

—Review Essay—

M. Cherif Bassiouni (ed.), *Libya: From Repression to Revolution: A Record of Armed Conflict and International Law Violations, 2011-2013, International Criminal Law Series* (Martinus Nijhoff Publishers, 2013) lxiii, 933 pp. \$320 (Hardback) ISBN: 9789004257344.

Hilmi M. Zawati*

In response to the Libyan government forces' excessive repression of peaceful demonstrations in Benghazi and other eastern Libyan cities in mid-February 2011,¹ the Security Council unanimously adopted Resolution 1970 on 26 February 2011, referring the situation in Libya to the prosecutor of the International Criminal Court (ICC) under Chapter VII of the United Nations Charter.² At the same time, the Human Rights Council established in its 15th special session, held on 25 February 2011, the United Nations Commission of Inquiry on Libya (UNCIL). The mandate of UNCIL is to investigate all violations of international human rights law allegedly committed in Libya, establish the facts of such violations and crimes, and identify, where possible, individuals

* Hilmi M. Zawati, D.C.L. (McGill), M.A. (McGill), Ph.D. (CPU), M.A. (Punjab), Post-Grad. Dipl. (Khartoum), LL.B. (Alexandria), is currently Chair of the International Centre for Legal Accountability and Justice (ICLAJ), and an international criminal law jurist and human rights advocate. He is the author of several prize-winning books on international humanitarian and human rights law, including his book *The Triumph of Ethnic Hatred and the Failure of International Political Will: Gendered Violence and Genocide in the Former Yugoslavia and Rwanda* (Lewiston, N.Y.: The Edwin Mellen Press, 2010). Dr. Zawati's most recent work is his book *Fair Labelling and the Dilemma of Prosecuting Gender-Based Crimes at the International Criminal Tribunals* (New York, N.Y.: Oxford University Press, 2014).
Email: hilmi.zawati@mail.mcgill.ca.

¹ One week later, protestors resorted to armed resistance using different kinds of weapons seized from government caches of heavy artillery. By 21 February 2011, the protests had evolved into a full-fledged revolutionary movement, and insurgents took control of Benghazi, while the Libyan government's security forces and pro-Qadhafi paramilitaries continued their brutal and systematic attacks on civilian populations in the protesting cities. See C. Shenkman, 'Catalyzing National Judicial Capacity: The ICC's First Crimes against Humanity outside Armed Conflict', 87 *New York University Law Review* (2012) 1210, at 1229–1230; H.M. Zawati, 'Prosecuting International Core Crimes under Libya's Transitional Justice: The Case of Abdullah Al-Senussi', in A. Diver and J. Miller (eds), *Justiciability of Human Rights Law in Domestic Jurisdictions* (Springer International Publishing, 2016) 217, at 217.

² SC Res.1970 (2011). This SC Res. refers the situation to the ICC.

responsible for those violations with a view to hold them accountable and bring them to justice.³

Three months later, on 1 June 2011, UNCIL submitted its preliminary report to the UN Human Rights Council,⁴ noting that its findings were exploratory due to several challenges, including the fragile security situation in Libya, which obstructed the work of the investigative team to conduct effective investigations and collect testimonies throughout Libya.⁵ Accordingly, on 14 July 2011, the Human Rights Council adopted a resolution to extend the mandate of UNCIL in order to receive an oral update from the Commission at its eighteenth session, and a final written report at its 19th session.⁶

UNCIL submitted its final report to the Human Rights Council on 8 March 2012,⁷ providing a detailed background of the civil war in Libya, and emphasizing the violations of the norms of international human rights law, international humanitarian law and international criminal law by the forces of Muammar Gaddafi, paramilitary organizations, as well as other war factions. These violations include the excessive use of force and prohibited weapons, unlawful killing, arbitrary detentions and enforced disappearances, torture and other forms of ill-treatment, wartime rape and sexual violence, and attacks on civilians, civilian objects, and protected persons and objects.⁸ At the same time, an independent research project, conducted by seven researchers between January 2012 and December 2012 was initiated by the International Institute of Higher Studies in Criminal Sciences (ISISC) to provide external research support to UNCIL.⁹

³ Human Rights Council Res. S-15/1, § 11, on the situation of human rights in the Libyan Arab Jamahiriya.

⁴ Human Rights Council, *Report of the International Commission of Inquiry to Investigate All Alleged Violations of International Human Rights Law in the Libyan Arab Jamahiriya*, UN Doc. A/HRC/17/44, 1 June 2011.

⁵ *Ibid.*, § 11.

⁶ Human Rights Council Res. 17/17 (2011), § 14, on the situation of human rights in the Libyan Arab Jamahiriya.

⁷ Human Rights Council, *Report of the International Commission of Inquiry on Libya*, UN Doc. A/HRC/19/68, 8 March 2012.

⁸ *Ibid.*, §§ 15-82.

