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**Human Rights Council****Fiftieth session**

13 June–8 July 2022

Agenda item 10

**Technical assistance and capacity-building****Detailed findings on the situation in Tarhuna\*****Conference room paper of the Independent Fact-Finding Mission on Libya***Summary*

Between 2015 and 2020, the al-Kaniyat militia ruled Tarhuna through a campaign of terror and intimidation against, and killing of, the inhabitants of this town. The militia terrorized the local population, primarily targeting those who they perceived as opposition or a threat. Based on extensive evidence, the Independent Fact-Finding Mission on Libya found reasonable grounds to believe that members of the al-Kaniyat militia committed a number of crimes against humanity through underlying acts of murder, extermination, imprisonment, torture, persecution on political grounds, enforced disappearance and other inhumane acts, and war crimes. Significantly, the Mission was recently able to identify three locations of possible undiscovered mass graves and wishes to extend its technical assistance to the Libyan authorities to utilize these findings in search for buried victims. Many of the atrocities documented by the Mission in this conference room paper have a continuing impact on the victims and the citizens of Tarhuna and Libya. The victims have addressed a clear message to the Mission demanding truth, justice, reparation, and peace. Those responsible for these violations and crimes in Tarhuna must be held accountable.

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\* Information complementary to that contained in the report submitted to the Human Rights Council pursuant to Council resolution 48/25 (A/HRC/50/63).

## I. Introduction

1. On 22 June 2020, at the request of the Government of Libya, the Human Rights Council adopted resolution 43/39 requesting the United Nations High Commissioner for Human Rights to establish and dispatch a fact-finding mission to Libya.<sup>1</sup> On 22 August 2020, the High Commissioner announced the appointment of Mohamed Auajjar, of Morocco, Tracy Robinson, of Jamaica, and Chaloka Beyani, of Zambia and the United Kingdom of Great Britain and Northern Ireland, as the members of the Independent Fact-Finding Mission on Libya, hereinafter referred to as the Mission, with Mr. Auajjar as Chair.

2. The Mission was mandated to establish, in an independent and impartial manner, the facts and circumstances of the human rights situation throughout Libya, to document alleged violations and abuses of international human rights law and international humanitarian law by all parties in Libya since the beginning of 2016, including any gendered dimensions, and to preserve evidence with a view to ensuring that perpetrators of violations and abuses are held accountable. In October 2021, the Mission presented its first written report to the Council.<sup>2</sup> By resolution 48/25 adopted on 13 October 2021, the Council then extended the Mission's mandate to 30 June 2022. It requested the Mission to present both a follow-up report of its findings at the Council's forty-ninth session, and at the fiftieth session, a comprehensive report on the situation of human rights in Libya, including on efforts to prevent and ensure accountability for human rights violations and abuses and with recommendations for follow-up.<sup>3</sup> In March 2022, the Mission presented its follow-up report.<sup>4</sup> The present Conference Room Paper is supplementary to the comprehensive report presented during the Human Rights Council's fiftieth session<sup>5</sup> and presents the Mission's detailed findings on the situation in Tarhuna since 2016.

3. The allegations of atrocity crimes in the town of Tarhuna warranted a particular focus due to their gravity, the level of victimization and suffering inflicted on the victims, the discovery of mass graves, and the widespread and systematic nature of the crimes committed. The crimes committed in Tarhuna have been addressed in the Mission's first report,<sup>6</sup> its follow-up report<sup>7</sup> and its comprehensive report.<sup>8</sup> Yet the Mission considered that a thorough focused investigation should be conducted in order to contribute to efforts towards uncovering the whole truth, including the fate and whereabouts of the missing persons, attributing responsibility, and ensuring guarantees of non-recurrence, in order to prevent such atrocities from happening again in Libya.

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<sup>1</sup> Human Rights Council Resolution 43/39.

<sup>2</sup> *Ibid.*, para. 43.

<sup>3</sup> Human Rights Council Resolution 48/25, para. 41.

<sup>4</sup> A/HRC/49/4.

<sup>5</sup> A/HRC/50/63.

<sup>6</sup> A/HRC/48/83, paras. 14, 44, 69-73 and 81.

<sup>7</sup> A/HRC/49/4, paras. 30, 35 and 70.

<sup>8</sup> A/HRC/50/63.

## II. Methodology

4. The Mission follows the best practices and methodologies for human rights fact-finding,<sup>9</sup> adhering at all times to the principles of “do no harm”, independence, impartiality, objectivity, transparency, and integrity.

5. In keeping with resolution 43/39, in which the Human Rights Council requested the Mission to conduct its investigations in an independent and impartial manner, the Mission established its own investigative priorities. It did not seek approval or instructions from any external stakeholders at any stage of its work. The investigations also focused on all actors involved without distinction. The Mission considered the events of Tarhuna to be a priority area of investigation. It conducted two site visits in July 2021 and May 2022, interviewed witnesses as well as representatives of governmental authorities and non-governmental organizations, gathered documentary evidence, including forensic reports and satellite imagery and conducted site visits of mass graves and places of detention in Tarhuna.

6. The Mission considered information from a variety of sources, including interviews with victims and other witnesses; summaries of accounts and analytical data included in reports of the United Nations and other reliable stakeholders, including NGOs and media; investigators’ direct observations during site visits; information provided by the Libyan authorities, other States and reliable stakeholders working on Libya; authenticated satellite imagery and audio-visual material; and verified open-source material. Further to a call for submissions issued on 25 January 2021 and again on 14 December 2021, civil society organizations and lawyers representing victims filed with the Mission information relevant to the areas under investigation.

7. Choosing Tarhuna as a focus of its investigations for this Conference Room Paper is in line with the Mission’s investigation scope as it fulfils two of its three criteria of selection.<sup>10</sup> In this respect, the Mission wishes to bring the attention of the Council to: i) the grave, widespread and systematic character of the violations that occurred in Tarhuna; and ii) the nature of violations, abuses and crimes committed against vulnerable groups who were subjected to multiple forms of victimization in Tarhuna.

8. Tarhuna was a major site of alleged violations that took place since 2016, which the Mission investigated in line with its temporal mandate. Some incidents occurring prior to this period were investigated where, for instance, a longer-term perspective was necessary to understand a pattern of violations, and the policy and *modus operandi* of the perpetrators. Furthermore, many of the enforced disappearances documented commenced before 2016 and, as continuing crimes, are thus falling within the Mission’s temporal mandate.

9. Where the Mission established a link between specific acts and alleged perpetrators that would be sufficient to warrant future criminal investigations or prosecutions, such evidence was collected and preserved on a strictly confidential basis.

### A. Standard of Proof

10. Consistent with the practice of most United Nations fact-finding bodies, the Mission employs the “reasonable grounds to believe” standard in making factual determinations on individual cases, incidents and patterns of conduct. The standard is considered met when a

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<sup>9</sup> See United Nations Office of the High Commissioner for Human Rights, International Commissions of Inquiry and Fact-Finding Missions on International Human Rights Law and International Humanitarian Law - Guidance and Practice, 2015.

<sup>10</sup> See A/HRC/50/63, para. 17.

sufficient and reliable body of primary information, consistent with other information, would allow an ordinarily prudent person to reasonably conclude that a case, incident or pattern of conduct occurred. This standard of proof is lower than that required in criminal proceedings.

11. Individual cases or incidents contained in this Conference Room Paper are based on at least one credible source of first-hand information, which was independently corroborated by at least another credible source of information. Where the report describes patterns of conduct, these are based on multiple credible sources of first-hand information, which are consistent with and corroborated by the overall body of credible information collected. In the few instances where this standard was not met – but the Mission still considered it appropriate to include the information – this is stated explicitly.

12. In cases of torture or sexual and gender-based violence, where a second independent source of information was often unavailable, the Mission considered the case or incident corroborated when it obtained one first-hand account which it assessed as credible and consistent with what was known about the incident or the established patterns of similar incidents within the circumstances.

13. Assessment of the validity of the information was separate from the assessment of its reliability and credibility. The Mission did not assume that a credible and reliable source would necessarily provide accurate and valid information. Where this report refers to the account of a witness, the Mission has accepted the statement as assessed and described to be truthful and relevant, unless stated otherwise.

14. The Mission made its own assessment of the credibility and reliability of sources, even when they were introduced by reliable intermediaries. All sources relied upon in the present paper were deemed to be credible and reliable.

## **B. Challenges faced in collecting evidence**

15. The security situation did not provide for a safe space to hold in-person meetings with all victims and witnesses. The Mission therefore conducted some of the interviews using other means of communication through secure channels.

16. As discussed in its previous reports to the Human Rights Council, the Mission faced considerable challenges with respect to the collection of relevant evidence in and from Libya. These included problems caused by evolving security concerns, access to pertinent locations or individuals, changing political dynamics, and layers of bureaucracy, among others.

17. With respect to state authorities seized of the Tarhuna file, the Mission has requested assistance and information from the Libyan authorities in Tripoli and Benghazi at various times in 2021 and 2022. In July 2021, the Mission requested and obtained assistance from the Ministry of Foreign Affairs, the Ministry of Justice and the Ministry of Interior for a site visit to Tarhuna. The Mission thanks these authorities for their cooperation, as well as the Office of the Military Prosecutor in Benghazi who provided it with useful information. The Mission requested similar assistance in April 2022 from the Ministries of Foreign Affairs and Justice for another site visit which took place during the Mission's investigative mission to Tripoli in May 2022.

18. The Mission has requested the sharing of information and evidentiary material in the possession of Libyan judicial institutions on Tarhuna-related crimes and human rights violations, in particular information on mass graves and evidence collected from them. While such questions were the subject of official correspondence and in-person meetings that took place in Tripoli, at the time of writing the Mission had not received the requested information and evidentiary material on these crimes and human rights violations.

19. During the Mission's first visit to Tarhuna in July 2021, local security and political issues limited its access to sources of evidence, such as government authorities conducting exhumations of mass graves, as well as victims and witnesses who raised safety concerns in their refusal to meet with the Mission. Its second visit to Tarhuna in May 2022 saw a marked improvement in the cooperation received from the relevant authorities which allowed the Mission to conduct on-site visits to relevant locations in and around Tarhuna, to conduct in-person interviews of the many victims and witnesses and to receive relevant evidence from governmental and non-governmental organizations.

20. The situation in Tarhuna has been under the scrutiny of a number of other actors looking to assist in uncovering the truth and providing accountability for the alleged crimes committed there. Although this scrutiny over the facts associated with alleged crimes in Tarhuna aided the Mission's evidence collection in some respects, the interest of other actors also comes with its complications, especially with respect to coordination among various groups around evidentiary material. This is especially true in relation to the investigation of mass graves.

21. The Mission met with the General Authority for the Searching and Identification of Missing Persons (GASIMP), which is the leading institution in the current excavation work being conducted at the Tarhuna sites, in close collaboration with the Office of the Prosecutor General and the Ministry of Health. GASIMP conducts DNA-related work for the purpose of identification in relation to the issue of missing persons by means of its laboratory facilities. The Ministry of Justice and the Ministry of Interior also maintain DNA identification capabilities and laboratories to conduct DNA identification work.

22. The Mission also contacted the Department of Forensic Medicine at the Centre for Judicial Expertise and Research (CJER), under the Ministry of Justice, which is in charge of providing technical expertise to the courts, prosecution offices, and other judicial authorities in relation to criminal laboratory work; analyzing materials and samples; studying criminal acts and phenomena, determining their causes, following up on their development, and proposing ways to combat and reduce them; and conducting legal and judicial research and studies related to crimes.

23. However, due to GASIMP and CJER's reluctance to share the information on families in their possession, the Mission and its Forensic Doctor were unable to contact all the families victimized. As a result, most of the information related to victims provided to the Mission was obtained through the Tarhuna Victims Association (TVA) and/or directly from families.

24. The Mission met in December 2021 with the Forensic Medicine Committee (also known as the "Mass Graves Committee"). According to Resolution No. 411, the Committee consists of five representatives from the CJER, one representative from the Field Medicine Support Centre of the Ministry of Health, as well as one representative from GASIMP and is in charge of excavating mass graves; recovering human remains and locating places where human remains might be buried; determining the circumstances of death; and identifying the victims and preserving unidentified bodies temporarily, until they are identified in line with legally recognized methods. The Mission's requests for a second meeting in June 2022 and for autopsy reports and a list of identified victims, were not fruitful.

25. All the challenges mentioned above are exacerbated by the scale and complexities of the alleged crimes that took place in and around Tarhuna as well as the ongoing insecurity in the country.

### **C. Victim-centred approach**

26. During the whole investigative process, the interests and concerns of the victims were central to the Mission's approach. Cooperation with the victims and their families remained

strong and consistent. The Mission paid the utmost attention to the safety and well-being of the individuals with whom it interacted. In accordance with the well-established investigative principle of “do no harm”, the Mission ensured that their collaboration with the Mission did not put them in danger or retraumatize them. Where appropriate, the Mission directed victims and witnesses to existing protection and assistance programmes.

27. The Mission sought from each person or entity it met their informed consent to use the information in this paper and/or share it with external stakeholders for accountability or assistance purposes. The report does not disclose the identity of the individuals interviewed by the Mission, except where consent was provided.

28. In keeping with the Mission’s mandate to preserve evidence for accountability purposes, the Secretariat has kept a safe record of all the materials it gathered in its confidential database and developed a record-management system to streamline future investigations.

29. The Tarhuna Victims Association (TVA) has played a critical role in supporting victims and their families. Given the aforementioned challenges, the role of the TVA and other civil society organisations became central to the Mission’s efforts to obtain information. For example, the TVA has submitted case files on numerous victims for the Mission’s consideration, which include summaries of the victim’s stories, police reports, medical records, identification documents, and other evidentiary material. The TVA has submitted regularly updated lists of victims of extrajudicial killings, enforced disappearances, and identified bodies from local mass graves. The TVA has also referred witnesses and victims to the Mission for possible interviews and facilitated contacts with victims and relevant state institutions. Lastly, the TVA has been in regular communication with the Mission to provide relevant information, when needed, allowing the Mission to corroborate much of the evidentiary material submitted. The Mission expresses its gratitude to the TVA and considers its cooperation an essential element and a model for a victim-centred approach to uncovering the truth of what has happened in Tarhuna.

### **III. Political context, military structure and shifting alliances**

#### **A. Context**

30. Tarhuna is a town located about 90 km south-east of the Libyan capital Tripoli and a gateway to the country’s centre and the east. The population of the town itself is estimated at 70,000 and the greater district has a population of around 250,000 inhabitants.<sup>11</sup> In 2011, the majority of Tarhuna’s population was considered loyal to the Qadhafi regime. In the first year following the fall of the regime, the city was under the control of different and changing factions, run by various local families.

31. According to available information, before the fall of the Qadhafi regime, the Al-Shaqaqi family, better known as the Al-Kani family or the al-Kaniyat, had no major influence in Tarhuna. Taking advantage of the anarchy in 2011 and 2012, the seven Al-Kani brothers who had been among the few in Tarhuna to have supported the revolution, began engaging in extensive criminal activities and the elimination of (perceived) opponents.

32. It is alleged that in 2012 the brothers and their associates, forming the al-Kaniyat militia, were behind the mysterious disappearance of Abu Ajila al-Hibshi, a senior figure who was jailed during the Qadhafi regime for an attempted coup d’état. After the regime’s

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<sup>11</sup> Data received from the municipality of Tarhuna.

fall, al-Hibshi built an army in Benghazi and brought that army back to Tarhuna. Threatened by his growing power, it is reported that Tripoli militias requested the al-Kaniyat militia to eliminate al-Hibshi.

33. In the period that predates the Mission's mandate, in order to assert themselves in Tarhuna and exact revenge against those who had wronged them in any way, the brothers and their associates are reported to have killed entire families, expelled others, and demolished their homes. By 2015, the al-Kaniyat consolidated their power and controlled every aspect of life in Tarhuna.

34. According to available information, the al-Kaniyat militia took control over the government cement factory in Tarhuna, reportedly appropriated 90% of its production and sold it on the black market. They also took control of a water factory which was later used as a prison (see *infra* paragraph 99). Using their increasing resources, they began purchasing and seizing weapons, including tanks, from other militias and criminals. The al-Kaniyat are also reported to have imposed a monthly tax on various local businesses under the pretext of providing them with security and protection.

35. A witness interviewed by the Mission stated that soldiers who had been deployed from Tripoli to Tarhuna were given large amounts of money to supplement their government salaries as a reward for their loyalty to the al-Kaniyat, especially between 2013 and 2017.

36. According to two witnesses, the militia also controlled banks in Tarhuna and Qasr ben Ghasir. One of them explained that this was particularly relevant as there had been an ongoing financial crisis, the banks had no liquidity and ordinary citizens could not withdraw their money unless they did it with the assistance of the al-Kaniyat. Another witness asserted that the government at the time was aware of this.

37. Victims who had successful businesses also described to the Mission that they or their relatives had been abducted, detained and, at times, tortured, so that they would give the al-Kaniyat large sums of money.

38. Several witnesses told the Mission that multiple Tripoli governments had supported the al-Kaniyat militia. According to one of them, in 2015 the militia received support from then Prime Minister Khalifa al Ghweil through intermediaries and were provided with money and weapons. According to another, prior to the militia's alliance with the Libyan National Army (LNA), the government of Prime Minister Sarraj (2016-2021), had been paying the al-Kaniyat for their loyalty, through the Ministry of Defence. A witness with inside knowledge of the al-Kaniyat alleged that a government minister was financially supporting the militia with "huge amounts of money" in 2017 and provided them with 50 armoured vehicles which had arrived through Misrata. The insider as well as other witnesses also named several Libyan businessmen and politicians who had been reportedly financing the al-Kaniyat.

39. The Harouda family (see *infra* paragraph 70) was also targeted for their land and assets. According to several witnesses, the Al-Kani brothers built a mall on the land they had seized from the family. The mall consisted of 150 shops which the al-Kaniyat rented to generate revenue.

40. The al-Kaniyat also controlled Zaitouna University and allegedly built an amusement park in Tarhuna which became a considerable source of income. A witness also alleged that the al-Kaniyat misappropriated social security funds, social solidarity funds for disabled persons and took over the Public Electricity Company for Tarhuna.

