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# **LEGAL OPINION**

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**London and The Hague**

**29 January 2019**

## Introduction

1. Since May 2018, a number of videos have emerged across the Internet showing the actions in 2018 in locations in Libya of militia from what appear to be the Libyan National Army (LNA), which is commanded by General Khalifa Haftar. The video footage depicts the killing and disfiguring of the bodies of civilians in Derna, Libya<sup>1</sup>; the execution of Derna residents<sup>2</sup>; the sustained abuse of civilians or captured fighters<sup>3</sup>; the taunting and threatening of civilians<sup>4</sup>; and attacks on and shelling of residential areas<sup>5</sup>.
2. I have been asked to prepare a short legal opinion, having viewed this video footage, on the following questions:
  - a. Whether these actions constitute war crimes and violations of international law;
  - b. What are the implications for senior commanders of the LNA and General Khalifa Haftar; and
  - c. What steps should be taken by the international community to address these serious violations of international law.
3. In order to prepare this opinion, I have examined the video materials listed herein and publicly available material and information about the actions of the LNA in Libya.

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<sup>1</sup> Sources: Al Nabaa (<https://alnabaa.tv>), published 9<sup>th</sup> September 2018  
[https://www.youtube.com/watch?v=bE8NwXrp0Mw&has\\_verified=1](https://www.youtube.com/watch?v=bE8NwXrp0Mw&has_verified=1)  
Libya Observer <https://www.libyaobserver.ly/sites/default/files/Dernamilitias.mp4>  
Almanara Media: <https://www.facebook.com/almanaramedia/videos/2224661210907253/>

<sup>2</sup> Sources: Aljazeera <https://www.youtube.com/watch?v=UvZhcEuss38>  
Aljazeera  
<http://www.aljazeera.net/news/reportsandinterviews/2018/6/14/%D8%AF%D8%B1%D9%86%D8%A9-%D8%B9%D9%84%D9%89-%D8%AE%D8%B7%D9%89-%D8%A8%D9%86%D8%BA%D8%A7%D8%B2%D9%8A-%D8%A7%D9%86%D8%AA%D9%87%D8%A7%D9%83%D8%A7%D8%AA-%D9%88%D8%A5%D9%81%D9%84%D8%A7%D8%AA-%D9%85%D9%86-%D8%A7%D9%84%D8%B9%D9%82%D8%A7%D8%A8>

<sup>3</sup> Sources: Twitter, published 29<sup>th</sup> May 2018 <https://twitter.com/hatemelzway/status/1001583146876526592>  
Twitter, published 8<sup>th</sup> June 2018 <https://twitter.com/Emhona099/status/1005152580283109380>

<sup>4</sup> Sources: YouTube, published 28<sup>th</sup> May 2018 <https://www.youtube.com/watch?v=w0921DayPXc>  
Facebook, 12<sup>th</sup> June 2018 <https://www.facebook.com/almanaramedia/videos/2224793537560687/>

<sup>5</sup> Sources: Facebook, published 29<sup>th</sup> May 2018  
<https://www.facebook.com/almanaramedia/videos/2201981209841920/>  
Facebook, published 6<sup>th</sup> June 2018 <https://www.facebook.com/almanaramedia/videos/2214862021887172/>

## **The Wider Context**

4. It has been widely alleged that LNA forces under the command of General Khalifa Haftar have repeatedly flouted international law and human rights standards. During the ongoing conflict in Libya, the LNA have been accused of committing war crimes during the siege of Benghazi when civilians were deliberately targeted and attacked. In 2016 Amnesty International reported in relation to this siege that:

“Time is running out for civilians in Ganfouda, who are being left to die trapped by the fighting. While bombs and shells continue to rain down on them, civilians are struggling to survive on rotten food and dirty water. And the sick and wounded must make do with dwindling supplies of expired medicines”<sup>6</sup>

5. Further, Human Right Watch stated that the LNA may have committed war crimes in March 2017:

“Libyan National Army (LNA) forces may have committed war crimes, including killing and beating civilians, and summarily executing and desecrating bodies of opposition fighters in the eastern city of Benghazi on and around March 18, 2017 ...The army forces allegedly intercepted civilians trying to flee a besieged neighborhood, some accompanied by opposition fighters, and the whereabouts of some civilians are unknown.”<sup>7</sup>

6. The recent videos from 2018 appear to show that this pattern of fundamental breaches of international law and human rights standards has continued in Libya at the hands of the LNA with further egregious acts of the unlawful killing, mutilation, torture, and cruel treatment of civilians.

