi government by number, yet does not identify even *one* member of the *thuwar*. That is a perplexing asymmetry, especially given that the Commission

[174] *See* Rome Statute, art. 28.
[175] Final Report, ¶ 769.

specifically found that various *thuwar* brigades committed both war crimes and crimes against humanity during the conflict and continued to commit them "in a climate of impunity" after the NTC took power.[176]

Indeed, that asymmetry is even more mystifying in light of numerous passages in the final report that suggest the Commission should have been able to identify individual *thuwar* responsible for international crimes. Consider the following paragraphs concerning unlawful killings:

> The Commission received reports of over a dozen Qadhafi soldiers shot in the back of the head around 22-23 February 2011 in a village between al-Bayda and Darnah, apparently by *thuwar*. Two videos seen by the Commission show a group of men, most in military uniform of the type worn by Qadhafi forces, being aggressively interrogated by unidentified men regarding their use of force against anti-Government protesters. The second video shows the same group dead lying face down on the ground, with hands tied behind the back. Many were shot in the head.[177]
>
> The Commission's forensic pathologist documented the deaths of two men on 9 October 2011. According to witnesses, they were arrested together with other men on 17 September 2011 in Al Zawiyah by a heavily armed group of local *thuwar* including members of the "Committee of Arrest and Correction of Injustice" and taken to Judayem detention centre. One of those arrested – released some three weeks later – told the Commission that he witnessed one of the victims being beaten with rubber hoses.[178]

In the first situation, the existence of the videos makes it highly unlikely that the Commission could not identify even one of the *thuwar* involved in the interrogations. And in the second situation, not only did a victim survive his detention to give evidence to the Commission, witnesses were able to identify the specific committee that was apparently responsible for the murders.

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[176] *Id*., ¶ 810.
[177] *Id*., ¶ 210.
[178] *Id*., ¶ 226.

It is possible, of course, that the Commission was genuinely unable to identify the individual *thuwar* responsible for those crimes – or for any other crimes. Indeed, given that the NTC left "the victims of *thuwar* violations without protection of the law, justice, and redress,"[179] those victims might well have been unwilling to incriminate specific individuals. But if that was the case, the Commission should have said so explicitly. As it stands, it is difficult to avoid speculating that the Commission was simply less interested in holding members of the *thuwar* criminally accountable than individuals associated with the Qadhafi government.

## B. International Humanitarian Law

There are also questions about the Libya Commission's application of the principle of proportionality. The final report concludes that a number of attacks by Qadhafi forces on residential areas were disproportionate:

> The use of unguided rockets and mortars against residential areas in this manner violated international law. An attack must distinguish between military and civilian targets. While the *thuwar* were using individual houses for shelter, rendering them lawful targets, the scale of the shelling and the damage caused to residential buildings by the use of these unguided weapons was disproportionate to the military gain.[180]

Unfortunately, with the exception of Misrata, the Commission's final report does not identify *which* residential areas suffered disproportionate attacks. Even worse, it is impossible to determine whether the Commission conducted an adequate proportionality analysis. The final report states the IHL standard correctly, noting that the principle of proportionality requires a party to forego an attack if "the incidental damage expected 'is excessive in relation to the concrete and direct military advantage anticipated'."[181] But the Commission limited its analysis to identifying the incidental damage caused by the attacks; its final report says nothing about the "military advantage anticipated" and does not explain why the expected incidental damage was excessive in comparison to that advantage. That is a significant oversight, especially as the

[179] *Id.*, ¶ 799.
[180] *Id.*, ¶ 600.
[181] *Id.*, ¶ 615.

Commission repeatedly acknowledges in the final report that many of the attacks targeted legitimate objectives whose neutralization could reasonably be expected to be militarily advantageous. The attack by Qadhafi forces on Zintan, for example, targeted a mosque that the *thuwar* were using "as a headquarters for planning military operations" and a school that housed the *thuwar*'s military committee.[182] Similarly, Qadhafi forces' shelling of Al Zawiyah was designed to repel a *thuwar* offensive.[183] It is certainly possible that the attacks were disproportionate despite their expected military advantage. The Commission's abbreviated analysis, however, makes independent analysis impossible.