41. As the most powerful family in Tarhuna from 2015-2020, the al-Kaniyat led an armed militia of hundreds of heavily armed and well-equipped men and controlled the town's infrastructure, services, businesses, taxes and security. They are reported to have also collected significant income from taxes on human and fuel smuggling across territories under their control.

42. From 2015-2018, the al-Kaniyat, also referred to as the 7th brigade, were aligned with the Tripoli-based Government of National Accord (GNA)<sup>12</sup> from which they allegedly received funding. However, that alliance became more strained as the al-Kaniyat sought control and influence beyond Tarhuna, in Tripoli itself. The 7th brigade launched an assault against Tripoli in September 2018<sup>13</sup> and were allegedly involved in an attack against the National Oil Corporation<sup>14</sup> that same month.

43. In April 2019, as the LNA, the GNA's main rival based in the East, launched an offensive against Tripoli, the al-Kaniyat allied with the LNA and allowed Tarhuna to become LNA's staging ground for the attack. Henceforth, they became the 9th Brigade.

44. In June 2020, the GNA pushed the LNA and the al-Kaniyat out of Tarhuna and regained control of the city.

## **B. Structure of the al-Kaniyat militia**

45. The Kaniyat family includes seven brothers:

- (a) Abdel Khaleq Khalifa Abdel Rahim Al-Shaqaqi (half-brother)
- (b) Mohammad Khalifa Abdel Rahim Al-Shaqaqi (Mohammed Al-Kani) (deceased)
- (c) Ali Khalifa Abdel Rahim Al-Shaqaqi
- (d) Abdel Rahim Khalifa Abdel Rahim Al-Shaqaqi
- (e) Abdel Mohsen Khalifa Abdel Rahim Al-Shaqaqi (deceased)
- (f) Moammar Khalifa Abdel Rahim Al-Shaqaqi
- (g) Abdel Azim Khalifa Abdel Rahim Al-Shaqaqi (deceased)

46. The Mission finds that Abdel Bari Al-Shaqiqi, their cousin, was close to the brothers.

47. Based on the evidence collected, the Mission finds that the al-Kaniyat was a militia group rather than an armed force, regardless of any military alliances that they may have formed. The Mission finds that there was no system of discipline nor any *formal* chain of command. However, the Al-Kani brothers had effective control over members of the militia.

48. Mohammed Al-Kani had a small group of men who were loyal to him and acted as his informants. Mohsen and Abdel Azim had a number of commanders below them, who were taking orders from them, and who themselves also had a number of subordinates. Abdel Rahim and Abdel Bari also had leadership roles and were also giving orders to members of the militia.

49. Their militia was formed from a number of tribes in Tarhuna and numbered in the thousands: they manned checkpoints, guarded prisons, conducted arrests, and carried out orders for execution and other atrocities.

50. The Mission received a report that militia members working for the al-Kaniyat were not allowed to execute or kill persons on their own volition, without receiving an order from

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<sup>12</sup> See S/2021/229, para. 38 and annex 16.

<sup>13</sup> <https://english.aawsat.com/home/article/1382761/7th-brigade-declares-'military-coup'-against-militias-libyan-capital>

<sup>14</sup> <https://www.aljazeera.com/news/2018/9/10/libya-national-oil-corporations-tripoli-offices-attacked>



one of the brothers. The exception was if a victim tried to escape, resist or fight against al-Kaniyat members; then they were allowed to kill them.

51. The Mission also received reports that while the commander of the 9th Brigade was appointed by the LNA, he was in fact taking orders from Mohammed Al-Kani, whom he feared.

52. The Mission finds that Abdel Rahim, Abdel Bari, and Mohammed Al-Kani exercised authority over the Judicial prison. The Mission has identified units of 7-8 militia members who were in control of the Boxes Prison and the Water Factory prison respectively. The Mission was unable to verify those individuals who were in charge of the Central Support Prison.

53. The Mission collected the names of over 100 alleged perpetrators from the 50 testimonies that it gathered in relation to Tarhuna but was only able to verify a fraction of this figure in the available time. Those perpetrators in relation to which the Mission was able to gather a reliable body of evidence are listed in the confidential list referenced in paragraph 189 of this paper.

## **IV. Terror in Tarhuna**

### **A. Introduction**

54. The al-Kaniyat militia ruled Tarhuna through force and terror. According to GASIMP, approximately 300 residents of Tarhuna are reported missing since 2015. According to the TVA, 215 are reported as still missing. Residents reported that the militia often abducted, detained, tortured, killed, and disappeared people, mainly men, who opposed them or who were suspected of doing so. An estimated 271 people were executed by the al-Kaniyat militia, including up to eight women and six children, however, two sources, including an insider, told the Mission that the number of disappeared and killed is likely between 500-600. Some said the militia seized private property and stole their money.

55. Based on available evidence, prior to 4 April 2019 when an agreement had been reached between the al-Kaniyat militia and the forces fighting in south Tripoli, the al-Kaniyat used to publicly execute their victims in order to intimidate the local population. For example, they would bring people blind-folded and handcuffed to the roundabout known as Jazeerat Al-Dawaran in front of the police station in the centre of Tarhuna, where they would execute them. As some families of the victims started to file complaints before the Public Prosecutor, the negative public opinion towards the al-Kaniyat increased and they began hiding their victims' bodies or disposing of them in neighbouring municipalities. Libyans and foreigners were hired to bury the bodies using bulldozers.

56. From the beginning of the non-international armed conflict which opposed GNA to LNA forces in April 2019, the disappearances and executions of civilian women, men and children, including persons with disabilities, increased significantly. The majority of the 119 bodies identified in mass graves in Tarhuna to date are victims of killings that occurred after April 2019. The majority of the crimes recorded by the Mission occurred between April 2019 and June 2020. Further investigations are required to investigate the correlation between the significant quantitative increase in criminality and the occurrence of the non-international armed conflict in Tarhuna.

## B. Victims

### 1. Targeted groups

57. The victims interviewed by the Mission are representative of hundreds of Tarhunans who have been subjected to great suffering and/or killed for being perceived to oppose the Al-Kani brothers and their militia. As indicated by the facts, victims were systematically targeted for being perceived as associated with groups who opposed the al-Kaniyat.

58. Illustrating the level of brutality, one resident of Tarhuna, three of whose relatives had been abducted by the al-Kaniyat militia, told the Mission: “When they capture and kill someone, they also make sure to kill the rest of the men in his family so that they don’t retaliate. After they kill people, they seize their money and property.”

59. According to witnesses, some of the victims of the al-Kaniyat had been civilians while others had a military background. A witness with inside knowledge of the militia stated that the al-Kaniyat were scared that people would inform the authorities in Tripoli about their acts and that they would immediately kill anyone they suspected to do so. The witness further explained that some victims had been killed because the al-Kaniyat wanted to eliminate powerful men, particularly those who had been in the army.

60. According to victims and witnesses, other reasons the al-Kaniyat militia used for selecting their victims depended on contemporary events, their alliances at the relevant time, their family links, or otherwise, grievances of the al-Kaniyat. Such justifications for arrest and later victimization included:

(a) Suspicion of having joined the ‘17 February’ revolution against Qadhafi in 2011:

61. One victim whose family member was abducted and eventually killed stated “I believe that our family was accused of supporting the 17 February Revolution and that we are traitors.” After undergoing extensive torture for months in late 2019, another witness, whose injuries the Mission’s Forensic Doctor examined and found consistent with torture, also told the Mission that he was forced to produce a list of names “associated with the Revolution of 17 February.”<sup>15</sup>

(b) Perceived to be opposed to LNA and LNA-affiliated groups:

62. According to one of the victims interviewed by the Mission, his siblings told him that they had to delete their accounts on Facebook “because the al-Kaniyat were killing people who were against the LNA by checking if they had posted anything against the LNA leadership on social media.” Another victim reported that he “was detained for four months where he was coerced to confess and to give names of those against LNA’s military forces and those affiliated to it, including the al-Kaniyat militia.” Another witness discussed the abduction, torture, and eventual killing of his 14-year-old son because the boy posted anti-Kaniyat messages on his Facebook profile. One victim told the Mission that after being detained and mistreated in an al-Kaniyat detention facility for months, he signed a pledge prior to his release that stated “I pledge before God and before the law that I will not work against the LNA”.

63. Another victim detained and victimized by al-Kaniyat militia members told the Mission, “they took my phone and went through the phone. They could not find anything

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<sup>15</sup> These acts were committed in 2019, after the Al-Kaniyat switched allegiance to the LNA.

that could tie me to the other side, the West. Then they started accusing me of being a traitor for not having joined them, they assumed that I was affiliated with the Misrata militia.”

(c) Actual or perceived wealth:

64. One victim was abducted and escorted to a bank by al-Kaniyat milita members who forced him to withdraw 800,000 dinars that were the proceeds of his company. Another victim who owned a food fertilizer factory was tortured and interrogated about the location of his money. One woman interviewed by the Mission in Tarhuna described how al-Kaniyat forces ransacked the family home and took “everything” they had while also injuring, abducting, and eventually disappearing her son during this raid. His body was later identified in a Tarhuna mass grave. In 2016, al-Kaniyat members abducted and beat a senior official at a Tarhuna savings bank to force him to resign in favour of an al-Kaniyat associate, thus giving the militia control of 65 million Libyan dinars.

(d) Perceived association with the GNA or Tripoli in general:

65. One witness explained to the Mission, for example, that his brother and cousin were arrested (and remain missing) simply because they were born in Tripoli. Another victim told the Mission that he was arrested by al-Kaniyat members and detained in the Central Support prison for “being an informant for Tripoli”. A religious figure who was abducted, detained, and tortured by al-Kaniyat members was confronted by one of the al-Kaniyat commanders who accused him of informing the security apparatus in Tripoli about the militia.

(e) Refusal to join the al-Kaniyat:

66. In one revealing example of the al-Kaniyat’s overall policy to target people from certain groups, an insider witness told the Mission about one victim who was first accused of being a spy and, when no incriminating material was found in his phone, was accused of being a traitor for not having joined them. Another witness explained that one of his family members was abducted at 1 a.m. after he had refused to join the militia. He remains missing, and when asked by a relative, an al-Kaniyat commander denied having any knowledge of his whereabouts. In another case, when a victim was asked for the reasons of his abduction and subsequent victimization in al-Kaniyat detention facilities, the victim told the Mission “the main reason is that my cousins joined the al-Kaniyat militia. They tried to convince us to join them but we refused. They insisted on us participating in their operations. My father did not allow us. He did not want us to go and work for criminals. When we refused several times, they accused us of opposing them. I never worked with al-Kaniyat nor for them.”

(f) Failure to attend the funeral of Mohsen Al-Kani or being perceived to be happy that he was killed:<sup>16</sup>

67. An insider told the Mission that the al-Kaniyat leadership had a “policy of killing. The people who didn’t come to the funeral of Mohsen, they were killed. Also, those who didn’t bring their wife to the funeral, they were killed.” Another witness explained to the Mission when asked why people were killed by al-Kaniyat members: “some were accused of being happy with Mohsen Al-Kani’s death, and some were seen as dangerous.”

(g) Asking al-Kaniyat members about the whereabouts of loved ones:

68. As stated elsewhere, one victim was detained, tortured, and ill-treated for asking after the status of his brother who he suspected was taken by al-Kaniyat members. Specifically, the victim said “I, myself, got arrested by al-Kaniyat after the abduction of my brother in May 2020. When they kill any member of any family, they kill the rest of the family. They arrested me because I was asking about my brother.” In another example, a woman’s husband

<sup>16</sup> Mohsen Al-Kani was killed in hostilities in September 2019.

was abducted in 2020 by al-Kaniyat militia members and was believed to be held at the Judicial Prison. When requesting information from al-Kaniyat officials about his whereabouts, they first denied knowing anything before asking her to come in to talk, after which she disappeared. Her body was found in July 2020 after Tarhuna was liberated.

## **2. Violations committed against women**

69. The Mission has received information that at least eight women were forcibly disappeared and potentially six were confirmed killed. Given a discrepancy between sources, it is unclear if six or eight bodies of women have been identified.<sup>17</sup> Also, according to testimonies collected by the Mission, some witnesses heard the screams of women held in the Judicial Prison that were consistent with being tortured.

70. The Mission documented the killing of four women, who were targeted because of their family links. They include three sisters from the Harouda family and a woman whose husband had been abducted by the al-Kaniyat in April 2020 and December 2019, respectively. According to the information received by the Mission, the Harouda family and the al-Kaniyat had been feuding in relation to land and possessions confiscated by the Al-Kani brothers. As mentioned above, the mall belonging to the Al-Kani brothers at the entrance of Tarhuna was reportedly built on land owned by the Harouda family. Also, the farm where one of the largest mass graves is located, Al Rabt Project, belongs to the Harouda family. It is worth noting that two years prior to the abduction and killing of the three sisters, their two brothers, had been abducted and are still missing. A third brother had fled Tarhuna, joined the GNA forces in Tripoli and had been outspoken against the al-Kaniyat from there. Due to this, according to another sister, the al-Kaniyat had been threatening to “break his back” and targeting his sisters was a way to do so. The fourth woman had been asked by the al-Kaniyat to pick up her husband. When she did as instructed, she was abducted and subsequently killed. The bodies of all four women were found in one of the Tarhuna mass graves (see also *infra* paragraph 138).

71. The period during which the Harouda sisters had been missing were particularly harrowing for the family because of the added fear of sexual violence. The surviving sister shared with the Mission her fear that the sisters had been abused sexually, that the abuses had been filmed and that it would be uploaded on social media or that images would circulate in Tarhuna. She also told the Mission of her subsequent relief that her siblings had been killed on the day of their abduction and that they died ‘clean’ and ‘honourable.’ She added that sexually abusing her sisters would have been the most hurtful way to get back at their brother.

72. Another four female victims documented by the Mission include a woman from the al-Na’ajy tribe, a Moroccan woman who lived in Tarhuna, and a policewoman, all of whom are still missing, as well as another policewoman from Tarhuna who had allegedly joined the al-Kaniyat and whose body was found in a Tarhuna mass grave.

73. When seeking to investigate allegations of sexual violence against women, the Mission was told of reports that one of the brothers, Abdel Rahim Al-Kani, had a room in their mall and that he would threaten women into having sex with him or else he would target their father or brothers. The Mission also heard from the TVA that families would not report missing women especially young women for fear of tarnishing their reputation and suggesting they had gone to the al-Kaniyat voluntarily. The Mission was told that many families with young women left Tarhuna or had their daughters married. These reports were

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<sup>17</sup> GASIMP confirmed that eight bodies of women were identified, whereas the TVA mentioned six.

raised in discussions several times, but the Mission was unable to independently confirm them.

74. The targeting of women in Tarhuna was particularly shocking as it was against cultural, religious and local traditions that retribution would not target women. As exemplified by the killing of the Harouda sisters, in a patriarchal society with strong tribal dynamics such as Tarhuna, targeting women was seen as a way to hurt the men and attack the honour of the whole family. Unlike other situations covered by the Mission where women had been targeted to force their male relatives to surrender, in the case of Tarhuna, women appear to have been targeted to further attack their male relatives.

75. In the context of Libya and in particular in Tarhuna, a small town where patriarchal and tribal mentalities prevail, it is extremely difficult for survivors of sexual violence to come forward. Doing so puts them at risk of rejection and ostracism.

### 3. Violations committed against children

76. In the course of the Mission's investigations in Tarhuna, it was found that children were not spared but also subjected to kidnapping, torture and killing by al-Kaniyat members. While it could not be established whether children, particularly boys, were targeted *as such*, children under the age of 18 have been reportedly killed and abducted by al-Kaniyat members. In 2020, the UN in Libya verified the abduction of three children by al-Kaniyat forces.<sup>18</sup> Amongst the bodies identified so far in Tarhuna's mass graves and at the Tarhuna hospital there are five children.

77. Moreover, children in Tarhuna have witnessed the killing or abduction of their parents and relatives, the burning of houses, and have parents, siblings and family members forcibly disappeared. This has had an enormous impact on the children. Witnesses interviewed by the Mission's Child Advisor consistently and emphatically raised the need for psychosocial support to children, arguing that children in Tarhuna are deeply affected by the traumatic experiences they have gone through

78. In 2015, a 14-year-old boy was abducted from the street in broad daylight as he was walking to a nearby mosque for mid-day prayer. Witnesses recognized one of the kidnappers as a member of the al-Kaniyat militia. The victim was from the al-Na'ajy clan of Tarhuna. In its quest to seize control of the town, the al-Kaniyat militia waged a campaign targeting other clans. They reportedly abducted and killed a large number of al-Na'ajy clan members,<sup>19</sup> and amongst them three of the victim's uncles who had been killed when al-Kaniyat militia attacked their home. The victim's father told the Mission that the boy had reacted angrily when he heard about his uncles' killing and wrote an angry post on his Facebook account condemning the murderers.

79. A witness with inside knowledge of the al-Kaniyat reportedly informed the boy's father that, following abduction, his son was taken before an al-Kaniyat commander who was told who the boy's father and uncles were. The commander then allegedly asked the boy if he had published these posts on Facebook. As the boy did not deny, he ordered his execution. The same witness also admitted to the torture of the boy. Ten days later, the victim's body was found in Tarhuna with signs of torture. His death certificate indicates that the cause of death was a gunshot. The victim's father stated that his brother had worked at the hospital and that he had examined the boy's body at the time and concluded that the boy had been

<sup>18</sup> A/75/873-S/2021/437, para. 100.

<sup>19</sup> In a list of victims reviewed by the Mission, 24 named victims of extrajudicial killings, out of 123, belonged to the al-Na'ajy clan.

brutally tortured. However, the father could not provide the Mission with the medical report as it had allegedly been destroyed.

80. The Mission received information from a number of witnesses about the killing of three children from the Al-Fallous family. The al-Kaniyat reportedly stormed the home of Abdul-Akali Saleh al-Mabrouk Al-Fallous and abducted him together with three of his children, aged 16, 15 and 10 years-old. The remains of the four victims were found in a Tarhuna mass grave. The family was reportedly targeted after a video produced by a group of men in Tripoli affiliated with the GNA (allegedly including a relative of Abdul-Akali Al-Fallous) which contained messages threatening the al-Kaniyat, was published on social media. It was reported that an al-Kaniyat commander ordered the punishment of anyone in Tarhuna related to those who appeared in the video, amongst whom were Abdul-Akali Al-Fallous and his children. According to media reports, 15 members of the al-Kaniyat arrested Abdel and his four sons, after raiding their house in the Na'aja area of Tarhuna and took them to the commander's farm, where the father and children were handcuffed. The al-Kaniyat commander allegedly assassinated them one by one, after insulting them. The youngest son survived.