## **Executive Summary**

7. The evidence of the video footage demonstrates that war crimes and violations of international law could have been committed by what appear to be LNA forces, under the command of General Khalifa Haftar. This evidence appears to depict the commission of the war crimes of murder, mutilation, torture, cruel treatment, outrages upon personal dignity, and the targeting of civilians.

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<sup>6</sup> <https://www.amnesty.org/en/latest/news/2016/09/libya-civilians-trapped-in-benghazi-in-desperate-conditions-as-fighting-encroaches/>

<sup>7</sup> <https://www.hrw.org/news/2017/03/22/libya-war-crimes-benghazi-residents-flee>

8. These acts *prima facie* constitute crimes and violations under the Statute of the ICC, the 1949 Geneva Conventions, and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT). There would of course have to be further investigation of what the video footage depicts, and all relevant evidence would have to be gathered and reviewed, in order for these allegations to be proved to the criminal standard.
9. In light of this evidence, it is imperative that the perpetrators and their commanders should be investigated to obtain all available evidence so that those responsible can be brought to justice. As a starting point, the individual perpetrators shown in the videos should be identified. Their commanders must then be investigated within the LNA structure headed by General Khalifa Haftar. It is vital that those in charge of the perpetrators are held to account given the notoriety and gravity of these crimes. Where there is evidence of them ordering these crimes, they should be prosecuted as direct offenders. Furthermore, those in charge should at least have known of these crimes, or had reason to know, and the failure to act to prevent or punish them could render those superiors criminally liable. The enforcement of the doctrine of *command responsibility* is essential for both the punishment of these crimes and the deterrence of future violations.
10. These investigations should be undertaken by the International Criminal Court (ICC), which has jurisdiction over the Libya Situation, if no genuine domestic investigations are underway. States are also obliged to exercise their universal jurisdiction and investigate these actions under the Geneva Conventions and CAT. Information and evidence should also be passed to the UN Special Rapporteurs, in particular the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, to facilitate an inquiry into these allegations.

## **Legal Framework**

11. Libya is a party to 1949 Geneva Conventions as of 22 May 1956.<sup>8</sup> Libya also acceded to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment on 16 May 1989.<sup>9</sup>
12. Libya is not a State Party to the ICC Statute. However, on 26 February 2011, the United Nations Security Council (UNSC) unanimously referred the Situation in Libya (since 15 February 2011) to the ICC for investigation in Resolution 1970 (2011). The ICC may therefore exercise its jurisdiction over crimes listed in the Statute committed on the territory of Libya from 15 February 2011 onwards.<sup>10</sup> The ICC would thus have jurisdiction over the conduct shown in the video footage.
13. Article 8 of the Statute lists the proscribed war crimes committed in both international and non-international armed conflicts. Given that the armed conflicts in Libya are regarded as internal, the most serious crimes that apply to non-international conflicts are violations of Article 3 common to the Geneva Conventions of 1949. Article 8(2)(c) lists these crimes, namely, murder, mutilation, cruel treatment, torture, outrages upon personal dignity, taking hostages, and sentencing or execution without due process. Article 8(2)(e) sets out further crimes defined that apply to non-international armed conflicts.
14. Further, Article 7 provides that the ICC has jurisdiction over Crimes Against Humanity if unlawful acts are committed as part of a widespread or systematic attack directed against any civilian population.