## C. International Criminal Law

The Libya Commission's conclusions regarding international criminal law raise seven important issues: two concerning the contextual elements of crimes against humanity; two concerning specific crimes against humanity; one concerning genocide; one concerning war crimes; and one concerning command responsibility.

### 1. Contextual Elements of Crimes Against Humanity

As noted in the previous section, the Commission declined to find that *thuwar* attacks on groups other than the Tawergha were crimes against humanity on the ground that those attacks were insufficiently widespread or systematic. Because the Commission adopted a questionable understanding of the "widespread or systematic" requirement, however, its legal conclusions regarding the attacks on other groups are questionable, as well. Consider, for example, the targeting of the Mashashiya by Zintan *thuwar*. According to the Commission, the Zintan *thuwar* "were united in their belief" that "the Mashashiya uniformly supported the Qadhafi government"; attacked and pillaged four Mashashiyan communities – in Oumer, Zawiayat-al-Bajoul, Awaniya, and Shgeiga; killed dozens of Mashashiyans; committed acts of torture against Mashashiyans; displaced nearly the entire Mashashiyan population; and continues to prevent the Mashashiyans from returning to their homes.[184] Given those findings, it is extraordinarily unlikely that an international tribunal would decline to conclude that the Mashashiyans were the victims of a widespread or systematic attack. "Widespread" refers to "the

[182] *Id*., ¶ 568.
[183] *Id*., ¶ 562.
[184] *Id*., ¶¶ 452-61.

large-scale nature of the attack and the number of targeted persons."[185] Multiple underlying crimes against humanity committed in multiple towns against multiple victims clearly satisfy that criterion. "Systematic" refers to "the organised nature of the underlying offences and the unlikelihood of their random occurrence."[186] Given the Zintan *thuwar*'s shared hatred for the Mashashiyans and the common pattern their attacks on Mashashiyan towns followed, the attacks were clearly "systematic."

That said, it is less clear whether the *thuwar*'s widespread and systematic attacks – those that the Commission found and those that the Commission declined to find – were committed "pursuant to or in furtherance of a State or organizational policy to commit such attack," one of the essential elements of crimes against humanity under the Rome Statute.[187] As noted in the previous section, the final report does not mention, much less discuss, the policy requirement That oversight may well undermine the Commission's legal conclusions regarding the *thuwar*'s responsibility for crimes against humanity. To begin with, it is unclear whether the various *thuwar* brigades, the Libyan National Army (LNA), or the NTC's Military Council would qualify as "organizations" for purposes of the Rome Statute. All three would likely satisfy the broad definition adopted by Pre-Trial Chamber II in the Kenya cases; the majority held that an organization is simply a group that "has the capability to perform acts which infringe upon basic human values."[188] But the dissenting judge in those cases defended a much narrower definition, one that would limit organizations to groups that have a "state-like" nature.[189] If the Appeals Chamber eventually adopts the narrower definition – it has yet to decide the issue –prosecuting anyone who fought against the Qadhafi government for crimes against humanity would be extremely difficult, because the Commission spends a great deal of time in its final report detailing how little central control the LNA or the NTC Military Council exercised over the various *thuwar*

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[185] GIDEON BOAS ET AL., II INTERNATIONAL CRIMINAL LAW PRACTITIONER SERIES: ELEMENTS OF CRIMES UNDER INTERNATIONAL LAW (2008), at 52.
[186] *Id*.
[187] The ICTY and ICTR do not require a state or organizational policy for crimes against humanity. *See* Thomas Obel Hansen, *The Policy Requirement in Crimes Against Humanity: Lessons from and for the Case of Kenya*, 43 GEO. WASH. L. REV. 1, 7 (2011).
[188] *Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya*, ¶ 90, ICC Doc. ICC-01/09 (Mar. 31, 2010).
[189] *Id*., ¶ 66 (dissenting opinion of Judge Kaul).

brigades.[190] To say that the *thuwar* ever formed a state-like entity seems a considerable stretch.

As noted earlier, the final report makes clear that the *thuwar* continued to commit crimes after the NTC took power. In theory, that would make it easier to prosecute the *thuwar*, the LNA, or members of the NTC for crimes against humanity. Even here, though, there are questions. First, the Commission's final report emphasizes that the NTC continued to struggle to maintain effective control over the various *thuwar* brigades.[191] Second, the Commission specifically concludes that "the significant difference between the past and the present is that those responsible for abuses now are committing them on an individual or unit level, and not as part of a system of brutality sanctioned by the central government."[192] In the absence of evidence to the contrary, therefore, the ICC could at best prosecute members of individual brigades for crimes against humanity – and even then, only if the Appeals Chamber ultimately adopts the broader definition of "organization." Either way, LNA officer or NTC officials would be effectively immune from prosecution.