81. During its visit to Tarhuna, the Mission had intended to interview the child survivor. However, it did not do so for fear of re-traumatisation. The Mission had received reliable information that a few days prior to its scheduled visit, the victim had displayed signs of trauma while speaking to a United Nations official.

82. In June 2020, more than 100 bodies, including women and children, were reportedly found in a hospital in Tarhuna and some of the bodies had signs of torture and execution, according to state officials. In addition, in June 2020, forces affiliated with the GNA stated that a discovered mass grave included the handcuffed body of a 12-year-old girl.

### **C. Abductions and arrests**

83. Evidence gathered by the Mission demonstrates that the pattern of criminal conduct of the al-Kaniyat almost always began with a violent abduction, at a checkpoint, in the street, or in homes.

84. Following their alliance with the LNA, the al-Kaniyat placed checkpoints in and around Tarhuna but also as far afield as between Tripoli and Qasr ben Ghashir (over 60 kilometres away). Many abductions occurred at these checkpoints. Victims would be stopped by individuals they identified as members of the al-Kaniyat and asked to hand over their mobile phones and their identification cards for inspection. The phones would be checked for any anti-LNA social media posts. If such posts were found, the individuals would be taken into custody or killed immediately. The same would happen if their identification cards indicated that they were residents of Tripoli or other areas which had been viewed with suspicion by the militia. One witness whose relatives had been stopped at such a checkpoint said that when the militia saw that her brother and cousin were from Tripoli, they confiscated their phones, asked them to get out of the car, put them in a military car and drove them to the Judicial Prison, located in Tarhuna.

85. In addition to arrests at checkpoints, armed members of al-Kaniyat also conducted targeted operations to apprehend and detain people in Tarhuna. Militia members in groups that varied in size from two or three to as many as 60 or more conducted such operations in the victims' homes, at their workplace, at family gatherings or on the street. One victim said that about 20 to 30 men and 14 vehicles surrounded their homes during one of these operations. Another victim described how more than 60 armed men attacked his extended family while they were attending a funeral and the noon prayer.

86. Once found, the victim(s) would be abused and taken in vehicles bearing al-Kaniyat insignia or similar identification. In one case, a witness reported that his brothers and friends had been forcibly dragged out of their house and shoved into vehicles by al-Kaniyat militia members who were yelling at them: “you are traitors, you are against the army.” Another victim described how a member of the militia rode in the back seat, pointing a weapon at his head and threatening to blow it off if he made any movement.

87. During arrest, victims were beaten with hard objects, such as the butt of a gun, and were often handcuffed, blindfolded, and taken in various vehicles, some of which bore the logos of al-Kaniyat, ‘9th Brigade’ or ‘Mohsen Al-Kani’. For example, a victim recounted that a militia member forced him to get out of the house, tied his hands with a piece of cloth, cursed him and hit him with the butt of the gun. The victim further stated that the militia put him in the back seat of a white Toyota 27 in between two militia members who said to him: ‘You are traitors, you betray Tarhuna, you will sell it to Misrata and the Turks.’ The victim also explained that after they had brought him to the ‘Water Factory’ in Tarhuna (see *infra* paragraph 99), they insulted his parents.

88. According to witness testimonies, none of the victims were accused of, or charged with, a criminal offence nor granted any form of due process.

#### **D. Places of Detention**

89. The al-Kaniyat and their militia imprisoned those they did not immediately kill, including in including abandoned houses and farms, and subjected them to physical and mental torture. The Mission documented four facilities in Tarhuna that the al-Kaniyat used as prisons: the Judicial Prison; the Boxes Prison; the Central Support Prison; and the Water Factory, considered a place of secret detention.

90. Before being released or killed, detainees were held in arbitrary detention for various periods of time, ranging from a few days to several months, according to those interviewed by the Mission.

91. The majority of victims were taken to the Judicial Police which consisted of multiple cells, of different sizes, used for different purposes. Some victims referred to the cells as follows:

- The Tahafuz cell, in which no one can visit the detainees, where they were waiting to die;
- The ‘camera cell’, which contained a surveillance camera;
- The ‘sauna cell’ which had no window, was covered with ceramic tiles and in which it was very hard to breathe;
- The ‘military cell’;
- The ‘convicted cell’;
- The ‘balanco or torture cell’, in which, a pulley device (see *infra* paragraph 104), electricity shocks and electric cables were used for torture.

92. Cells were overcrowded with, at times, 35 detainees in a 5x7m space. Some cells had toilets and, at times, due to a lack of water, the prisoners would drink toilet water. Food was provided, but it was of poor quality and quantity. The prisoners were sleeping on the floor.

93. One of the prisoners, a doctor by profession, was ordered by the armed group to treat patients and provide them with some medication. However, no treatment was provided for injuries sustained as a result of the torture. A victim reported that during detention, he

suffered from wounds from torture but did not receive any medical examination or treatment inside the prison. He also reported that many detainees suffered from scabies and skin ulcers as a result of torture.

94. The Mission visited the Boxes Prison during its missions in July 2021 and May 2022. This site was in an agricultural laboratory which had not been in use from 2011 until 2019 when the al-Kaniyat began using it as a detention facility. According to victims, it was called the Boxes Prison because it had nine small box-like iron enclosures in which the detainees were kept. The Mission's Forensic Doctor confirmed the existence of the boxes and measured them at 0.8x0.8m.



*Photos taken by the Mission during site visits to the Boxes Prison showing the 0.8x0.8m boxes-like enclosures*

95. Witnesses also stated that fires would be built on top of these enclosures. According to a witness, as many as three or four persons were placed in each oven that were used every few days for interrogations. Given that these interrogations were mostly conducted at night, the victims tried to sleep during the day. Another said that they would sometimes place two persons in each cell so that they could not breathe. One male victim, aged 28, said that he “had been locked in an oven” and told the Mission: “I saw hell in my own eyes. I thought I was going to die. I could not stand. They were interrogating me every day.” Prisoners were given a small piece of bread per day, a bottle of water to drink from and another bottle in which to urinate. Some were not allowed to go to the toilet, while others were allowed every three days and whipped if they took longer than the two minutes allowed.

96. In addition to confirming the existence of the boxes during the site visit, the Mission's Forensic Doctor observed the presence of a massive amount of ash on the boxes and on the floor. According to his analysis, it did not appear that the ash had been transferred from another place, most notably because of the existence of soot on the walls and the ceiling as well as partially burned wood pieces on the floor.



97. The Mission also visited the Central Support Prison which was a government facility located next to the Judicial Prison, and close to the Boxes Prison, and had consisted of 12-16 cells and rooms. The al-Kaniyat purportedly began using it as a detention facility as of 2015. The detainees slept on the floor without mattresses. The cells were overcrowded, sometimes with as many as 20-25 persons in one cell. Food was very scarce. For example, 20 people would share one dish which would normally feed no more than three. The water was not potable.

98. One of the witnesses stated that some detainees were from Tarhuna, while others were from Souk al Khamis, al Sayeh, Tajourah, al Erban, Massalata and Tripoli, towns and cities which were of strategic importance to the al-Kaniyat militia.

99. According to witnesses, the al-Kaniyat killed Basset Bou Naamah and took over his Water Factory in Tarhuna to which they transferred one of their headquarters, and in which they created another prison. The Water Factory is located 200 metres away from the University of Tarhuna.

100. This prison also had boxes but was different from the agriculture site Boxes Prison. Several witnesses described that at the Water Factory, prisoners were kept in two hangars or storage areas, 20x5m, one of which contained five 1x1m boxes or cells in which it was impossible to stand up. There were no toilets and the prisoners had to urinate into small water bottles. They were given expired dry food twice a day and despite some reporting stomach pain, were not provided with any medical assistance or medication. They slept seated, on the floor or in the cold, with rain leaking from the roof. A victim recounted that when he had asked an al-Kaniyat militia member for water, the man deliberately spilled the water on the floor and told him to lick it off the floor, like an animal.

## **E. Torture**

101. While in detention, victims were subjected to various methods of torture. A victim stated that the al-Kaniyat treated their prisoners like “insects”.

102. Based on interviews the Mission conducted with victims and witnesses, torture would last from 15 minutes to three hours and the methods included: severe beatings by plastic pipes, electric cables, iron sticks, butts of rifles and guns, and other blunt objects which resulted in broken noses and teeth.

103. For example, a victim described that he had been taken outside, beaten all over his body and head with an iron stick and a plastic pipe, then left to lie handcuffed on the ground in the sun. Another victim described witnessing someone being beaten and threatened with death and then taken to a room where he was hung on a wall with metal chains while the perpetrators took turns beating him with a plastic hose. A witness described seeing someone who had been tortured, with all his nails torn out. The man’s clothes were stained with blood and he was in a state of shock – he could not move or speak. According to the witness, he had been hit on his hands, face, feet and had bruises all over the body. The perpetrators had used a Kalashnikov bayonet to torture him and his hands and feet had been pierced.

104. Several victims described the use of a ‘balanco’ at the Judicial Prison, Water Factory and Boxes Prison. The ‘balanco’ is described as a pulley system which would be used to suspend detainees from the ceiling or a high wall whereby the victim would be tied by the wrists and suspended in stress positions (often with their arms pulled behind their backs) for extended periods of time during which they were also beaten. They would then be suddenly released, causing injury, pain and rupture in the wrist area. In at least one instance, a victim claimed that his brother had died in a cell next to him as a consequence of ‘balanco’ torture after he had been screaming in pain all night.

105. Several victims also described the ‘falaqa’ torture method to which they had been exposed. Foot whipping, or falaqa, is a method of inflicting pain and humiliation by administering a beating on the soles of a person's bare feet. Unlike most types of flogging, it is used more to cause pain than actual injury to the victim.

106. In the Boxes Prison, the detainees were also tortured with extreme heat (see supra paragraph 95).

107. According to the information gathered by the Mission, other methods of torture included being held incommunicado from several days to several weeks; being held in solitary confinement, in one case for six months; being burned and tortured with electric cables; dripping a burning substance on the victim's body; hooding; torturing with a drilling machine; limiting access to water, food and toilets; death threats; witnessing the killing of other detainees; being wounded by gunfire; and sleep deprivation.

108. The Mission's Forensic Doctor collected and evaluated information on these methods. He specifically corroborated the allegations of torture by drilling in relation to two victims and the allegation of wounding by gunfire in relation to another.

109. Although underreported for a variety of reasons, available information suggests that rape and other forms of sexual violence occurred in al-Kaniyat prisons. Sexual violence in detention included forced nudity, beating of, and applying electricity to, sexual organs, cutting off the genitals, sexual torture and rape. A victim, who was a religious figure, told the Mission that he had been photographed naked and that this had been done with the threat of circulating the images in Tarhuna. He also said that he was later raped during his interrogation with an object which he believed to have been a wooden stick. He added that he had fallen unconscious several times and felt “from time-to-time sharp prickles on the anus. I don't know if it was sticks or other sharp objects”. A medical report provided to the Mission by the witness also showed that he sustained injuries in the anal region consistent with being tortured.

110. The impact of sexual violence goes far beyond the physical act and the mere suspicion that someone, whether male or female, has been subjected to sexual violence leads to stigmatization.

## **F. Disappearances**

111. While in captivity, victims were provided with no reasons for their detention nor access to any legal assistance and were held incommunicado. Families of those detained never received any official notification or other information regarding the circumstances of arrest or reasons for detention from the al-Kaniyat militia or any governmental authorities. In some cases, when approached by the family members of a missing person, members of the militia verbally denied any knowledge of the person's arrest, abduction, or detention. In other cases, al-Kaniyat leaders refused to answer the family members' phone calls, threatened them if they continued to ask questions, ignored them and, in some cases, tortured or killed them. According to the TVA, around 215 people are still missing, some of them since 2016.

112. One victim recounted her family's efforts to find her brother and cousin as follows:

In December 2019, we went to the Judicial Prison in Tarhuna, to the Central Support Prison and to the military police asking about my brother and cousin's whereabouts. The military police explained that as they were not military, they would not be held by them. They all said they did not know anything. We did not enter the prisons. We stayed outside. At the Judicial Prison, two armed men were standing at the gate. They were very rude with us. At the Central Support Prison, there was a man standing behind the gate. We did not even see his face. He said that they were not in that prison.

On that day, we went to see Mohammed Al-Kani who was with his guards. They were all armed. My mother wanted to speak with Mohammed Al-Kani. He told her to talk to his guard, who introduced himself and gave my mother his number. He told her that he will check and will come back to her. My mother called him, he told her to call him later. She called him three times and then at the last call, he told her rudely that she was annoying him. My mother did not call him back.

113. Another victim described how the morning after their relative's disappearance, family members went to the checkpoint to look for him and asked the military police about his whereabouts. One of the officers confirmed that the relative had been arrested the previous day but stated that he did not know where the detainee was taken. They subsequently heard from others that the victim had been killed but, at the time of writing, the family has still not been able to find the body. Several women interviewed by the Mission also mentioned going to the mall belonging to the Al-Kani brothers to find out about their missing relatives. Many still had hope that their missing sons were in jail in the East or in Tripoli. Some women even travelled to Benghazi to find out about their loved ones who they believed to be held in the East.

114. Another victim described multiple efforts over an extended period of time to find out what happened to his two brothers who had been abducted by the al-Kaniyat at a checkpoint. Despite death threats, the victim inquired at several checkpoints and with both State and non-State authorities. Together with his mother, he travelled to locations outside of Tarhuna in an attempt to find any information about his brothers. Following the end of the conflict in Tarhuna, they learned, unofficially, that his brothers had been tortured and killed. One of the brothers was found in a mass grave but, at the time of writing, the search for the other continues.

115. Another family told the Mission that they had been provided false information that led them to believe that their relatives might still be alive and that they paid a lot of money to receive information about the victims' whereabouts. They had also been given assurances by senior officials in Benghazi that their relatives would be released. The victims were subsequently found in mass graves. It has been established that they had been killed on the same day of their abduction.

116. A witness with inside knowledge of the al-Kaniyat told the Mission that the militia did not want to give the bodies to their relatives and families, as they wanted revenge. The witness quoted an al-Kaniyat leader as saying: "I want families of the victims to search for 50 years and to never find their sons and loved ones."

117. Most families did not request information about their abducted family members out of fear for their safety. One victim was arrested, detained for a month and tortured solely for asking about the whereabouts of his brother. Several witnesses told the Mission that the families were too afraid to inquire about their missing relatives or file a complaint because al-Kaniyat controlled everything, including the police. Some even feared that they would have been killed if they had tried to launch an investigation in Tripoli because the al-Kaniyat had informants there as well.

118. A mother whose two younger sons had been abducted by one of the al-Kaniyat senior members from their beds at home in the middle of the night in April 2020 explained that her sons are still missing. She told the Mission that she had lodged a complaint but has not heard back, that she believes they are still in prison and that she continues to look for them.

119. Another victim, who was detained himself and whose five brothers are still missing after the mass killings that followed Mohsen Al-Kani's death in September 2019, told the Mission that out of fear he did not dare ask about their whereabouts or whether they were still alive. He only felt safe enough to file a complaint and take a DNA test until after Tarhuna was liberated; he still has not received any information about his brothers' whereabouts.

120. Victims held at the Judicial Prison and the Boxes Prison told the Mission that the prisoners were not allowed to receive visits or communicate with their families in any way, and that when the family asked about them, they did not receive an answer. Additionally, one of the prisoners had been told that he did not have any rights and that he was going to die in detention.

121. Another victim explained that her husband had been arrested at a checkpoint. When he did not return home the following day, she went to the checkpoint to look for him and asked about him at a nearby military police station. One of the officers confirmed that her husband had been arrested the day before but said that he did not know where he was taken. She also said that she did not know whether he was dead or alive for two months and that later she was told in an anonymous phone call that he had actually been killed immediately and thrown into the desert.

122. Another witness told the Mission that the al-Kaniyat denied any knowledge of the whereabouts of his nephew whose body was later discovered in the Gabina mass grave.

## **G. Killings**

123. Since they began establishing their rule over the city, the al-Kaniyat regularly killed people in Tarhuna. People were killed in the street, in their homes, during family gatherings (such as funerals), at checkpoints and in prisons.

124. In some cases, many members of the same family were eliminated as they opposed the al-Kaniyat activities in Tarhuna, including one family that was killed because they refused to have one female family member in her early twenties marry one of the Al-Kani brothers. For example, the Mission received information regarding the killings of at least 13 members of the Al-Awashir family, at least 13 members of the Abu-Klish family, and at least seven members of the Said Abdel Qader family. Killing practically entire families appears to have been a way for the al-Kaniyat to ensure no one would take revenge.

125. More than a dozen victims described how their relatives, cell mates or others were killed while in detention. Some died as the consequence of torture. One victim stated that in the Boxes Prison, some days four to six people would get killed and some days 16. In the Judicial Prison, one victim saw the execution of up to ten detainees and another witnessed the killing of six.

126. Others recounted killings during the raids on their homes or abductions at checkpoints or in the street. For example, at a checkpoint, a victim witnessed the torture and murder of another victim whose stomach, as well as hands and feet were pierced with a Kalashnikov bayonet. It is suspected that he was targeted because he was working for the government in Tripoli. Similarly, after disappearing one family member in September 2019 and shooting another in the streets of Tarhuna with 30 bullets in December 2019, al-Kaniyat members attacked the family at the latter's funeral, abducting and killing more relatives. When asked why they were being targeted, one of the victims explained that it was because his uncle was an important merchant, who owned a gas station and real estate and had supported the 17 February revolution.

127. Numerous victims also recounted two mass killings – one in the aftermath of the killing of Mohsen Al-Kani in September 2019 and the other in the aftermath of the injury of Abdel Rahim Al-Kani in December 2019, which both occurred during hostilities with the GNA.