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<sup>8</sup> [https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/vwTreatiesByCountrySelected.xsp?xp\\_countrySelected=LY](https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/vwTreatiesByCountrySelected.xsp?xp_countrySelected=LY)

<sup>9</sup> [https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg\\_no=IV-9&chapter=4&clang=\\_en](https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-9&chapter=4&clang=_en)

<sup>10</sup> <https://www.icc-cpi.int/libya>

## **The Applicable Crimes**

15. Subject to further investigation, the video footage examined shows that *prima facie* the following crimes have been committed:

- a. War crimes of murder and mutilation,<sup>11</sup>
- b. War crimes of cruel treatment,<sup>12</sup>
- c. War crimes of torture,<sup>13</sup>
- d. War crimes of outrages upon personal dignity,<sup>14</sup> and
- e. War crimes of attacking civilians.<sup>15</sup>

### **War crimes of murder and mutilation**

16. The video footage shows civilian residents of Derna being shot repeatedly and bodies lying on the ground, which are being shot even though motionless and which appear to be dead.<sup>16</sup> The perpetrators are seen killing the persons as well as mutilating their bodies with multiple gunshots.

17. The persons being attacked are not engaged in the conflict.<sup>17</sup> They do not appear to be taking any active part in the hostilities.<sup>18</sup> They are dressed in civilian clothing, which contrasts with the perpetrators military style clothing. In one video the victims who are attacked clearly appear to be civilians - they had no weapons on them and were fleeing from one district of Derna when their car was stopped after what appear to be LNA fighters sprayed it with bullets.<sup>19</sup>

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<sup>11</sup> Article 8(2)(c)(i)

<sup>12</sup> Article 8(2)(c)(i)

<sup>13</sup> Article 8(2)(c)(i)

<sup>14</sup> Article 8(2)(c)(ii)

<sup>15</sup> Article 8(2)(e)(i)

<sup>16</sup> [https://www.youtube.com/watch?v=bE8NwXrp0Mw&has\\_verified=1](https://www.youtube.com/watch?v=bE8NwXrp0Mw&has_verified=1)

<https://www.youtube.com/watch?v=UvZhcEuss38>

<sup>17</sup> Element 1 of War Crime of Murder, Article 8(2)(c)(i)

<sup>18</sup> Element 2 of War Crime of Murder, Article 8(2)(c)(i)

<sup>19</sup> <http://www.aljazeera.net/news/reportsandinterviews/2018/6/14/%D8%AF%D8%B1%D9%86%D8%A9-%D8%B9%D9%84%D9%89-%D8%AE%D8%B7%D9%89-%D8%A8%D9%86%D8%BA%D8%A7%D8%B2%D9%8A-%D8%A7%D9%86%D8%AA%D9%87%D8%A7%D9%83%D8%A7%D8%AA-%D9%88%D8%A5%D9%81%D9%84%D8%A7%D8%AA-%D9%85%D9%86-%D8%A7%D9%84%D8%B9%D9%82%D8%A7%D8%A8>

18. The perpetrators appear to be members of the LNA. As noted above, the conduct of the LNA takes place in the context of an armed conflict not of an international character.<sup>20</sup> The conflict exists between armed groups in different regions in Libya.<sup>21</sup>
19. The acts depicted in the video footage appear to be taking place in the context of the ongoing conflict in eastern Libya in which it is widely reported that General Khalifa Haftar's forces have been attempting to seize control of Derna from the Derna Protection Force (DPF), previously known as the Derna Mujahideen Shura Council (DMSC), which was created to provide security for the city and to defend it against the LNA and from attacks by ISIS.<sup>22</sup>
20. Accordingly, the evidence appears to show the commission of the war crimes of murder and mutilation.

#### **War crimes of cruel treatment**

21. It is evident from the video footage that one of the victims is beaten with an object whilst being forced to lie on the ground.<sup>23</sup> Further videos show victims being taunted and threatened with rifles.<sup>24</sup>
22. One of these videos shows such treatment at a checkpoint manned by militias.<sup>25</sup> It is clear that these persons were civilians and that what appear to be LNA militia were inflicting severe physical and mental pain as well suffering on the civilian victims.<sup>26</sup>
23. These acts appear to be cruel treatment of civilians which in the context of an internal armed conflict constitute war crimes.