### 2. Specific Crimes Against Humanity

The Commission considered whether Qadhafi forces and the *thuwar* were responsible for a variety of crimes against humanity, including murder, torture, rape, and enforced disappearance. Nevertheless, although the final report specifically identifies the legal elements of forcible transfer and persecution as crimes against humanity, the Commission never discusses whether the *thuwar*[193] committed those crimes. That is a problematic oversight, as discussed earlier, because both crimes seem amply supported by the Commission's own factual findings.

To begin with, consider forcible transfer. The Commission's failure to consider whether the *thuwar* committed forcible transfer as a crime against humanity is understandable concerning groups other than the Tawerghans, because it concluded – wrongly, as discussed above – that they had not been the target of widespread or systematic attacks. The Commission should nevertheless have

[190] *See* Final Report, ¶¶ 61-74.
[191] *Id*., ¶ 74.
[192] *Id*., ¶ 39.
[193] Those crimes are discussed in the section of the final report dedicated to "Targeted Communities," and the Commission specifically notes that it did "not found evidence that one particular group, within the *thuwar* and their supporters, was targeted more than others" by Qadhafi forces. *Id.*, ¶ 389.

considered whether the displacement of those groups constituted the war crime of "[o]rdering the displacement of the civilian population for reasons related to the conflict," which applies in NIAC.[194] Although that war crime permits displacement if "the security of the civilians involved or imperative military reasons so demand," that does not seem to be the case with many of the displaced groups, such as the Mashashiyans.

There is no justification, however, for the Commission's failure to discuss whether the Mistratan *thuwar*'s displacement of the Tawerghans constituted the crimes against humanity of forcible transfer. The Commission specifically found that the Tawerghans were the victims of a widespread or systematic attack. Moreover, it is clear that thousands of Tawerghans were forced out of their homes by the violence against them. As the Commission notes, "Tawergha, a town with an estimated population of 30,000, was emptied of its inhabitants and remains empty today."[195] Moreover, the final report describes claims by the NTC that "the Tawerghans left of their own accord, 'perhaps out of fear, due to the crimes they committed'," as less than "the full picture."[196] Its skepticism appears sound, given the numerous acts of violence committed against the Tawerghans, ranging from burning their houses[197] to shooting at them as they left town[198] to statements by a Misratan thuwar officer that "[w]e 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."[199]

The Commission's failure to consider whether the Misratan *thuwar* persecuted the Tawerghans is even more troubling. The Rome Statute defines the crime against humanity of persecution as "the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity."[200] That deprivation must take place in connection with another war crime or crime against humanity.[201] According to the Commission, the *thuwar* committed a variety of war crimes and crimes against humanity against the Tawerghans, including murder, torture, enforced disappearance, destruction of property,

[194] Rome Statute, art. 8(2)(e)(viii)..
[195] Final Report, ¶ 397.
[196] *Id*., ¶ 399.
[197] *Id*., ¶ 402.
[198] *Id*., ¶ 395.
[199] *Id*., ¶ 448.
[200] Rome Statute, art. 7(2)(g).
[201] *Id*., art. 7(1)(h).

and pillaging.[202] All of those underlying crimes constitute persecution when committed "by reason of the identity of the group or collectivity,"[203] and there is little question that the Tawerghans were targeted because of their identity. As the final report notes, the word "Tawergha" was crossed off of road signs in the town and pro-Qadhafi graffiti was replaced with slogans like "the brigade for purging slaves, black skin"[204]; *thuwar* soldiers described arrested Tawerghans as "you blacks, you animals"[205]; and a *thuwar* commander boasted to a reporter that "Tawergha no longer exists."[206]

### 3. Genocide

Most troubling of all, however, is the Commission's failure to consider whether the Misratan *thuwar*'s treatment of the Tawerghans was genocidal. The Rome Statute defines genocide as a number of different acts "committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such."[207] The prohibited acts include killing and causing serious bodily or mental harm.[208]