128. According to several victims, members of the al-Kaniyat militia killed detainees in various prisons, as well as non-detainees, all out of revenge for the death of Mohsen Al-Kani who died on or about 13 September 2019. The militia gathered people from the prisons and

other locations and killed them *en masse*. One of the victims was later found in a mass grave. The numbers of those killed are estimated by witnesses between 35-70.

129. According to several victims, the Judicial Prison and the Central Support Prison were the site of what some refer to as the ‘21 December 2019 massacre’ when a large group of people was killed in revenge for the injury of Abdel Rahim Al-Kani in an attack by the GNA forces the previous day. Estimates from witnesses place the number of people executed between 30 to above 40.

130. A victim recalled the mass killing as follows:

At the Judicial Prison, I remember the night of 21 December 2019. The night where they killed tens and tens of detainees following the injury of Abdel Rahim Al-Kani (...) Before the evening prayers, an inmate noticed something unusual. He was looking through the small window and saw a group of armed men spreading around the prison. Few seconds later, we heard intensive shooting in the air and the prison became chaotic. The armed men were calling each other through their walkie-talkie and detainees were screaming. I also heard fire shooting in the Central support Prison which was located very close to the Judicial Prison. Few minutes later, three unmasked men came to our cell and picked seven detainees. They dragged them out of the cell. Then we heard fire shooting in the prison yard. We learned that the seven detainees were executed. I was very scared, and I began to pray. On the next day, another detainee was brought to our cell (...) He had been in a different cell on the night of the massacre. He told us that he had seen a group of masked men dragging tens of detainees to the prison yard, handcuffing them and placing plastic bags on their heads before executing them. They shot them dead.

131. Other non-detainees were also killed in the aftermath of the attack against Abdel Rahim Al-Kani. For example, a victim recounted that the al-Kaniyat had arrested many people that day, and that his two brothers were taken from their home the same evening. One of the brothers was killed while the other managed to escape. The body of the victim was identified in the Harouda farm mass grave site in September 2020.

132. Another man had been killed reportedly for no reason other than being in the street when al-Kaniyat members passed by them. At his funeral, the mourners were attacked by around 30 vehicles with many masked militia members who shot at the family, yelling: ‘you are a rat, you deserve it.’ Al-Kaniyat members also arrested and took away numerous family members, some of whom were later found and identified in Tarhuna mass graves.

## H. Mass graves

133. There is no definition under international law of ‘mass graves.’ The Mission adopts the definition as contained in the Bournemouth Protocol, which states: ‘[t]he term mass grave is used here to mean ‘a site or defined area containing a multitude (more than one) of buried, submerged or surface scattered human remains (including skeletonised, commingled and fragmented remains), where the circumstances surrounding the death and/or the body-disposal method warrant an investigation as to their lawfulness’<sup>20</sup> such as indications of extrajudicial, summary or arbitrary executions.<sup>21</sup>

<sup>20</sup> The Bournemouth Protocol on Mass Grave Protection and Investigation, 2020, p. 4.

<sup>21</sup> See General Assembly resolution 60/147; E/CN.4/2005/102/Add.1; Minnesota Protocol on the Investigation of Potentially Unlawful Death (2016), Revised, Glossary, “Commingled remains”.

134. Since al-Kaniyat's departure from the city in June 2020, the Libyan authorities, with international assistance, have located four mass grave sites and several individual graves, from which they recovered 247 bodies, 138 of which have thus far been positively identified, including three children and eight women.<sup>22</sup>

135. The Mission's Forensic Doctor conducted an analysis of the findings as well as a site visit and concurred that the position of the bodies indicates that they had been dumped randomly rather than laid to rest in a proper burial process. Furthermore, according to GASIMP, all recovered bodies had gunshot wounds to either the back of the head or chest, and over 90% of them were bound by the hands and blindfolded. Five cases of torture prior to death were documented by the Mission's Forensic Doctor.

136. In May 2022, the Mission visited the four mass grave sites, which are referred to as, the Landfill; Al Rabt Project; Gabina; and 5Km Agricultural site.

137. The Landfill is more than 100 hectares in size. Thus far, one hectare has been explored and five mass and two individual graves have been found, from which 34 bodies were recovered. Resources are required to continue investigating this area.<sup>23</sup>

138. At Al Rabt Project, an additional 20 other body parts were also recovered. In one mass grave at this location, four bodies of women were found together. In another mass grave, three women (the Harouda sisters) and a man were discovered. The largest mass grave found here included 11 bodies with each body still handcuffed with gunshot wounds to the back of the head or the chest.<sup>24</sup>

139. At 5Km Agricultural site, 10 mass and nine individual graves were found from which 54 bodies were recovered. The vast majority of the bodies were still handcuffed with gunshot wounds to the back of the head or the chest. Some were still blindfolded. It would also appear that the perpetrators mixed the earth with barley seeds in an apparent attempt to conceal the location.<sup>25</sup>

140. At the Gabina site, two mass graves and nine individual graves were uncovered from which 16 bodies were recovered. The majority of the bodies were still handcuffed with gunshot wounds to the back of the head or the chest. Some were still blindfolded. Four individuals were found with their car license plates. The licence plate numbers facilitated the search for the victims' families. The victims' identity was then also confirmed through DNA testing and the families confirmed that the victims had been kidnapped by members of the al-Kaniyat militia who had also confiscated the victims' cars.<sup>26</sup>

141. The bodies of nine members of the Jaballah family who had been abducted on 21 December 2019 were found in a mass grave in Tarhuna on 31 January 2021. One of them still had cigarettes and a lighter in his pocket and another had his oxygen inhaler; they were also wearing the same socks and shoes as on the day of their abduction, indicating that they were likely killed on the same day.

142. According to insider knowledge, there might still be up to 100 as of yet undiscovered mass graves.

#### ***Findings of new Mass Graves in Tarhuna***

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<sup>22</sup> Confidential report of the Mission's Forensic Doctor.

<sup>23</sup> Ibid.

<sup>24</sup> Ibid.

<sup>25</sup> Ibid.

<sup>26</sup> Ibid.

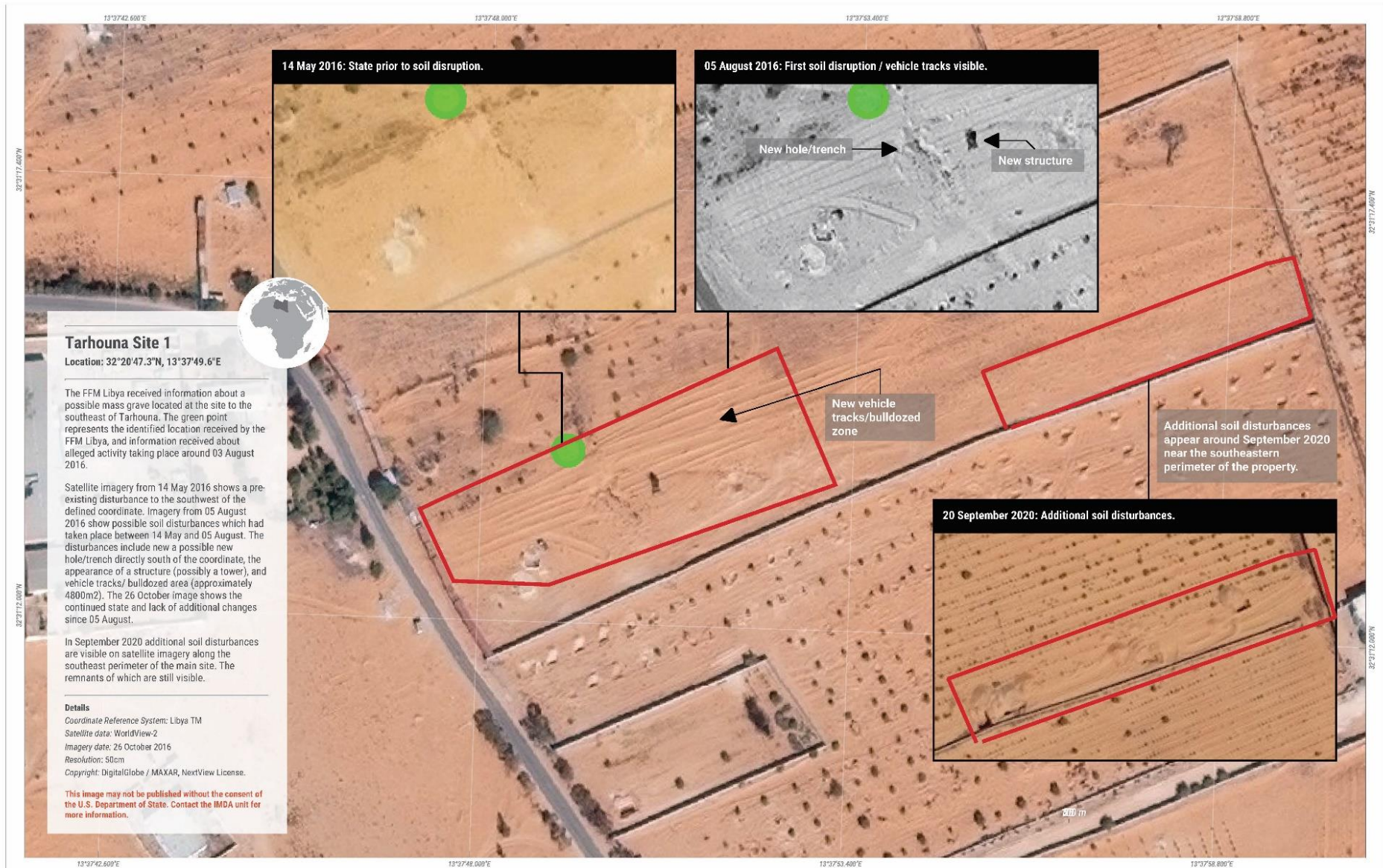
143. In this regard, the Mission identified three locations that may represent some of these undiscovered mass graves. While the Mission preserves evidence of its findings of new mass graves in Tarhuna, further measures to take in this regard are at the disposal of the Libyan authorities and the victims so that the truth of what is inside those probable mass graves is uncovered. To identify whether these places were mass graves, the Mission first used sources to locate the best possible GPS coordinates and compared those coordinates with relevant existing evidence about known criminality nearby. Based on this information, the Mission then requested assistance from UNOSAT to provide imagery and analysis of these locations over the relevant timeframe. The resulting imagery and analysis (see below) provided evidence that all three sites experienced soil disturbances consistent with mass graves, such as the digging of holes, movement of heavy machinery, and construction of buildings nearby. In one of these sites, the imagery of a location which is within a short walking distance to the Judicial Prison shows the clear expansion of holes and mounds that are consistent with a mass grave. The Mission is ready to share its technical knowledge and provide its findings to the Libyan authorities in order to excavate these new locations and to uncover the truth about any possible buried bodies.



## Libya: Tarhouna Site 1

Independent Fact-Finding Mission on Libya | Imagery date: 26 October 2016 10:01 UTC Location: 32°20'37.7"N, 13°38'46.3"E

June 2022





## Libya: Tarhouna Site 2

Independent Fact-Finding Mission on Libya | Imagery date: 07 March 2020 09:50 UTC | Location: 32°20'47.3"N, 13°37'49.6"E

June 2022





## Libya: Tarhouna Site 3

Independent Fact-Finding Mission on Libya | Imagery date: 28 October 2019 10:14 UTC Location: 32°23'12.2"N 13°38'32.0"E

June 2022



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## V. Crimes against Humanity

### A. Introduction

144. The Mission has approached the accountability aspect of its mandate in recognition of the fact that it is neither a judicial body nor a prosecutor. It cannot make final determinations of individual criminal responsibility. It can however determine whether its findings establish reasonable grounds that crimes against humanity have been committed, so as to merit a criminal investigation by a competent national or international organ of justice, and preserve the relevant evidence. The Mission's findings must be understood as being on the basis of the 'reasonable grounds' standard of proof even when the full expression is not necessarily expressed throughout the text.

145. Applied to crimes against humanity, the 'reasonable grounds' standard of proof is applied to making factual determinations on individual cases, incidents and patterns of conduct which then provide the basis for their legal qualification as crimes against humanity. In order to identify perpetrators, the Mission decided that there must be a reliable body of material consistent with other verified information, which tends to show that a person may reasonably be suspected of being involved in the commission of a crime.

146. In this paper, the Mission has focused its analysis of the crimes in Tarhuna in terms of crimes against humanity, although criminal conduct can be both a crime against humanity and a war crime. For conduct to be classified as a war crime it is not required by law that the conduct be part of a widespread or systematic attack against a civilian population but a nexus to an armed conflict is required. Since crimes against humanity encapsulate gross violations of international human rights law, and can be committed at all times, whether during armed conflict or in peacetime, the violations are not considered explicitly under the framework of international human right law. However, relevant human rights jurisprudence is applicable in the analysis of the underlying acts.

### B. Widespread and Systematic Attack on a Civilian Population

147. Based on the body of testimony and information received, the Mission finds reasonable grounds to believe that members of the al-Kaniyat militia committed crimes against humanity against a civilian population in Tarhuna.

148. The Mission finds that there was an attack, consisting of a course of conduct based on the fulfilment of the *actus reus* requirements of the underlying acts of murder, extermination, rape, imprisonment, torture, persecution on political grounds, enforced disappearance and other inhumane acts by the al-Kaniyat militia against hundreds of civilians in Tarhuna that began in 2014 and continued until 2020. In line with the Mission's temporal mandate, the report and this analysis focuses on criminal conduct occurring from the beginning of 2016 until June 2020 specifically.

149. As detailed in this report, those targeted in Tarhuna, and victims of murder, extermination, torture, imprisonment, persecution and enforced disappearance, were predominantly civilians and included the elderly, persons with disabilities, women, and children. Although not documented by the Mission, among the hundreds of victims of the crimes against humanity committed by the al-Kaniyat, there is a possibility that some may have been GNA combatants from the 2019-2020 non-international armed conflict that took place between the GNA and the LNA in and around southern Tripoli and down to Tarhuna, who were no longer taking part in hostilities when the crimes were perpetrated because they

had been placed hors de combat, in particular, due to their wounds and/or having been detained.

150. There are reasonable grounds to believe that the attack was both widespread and systematic. As outlined in this report, there is evidence of a policy by the Al-Kaniyat and associated armed groups to regularly arrest and detain without any form of due process members of the population of Tarhuna, abduct them from their homes and from the street, to imprison them without due process, often secretly, to torture and murder them in detention, to execute them, including in public, and to exterminate dozens of people at once, including entire families and prison populations. The large number of victims, numbering in the hundreds, as detailed in this report, within a small geographical area, indicate that this attack can be described as ‘widespread’.

151. Although, it is not necessary to *also* conclude that the attack was systematic, there are reasonable grounds to believe that the ‘systematic’ requirement is satisfied. The Mission considers that the multitude of underlying acts committed by the al-Kaniyat militia considered in this report were committed pursuant to an organizational policy, such that they could cumulatively be described as a deliberate campaign of terror, control, punishment and oppression of the civilian population of Tarhuna. The evidence indicates a clear and consistent pattern of similar, large-scale, and interlinked criminal conduct, based on the same *modus operandi*, and consisting primarily of systematic abductions, arbitrary detention, enforced disappearance, torture, and executions at point blank range, often in broad daylight and in public. This criminal conduct is in line with an underlying political objective to persecute and punish opposition and silence critics, to consolidate power and wealth, including by eliminating actual or perceived political opponents, actual and perceived supporters of the February 17 revolution, wealthy individuals (after which they appropriated their land and assets), and critics of the Al-Kani family.

152. From April 2019 until June 2020, when they were integrated into LNA forces fighting against the GNA, they also systematically eliminated individuals as revenge for al-Kani deaths caused by the GNA, critics of the war on Tripoli, critics of the LNA from towns or cities known to support the GNA, perceived supporters of the GNA, and those who refused to join the ranks of their militia. Acts of murder, imprisonment and torture committed in that time period in relation to these victims may also amount to war crimes.

153. Thus, the al-Kaniyat militia exerted absolute dominance over the town, through which it generated and perpetuated a climate of lawlessness, fear and terror. This fostered an environment for the commission of further crimes with total impunity, and with the imputed knowledge of State authorities. As described in this paper, organized efforts were made to conceal the crimes committed by burying corpses in mass graves, which were only discovered following the end of the conflict in June 2020, when the LNA, the al-Kaniyat militia and associated armed groups withdrew to the east of the country.

## **C. Underlying Acts**

### **1. Imprisonment or other severe deprivation of physical liberty<sup>27</sup>**

154. The Mission finds that detainees of all four prisons investigated in this report – the Judicial Prison (Al Qadaiyah), the Boxes Prison, the Water Factory, and the Central Support Prison - are victims of the crime of imprisonment. Suspects of what the al-Kaniyat would consider ‘wrongs’ were violently abducted, from a checkpoint, a street, or their homes, and

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<sup>27</sup> Rome Statute of the International Criminal Court, Article 7(1)(e).

brought to a detention facility. Often, victims could only guess the reason for their abduction from the line of interrogation.

155. As the al-Kaniyat operated with disregard for the law, and with total impunity, detainees were never brought before a judge in accordance with article 9(3) and (4) of the International Covenant on Civil and Political Rights (ICCPR) nor were they ever charged, convicted or sentenced to imprisonment, following a fair and public hearing, by a competent, independent and impartial tribunal established by law as would be required by article 14(1) of the ICCPR.

156. Victims were not imprisoned for reasons that conform to international human rights law. As detailed in this paper, if the al-Kaniyat did not immediately execute a victim following their abduction, they detained victims in the Judicial Prison and other prisons under their control without charge or any form of due process. As detailed above, victims were not accused of any criminal wrongdoing, but were imprisoned arbitrarily, based on perceived affiliations, family links, political opinions or allegiances, opposition to the al-Kaniyat, or even their wealth.

157. Victims told the Mission that they had been held incommunicado and subjected to cruel and inhuman treatment as a result of the conditions of detention. Many were severely tortured, in violation of Articles 1 and 2 of the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention Against Torture), during their confinement and languished for several months as disappeared persons before they were ultimately taken out and executed.