⁹ Since the toppling of Muammar Gaddafi in 2011, human rights situation in different Libyan regions had been aggravated. A most recent report by the Human Rights Council, documenting abuses committed in Libya between 2014 and 2015, indicates that the human rights situation had deteriorated dramatically throughout that period. The report details widespread and horrific abuses by different factions, including torture, rape and other forms of sexual violence, prolonged suspension in stress positions, targeted assassinations, abductions, and illegal detention. See Human Rights Council, *Investigation by the Office of the United Nations High Commissioner for Human Rights on Libya: Detailed Findings*, UN Doc. A/HRC/31/CRP.3, 15 February 2016. In conjunction with the above report, see also Human Rights Council, *Investigation by the Office of the United Nations High Commissioner for Human Rights on Libya Report of the Office of the United Nations High Commissioner for Human Rights*, UN Doc. A/HRC/31/47, 15 February 2016.

The above reports form the core of *Libya: From Repression to Revolution: A Record of Armed Conflict and International Law Violations, 2011-2013*,¹⁰ an impressive work edited by M. Cherif Bassiouni, Emeritus Professor of Law and Honorary President of the International Human Rights Law Institute at DePaul University College of Law, USA. This voluminous work, grounded on the above reports and on the ISISC analysis of the violations of the norms of the human rights law in seven regions of Libya that experienced the heaviest clashes between Gaddafi forces and the *thuwar*, consists of a general introduction by the editor, and 15 chapters in two main parts, providing analysis of the compiled data contributed by Douglass K. Hansen, Jesse M. Franzblau, Sara Parikh Drar, and Angela Mudukuti.¹¹

At the outset of his introduction, Bassiouni highlights the relation between the Project and the work of the UNCIL. He states that both ventures performed a separate but complementary role.

Furthermore, the editor underlines a number of challenges that confronted both Project researchers and the fact-finding team, including the quality and credibility of the collected data sources, a matter that required a lot of time to examine the collected material and check its reliability and accuracy.¹² Another challenge is the clash of terminology. The Project's researchers faced the problem of inconsistent terms. They spent a considerable time in categorizing these terms and using it throughout the Project in a proper way. This was a substantial step taken to avoid any misunderstandings and to help the international community to establish justice and combat the culture of impunity in Libya.¹³

The reviewed work consists of two parts. Part One, comprising the first five chapters, focuses on the history of repression in Libya, as well as on the violations of human rights during and in the aftermath of the Libyans' popular revolution of 17 February 2011. It provides a historical overview of the conflict after four decades of continuous repression under Gaddafi's totalitarian regime, and the impact of the brutal civil war on various aspects of Libyan lives. The first chapter examines Libya's history, with an emphasis on its political and social structure under Gaddafi's regime. Moreover, it provides a brief history of Gaddafi's support for the international acts of terrorism, including the 1988 Pan Am flight 103 bombing.¹⁴ The chapter also highlights Gaddafi's normalization with Western governments that preceded the events leading to the February 2011 popular uprising, and finally, the international community's abandonment of Gaddafi and military intervention to protect Libyan civilians and end his rule.¹⁵

¹⁰ M. Cherif Bassiouni (ed.), *Libya: From Repression to Revolution: A Record of Armed Conflict and International Law Violations, 2011-2013* (Martinus Nijhoff Publishers, 2013).

¹¹ *Ibid.*, at xvii.

¹² *Ibid.*, at xxiii.

¹³ *Ibid.*

¹⁴ *Ibid.*, at 104.

¹⁵ *Ibid.*, at 122.

The second chapter considers the evolution of armed conflict in Libya between 2011 and 2012. It provides an overview of the structure and composition of both the Gaddafi and the *thuwar* forces.¹⁶ The chapter also explores the Gaddafi regime's lack of developing a strategic approach to confront either internal uprising or external intervention.¹⁷ The third chapter examines the legal basis for NATO's military intervention in the Libyan conflict in the light of the laws of armed conflict,¹⁸ including the use of force under Chapter VII of the United Nations Charter pursuant to the Security Council Resolution 1973.¹⁹ The chapter argues that although the latter approves foreign military engagement for humanitarian reasons, particularly to protect civilians under the threat of attack in Libya, including in Benghazi,²⁰ NATO's direct involvement in the conflict continues to be debateable.²¹ It also reviews NATO's conduct during the Libya campaign and its obligation to investigate its potential unlawful attacks.²²

The fourth chapter underlines accountability for violations of the norms of the international human rights law, humanitarian law, and international criminal law during the 2011-2012 armed conflict in Libya.²³ It provides that all war factions had committed acts that qualify as violations of the above three legal regimes in varying proportions. The chapter also highlights the issue of holding individuals accountable for such violations under Libyan transitional justice.²⁴

While there were no judicial mechanisms under Gaddafi's regime for holding individuals accountable for violations of the norms of international law, there is a serious obstacle to hold individuals accountable for such crimes on an equal footing at various Libyan courts and special tribunals.²⁵

The fifth chapter sheds some light on the Libyan transitional period, particularly on the socio-political landscape.²⁶ It also focuses on Libyan non-state armed actors, who emerged during the civil war, as well as on security challenges,

¹⁶ *Ibid.*, at 133.