It is at least arguable that the Misratan *thuwar* committed genocide against the Tawerghans. To begin with, the Tawerghans qualify as a racial group both objectively and subjectively. Objectively, the Commission notes that "Misrata's residents are predominantly Arab while Tawerghans are black descendants of slaves."[209] Subjectively, as indicated by the graffiti and comments quoted above, the Misratan *thuwar* perceived the Tawerghans as racially black. Indeed, the racist language used by the *thuwar* – "slaves," "blacks," "animals" – is eerily reminiscent of how the "Arab" supporters of the Sudanese government described the "African" Fur, Masalit, and Zaghawa tribes in Darfur.[210] The Commission also found, as noted earlier, that the Misratan *thuwar* murdered and tortured Tawerghans – acts that satisfy genocide's *actus reus*.[211]

The critical question, then, is whether the Misratan *thuwar* murdered and tortured individual Tawerghans "with intent to

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[202] *See* Final Report, ¶¶ 486-88.
[203] BOAS ET AL., *supra* note 185, at 97-99.
[204] Final Report, ¶ 403.
[205] *Id*., ¶ 426.
[206] *Id*., 448.
[207] Rome Statute, art. VI.
[208] *Id*.
[209] Final Report, ¶ 391.
[210] *See* Darfur Report, *supra* note 97, at ¶ 511.
[211] BOAS ET AL., *supra* note 185, at 182.

destroy, in whole or in part," the Tawerghans "as such." Proving specific intent is almost always the most difficult aspect of a genocide prosecution.[212] Nevertheless, many of the Commission's factual findings support the existence of genocidal intent among the Misratan *thuwar*. In addition to the arguably genocidal comments quoted above – "purging slaves, black skin"; "Tawergha no longer exists" – the Commission quotes one *thuwar* as saying that the Tawerghans deserved "to be wiped off the face of the planet."[213] Moreover, the Commission found that, after forcibly displacing the Tawerghans, the Misratan *thuwar* then repeatedly attacked their IDP camps in Al Jufrah, Benghazi, and Aidabiya.[214] International tribunals have often inferred the specific intent to commit genocide from such targeted attacks.[215]

None of this evidence proves beyond a reasonable doubt that the Tawerghans were the victims of acts of genocide. But it does seem more likely than not – the standard of proof applied by the Commission. At the very least, the Commission should have made a statement in its final report similar to the one offered by the Darfur Commission:

> One should not rule out the possibility that in some instances single individuals, including Government officials, may entertain a genocidal intent, or in other words, attack the victims with the specific intent of annihilating, in part, a group perceived as a hostile ethnic group. If any single individual, including Governmental officials, has such intent, it would be for a competent court to make such a determination on a case by case basis.[216]

Such a statement would not have been welcomed by the NTC, which has consistently denied mistreating the Tawerghans.[217] But it would have had a solid evidentiary foundation.

**4. War Crimes**

In its final report, the Commission notes that Qadhafi forces flew the revolutionary flag in Bani Walid to identify and kill alleged members of the *thuwar*:

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[212] *Id*. at 160.
[213] Final Report, ¶ 447.
[214] *Id*., ¶¶ 439, 441.
[215] *See, e.g.*, BOAS ET AL., *supra* note 185, at 161.
[216] Darfur Report, *supra* note 97, at ¶ 520.
[217] *See, e.g.*, Final Report, ¶ 451.

> A further series of executions followed the setting up of a false *thuwar* checkpoint by Qadhafi forces. A witness told the Commission that on 17 September 2011, he went to visit his brother a short distance from his house. He ran into a checkpoint with gunmen raising the rebels' flag. They stopped him and asked him if he was with the thuwar or with the Qadhafi forces. He immediately answered that he supported the thuwar. The gunmen beat him, handcuffed him and put him in the back of a pickup, before sending him to a government complex in the east of the city. He was put into a room with 13 others, beaten and insulted. The group was subsequently searched, particularly for mobile phones. Three of them, including the witness, were released as nothing was found. He later found out that eight of the 10 found with incriminating material were later shot dead.[218]