158. Given the violent nature of the abductions and the lack of due process, the conditions of detention, and the atrocities perpetrated in places of detention, the perpetrators involved in arbitrary arrest and detention must have known that those detained were civilians, that they were arrested and detained without due process of law, that they were subjected to inhumane conditions of detention, and in most cases, subjected to torture and ultimately executed.

## **2. Torture<sup>28</sup> and other inhumane acts<sup>29</sup>**

159. Torture, as defined under international criminal law and international human rights law, was an established feature of the prisons under the control of the al-Kaniyat. The instances of torture recounted in this paper have taken place in detention facilities where the victims have been in the custody, and under the control, of armed prison guards. The Mission finds that the same forms of physical and psychological torture were used systematically in the four prisons to punish, humiliate and intimidate victims held largely on discriminatory political grounds. The Mission has documented a wide range of methods of torture; in many cases, several of these methods were employed against a single victim.

160. As detailed in Section IV.E above, daily, constant beatings, stabbings, balanco suspension for hours, which often resulted in broken bones, drilling into limbs, and other atrocities, all amount to severe physical pain and suffering and mental anguish amounting to torture. The Mission also documented one case of rape in detention, amounting to torture.

161. The Mission also considers that the cumulative effect of the circumstances and conditions in the places of detention also amounted to inhuman and degrading treatment and torture. In the Boxes Prison in particular, the compounding effect of compelling vulnerable persons to live 24 hours a day, incommunicado, in claustrophobic cells similar to boxes - that

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<sup>28</sup> Rome Statute of the International Criminal Court, Article 7(1)(f))

<sup>29</sup> Rome Statute, Article 7(1)(k); Convention Against Torture, Article 1.

sometimes were transformed into hot ovens - in darkness, with inadequate food and water, the inability to exercise, and with the certainty, in most cases, of ultimate execution, in itself amounts to torture.

162. The inhumanity of the overall situation in each of the prisons was particularly shaped by the cumulative effect of being held in unsanitary conditions, with scarce food and water, while hearing the screams and cries of torture and the executions of fellow detainees, witnessing deaths in custody, and being threatened with execution, ultimately amounting to deliberate and severe psychological torture.

163. Given that this treatment and these acts were inflicted upon these victims with the intent to punish, some of these acts also amount to war crimes, where the victims were opponents of the LNA, or GNA supporters (actual or perceived) during the April 2019-June 2020 non-international armed conflict.

164. Furthermore, most of the victims inside the prisons were detained as forcibly disappeared persons, isolated from their families for long periods. This is also a violation of the right to humane conditions of detention and the prohibition of torture, with the victims of the latter being both the disappeared person and their relatives. With respect to the latter, the uncertainty about the fate of their loved ones is a source of continued anguish and anxiety, which results from the refusal to acknowledge the deprivation of freedom or to give information about the whereabouts of these persons. Not knowing whether the disappeared is still alive, and if so in what state of health and under which conditions, causes a level of mental distress and suffering so severe which, in numerous cases documented by the Mission, also rises to the level of torture as a crime against humanity.

165. As to the mental element, given the nature of the acts described in this paper, it is implausible that the perpetrators did not intend to inflict pain or suffering. It is considered that the infliction was intentional, and the mental element satisfied.

### **3. Extermination<sup>30</sup> and Murder<sup>31</sup>**

166. The elements of murder and extermination as crimes against humanity are identical save for the ‘mass killing’ requirement. Taken by themselves, the individual killings detailed in Section IV.G above do not meet the “large scale” requirement. However, cumulatively, the individual or smaller-scale executions for which the al-Kaniyat militia was responsible, occurred on a large scale, even though they took place over several years, and amount to extermination. All of the killings documented by the Mission were perpetrated in the same town, in similar circumstances, by the same perpetrators. As detailed, the victims were all civilians, targeted for the same reasons, not in their individual capacity but as part of a policy to eliminate all opposition to the al-Kaniyat.

167. The massacres of families and prisoner populations that occurred in a single transaction, as detailed above, clearly meet the ‘large scale’ requirement. Furthermore, the murders carried out in revenge in relation to GNA attacks during the non-international armed conflict which occurred between April 2019 and June 2020 may also amount to war crimes.

168. Evidence gathered by the Mission, as detailed above in paragraph 54, indicates that approximately 271 individuals were exterminated by members of the al-Kaniyat between 2016 and 2020. The number of people still listed as missing from Tarhuna provides further

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<sup>30</sup> Rome Statute, Article 7(1)(b).

<sup>31</sup> Rome Statute, Article 7(1)(a).



guidance as to the likely number of victims executed. A minimum of 215 persons from Tarhuna are still listed as missing, based on the cross-referencing of lists and other sources.

169. As detailed above, the predominant method of killing was by gunshot, execution style, following an abduction and/or period of detention. Many were killed whilst blindfolded and handcuffed. Some of these victims reportedly died under torture (see supra paragraph 104).

170. The bodies of many of these victims were consigned to mass graves, which were later discovered and exhumed. Although forensic experts have not yet been able to conclude with certainty how many bodies linked to the crimes perpetrated by the al-Kaniyat are in mass graves in and around Tarhuna, as they are still uncovering them, a conservative estimate is that a minimum of 247 bodies have been exhumed from mass graves. It is expected that the total number of bodies found and linked with the atrocities in Tarhuna will increase as these sites continue to be exhumed.

171. There are reasonable grounds to believe that the perpetrators meant to cause these deaths, based on the method of killing, the large scale and systematic nature of the killings; and the fact that the victims' bodies were concealed in mass graves. Furthermore, there is evidence that many of the executioners were acting on explicit orders to kill.

#### **4. Persecution<sup>32</sup>**

172. The Mission finds that the widespread and systematic attack against a defined population in Tarhuna was carried out by the al-Kaniyat on the basis of the political affiliations, actual or perceived, of the targeted population. Most of those targeted represented opposition, dissent, a threat to power, or otherwise a lack of support or obedience to the al-Kaniyat. This is notably evidenced by the nature of the interrogations and accusations levelled at victims (see the testimonies included in Section IV.B above).

173. The deliberate and systematic disappearance and killing of civilians, as well as their organised abduction, detention, and torture, are blatant denials of fundamental rights and constitute persecution as these acts qualify as other underlying acts of crimes against humanity, namely extermination, enforced disappearance, imprisonment and torture. The Mission therefore finds that the circumstances accompanying the terrorising, the cruel and inhumane treatment of the civilians, the enforced disappearances and exterminations evidence the existence of a discriminatory intent of the perpetrators on political grounds and amounted to a persecutorial campaign against all opponents in Tarhuna.

#### **5. Enforced disappearance<sup>33</sup>**

174. The Declaration on the Protection of All Persons from Enforced Disappearance categorises enforced disappearance as a grave and flagrant violation of the human rights and fundamental freedoms proclaimed in the Universal Declaration of Human Rights, and an affront to human dignity.<sup>34</sup>

175. According to testimony obtained by the Mission on the modus operandi of the practice of disappearances by the al-Kaniyat, the kidnappers followed a pattern. A person suspected of being opposed to the al-Kaniyat, or a critic, or a supporter of the GNA, was violently seized. He or she was put into a military vehicle and taken away. The perpetrators often

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<sup>32</sup> Rome Statute, Article 7(1)(h).

<sup>33</sup> Rome Statute, Article 7(1)(i).

<sup>34</sup> The Declaration for the Protection of All Persons From Enforced Disappearances 1992, Article 1.1.

appeared in plain clothes so that no personal names or affiliations were visible. In almost all cases, the victim was held incommunicado in prison, with no access to family or legal counsel.

176. From the perspective of the victims' relatives, targets of the al-Kaniyat were regularly disappeared and not heard from again until their body was discovered in a mass grave, in some cases, years later. Often, and unbeknownst to the family until later, the person was secretly detained for a period of time before either being released or executed. When a detainee was killed, whether following a period of detention or not, the family was not notified, and the al-Kaniyat denied their families the opportunity to collect the body for burial, instead concealing the victims' bodies in mass graves, thereby prolonging their enforced disappearance. Both situations amount to enforced disappearance in that the initial arrest was followed by refusal to disclose the fate or whereabouts of the victim, who was intentionally placed outside the protection of the law.

177. Making opponents and other targets disappear was a deliberate feature of the system put in place by the al-Kaniyat that served to instil fear in the population of Tarhuna by demonstrating that anyone who did not demonstrate allegiance or support could disappear at any time for reasons solely determined by, and known to, the al-Kaniyat. Refusing to deliver the bodies to the families was also a form of revenge exacted on the population.

178. As detailed above, following a violent abduction, families of detainees were not informed of the fate or whereabouts of their detained family member. At best, the al-Kaniyat commonly refused to acknowledge the imprisonment outright, or evaded questions from family members. However, the Mission documented cases in which victims were tortured or killed for simply wanting to know the whereabouts of their loved ones. As a consequence of the climate of fear and terror instilled in the population of Tarhuna, several witnesses testified that they were terrified of approaching the al-Kaniyat or other authorities in Tarhuna in relation to disappeared relatives.

179. As to the mental element, the Mission collected evidence that abductions and detentions were either carried out by, or with the authorization, support or acquiescence of, or on the direct orders of, al-Kaniyat leaders. In many instances, the al-Kaniyat was put on notice that individuals were missing and actively promoted and participated in the forced disappearance of their opponents and critics in Tarhuna. The Mission considers that the disappearances were intentional, and the mental element is satisfied.

180. Despite the fact that the al-Kaniyat no longer exert any authority in Tarhuna, since their departure from the town in June 2020, many of the cases of enforced disappearance in relation to the events in Tarhuna are continuous crimes, which will only come to an end when the fate and whereabouts of all victims have been fully disclosed.

#### **D. The individual criminal responsibility of alleged perpetrators**

181. The importance of determining individual criminal responsibility for international crimes whether committed under the authority of the State or outside such authority stands and is a critical aspect of the enforceability of rights and of protection against their violation.

182. International crimes, in particular crimes against humanity, genocide and war crimes, are not codified in Libyan law.

183. Libyan law fails to capture the particular gravity of crimes against humanity and the *mens rea* thereof that the underlying acts are committed "as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack." Charging an individual with "ordinary" crimes such as murder, torture, and enforced disappearance, without considering whether it rises to the level of a crime against humanity, does not ensure



national proceedings include the conduct and intent covered by the chapeau elements of Article 7 of the Rome Statute of the International Criminal Court.

184. Furthermore, the underlying acts of crimes against humanity— in particular murder, torture and inhumane treatment, enforced disappearance, and rape – are either not defined, or defined inconsistently with the definitions that apply under treaty or customary international law. For example, the definition of torture under article 2 of Law No. 10 of 2013 excludes some of the purposes included in the definition contained in article 1 of the Convention against Torture. The definition of ‘forced disappearance’ in Law No. 10 of 2013 is inconsistent with the International Convention for the Protection of all Persons from Enforced Disappearance and customary international law, or acts which are constitutive of enforced disappearance and prohibited by the Convention against Torture and the ICCPR.

185. Although the primary responsibility for ensuring accountability for international crimes in Libya rests with the Libyan justice system, Libya’s legal framework does not meet international law standards governing the obligation to penalise, investigate and prosecute crimes under international law, and the rights to liberty and to a fair trial. Substantial reforms to the legal framework are required to ensure fair and effective justice in future cases, regardless of the modality adopted, whether the cases take place in the regular courts or in a specially constituted chamber within the judicial system.

186. Failing domestic proceedings, individuals could also be held responsible on the basis of the Rome Statute of the International Criminal Court, as although Libya is not a State party, the situation in Libya is the subject of a Security Council referral,<sup>35</sup> or on the basis of universal jurisdiction.

## 1. The identification of possible perpetrators

187. Under international law as much as in national systems, the foundation of criminal responsibility is the principle of personal culpability: nobody may be held criminally responsible for acts or transactions in which he or she has not personally engaged or in some other way participated (*nulla poena sine culpa*). Furthermore, it is an established principle of international law that perpetrators of crimes against humanity are not relieved of criminal responsibility on the basis that they have acted on superior orders, because orders to commit crimes of such gravity are manifestly unlawful.<sup>36</sup>

188. The Mission has collected reliable and consistent elements which indicate the responsibility of some individuals for crimes against humanity or war crimes, in Libya and particularly Tarhuna. In relation to Tarhuna, those identified as possibly responsible for crimes against humanity consist of individual perpetrators, while others are identified for their possible involvement in ordering the commission of international crimes, or for aiding and abetting the perpetration of such crimes.

189. Where testimony or other information gathered by the Mission indicated the names of individuals who committed, ordered, or aided and abetted crimes against humanity, these have been duly recorded in a confidential list safeguarded as part of the Mission’s confidential database. This list includes the names of suspects, information about the potential suspect’s position or role, and a summary of evidence compiled by the Mission relating to the potential suspect.

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<sup>35</sup> Security Council resolution 1970, para. 4.

<sup>36</sup> Rome Statute, Article 33.

190. The Mission has decided not to publish these names due to: (1) the importance of the principles of due process and respect for the rights of the suspects in light of article 14 of the International Covenant on Civil and Political Rights and article 7 of the African Charter on Human and Peoples' Rights, given that the “reasonable grounds” standard of proof is much lower than that required in criminal trials, and the individuals have not been afforded the right to reply; and (2) its continued adherence to the “do no harm” principle, particularly, the need to ensure the protection of witnesses from being harassed, intimidated, or killed.

## **2. Modes of criminal liability for international crimes**

191. Under international criminal law, all those who, individually or jointly, engage in conduct considered to be prohibited and criminalized bear individual criminal liability for their conduct if the requisite *mens rea* is present. It extends both to the individuals who carry out the underlying violent acts, and to the individuals who have planned, instigated, ordered, or otherwise aided and abetted in the planning, preparation, or execution of the attacks.

192. Assigning criminal responsibility to specific individuals requires an extensive, focused investigation into the actions and state of mind of specific perpetrators and will require additional fact-finding and investigation. While such an analysis is thus beyond the scope of this paper, this section sets out the most relevant analytical frameworks for understanding potential liability of the perpetrators implicated in the atrocities in Tarhuna.

193. The available evidence implicates a number of individuals in the direct commission of the enumerated acts, as well as others responsible for ordering or aiding and abetting such acts. These individuals could be held criminally responsible if their acts were committed a part of the widespread or systematic attack and they acted with knowledge that their conduct was part of such an attack.

### ***Perpetration***

194. The Mission has identified four commanders who participated directly in the commission of crimes against humanity in Tarhuna. In total, 12 individuals have been identified as suspected to have directly committed some of the crimes against humanity and war crimes detailed in this paper.

195. Applying the mental element required for a crime against humanity, there are reasonable grounds to believe that these individuals are criminally liable for acts of extermination, torture, imprisonment, persecution and enforced disappearance which they are aware were, and intended to be, committed in a widespread and systematic manner against a defined civilian population in Tarhuna.

### ***Ordering***

196. The Mission has gathered reliable material and information which tend to show that four commanders directly ordered the men under their control to exterminate and murder civilians, including those in detention, which are crimes against humanity.

197. In addition to the direct commission of the crimes detailed in this report, based on credible and reliable evidence gathered by the Mission, there are reasonable grounds to believe that these four individuals were directly ordering members of the militia to commit the violations detailed in this paper. Specifically, the Mission received a report that over 150 men working for the al-Kaniyat were executing orders to kill, including the killing of detainees from the Judicial Prison and from Tripoli prisons. Several lower-level commanders were also issuing direct orders to subordinates. This evidence, together with evidence indicating that the militia only acted upon direct orders, gives rise to a reasonable inference that these four commanders had ordered all of the killings that they did not personally commit, particularly those which were carried out as revenge attacks/reprisals, and including

violations occurring in places of detention. Given their authority and control, they must have been aware of the substantial likelihood that the crimes that they ordered would be committed.

198. For example, one witness told the Mission that the guards at the Boxes Prison would consult with two of these individuals before executing prisoners and that they would come and give orders for people to die. Another said that he was detained and tortured by men under the command of the four individuals, giving rise to an inference that those violations were committed upon orders.

#### ***Aiding and Abetting***

199. The Mission has identified a number of members of the al-Kaniyat militia who are suspected of also having aided and abetted the commission of crimes against humanity and war crimes in Tarhuna. The existing evidence indicates that they aided and abetted the crimes through: (1) their presence and actions during the course of the attacks, including during abductions, at checkpoints, and in prisons; (2) the provision of security at prisons in which attacks occurred; and/or (3) their failure to prevent or punish crimes.

200. In combination with their authority, including over those in charge of and/or guarding the prisons and checkpoints, their ability to stop the perpetration of the crimes, their presence at these places of detention, the fact of prior conduct of ordering and direct perpetration of violations including killings, gives rise to a reasonable inference that those individuals intended to aid and abet the crimes detailed in this report that they either did not commit or order themselves, even if they were not aware of each single incident.

201. For example, one individual *gave orders* to guards to detain victims at the Judicial Prison, where they were later held in inhumane conditions and subjected to torture. Interviewees testified as to *the presence* of one of the individuals at the Judicial Prison, in relation to which the Mission has documented numerous atrocities. A witness told the Mission that four commanders *were in charge* of the Boxes Prison where the Mission has documented torture, including by the same individuals (see Annex below, paragraphs 256-258).

202. The militia's members who carried out arrests, as well as the directors and guards of these places of detention, may also be considered aiders and abettors, as by arresting and preventing the escape of the detainees respectively, they *substantially contributed* to the violations that were committed against these victims in detention, and their subsequent killing. Furthermore, although the Mission was unable to gather evidence on those who transported dead bodies, and those who dug the mass graves, these individuals may also be considered aiders and abettors of enforced disappearance and extermination.

203. The Mission notes that a clear pattern of abductions, disappearances and killings by the al-Kaniyat emerged between 2016 and 2020, and most notably between 2019 and 2020, a fact which could not have been ignored by those identified by the Mission. By continuing their actions nonetheless, they may be suspected of having aided and abetted these crimes.

### **E. State Responsibility for crimes against humanity**

204. The Mission was unable to obtain sufficient evidence that the al-Kaniyat was an organ of the State as per article 4 of the Articles on Responsibility of States for Internationally Wrongful Acts. The Mission was also unable to obtain sufficient evidence that they had been empowered by the law to exercise elements of governmental authority and had been acting in that capacity such that their conduct would be considered an act of the State under international law in accordance with article 5 of the Articles on Responsibility of States for Internationally Wrongful Acts.