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<sup>20</sup> Element 4 of War Crime of Murder, Article 8(2)(c)(i)

<sup>21</sup> <https://www.geneva-academy.ch/joomlatools-files/docman-files/Libya%20A%20Short%20Guide%20to%20the%20Conflict.pdf>

<sup>22</sup> <https://www.reuters.com/article/us-libya-security/impact-of-fighting-on-civilians-in-libyas-derna-devastating-u-n-idUSKCN1IP3HD>

<sup>23</sup> [Almanara Media: https://www.facebook.com/almanaramedia/videos/2224661210907253/](https://www.facebook.com/almanaramedia/videos/2224661210907253/)

<sup>24</sup> Published 28<sup>th</sup> May 2018, <https://www.facebook.com/almanaramedia/videos/2224793537560687/>

<sup>25</sup> Published 12<sup>th</sup> June 2018, <https://www.youtube.com/watch?v=w0921DayPXc>

<sup>26</sup> Element 1 of War Crime of Cruel Treatment, Article 8(2)(c)(i)

## **War crimes of torture**

24. The acts shown in the video footage also amount to torture in breach of the provisions of CAT. The perpetrators appear to be inflicting this torture to intimidate and coerce civilians in Derna into leaving the region. These actions from part of the ongoing conflict involving the LNA and its campaign to take control of Derna.<sup>27</sup>
25. From the available evidence, the victims are civilians and were taking no active part in the hostilities.<sup>28</sup>
26. The acts could thus constitute torture of civilians and in the context of an internal armed conflict amount to war crimes.

## **War crimes of outrages on personal dignity**

27. In video footage a victim is seen unzipping his trousers while lying on the ground, before he is executed.<sup>29</sup> It has been reported that there have been several other incidents in which local militias have ordered captives to remove their trousers to humiliate them.
28. As noted above, other videos show dead bodies being continually shot at<sup>30</sup>, toyed with<sup>31</sup>, hung from machine guns mounted on a truck<sup>32</sup>, and hung over the bucket of an excavator<sup>33</sup>. The crime of outrages on personal dignity can be committed against dead persons.
29. The militia are clearly seen to be humiliating, degrading or otherwise violating the dignity of persons dead and alive.<sup>34</sup> The nature of the humiliation is certainly outrageous<sup>35</sup>, and thus could constitute war crimes.

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<sup>27</sup> <https://www.reuters.com/article/us-libya-security/impact-of-fighting-on-civilians-in-libyas-derna-devastating-u-n-idUSKCN1IP3HD>

<sup>28</sup> Element 3 of War Crime of Torture, Article 8(2)(c)(i)

<sup>29</sup> [Almanara Media: https://www.facebook.com/almanaramedia/videos/2224661210907253/](https://www.facebook.com/almanaramedia/videos/2224661210907253/)

<sup>30</sup> [https://drive.google.com/file/d/167a-reZB2aBQv8CtSi\\_AV-Nit9V8rYhW/view](https://drive.google.com/file/d/167a-reZB2aBQv8CtSi_AV-Nit9V8rYhW/view)

<sup>31</sup> <https://drive.google.com/file/d/139RxlvEQGocPXA5pkStkv6T4Hlv1Y9i6/view>

<sup>32</sup> <https://twitter.com/hatemelzway/status/1001583146876526592>

<sup>33</sup> <https://twitter.com/Emhona099/status/1005152580283109380>

<sup>34</sup> Element 1 of War Crime of Outrages on Personal Dignity, Article 8(2)(c)(ii)

<sup>35</sup> Element 2 of War Crime of Outrages on Personal Dignity, Article 8(2)(c)(ii)



## **War crimes of attacking civilians**

30. A number of videos show attacks on and shelling of residential areas in Derna. One depicts militia firing light and heavy calibre machine guns from a hilltop towards a residential area below.<sup>36</sup> Another video shows the intensity of the firing and bombing during one night in Derna's densely populated residential area.<sup>37</sup>
31. In light of the available evidence, it appears that these attacks were directed against civilians<sup>38</sup>, and the object of the attack was the civilian population or individual civilians not taking part in hostilities.<sup>39</sup> The perpetrators would appear to have intended the civilian population not taking direct part in hostilities to be the object of the attack.<sup>40</sup>
32. Accordingly, such deliberate and targeted attacks on civilians could constitute war crimes.

## **Crimes against Humanity**

33. The crimes shown in the videos could also amount to Crimes against Humanity if it can be established on all the evidence that they were committed as part of a widespread or systematic attack directed against the civilian population of Derna.