Although the final report does not discuss the legal implications of this conduct, it arguably qualifies as the war crime of making improper use of the flag of the adversary. There is no question that such conduct is prohibited by IHL and qualifies as a war crime in IAC: the First Additional Protocol prohibits the use of enemy flags "while engaging in attacks or in order to shield, favour, protect or impede military operations,"[219] and the Rome Statute criminalizes "making improper use . . . of the flag… of the enemy" when that use results in death or serious personal injury.[220] It is an open question, however, whether improperly using an enemy flag is also criminalized in NIAC[221] – the critical issue regarding the conduct of the Qadhafi forces. The ICRC study of custom cautiously suggests that it is.[222]

### 5. Command Responsibility

As noted earlier, the Commission's list of potential perpetrators relies heavily on the doctrine of command responsibility. As the final report says:

> In many instances, the Commission has been able to obtain information on the commanders of specific

[218] *Id*., ¶ 202.
[219] AP I, art. 39(2).
[220] Rome Statute, art. 8(2)(b)(vii).
[221] Customary IHL Study, Rule 62, *supra* note 141, at 217.
[222] *Id*. at 214.

> military or security units allegedly involved in violations, and thereby to assign responsibility to senior military officers based on their command and control of those under their supervision.[223]

The problem is that, by failing to discuss the elements of command responsibility, the Commission makes it impossible to determine whether its recommendations concerning individual criminal responsibility are based on the correct legal standard. The Commission's inaccurate identification of the *mens rea* of command responsibility – which, as noted above, fails to differentiate between the different mental states that apply to military commanders and civilian superiors – is particularly problematic, because it appears that at least some of the individuals on the Commission's list of perpetrators fall into the latter, more difficult to convict, category. The final report describes an interrogator potentially responsible for a number of post-detention executions at a boy-scout base at Al Qalaa, for example, as "a short man in his mid-forties always in civilian clothes."[224]

## D. Third Parties

Finally, it is possible to question the Commission's legal conclusions concerning the provision of weapons to the *thuwar* and NATO attacks that resulted in civilian deaths. With regard to the former, the final report notes the following:

> *Thuwar* forces are also believed to have received equipment from foreign countries, including Qatar and France, including uniforms and communication equipment. Weapons were smuggled into Libya through the Tunisia border. They were also distributed from Benghazi and Malta to the besieged city of Misrata by sea.[225]

Surprisingly, despite this statement, the Commission never analyzed the legality of France and Qatar's actions in light of paragraph 9 of SC Res. 1970, enacted on 26 February 2011, which decided "that all Member States shall immediately take the necessary measures to prevent the direct or indirect supply, sale or transfer to the Libyan Arab Jamahiriya, from or through their territories or by their nationals, or using their flag vessels or

[223] Final Report, ¶ 49.
[224] *Id*., ¶ 164.
[225] *Id*., ¶ 70.

aircraft, of arms and related materiel of all types, including weapons and ammunition."[226] The provision of weapons to the *thuwar* – which reportedly consisted of everything from small arms to anti-tank missiles[227] – arguably breached SC Res. 1970's arms embargo.

To be sure, there is a plausible argument that states were, in fact, entitled to arm the *thuwar*. Some scholars believe that the arms embargo in SC Res. 1970 was modified – and relaxed – by paragraph 4 of SC Res. 1973, enacted on 17 March 2011, which authorized Member States "to take all necessary measures, *notwithstanding paragraph 9 of resolution 1970* (2011), to protect civilians and civilian populated areas under threat of attack in the Libyan Arab Jamahiriya."[228] As they read it, paragraph 4 permitted Member States to deliver weapons to the rebels as long as those weapons would be used for civilian protection.[229] That argument, however, is far from iron-clad. First, it is an open question whether arming rebels can ever be legitimately be described as necessary "to protect civilians."[230] Second, and perhaps more important, SC 1970's arms embargo was in force in unmodified form for nearly three weeks – from February 26 to March 17. It seems highly likely that Qatar, in particular,[231] was shipping weapons to the *thuwar* during that time; the Reuters article cited by the Commission,[232] which describes daily weapons shipments, was published on March 31. It is possible, of course, that Qatar waited until March 17 to begin shipments. Nevertheless, in light of the uncertainty regarding dates – and in light of the general uncertainty about the provision of weapons under SC Res. 1973 – the Commission would have been well advised to consider the legality of the French and Qatari shipments.

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[226] SC Res. 1970, ¶ 9.