205. On 14 June 2020, the Prosecutor-General's office issued a statement concerning the investigation of crimes committed by armed groups that controlled Tarhuna prior to the GNA taking over this territory. This statement indicated that warrants for arrest for 110 individuals had been issued and that some of these warrants had been executed. The statement further elaborated on how forensic experts would be carrying out exhumations and autopsies, that DNA samples would be taken from bodies and possible family members for identification purposes, and that people should come forward to give evidence regarding the alleged involvement of al-Kaniyat members in these crimes.

206. The Mission emphasizes that crimes against humanity, in their own right, are crimes of such gravity that they not only trigger the responsibility of the State concerned but demand a firm response by the international community as a whole, in the form of universal jurisdiction but also the provision of technical assistance to the State and capacity building to ensure that the perpetrators are held accountable.

## **VI. Transitional justice**

### **A. Listening to the victims' voices**

207. Many of the atrocities documented by the Mission are international crimes that shock the conscience of humanity and have a continuing impact on the victims and the citizens of Tarhuna and Libya. Listening to the voice of the victims, the Mission noted their demand for truth, justice, reparation and that these crimes never reoccur in Tarhuna and Libya. Those responsible for the crimes of Tarhuna must be held accountable.

208. One victim told the Mission "I want dignity for my children, my life, and myself". Another shared their hope to see justice, telling the Mission "I hope from the bottom of my heart that one day justice will take its place and those who committed those atrocities will be tried." Another explained: "I want those criminals to be tried and I want to see them behind bars. Justice should prevail."

209. Tarhuna inhabitants and Libyans in general have the right to know the truth of how, why and what happened to their relatives. They have a right to know why their town was subject to a reign of terror and who supported the militia permitting them to commit these crimes with complete impunity. The direct victims of crimes against humanity, as well as war crimes, detailed in this paper have the right to reparations in the widest sense. The town of Tarhuna suffered destruction, terror and was left full of with mass graves and scenes of torture, killing, abduction and general sense of fear.

210. The victims of Tarhuna and their families have continuously expressed to the Mission an acute need to see an end to such heinous crimes. For this to happen, Libyan authorities have to take concrete measures so that no weapon remains in the hand of militias, no security forces can work outside the ambit of the law, and no political authority support a militia in committing crimes with impunity in return for political loyalty. There is a legal and ethical responsibility on Libyan officials and duty bearers to admit to the mistake of supporting the al-Kaniyat and allowing the perpetrators to terrorize Tarhuna. The failure of senior authorities in Tripoli prior to 2019 and in Benghazi after 2019 to prevent such crimes or to prosecute the perpetrators is a failure in their duty to protect the human rights of their citizens. Reforming security sectors, strengthening Libyan judicial institutions, and ensuring that the rule of law and democracy prevail in Libya, are sustainable guarantees for preventing these atrocious crimes from happening again.

## B. Transitional justice in the context of Tarhuna

211. The Mission's core mandate is the documentation of violations of international human rights law and international humanitarian law with a view to ensuring that perpetrators of these violations are held accountable. Therefore, through its fact-finding, the Mission seeks to contribute to the fight against impunity by contributing to effective prosecutions, which are not only indispensable to the realisation of the right to justice, but are also a guarantee of non-recurrence, and thus a central aspect of transitional justice.

212. As such, the Mission is also an aspect of the operationalisation of the right to truth. In this sense, the Mission's purpose should be seen as part of a public reckoning of the magnitude of the crimes committed in Tarhuna since 2016, their patterns and causes, and the underlying motives, means and structures used in committing them. By gathering and verifying information on violations and perpetrators, the Mission is contributing to the creation of a historical record of events and providing the basis for future investigations, through which the right to truth may be further realised.

213. The Mission's contribution in discovering more mass graves in the recent period and the expectations of finding additional ones pose specific additional challenges. First and foremost, a mass grave signifies the commission of a multiplicity of crimes – not only gross human rights violations, such as the violation of the right to life, the right to recognition as a person before the law, the right to liberty and security of the person, and the right not to be subjected to torture and other cruel, inhuman or degrading treatment or punishment, and unlawful handling of human remains but also the intention to obstruct justice.<sup>37</sup>

214. The United Nations Special Rapporteur on extrajudicial, summary or arbitrary executions also recognizes that , “[I]awful and respectful handling of mass graves are major elements of States' obligations to non-repetition and to the rights of victims to reparation.”<sup>38</sup> In this respect, decisions must be made about the management of these sites with a view to achieving different and sometimes conflicting, objectives emerge such as identification, crime scene investigation and collection of evidence, memorialization and (re)burial.<sup>39</sup>

215. Finally, without positive identification of the dead and the legal recognition of death, families of the missing face not only the anguish of not knowing the fate of their loved ones but also “encounter often debilitating impediments to their exercise of inheritance rights.”<sup>40</sup>

## VII. Conclusions and recommendations

216. The Mission finds reasonable grounds to believe that the crimes against humanity of extermination, imprisonment, torture, persecution and enforced disappearance were committed by members of the al-Kaniyat militia against a defined population in Tarhuna since they asserted control over the town until June 2020. These crimes were committed in a widespread manner, whereby the al-Kaniyat systematically targeted and eliminated all actual and perceived opposition with total impunity.

217. Given the vast scale of the acts committed against a defined population in Tarhuna, over many years, there may be many additional individuals who could also be criminally liable, including lower-ranking members of the al-Kaniyat and associated militia.

<sup>37</sup> A/75/384, 12 October 2020, para. 32 and 48.

<sup>38</sup> A/75/384, 12 October 2020, para. 59.

<sup>39</sup> A/75/384, 12 October 2020, para. 26.

<sup>40</sup> A/75/384, 12 October 2020, para. 28.

218. The Mission encourages the Libyan authorities to utilize its findings of probable additional mass graves to exhume new locations in search for buried victims.

219. The crimes in Tarhuna have victimised entire families, through the killings of male family members, who were the primary source of economic support for the family, and the consequent traumatising, fear and impoverishment of remaining family members, including children.

**220. In relation to the crimes committed in Tarhuna, the Mission calls on Libya to:**

**(a) End impunity by developing a comprehensive transitional justice agenda which should include both judicial and non-judicial processes and mechanisms, such as prosecution initiatives, facilitating initiatives in respect of the right to truth, delivering reparations as well as institutional reform in full conformity with international legal standards and obligations.**

**221. Specifically, the Mission calls on Libyan authorities to:**

**(a) Establish a Special Tribunal for Tarhuna to prosecute international crimes with international technical support and expertise; and ensure that statutes of limitations and amnesties do not apply for such international crimes under the jurisdiction of this Tribunal. The Tribunal should enjoy an independent judicial law enforcement force at its disposal to implement its decisions, and ensure its protection from interference;**

**(b) Continue searching for the missing and for remaining mass graves, using the Mission's findings in that regard;**

**(c) Continue exhumations of bodies as well as their identification, in consultation with and full respect for the families of the victims;**

**(d) Analyse and address the deficiencies in Libyan State institutions that have enabled – if not promoted – impunity and the attendant cycles of violence that have led to the atrocities; and implement a comprehensive vetting program and security sector reform.**

**(e) Develop, adopt and implement a comprehensive program of recognition, compensation and rehabilitation for victims and their families, with a particular focus on providing psychosocial help for the children of Tarhuna; establish a trust fund for developing the town of Tarhuna; and**

**(f) In consultation with the victims' families, implement measures to preserve the victims' memory. These measures could include establishing at least one school and naming it in reference to the victims of Tarhuna; allocate a day for remembrance for the victims of Tarhuna; and name one street in Tripoli and in Benghazi in reference to Tarhuna victims.**

**222. The Mission calls on the international community and States to:**

**(a) Cooperate in criminal matters to prosecute the perpetrators of international crimes in Tarhuna including via extradition of the accused and cooperation;**

**(b) Apply universal jurisdiction over the accused when found on their territory; and**

**(c) Support Libya in all its efforts to implement recommendations above through technical and other assistance.**

## Annex

### Legal Framework

223. The Mission recognises that it is neither a judicial body nor a prosecutor. It cannot make final determinations of individual criminal responsibility. It can however determine whether its findings establish reasonable grounds that crimes against humanity have been committed so as to merit a criminal investigation by a competent national or international organ of justice. The Mission's findings on crimes against humanity are to be understood as being on the basis of the 'reasonable grounds' standard of proof.

224. Broadly, the definition of crimes against humanity in Article 7 of the Rome Statute reflects that accepted in general international law. It is unknown which variant of this offence may ultimately be utilised in relation to crimes committed in Libya. For its part, the Mission has based its investigations on the definition of crimes against humanity under the Rome Statute, however it has not adopted the ICC's state or organisational policy requirement (of the "attack" component of the chapeau) as formulated in Article 7(2)(a) as a distinct contextual element for two reasons. The first is that there are some indications in ICC jurisprudence of a nascent shift away from such a requirement<sup>41</sup> and secondly, considering the drafting history of the ICC Statute, the rationale underlying the inclusion of a policy element in the definition was to "help distinguish between what is of concern to the international community on the one hand and, on the other, the sort of crimes that should remain the exclusive concern of domestic jurisdictions".<sup>42</sup> This normative limitation, effectively limiting the ICC's jurisdiction, does not apply to the Mission. Furthermore, the Mission has also departed from the ICC in that it has not applied the 'prolonged' requirement with respect to enforced disappearance as a crime against humanity.

### Crimes Against Humanity

225. The prohibition of crimes against humanity is recognized as a principle of *jus cogens* and is universally applicable.<sup>43</sup> Crimes against humanity entail gross human rights violations of a scale and level of organisation that shock the conscience of humanity.

226. Article 7(1) of the ICC Statute, which largely reflects customary international law, defines crimes against humanity as any of the following acts when committed as part of a

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<sup>41</sup> There is a concern that a certain interpretation that has been given to 'organisational policy' in article 7(2)(a) of the Rome Statute is ultimately inconsistent with the object and purpose of the Rome Statute. See for example ICC, *Prosecutor v. Bosco Ntaganda*, Judgment on the appeals of Mr Bosco Ntaganda and the Prosecutor against the decision of Trial Chamber VI of 8 July 2019 entitled 'Judgment', Annex 5: Partly concurring opinion of Judge Chile Eboe-Osuji, 30 March 2021, paras. 142-143; ICC, *Prosecutor v. Bosco Ntaganda*, Judgment on the appeals of Mr Bosco Ntaganda and the Prosecutor against the decision of Trial Chamber VI of 8 July 2019 entitled 'Judgment', ANNEX 3: Separate opinion of Judge Luz Del Carmen Ibáñez Carranza on Mr Ntaganda's appeal, para. 156; See also ICC, *Prosecutor v Ruto and Sang* (Decision on the Defence Applications for Judgments of Acquittal), Reasons of Judge Eboe-Osuji, 5 April 2016.

<sup>42</sup> Guénaél Mettraux, *International Crimes: Law and Practice: Volume II: Crimes Against Humanity* (2020), p. 292.

<sup>43</sup> International Law Commission (ILC), Draft articles on Crimes Against Humanity, Preamble; ILC, Peremptory Norms of General International Law (*jus cogens*): Text of the Draft Conclusions and Draft Annex Provisionally Adopted by the Drafting Committee on First Reading, UN Doc. A/CN.4/L.936, 29 May 2019, Draft conclusion 3.

widespread or systematic attack directed against any civilian population, with knowledge of the attack:

- (a) Murder;
- (b) Extermination;
- (c) Enslavement;
- (d) Deportation or forcible transfer of population;
- (e) Imprisonment;
- (f) Torture;
- (g) Rape and forms of sexual violence;
- (h) Persecution on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds;
- (i) Enforced disappearance of persons;
- (j) The crime of apartheid;
- (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

227. Pursuant to Article 7(2)(a) of the Statute, an ‘[a]ttack directed against any civilian population’ means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack.<sup>44</sup>

#### ***Article 7 chapeau requirements***

##### ***Attack***

228. An ‘attack’ for the purposes of crimes against humanity has been described as “a course of conduct involving the commission of acts of violence”.<sup>45</sup> A ‘course of conduct’ signifies a “systemic aspect” to the attack, describing “a series or overall flow of events as opposed to a mere aggregate of random acts. The ‘multiple commission of acts’ sets a quantitative threshold involving a certain number of acts falling within the course of conduct”.<sup>46</sup>

229. The notion of ‘attack’ encompasses any form of mistreatment of a civilian population<sup>47</sup> that includes multiple commission of acts referred to in Article 7(1).<sup>48</sup> The attack need not necessarily be military in nature, and it may involve any form of violence against a civilian population.<sup>49</sup> An attack may precede, outlast, or continue during an armed conflict,

<sup>44</sup> Rome Statute, Article 7(2)(a). See also ICC, Elements of Crimes, Introduction to Article 7 of the Statute, para. 3.

<sup>45</sup> ICTR, *Prosecutor v. Ephrem Setako*, Case No. ICTR-04-81-T, Judgement and Sentence, 25 February 2010, para. 476.

<sup>46</sup> ICC, *Prosecutor v. Laurent Gbagbo*, Case No. ICC-02/11-01/11, Decision on the confirmation of charges against Laurent Gbagbo, 12 June 2014, para. 209.

<sup>47</sup> ICTR, *Prosecutor v. Ferdinand Nahimana*, Case No. ICTR-99-52-A, Judgement, 28 November 2007, para. 916.

<sup>48</sup> ICTY, *Prosecutor v. Milan Lukić et al.*, Case No. IT-98-32/1-T, Judgement, 20 July 2009, para. 873; *Gbagbo*, Decision on the confirmation of charges against Laurent Gbagbo.

<sup>49</sup> ICC, *Prosecutor v. Germain Katanga*, Case No. ICC-01/04-01/07, Judgment pursuant to Article 74 of the Statute, 7 March 2014, para. 1101.



without necessarily being part thereof.<sup>50</sup> It is an event in which the enumerated crimes must form part.<sup>51</sup>

#### ***Directed against a civilian population***

230. The ICTY held that ‘the emphasis is not on the individual victim but rather on the collective, the individual being victimised not because of [their] individual attributes but rather because of [their] membership of a targeted civilian population.’<sup>52</sup> Article 7 of the ICC Statute does not require a separate finding that the civilian population was the primary object of the attack.<sup>53</sup>

231. The term ‘civilian’ refers to persons who are not members of any armed forces or other legitimate combatants.<sup>54</sup> The term ‘civilian population’ means that the population must simply be predominantly civilian in nature.<sup>55</sup> Members of armed forces placed *hors de combat* by sickness, wounds, detention, or any other cause, may also be victims of acts amounting to crimes against humanity.<sup>56</sup>

232. Relevant factors include the means and methods used in the course of the attack; the number and status of the victims; the discriminatory nature, if any, of the attack, in terms of a pattern related to the national, ethnic, racial or religious identity of victims; and the nature of the crimes committed in its course<sup>57</sup> and evidence of the scale of the crimes committed in the course of the attack.<sup>58</sup>

#### ***Widespread or systematic character of the attack***

233. Under both the Rome Statute (Article 7(1)) and customary international law, the attack against the civilian population as a whole – as opposed to the individual underlying crimes – must be either widespread *or* systematic in nature.<sup>59</sup> Although the two criteria are disjunctive rather than cumulative, they are often difficult to separate since a widespread attack targeting

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<sup>50</sup> ICTY, *Prosecutor v. Dragoljub Kunarac et al.*, Case Nos. IT-96-23 & IT-96-23/1-A, Judgement, 12 June 2002, para. 86.

<sup>51</sup> ICTR, *Prosecutor v. Clément Kayishema et al.*, Case No. ICTR-95-1-T, Judgement, 21 May 1999, para. 122.

<sup>52</sup> ICTY, *Prosecutor v. Dusko Tadić*, Case No. IT-94-1-T, Sentencing Judgment, 14 July 1997, para. 644.

<sup>53</sup> ICC, *Prosecutor v. Bosco Ntaganda*, Judgment on the appeals of Mr. Bosco Ntaganda and the Prosecutor against the decision of Trial Chamber VI of 8 July 2019 entitled ‘Judgment’, 30 March 2021, paras. 7, 424.

<sup>54</sup> Article 50, Additional Protocol I to the Geneva Conventions 1949.

<sup>55</sup> ICTY, *Prosecutor v. Dario Kordić et al.*, Case No. IT-95-14/2-T, Judgement, 26 February 2001, para. 180; ICTR, *Prosecutor v. Ignace Bagilishema*, Case No. ICTR-95-1A-T, Judgement, 7 June 2001, para. 79; ICTR, *Prosecutor v. Laurent Semanza*, Case No. ICTR-97-20-T, Judgement and Sentence, 15 May 2003, para. 330.

<sup>56</sup> ICTY, *Prosecutor v. Milan Martić*, Case No. IT-95-11-A, Judgement, 8 October 2008, paras. 303-314; ICTY, *Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-T, Judgement, 3 March 2000, para. 214.

<sup>57</sup> ICTY, *Prosecutor v. Mile Mrksić et al.*, Case No. IT-95-13/1-T, Judgement, 27 September 2007, para. 440.

<sup>58</sup> ICTY, *Prosecutor v. Milomir Stakić*, Case No. IT-97-24-T, Judgement, 31 July 2003; ICTY, *Prosecutor v. Dragoljub Kunarac*, Case Nos. IT-96-23 & IT-96-23/1-A, Judgement, 12 June 2002, para. 94.

<sup>59</sup> ICTR, *Prosecutor v. Sylvestre Gacumbitsi*, Case No. ICTR-2001-64-A, Judgement, 7 July 2006, para. 102.

a large number of victims is generally predicated on some degree of coordination, planning or organisation.