## **Implications of this Evidence of the Commission of International Crimes**

34. It is imperative that these violations are investigated in full so that the perpetrators and their commanders can be tried and held to account. As there is no evidence of genuine investigations taking place in Libya, the ICC should examine the available video footage and assemble all relevant evidence to investigate and prosecute these crimes.
35. The ICC has already issued arrest warrants for allegations of war crimes committed in eastern Libya. On 4 July 2018, the ICC Pre-Trial Chamber issued a second arrest warrant

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<sup>36</sup> Published 29<sup>th</sup> May 2018, <https://www.facebook.com/almanaramedia/videos/2201981209841920/>

<sup>37</sup> Published 6<sup>th</sup> June 2018, <https://www.facebook.com/almanaramedia/videos/2214862021887172/>

<sup>38</sup> Element 1 of War Crime of Attacking Civilians, Article 8(2)(e)(i)

<sup>39</sup> Element 2 of War Crime of Attacking Civilians, Article 8(2)(e)(i)

<sup>40</sup> Element 3 of War Crime of Attacking Civilians, Article 8(2)(e)(i)

for Mahmoud Mustafa Busyf Al-Werfalli in relation to charges for murder as a war crime in eastern Libya. The Pre-Trial Chamber found the case against Mr Werfalli to be admissible before the Court, due to the lack of investigative activities in Libya.<sup>41</sup> Whilst under the principle of complementarity national judicial systems are primarily responsible for trying perpetrators of crimes, the ICC has jurisdiction where the national authorities fail to conduct a genuine investigation or trial.

36. It is essential that the commanders of the perpetrators are investigated under the well-established doctrine of *command responsibility* both for ordering and directing the violations, and/or for failing in their duties as superiors effectively to prevent or punish the crimes committed by their subordinates. The commanders of the LNA forces, including General Khalifa Haftar, who are operating in Derna and appear to be involved in the commission of the crimes identified in this opinion, should be the subject of such an investigation.<sup>42</sup> There is evidence that they ordered civilians to be targeted during the operations to besiege Derna, all of which should be investigated.<sup>43</sup>
37. The investigation and prosecution of those up the chain of command is very important in order to establish the full record of criminal activity, to guarantee accountability and justice, and to deter the future occurrence of similar crimes in the conflict.

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<sup>41</sup> <https://www.icc-cpi.int/CaseInformationSheets/al-werfalliEng.pdf>

<sup>42</sup> <https://www.icc-cpi.int/iccdocs/pids/publications/uicceng.pdf>

<sup>43</sup> See for example:

<https://www.justsecurity.org/45094/hifter-smoking-gun-videos-emerge-citizen-libyan-warlord-khalifa-haftar-ordering-war-crimes/>

<https://www.justsecurity.org/45178/khalifa-haftar-liability-superiors-ordering-offenses-v-responsibility-omissions/>

<https://www.youtube.com/watch?v=ffWJY3Uu4YI>

### **Steps and actions that should be undertaken**

38. The ICC Prosecutor should be urged to prioritise these investigations in the current Libya Situation which provides the Court with jurisdiction over these events due to the referral by the Security Council which is not time barred.
39. ICC States Parties can also request the Office of the Prosecutor at the ICC to carry out investigations<sup>44</sup>, and could do so in the present Situation.
40. States can also rely on Universal Jurisdiction to investigate and prosecute these crimes, even if they were not committed on their territories or by one of their nationals. The 1949 Geneva Conventions and the Convention Against Torture oblige State Parties to invoke universal jurisdiction to investigate and prosecute serious war crimes.
41. Furthermore, the United Nations Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, could be urged to examine the allegations and submit findings to the UN Human Rights Council and the UN General Assembly to require immediate action. In the same way the Special Rapporteur on Torture should be asked to investigate the allegations of torture and inhumane and cruel treatment.

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<sup>44</sup> Article 13(a) of ICC Statute

## **Conclusion**

42. The video footage examined shows appalling acts of violence. It is evidence of the commission of very serious war crimes in the Derna region. It should serve as a stark reminder of the gruesome crimes being perpetrated with impunity in eastern Libya, and of the urgent need for decisive, corrective action.
  
43. The individual perpetrators should be identified without delay for prosecution, and so too should their masters and commanders who are behind directing these atrocities and failing to end them.