[227] *See Qatari Weapons Reaching Rebels in the Libyan Mountains*, REUTERS (31 March 2011).

[228] SC Res. 1973 (17 Mar. 2011), ¶ 4.

[229] *See* Dapo Akande, "Does SC Resolution 1973 Permit Coalition Military Support for the Libyan Rebels?" *EJIL: Talk!* (31 March 2011), http://www.ejiltalk.org/does-sc-resolution-1973-permit-coalition-military-support-for-the-libyan-rebels/.

[230] *See* Marko Milanovic, "Can the Allies Lawfully Arm the Libyan Rebels?" *EJIL: Talk!* (30 March 2011), http://www.ejiltalk.org/can-the-allies-lawfully-arm-the-lybian-rebels/. Indeed, as noted, the *thuwar* are themselves responsible for numerous attacks on civilians.

[231] The alleged French weapons shipments *See*m to have taken place after SC Res. 1973 was enacted. *See France Airdropped Arms to the Rebels*, BBC NEWS (29 June 2011).

[232] Final Report, ¶ 70 n. 70.

The Commission's discussion of potential NATO violations of IHL also deserves mention. As noted earlier, the Commission not only insisted on assessing the legality of NATO's actions – despite the organization's strident opposition – it concluded that a number of NATO bombing attacks had targeted areas "that showed no evidence of military utility" and had resulted in "confirmed civilian casualties." The Commission deserves credit both for its willingness to investigate NATO and for its refusal to uncritically accept NATO's claims that it targeted only legitimate military objectives. That said, it appears that the Commission took a far more deferential attitude toward NATO than toward the Qadhafi government.

Consider, for example, the Commission's treatment of two NATO attacks on Majer on 8 August 2011. The first attack struck six buildings and killed 20 civilians; the second attack struck a group of rescuers 15 minutes later and killed 18 civilians.[233] After visiting the site and interviewing witnesses, the Commission concluded that "[w]hatever the legitimacy of the initial strikes, no evidence to suggest that the rescuers were in military vehicles or were otherwise participating in hostilities. Nor has it seen any other evidence to suggest that the pilot might have had reason to positively identify the people as military targets."[234] It also found that at least one of the bombs used in the attacks was more than five years past its warranty date and that the second attack had involved a laser-guided bomb, which meant that the pilots of the aircraft "would have had to observe the target throughout the attack" via infra-red camera in order to guide the bomb to the target.[235]

As it did with all questionable attacks, the Commission asked NATO to justify the Majer bombings. In response, NATO insisted that the attacked buildings were "functioning as a troop staging area" and were "being used as a staging area for Government forces actively engaged in attacks on civilians and civilian-populated areas."[236] It did not, however, provide any evidence in defense of that claim. Indeed, it refused a Commission request to release gun-camera footage regarding the attacks on the ground that "[v]ideo footage… is the property of the individual Nations operating the video recording platforms and is classified in order to protect important information about platform capabilities"[237] – a

[233] *Id*., ¶ 620.
[234] *Id*., ¶ 622.
[235] *Id*.
[236] *Id*., ¶ 623.
[237] Letter from Olson to Kirsch, *supra* note 55, at 35.

fact noted by Human Rights Watch, but not (curiously) by the Commission itself.[238]

Because NATO's description of the targets in Majer was not supported by its investigation, the Commission asked UNOSAT to analyze the target area before, during, and after the strikes. That analysis found no evidence of military activity at any of those times.[239] The Commission thus reached the following conclusions in its final report:

> The Commission found no evidence on the ground, or through satellite imagery analysis, that the site had a military purpose. On the basis of the information received by the Commission, it seems clear that those killed were all civilians. NATO's response to the Commission did not provide an adequate explanation of the military value of the target, nor an explanation of the second strike. On the basis of the information provided, the Commission is unable to make a determination as to the military rationale for the initial attack and subsequent decision to launch the second strike (or 'restrike') at Majer.[240]
>
> The Commission is unable to determine, for lack of sufficient information, whether these strikes were based on incorrect or outdated intelligence and, therefore, whether they were consistent with NATO's objective to take all necessary precautions to avoid civilian casualties entirely.[241]