### *Widespread*

234. The term ‘widespread’ refers to the large-scale nature of the attack, its geographic scope, and the number and multiplicity of civilians against whom the attack is directed.<sup>60</sup> It may be established by the cumulative effect of a multiplicity of smaller, discrete acts, or the singular effect of an inhumane act of extraordinary magnitude.<sup>61</sup>

235. The ICC Trial Chamber III in *Bemba* held the term ‘widespread’ to denote an attack that is massive, frequent, carried out collectively with considerable seriousness and directed against a multiplicity of victims,<sup>62</sup> or “an attack carried out over a large geographical area or an attack in a small geographical area directed against a large number of civilians”.<sup>63</sup> Hence, a key feature of the ‘widespread’ standard is that it is intended to exclude isolated acts of violence,<sup>64</sup> such as “murder directed against individual victims by persons acting of their own volition rather than as part of a broader initiative”.<sup>65</sup> The assessment as to whether an attack is widespread is “neither exclusively quantitative nor geographical, [and] must be carried out on the basis of the individual facts”.<sup>66</sup>

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<sup>60</sup> ICTY, *Prosecutor v. Dragoljub Kunarac et al.*, Case Nos. IT-96-23-T & IT-96-23-/1-T, Judgement, 22 February 2001, para. 428. See also ICTY, *Prosecutor v. Vidoje Blagojević et al.*, Case No. IT-02-60-T, Judgement, 17 January 2005, paras 545-546; ICTY, *Prosecutor v. Dario Kordić et al.*, Case No. IT-95-14/2-A, Judgement, 17 December 2004, para. 94; ICC, *Prosecutor v. Jean-Pierre Bemba Gombo*, Case No. ICC-01/05-01/08, Judgment pursuant to Article 74 of the Statute, 21 March 2016, para. 163; *Katanga*, Judgment pursuant to Article 74 of the Statute, para. 1123; *Katanga et al.*, Decision on the confirmation of charges, para. 394; ICC, *Prosecutor v. Bosco Ntaganda*, Decision pursuant to Article 61(7)(a) and (b) of the Rome Statute on the charges of the Prosecutor against Bosco Ntaganda, Case No. ICC-01/04-02/06, 9 June 2014, para. 24. See also *Draft Code of Crimes against Humanity*, commentary to Art. 18, para. 4 (‘[o]n a large scale’ means ‘that the acts are directed against a multiplicity of victims. This requirement excludes an isolated inhumane act committed by a perpetrator acting on his own initiative and directed against a single victim’).

<sup>61</sup> ICTY, *Prosecutor v. Vidoje Blagojević et al.*, Case No. IT-02-60-T, Judgement, 17 January 2005, para. 545.

<sup>62</sup> *Bemba*, Judgment pursuant to Article 74 of the Statute, para. 163; *Akayesu*, Judgement, para. 580.

<sup>63</sup> *Bemba*, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, para. 83.

<sup>64</sup> ICC, *Prosecutor v. Bosco Ntaganda*, Case No. ICC-01/04-02/06, Decision on the Prosecutor’s application under Article 58, 13 July 2012, para. 19; ICC, *Prosecutor v. Ahmad Muhammad Harun et al.*, Case No. ICC-02/05/-01/07, Decision on the prosecution application under Article 58(7) of the Statute, 27 April 2007, para. 62; ICTR, *Prosecutor v. Georges Anderson Nderubumwe Rutaganda*, Case No. ICTR-96-3-T, Judgement and Sentence, 6 December 1999, paras 67-69; *Kayishema et al.*, Trial Judgment, paras. 122–123; ILC, Draft Code of Crimes against the Peace and Security of Mankind, Report of the Commission to the General Assembly on the work of its forty-third session, A/46/10 (1991), Yearbook of the International Law Commission, 1991, vol. II, Part Two, Commentary to Article 21, pp. 47, 103.

<sup>65</sup> ILC, Draft Articles on Prevention and Punishment of Crimes Against Humanity with Commentaries, 2019, para. 12.

<sup>66</sup> ICC, Situation in the Republic of Kenya, Case No. ICC-01/09, Decision pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, 31 March 2010, para. 95.

### *Systematic*

236. ‘Systematic’ refers to the “organised nature of the acts of violence and the improbability of their random occurrence”<sup>67</sup> in furtherance of a common policy, which follows a regular pattern and results in a continuous commission of acts or as ‘patterns of crimes’ such that the crimes constitute a non-accidental repetition of similar criminal conduct on a regular basis.<sup>68</sup> It requires “organized action, following a regular pattern, on the basis of a common policy and involves substantial public or private resources”.<sup>69</sup>

237. In determining whether an attack is systematic and to identify patterns of crimes, the following are taken into account: (i) identical acts took place or similarities in criminal practices can be identified; (ii) the same modus operandi (and/or means or methods) was employed or (iii) victims were treated in a similar manner across a wide geographic area.<sup>70</sup> Further indicators of the systematic nature of an attack include that: (i) the violations are in line with an underlying political objective; (ii) there is an ideology to destroy, persecute or weaken a community, including on the basis of national/ethnic/racial or religious grounds; (iii) high-level political and/or military authorities are implicated in the definition and establishment of a methodical plan to commit violations; (iv) propaganda, indoctrination or psychological oppression are used to create an environment in which crimes will occur; (v) criminal acts are being perpetrated on a very large scale and follow a regular pattern making it improbable that the acts could occur randomly; (vi) there is a repeated and continuous commission of inhumane acts linked to one another; and (vii) organized efforts are made to conceal the crimes committed.<sup>71</sup>

238. Neither the underlying attack nor the acts of the accused need be supported by any form of state or organisational plan or policy. Nor is a plan or policy a necessary element of proof that the underlying attack was systematic in character;<sup>72</sup> nonetheless may serve as evidence of the systematic character of the attack. This policy may be made by an organ of the State but can also be formulated “by groups of persons who govern a specific territory or by any organisation with the capability to commit a widespread or systematic attack against a civilian population”.<sup>73</sup> A policy can therefore be “inferred by discernment of, inter alia, repeated actions occurring according to a same sequence, or the existence of preparations or collective mobilisation orchestrated and coordinated by that State or organisation”<sup>74</sup> or from a variety of factors which taken together, establish that a policy existed.

<sup>67</sup> ICTY, *Kordić et al.*, Appeal Judgement, para. 94; ICC, *Prosecutor v. Bosco Ntaganda*, Case No. ICC-01/04-02/06, Judgment, 8 July 2019, para. 692; *Gbagbo*, Decision on the Confirmation of Charges against Laurent Gbagbo, para. 222; *Katanga*, Judgment pursuant to Article 74 of the Statute, para. 1123; *Katanga et al.*, Decision on the Confirmation of Charges, para. 394; *Harun et al.*, Decision on the prosecution application under Article 58(7) of the Statute, para. 62.

<sup>68</sup> *Katanga et al.*, Decision on the confirmation of charges, para. 397; See also, *Ntaganda*, Trial Judgment, para. 692; *Katanga*, Judgment pursuant to Article 74 of the Statute, para. 1123; *Ntaganda*, Decision on the confirmation of charges, para. 24.

<sup>69</sup> ICTR, *Prosecutor v. Alfred Musema*, Case No. ICTR-96-13-T, Judgement and Sentence, 27 January 2000, para. 204; *Akayesu*, Trial Judgement, para. 580.

<sup>70</sup> *Ntaganda*, Trial Judgment, para. 693; see also *Katanga*, Judgment pursuant to Article 74 of the Statute, para. 1113. See also *Kunarac et al.*, Appeal Judgement, para. 95.

<sup>71</sup> See ICTY, *Blaškić*, Trial Judgment, para. 204; ICTY, *Prosecutor v. Vlastimir Đorđević*, Case No. IT-05-87/1-T, Public Judgement, paras. 1262-1380; *Kordić et al.*, Appeal Judgement, paras. 98, 179; ICC, *Katanga*, Decision on the Confirmation of Charges, para. 397.

<sup>72</sup> ICTY, *Kunarac et al.*, Appeal Judgement, para. 98.

<sup>73</sup> ICC, *Bemba*, Decision Pursuant to Article 61(7)(a) and (B) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, para. 81.

<sup>74</sup> ICC, *Katanga*, Judgment pursuant to Article 74 of the Statute, para. 1109.

### *Applicable Underlying Acts*

#### *Imprisonment*

239. Imprisonment as a crime against humanity requires that an individual is arbitrarily deprived of his or her liberty, and that this deprivation is done intentionally or in the reasonable knowledge that arbitrary deprivation of liberty is likely to occur.<sup>75</sup> Not every infringement of liberty forms the material element of the underlying offence; the deprivation of liberty must be of similar gravity and seriousness as the other crimes enumerated as crimes against humanity.<sup>76</sup> A deprivation of liberty amounts to imprisonment if it is arbitrary and therefore illegal, with the term ‘arbitrary’ establishing the requirement that the deprivation be without due process of law.<sup>77</sup>

240. In assessing whether imprisonment constitutes a crime against humanity, relevant factors are whether the initial arrest was unlawful by considering, for example, whether it was based on a valid arrest warrant, whether the detainees were informed of the reasons for their detention, whether the detainees were ever formally charged, whether they were informed of any procedural rights, and whether any period of detention was lawful.<sup>78</sup>

241. The Working Group on Arbitrary Detention has classified secret detention as being per se arbitrary as it is clearly impossible to invoke any legal basis justifying the deprivation of liberty, and its very nature may result in indefinite periods of detention.<sup>79</sup> The practice of secret detention ipso facto violates the guarantees enshrined in Articles 9 (right to liberty) and 14 (right to a fair trial) of the ICCPR, or in most cases, automatically or inherently entails such consequences that amount to a violation. Under IHRL, every instance of secret detention by a state or de facto state authority also amounts to a case of enforced disappearance<sup>80</sup> and also violates the prohibition against torture and other forms of ill-treatment<sup>81</sup> including because every instance of secret detention is by definition incommunicado detention.<sup>82</sup> Indefinite or prolonged solitary confinement<sup>83</sup> - in excess of 15 consecutive days<sup>84</sup> - as a restriction or disciplinary sanction may amount to torture or other cruel, inhuman or

<sup>75</sup> ICTY, *Prosecutor v. Milorad Krnojelac*, Case No. IT-97-25-T, Judgement, 15 March 2002, para. 124.

<sup>76</sup> ECCC, *Kaing Guek Eav alias Duch*, Case File/Dossier No. 001/18-07-2007/ECCC/TC, Judgement, 26 July 2010, para. 349.

<sup>77</sup> ICTY, *Kordić et al.*, Trial Judgement, para. 302. See also ICTR, *Prosecutor v. André Ntagerura*, Case No. ICTR-99-46-T, Judgement and Sentence, 25 February 2004, para. 702.

<sup>78</sup> ICTY, *Kordić et al.*, Trial Judgement, 26 February 2001, para. 280; ICTY, *Prosecutor v. Zdravko Mucić et al.*, Case No. IT-96-21-T, Judgement, 16 November 1998, para. 327; *Krnojelac*, Trial Judgement, paras. 117-118.

<sup>79</sup> 2010 joint study on global practices in relation to secret detention in the context of countering terrorism, issued by four UN Special Procedures, A/HRC/13/42, 20 May 2010, paras. 18-23.

<sup>80</sup> E/CN.4/1997/34: The Working Group on Enforced or Involuntary Disappearances confirmed in its general comment on article 10 of the Declaration on the Protection of All Persons from Enforced Disappearance that under no circumstances, including states of war or public emergency, can any State interest be invoked to justify or legitimize secret centres or places of detention which, by definition, would violate the Declaration, without exception.

<sup>81</sup> 2010 joint study on global practices in relation to secret detention in the context of countering terrorism, issued by four UN Special Procedures, A/HRC/13/42, 20 May 2010, para. 34-35.

<sup>82</sup> 2010 joint study on global practices in relation to secret detention in the context of countering terrorism, issued by four UN Special Procedures, A/HRC/13/42, page 2.

<sup>83</sup> Confinement of prisoners for 22 hours or more a day without meaningful human contact: Nelson Mandela Rules, Rule 44.

<sup>84</sup> Nelson Mandela Rules, Rule 44.

degrading treatment or punishment.<sup>85</sup> Confinement under inhumane conditions can be included in the underlying acts of “imprisonment” and “other inhumane acts” and also meets the definition of a persecutory act.<sup>86</sup>

### *Torture*

242. Under the Rome Statute, torture as a crime against humanity means the intentional infliction of severe pain and suffering, whether physical or mental, upon a person in the custody or under the control of the accused.<sup>87</sup> Under the Rome Statute, the crime against humanity of torture does not require the act to be committed with a specific purpose, or by a public official.<sup>88</sup>

243. The material elements of this crime are (1) the infliction of severe pain and suffering, whether physical or mental; and (2) that the infliction is on a person in the custody or under the control of the accused. Although there is no definition of the threshold of “severe”, “an important degree of pain and suffering has to be reached”.<sup>89</sup> The objective severity of the harm inflicted must be first assessed, before considering subjective criteria such as the physical or mental effect on the victim.<sup>90</sup> When assessing the seriousness of acts charged as torture, one must “take into account all the circumstances of the case, including the nature and context of the infliction of pain, the premeditation and institutionalisation of the ill-treatment, the physical condition of the victim, the manner and method used, and the position of inferiority of the victim. The extent that an individual has been mistreated over a prolonged period of time will also be relevant.”<sup>91</sup> Intentionally subjecting persons to extremely inhumane conditions of detention can also constitute ‘other inhumane acts’ as a crime against humanity.<sup>92</sup>

244. Acts considered to amount to “severe pain or suffering” for the purpose of torture include: severe beatings, punches and kicks; rape, attempted rape and other forms of sexual

<sup>85</sup> Nelson Mandela Rules, Rule 43.

<sup>86</sup> ICTY, *Prosecutor v. Miroslav Kvočka et al.*, Case No. IT-98-30/1-T, Judgement, 2 November 2001, para. 189.

<sup>87</sup> Rome Statute (1998) art 7(2)(e).

<sup>88</sup> The ICC Elements of Crimes requires the “purpose” element with respect to torture as a war crime but not as a crime against humanity (ICC Elements of Crimes, p. 7, footnote 14, stating: “It is understood that no specific purpose need be proved for this crime”). The ICTY and ICTR jurisprudence consider the purpose element as the distinguishing feature of torture as opposed to ill treatment (*Akayesu*, Trial Judgment, paras. 593-595; *Mucić et al.*, Trial Judgment, para. 459; ICTY, *Prosecutor v. Anto Furundžija*, Case No. IT-95-17/1-T, Judgement, 10 December 1998, para. 161; *Krnjelac*, Trial Judgment, para. 180.

<sup>89</sup> *Bemba*, Decision Pursuant to Article 61(7)(a) and (B) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, para. 193.

<sup>90</sup> *Kvočka et al.*, Trial Judgment, paras. 142-143.

<sup>91</sup> *Krnjelac*, Trial Judgment, para. 182.

<sup>92</sup> See *Kaing Guek Eav alias Duch*, para. 372. The court found that conditions of detention amounted to inhumane acts that included shackling and chaining, blindfolding and handcuffing when being moved outside the cells, severe beatings and corporal punishments, detention in overly small or overcrowded cells, lack of adequate food, hygiene and medical care. See also *Kvočka et al.*, Trial Judgment, paras. 190, 199, affirmed by ICTY, *Prosecutor v. Miroslav Kvočka et al.*, Case No. IT-98-30/1-A, Judgement, 28 February 2005, paras. 324-325. The ICTY considered that the conditions prevailing in internment camp amounted to crimes against humanity: “gross overcrowding in small rooms without ventilation, requiring the detainees to beg for water, and forcing them to relieve bodily functions in their clothes... constant berating, demoralizing, and threatening of detainees, including the guards’ coercive demands for money from detainees, and the housing of detainees in lice-infected and cramped facilities.”

violence; electric shocks; and deprivation of sleep, food or water.<sup>93</sup> Examples of treatment causing mental suffering include: mock executions, prolonged solitary confinement and threats of death or violence and being forced to watch others being killed, tortured or raped.<sup>94</sup>

245. The very fact of being detained as a disappeared person, isolated from one's family for a long period is certainly a violation of the right to humane conditions of detention and the prohibition of torture.<sup>95</sup> According to the Special Rapporteur on Torture, "to make someone disappear is a form of prohibited torture or ill-treatment, clearly as regards the relatives of the disappeared person and arguably in respect of the disappeared person or him/herself".<sup>96</sup> Under the Convention against Torture, "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.

246. As to the mental element, Article 7(2)(e) of the ICC requires that the infliction of pain and suffering must be intentional. This means that Article 30 of the Rome Statute, which sets up a general requirement for the double elements of intent and knowledge, is not applicable here.<sup>97</sup> It is therefore sufficient that the perpetrator intended to inflict pain or suffering, and that the victim endured severe pain or suffering.<sup>98</sup>

### ***Enforced disappearance***

247. Enforced disappearance as a crime against humanity entails the arrest, detention or abduction of a person, accompanied by a refusal to acknowledge it or to give information on the whereabouts of the person.<sup>99</sup> The detention and refusal to give information must have been by or with the authorisation, support or acquiescence of a State or political organisation, and the perpetrator must have "intended to remove [the victim] from the protection of the law for a prolonged period of time".<sup>100</sup> However, the wording 'prolonged' is a normative limitation acting as a jurisdictional threshold<sup>101</sup> for the ICC that does not bind the FFM, thus enforced disappearances of any duration have been included in this report.<sup>102</sup>

<sup>93</sup> For further examples, see A/HRC/13/39/Add.5, para. 51.

<sup>94</sup> United Nations Human Rights Committee, General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment), 10 March 1992, para. 6.

<sup>95</sup> A/56/156, para. 10.

<sup>96</sup> A/56/156, para. 14.

<sup>97</sup> This was confirmed by the ICC Pre-Trial Chamber in *Bemba*, which concluded that the term "intentional" in Article 7(2)(e) excluded the separate requirement of knowledge set out in Article 30(3): *Bemba*, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, para. 194.

<sup>98</sup> *Bemba*, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, para. 194.

<sup>99</sup> Elements of Crimes (2013) art 7(1)(ii) para. 1

<sup>100</sup> Elements of Crimes (2013) art 7(1)(ii) paras. 5-6.

<sup>101</sup> WGEID, General comment on enforced disappearance as a crime against humanity, A/HRC/13/31, 21 December 2009, para. 39.

<sup>102</sup> The WGEID has often referred to "short-term disappearances" indicating that "there is no time limit, no matter how short, for an enforced disappearance to occur", as the first hours of deprivation of liberty are often those during which violations and abuses, including torture and cruel, inhuman or degrading treatment, occur. See, for instance, A/HRC/39/46, para. 143.

248. Secret detention, the refusal to provide information/provision of false information/intimidation of those requesting information, and the concealment of victims' corpses in mass graves, prolonging their enforced disappearance, evidences an intention to remove the persons from the protection of the law.

### ***Extermination***

249. The *actus reus* of extermination is the act of killing on a large scale,<sup>103</sup> distinguishes the crime against humanity of extermination from that of murder.<sup>104</sup> "Large scale" does not suggest a strict numerical approach with a minimum number of victims.<sup>105</sup> The assessment of "large scale" is made on a case-by-case basis, taking into account the circumstances in which the killings occurred.<sup>106</sup> Relevant factors include, inter alia, the time and place of the killings, the selection of the victims and the manner in which they were targeted, and whether the killings were aimed at the collective group rather than victims in their individual capacity.<sup>107</sup> For example, the ICTR Trial Chamber considered that the killing of between 15 and 60 Tutsis at the Nyabikenke commune office occurred on a "large scale".<sup>108</sup> Similarly, in *Gatete*, recalling that no numerical minimum is required, it was satisfied that the killings of at least 25 to 30 people were conducted on a sufficiently large scale for the purposes of amounting to extermination.<sup>109</sup> Separate incidents may be considered cumulatively in assessing whether killings meet the required scale.<sup>110</sup> The *actus reus* of extermination may be established on the basis of "an accumulation of separate and unrelated incidents".<sup>111</sup>

### ***Persecution***

250. The *actus reus* of persecution as a crime against humanity is the gross or blatant denial, on discriminatory grounds, of a fundamental right, laid down in international customary or treaty law, reaching the same level of gravity as and committed in connection with one or more underlying acts. The requisite *mens rea* is the specific intent to discriminate against the victims on account of their racial or religious characteristics or political affiliation as well as knowledge of the widespread or systematic nature of the attack on civilians.<sup>112</sup>

<sup>103</sup> ICTR, Prosecutor v. Édouard Karemera et al., Case No. ICTR-98-44-A, Judgement, para. 660; ICTY, Prosecutor v. Milan Lukić and Sredoje Lukić, Case No. IT-98-32/1-A, Judgement, para. 536; ICTR, Prosecutor v. Théoneste Bagosora et al., Case No. ICTR-98-41-A, Judgement, 14 December 2011, para. 394; ICTR, Prosecutor v. Elizaphan Ntakirutimana and Gérard Ntakirutimana, Case Nos. ICTR-96-10-A and ICTR-96-17-A, Judgement, para. 516.

<sup>104</sup> Lukić and Lukić, Appeal Judgement, para. 536; ICTY, Prosecutor v. Milomir Stakić, Case No. IT-97-24-A, Judgement, 22 March 2006, para. 260, referring to Ntakirutimana Appeal Judgement, para. 516.

<sup>105</sup> See, e.g., Lukić and Lukić, Appeal Judgement, para. 537; ICTR, Prosecutor v. Emanuel Rukundo, Case No. ICTR-2001-70-A, Judgement, 20 October 2010, para. 185; Ntakirutimana, Appeal Judgement, para. 516. See also Bagosora et al., Appeal Judgement, fn. 924.

<sup>106</sup> Lukić and Lukić, Appeal Judgement, para. 538 and references cited therein.

<sup>107</sup> Lukić and Lukić, Appeal Judgement, para. 538 and references cited therein.

<sup>108</sup> ICTR, Prosecutor v. Callixte Nzabonimana, Case No. ICTR-98-44D-T, Judgement and Sentence, 31 May 2012, para. 1785.

<sup>109</sup> ICTR, Prosecutor v. Jean-Baptiste Gatete, Case No. ICTR-2000-61-T, Judgement and Sentence, 31 March 2011, para. 639.

<sup>110</sup> Brđanin Rule 98bis Decision, para. 73, ICTY, Prosecutor v. Radoslav Brđanin, Case No. 99-36-T, Judgement, 1 September 2004, para. 391.

<sup>111</sup> Brđanin, Trial Judgement, para. 391. The Trial Chamber's approach was affirmed by the Appeals Chamber, ICTY, Prosecutor v. Radoslav Brđanin, Case No. 99-36-A, Judgement, 3 April 2007, paras 471-472; Ntakirutimana, Appeal Judgement, para. 521.

<sup>112</sup> ICTY, Prosecutor v. Zoran Kupreškić et al., Case No. IT-95-16-T, Judgement, 14 January 2000, paras. 770-784.

The mens rea for persecutions “is the specific intent to cause injury to a human being because he belongs to a particular community or group”. There is no requirement in law that the perpetrator possesses a ‘persecutory intent’ over and above a discriminatory intent.<sup>113</sup>

251. The targeted group does not only comprise persons who personally carry the (religious, racial or political) criteria of the group. The targeted group must be interpreted broadly and may include such persons who are defined by the perpetrator as belonging to the victim group due to their close affiliations or sympathies for the victim group such that the victims are discriminated in fact for who or what they are on the basis of the perception of the perpetrator.<sup>114</sup> Discrimination on the basis of a person’s political ideology satisfies the requirement of ‘political’ grounds.<sup>115</sup> The targeting of inhabitants of areas perceived as supporting an opposing group has been held to be persecutory.<sup>116</sup>

### *The mental element for crimes against humanity*

252. As the Elements of Crimes under the Rome Statute state, it is required that, “the perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack against a civilian population”. Therefore, the required nexus between the acts of an accused and the attack consists of two elements: (a) the commission of an act which, by its nature or consequences, is objectively part of the attack; and (b) knowledge on the part of the accused that there is an attack on the civilian population and that their acts are part thereof<sup>117</sup> or are intended to be a part thereof.

253. In relation to (a), the acts need not be committed in the midst of the attack to be sufficiently connected to it.<sup>118</sup> An act therefore committed before or after the main attack could still be considered to be part of it, provided that the act was not isolated from it.<sup>119</sup> Acts are considered part of the attack if the acts share common features, such as nature, consequences, characteristics, and targets<sup>120</sup> and are consistent with the general motives and a modus operandi.<sup>121</sup> The requirements in (b) are not such that proof is required that the perpetrator had knowledge of all the attack’s details or characteristics;<sup>122</sup> it is sufficient that the perpetrator knew of the overall context within which his or her acts took place,<sup>123</sup> which

<sup>113</sup> Kordić et al. , Appeal Judgement, 17 December 2004, para. 111.

<sup>114</sup> ICTY, Prosecutor v. Mladen Naletilić et al., Case No. IT-98-34-T, Judgement, 31 March 2003, para. 636.

<sup>115</sup> Akayesu, Trial Judgement, para. 583.

<sup>116</sup> “The Chamber considers that there are substantial grounds to believe that at least 348 victims of the killings, rapes and injuries committed by the pro-Gbagbo forces in the course of the five incidents analysed above were targeted by reason of their identity as perceived supporters of Alassane Ouattara. This conclusion of the Chamber is supported by the facts, outlined above, that during the five events under consideration, the pro-Gbagbo forces targeted participants at pro-Ouattara demonstrations, or inhabitants of areas perceived as supporting Alassane Ouattara, namely Abobo and certain neighbourhoods of Yopougon (Doukoure, Mami Fatai and Lem)”: ICC, Prosecutor v. Charles Blé Goudé, Case No. ICC-02/11-02/11, Decision on the confirmation of charges against Charles Blé Goudé, 11 December 2014, para. 122.

<sup>117</sup> Kunarac et al., Appeal Judgement, para. 99.

<sup>118</sup> Kunarac et al., Appeal Judgement, para. 102.

<sup>119</sup> Kunarac et al., Appeal Judgement, para. 102.

<sup>120</sup> ICTR, *Prosecutor v. Kajelijeli*, Trial Judgement, 1 December 2003; ICTY, *Kunarac et al.*, Trial Judgment, *Gbagbo*, Decision on the confirmation of charges against Laurent Gbagbo.

<sup>121</sup> *Bemba*, Judgment pursuant to Article 74 of the Statute.

<sup>122</sup> *Kunarac et al.*, Trial Judgment, para. 434.

<sup>123</sup> ICTY, *Prosecutor v. Mitar Vasiljević*, Case No. IT-98-32-A, Judgement, 25 February 2004, paras. 20, 28; ICC Elements of Crimes, General Introduction, para. 3.



could be evidenced by, for example, the perpetrator's participation in the attack<sup>124</sup> or in the preparation of the attack.<sup>125</sup>

### *Applicable Modes of Criminal Liability*

#### *Direct Commission/Perpetration*

254. The available evidence implicates a number of individuals in the direct commission of the enumerated acts. These individuals can be held criminally responsible if their acts were a part of the widespread or systematic attack and they acted with knowledge that their conduct was part of such an attack.

#### *Ordering*

255. Some individuals are implicated in orders, particularly to kill. To be held criminally responsible for ordering the commission of a crime, an individual must have instructed another person to engage in an act or an omission, and such instruction must have resulted in the commission of a crime or an attempt thereof. The accused must have held a position of *de jure* or *de facto* authority over the other person; there must be proof of some position of authority on the part of the individual that would compel another to commit a crime in following the accused's order.<sup>126</sup> However, a mere position of authority cannot suffice to infer that a perpetrator must have ordered the crime.<sup>127</sup> The order need not be in written or any particular form, nor must it be transmitted directly to the physical perpetrator. It is not necessary that the crime would not have been perpetrated but for the accused's order, but the order must have had a direct and substantial effect on its commission. The fact that an order was given can be proved from inferences through circumstantial evidence.<sup>128</sup> For example, an act of ordering can be proven by considering direct or circumstantial evidence of omissions or failures to act, but an omission cannot of itself constitute an act of ordering<sup>129</sup> since giving an order requires a positive act.<sup>130</sup> The suspect must intend to order a crime or must be aware of the *substantial* likelihood that a crime would be committed in the execution of the act or omission ordered.<sup>131</sup> The knowledge of any level of risk, however low, does not suffice for the imposition of criminal responsibility.<sup>132</sup>

<sup>124</sup> ICTY, *Prosecutor v. Goran Jelisić*, Case No. IT-95-10-T, Judgement, 14 December 1999.

<sup>125</sup> *Blé Goudé*, Decision on the confirmation of charges against Blé Goudé.

<sup>126</sup> ICTY, *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, Public Redacted Version of Judgement Issued on 24 March 2016 – Volume I of IV, 24 March 2016, para. 573; see also ICTY, *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-T, Judgement, 29 May 2013, para. 231.

<sup>127</sup> *Bagosora et al.*, Appeal Judgement, para. 323.

<sup>128</sup> *Blaškić*, Trial Judgment, para. 281; *Akayesu*, Trial Judgement, , para. 483. The Trial Chamber in *Semanza*, Trial Judgement, used the same phrase (para. 382) and the Trial Chambers in *Rutaganda*, Trial Judgment, para. 39 used similar phrases. Cited by *Brđanin*, Trial Judgment, para. 270. Similarly ICTY, *Krstić*, Trial Judgment, para. 601; ICTY, *Prosecutor v. Fatmir Limaj et al.*, Case No. IT-03-66-T, Judgement, 30 November 2005, para. 515; with respect to proving an order by circumstantial evidence, see also ICTY, *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-A, Judgement, 30 November 2006, paras. 170-171.

<sup>129</sup> *Galić*, Appeal Judgement, paras. 177-178.

<sup>130</sup> *Prlić et al.*, Trial Judgement, para. 231.

<sup>131</sup> *Karadžić*, Public Redacted Version of Trial Judgement – Volume I of IV, 24 March 2016, para. 573; see also *Prlić et al.*, Trial Judgement, para. 231.

<sup>132</sup> *Blaškić*, Appeal Judgement, 29 July 2004, para. 41, reversing the Trial Chamber statement that "any person who, in ordering an act, knows that there is a risk of crimes being committed and accepts the

### *Aiding and Abetting*

256. Although there may be insufficient evidence to establish that some individuals personally carried out or ordered the underlying criminal acts, some individuals have been identified by the Mission as responsible for aiding and abetting crimes against humanity. Aiding and abetting is a form of liability in which the accused contributes to the perpetration of a crime that is committed by another person. While the contribution need not be indispensable to the crime, it must have a substantial effect on the commission of the crime.<sup>133</sup>

257. The *actus reus* of aiding and abetting may be satisfied by a commander permitting the use of resources under his or her control, including personnel, to facilitate the perpetration of a crime. The provision of engineering machinery and personnel for burial operations can have a substantial effect on the commission of mass executions.<sup>134</sup> An individual can be found liable for aiding and abetting a crime when it is established that his conduct amounted to tacit approval and encouragement of the crime and that such conduct substantially contributed to the crime. When this form of aiding and abetting has been a basis for a conviction, "it has been the authority of the accused combined with his presence on (or very near to) the crime scene, especially if considered with his prior conduct, which all together allow the conclusion that the accused's conduct amounts to official sanction of the crime and thus substantially contributes to it."<sup>135</sup>

258. The aider and abettor need not share the *mens rea* of the principal perpetrator but must be aware of the essential elements of the crime ultimately committed by the principal, including his state of mind.<sup>136</sup> It is not necessary that the aider and abettor know the precise crime that was intended or actually committed<sup>137</sup> but only knowledge that his acts or omissions assist the commission of such crime.<sup>138</sup>

### *War Crimes*

259. This class of international crimes embraces any serious violation of international humanitarian law committed in the course of an international or non-international armed conflict, which entails the individual criminal responsibility of the person breaching that law.<sup>139</sup>

260. Article 8(2)(c) of the ICC Statute defines war crimes in the case of an armed conflict not of an international character as serious violations of Article 3 common to the four Geneva Conventions of 12 August 1949, including murder, cruel treatment and torture committed

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risk, shows the degree of intention necessary (recklessness) so as to incur responsibility for having ordered, planned or incited the commitment of the crimes". For an application to the facts, see para. 345 et seq.

<sup>133</sup> ICTR, *Prosecutor v. Paul Bisengimana*, Case No. ICTR-00-60-T, Judgement and Sentence, 13 April 2006, para. 33.

<sup>134</sup> ICTY, *Prosecutor v. Vujadin Popović et al.*, Case No. IT-05-88-A, Judgement, 30 January 2015, paras. 1783-1784.

<sup>135</sup> ICTR, *Prosecutor v. Grégoire Ndahimana*, Case No. ICTR-01-68-A, Judgement, 16 December 2013, para. 147.

<sup>136</sup> Ndahimana, Appeals Judgement, para. 147.

<sup>137</sup> ICTY, *Prosecutor v. Pavle Strugar*, Case No. IT-01-42-T, Judgement, 31 January 2005, para. 350.

<sup>138</sup> ICTY, *Prosecutor v. Nikola Sainović et al.*, Case No. IT-05-87-A, Judgement, 23 January 2014, para. 1760.

<sup>139</sup> ICTY, *Prosecutor v. Dusko Tadić*, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 94.

against persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat.<sup>140</sup>

261. To establish whether a crime qualifies as a ‘war crime’, certain pre-conditions must be met:

- (a) The existence of an armed conflict (international or non-international); and
- (b) A nexus between the alleged violation and the armed conflict.

262. The classification of a situation of armed violence under international law is an objective legal test. A non-international armed conflict exists “whenever there is protracted armed violence between governmental authorities and organized armed groups or between such groups within a State”.<sup>141</sup> This definition encompasses two core, cumulative criteria, which distinguish a non-international armed conflict from internal tensions or disturbances: (i) the intensity of the armed violence and (ii) the level of organization of the armed group(s) involved. ICTY jurisprudence reflects a number of indicative factors<sup>142</sup> to assess whether these criteria have been met.<sup>143</sup>

263. The armed conflict need not have been causal to the commission of the crime charged but must have played a substantial part in the perpetrator’s ability to commit that crime. It is not required that the alleged crimes occur at a time and in a place where fighting is actually taking place. Relevant factors include whether the perpetrator was a combatant, whether the victim was a non-combatant, whether the victim was a member of the opposing party, and whether the act may be said to have served the ultimate goal of a military campaign.<sup>144</sup>

<sup>140</sup> See also Common Article 3; APII, Article 4.

<sup>141</sup> *Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 70. The same two criteria have been adopted by: the SCSL, *Prosecutor v Issa Hassan Sesay et al.*, Case No. SCSL-04-15-T, Judgement, 2 March 2009, para. 95; ICC, *Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, Decision on the confirmation of charges, 29 January 2007, para. 233; Report of the Secretary-General’s Panel of Experts on Accountability in Sri Lanka, 31 March 2011, para. 181; Report of the International Commission of Inquiry to Investigate All Alleged Violations of International Human Rights Law in the Libyan Arab Jamahiriya, UN Doc A/HRC/17/44, 1 June 2011, para. 63f.

<sup>142</sup> The number, duration, and intensity of individual confrontations. This includes occupations, besieging or blocking of towns, the closure of roads, and the existence of front lines; The type of military equipment and weapons used, including the number and caliber of munitions fired; Efforts by an armed group to better arm itself can be taken into account; The number of persons and types of forces partaking in the fighting; The number of casualties and the extent of material destruction caused; The number of civilians fleeing the zone of hostilities; The frequency of fighting over time and the spreading over territory; The reaction by the government, e.g. an increase in the number of government forces or general mobilization, the use of its armed forces instead of the police, the claiming of the rights of a belligerent, the recognition of an armed group as a belligerent, the labelling of the situation as “civil war” or similar terms, the declaration of a state of emergency or the reliance on rules of international humanitarian law; The reaction and involvement of the international community. This can include the situation being on the agenda of the Security Council or the General Assembly, the deployment of peacekeeping missions, calls of the international community for the respect of international humanitarian law; or whether attempts are made to broker ceasefire agreements.

<sup>143</sup> *Limaj et al.*, Trial Judgement, para. 90; ICTY, *Prosecutor v. Ramush Haradinaj et al.*, Case No. IT-04-84-T, Judgement, 3 April 2008, paras. 49, 60; ICTY, *Prosecutor v. Ljube Bošković et al.*, Case No. IT-04-82-T, Judgement, 10 July 2008, paras. 149, 177.

<sup>144</sup> *Bošković et al.*, Trial Judgement.