These conclusion are remarkably conservative. Imagine if Qadhafi forces used artillery against a target with no evident military use; shelled the target again after non-uniformed rescuers went to help the wounded, despite having spotters who could not positively determine whether they were combatants; and then refused on national-security grounds to release video footage that could shed light on what the spotters were able to see during the second attack. It beggars belief to assume that, in such a situation, the Commission would have been "unable to determine" whether the second attack violated the principle of distinction or the principle

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[238] HUMAN RIGHTS WATCH, UNACKNOWLEDGED DEATHS: CIVILIAN CASUALTIES IN NATO'S AIR CAMPAIGN IN LIBYA (May 2012), at 25.
[239] *Id*.
[240] Final Report, ¶ 625.
[241] *Id*., ¶ 654. The language in question refers to the Majer strikes as well as other NATO strikes.

of proportionality. And it is even more unlikely that the Commission would have concluded that "[w]ithout further evidence to substantiate" the Qadhafi government's claims, it could not determine whether the second attack violated the government's obligation to take all feasible precautions to protect civilians.

Similar conservatism marks the Commission's legal conclusions regarding NATO attacks on Zlitan[242] and Bani Walid.[243] It is thus reasonable to speculate that, although it did not prevent the Commission from expanding its mandate, NATO pressure on the Commission to downplay potential violations of IHL was at least partially successful. In one of its letters to the Commission, NATO stated that it would be "concerned" if "NATO incidents" were "included in the Commission's report as on a par with those which the Commission may ultimately conclude did violate law or constitute crimes."[244] Unfortunately, that language seems to have had its intended effect.

## CONCLUSION

The International Commission of Inquiry on Libya can be considered a qualified success. Though born in sin, created by the Human Rights Council to confirm its pre-existing belief that the Qadhafi government was responsible for serious violations of international law, it reinterpreted its mandate to include the conduct of the *thuwar* and NATO as well – the latter over the organization's strident protests. It followed the best practices of human-rights fact finding, explaining the law, privileging direct evidence, conducting hundreds of interviews with victims and witnesses, scrupulously corroborating testimony with physical evidence, and conservatively applying its chosen standard of proof. And it uncovered a wealth of evidence – seemingly credible given its rigorous methodology – indicating that, to different degrees, all of the parties to the conflict committed acts that international law condemns.

That said, the Commission is not without its flaws. In some cases, the Commission's legal positions are simply incorrect, such as its insistence that international human rights law limits the use of lethal force in IHL and its elision of the differences between the command responsibility of military commanders and civilian

[242] *Id*., ¶¶ 629-32.
[243] *Id*., ¶¶ 633-35.
[244] Letter from Olson to Kirsch, *supra* note 55, at 37.

superiors. In other cases, the Commission's positions are at best debatable, such as its (unnecessary) assertion that customary international law prohibits the use of blinding weapons in non-international armed conflict and its belief that states have an obligation to prosecute all international crimes.

Those problems, moreover, are anything but harmless. On the contrary, because of its legal errors, the Commission both overstates and understates the responsibility – state, organizational, or individual – of the various parties to the conflict. For example, because the Commission applied an inadequate proportionality analysis, it condemned a number of attacks by Qadhafi's forces that might well have been legitimate. Conversely, because the Commission wrongly concluded that "widespread and systematic" admits of degrees, it wrongly refused to condemn *thuwar* attacks on groups other than the Tawerghans.

Notice that both of these examples make the Qadhafi government appear less law-abiding than the *thuwar*. That asymmetry, unfortunately, is indicative of the Commission's work as a whole. Nearly all of the Commission's major oversights serve to understate the responsibility of the *thuwar* for violations of international law, particularly concerning the Misratan *thuwar*'s mistreatment of the Tawerghans. The Commission did not even *consider* whether the Mistratan *thuwar* committed the crimes against humanity of forcible transfer and persecution, to say nothing of genocide, even though its factual findings clearly suggest that they did.

Despite its best efforts, then, the Commission appears to have been unable to completely cleanse itself of the stain of its politicized birth. The Human Rights Council created the Commission to focus on the crimes of the Qadhafi government, and that is exactly what it did – even if not with the single-minded focus that the Council intended. That partiality in no way discredits the Commission's work; its reports provide the most detailed and compelling account of the Libyan conflict to date. But it serves as a stark reminder that even the most seemingly independent and impartial international commission of inquiry can never escape politics completely.