¹⁷ *Ibid.*, at 158.

¹⁸ *Ibid.*, at 199.

¹⁹ SC Res. 1973 (2011).

²⁰ *Ibid.*, § 4.

²¹ Bassiouni, *supra* note 10, at 268.

²² *Ibid.*, at 266.

²³ *Ibid.*, at 289.

²⁴ *Ibid.*, at 365.

²⁵ A closer look at the Libyan transitional laws, particularly Law No. 38, shows that Art. 4 provides blanket immunity for the *thuwar* who carried out the task of toppling the Gaddafi regime, the matter that approves the status of lawlessness and encourages the culture of impunity. Early reports suggest that this amnesty law was drafted in order to address the tribal leaders' concerns of holding members of relative rebel forces accountable for human rights violations allegedly committed during and after the uprising against Gaddafi's totalitarian regime. See H.M. Zawati, 'The Challenge of Prosecuting Conflict-Related Gender-Based Crimes under Libyan Transitional Justice', 10 *Journal of International Law and International Relations* (2014) 44, at 66-67; Art. 4 Law No. (38) for the Year 2012 on Some Special Measures Regarding the Transitional Period, National Transitional Council, Libya, 2 May 2012.

²⁶ Bassiouni, *supra* note 10, at 405.

existing as a direct result of weapons proliferation and lack of constitutional institutions and governance.²⁷ Non-state armed actors played a significant role in the deterioration of many aspects of life in post-conflict Libya.

Part two, including the last ten chapters of the book, provides the reader with the required information for understanding the Libyan crisis.²⁸ The chapters present an overview and analysis of violations in a number of Libyan regions and cities that experienced the heaviest fighting during the conflict, namely Benghazi; Ajdabiya and Brega; Ra's Lanuf and Bin Jawad; Misrata; the Nafusa Mountains; Khums; Zawiya; Tripoli; Bani Walid; and Sirte. In other words, every chapter in this part discusses the conflict within the context of a certain region, explaining how it developed, how it was fought, and the violations of the norms of the international humanitarian law, international human rights law, and international criminal law perpetrated during the armed conflict.²⁹

Following the same format, each chapter in this part is divided into the following five sections: introduction; summary of events; illustrations of the violations; the role of NATO; and conclusion. While the first two sections in each chapter provide basic information and a summary of events that the reader needs to know about the examined region, section five elucidates the violations in each region, as follows: excessive use of force;³⁰ unlawful killing;³¹ arbitrary detentions and enforced disappearances;³² torture and other forms of ill-treatment;³³ denial of access to medical treatment;³⁴ freedom of expression;³⁵ attack on civilians; civilian objects, protected persons and objects;³⁶ prohibited weapons;³⁷ mercenaries;³⁸ targeting specific groups;³⁹ sexual violence;⁴⁰ and the use of children and their treatment in armed conflict.⁴¹

Section Four discusses the role of NATO in the conflict. As has been illustrated in the third chapter, NATO's military intervention, carried out by France, United Kingdom, and the United States, started with the aim of protecting civilians, and then moved to boost the *thumar* capabilities to overthrow Muammar

²⁷ *Ibid.*, at 432.

²⁸ *Ibid.*, at 479.

²⁹ *Ibid.*

³⁰ *Ibid.*, at 600.

³¹ *Ibid.*, at 706.

³² *Ibid.*, at 672.

³³ *Ibid.*, at 521.

³⁴ *Ibid.*, at 523.

³⁵ *Ibid.*, at 549.

³⁶ *Ibid.*, at 578.

³⁷ *Ibid.*, at 711.

³⁸ *Ibid.*, at 580.

³⁹ *Ibid.*, at 625.

⁴⁰ *Ibid.*, at 630; See also H.M. Zawati, 'Hidden Deaths of Libyan Rape Survivors: Rape Casualties Should be Considered Wounded Combatants Rather than Mere Victims of Sexual Violence', *The National Law Journal* (2012) 35, at 35.

⁴¹ *Ibid.*, at 854.

Gaddafi and end his tyrannical regime.⁴² Finally, each chapter ends with a conclusion that elucidates its findings.

Nevertheless, regardless the fact that the UNCIL's reports were the subject of criticism on different levels,⁴³ the reviewed work addresses many of the raised concerns as it expands on and analyses the above reports. As this voluminous work elaborates on the above UNCIL's reports, which were conducted while the civil war has not come to an end, and the violations of the norms of the humanitarian law, international human rights law and international criminal law continue from all war factions, a revised edition of this work, in the light of the latest Human Rights Council reports on Libya, is recommended.

That being said, this landmark work contributes to the existing scholarship in many different ways. It is the first comprehensive legal analysis to focus on the early stages (2011-2012) of the ongoing civil war in Libya. Moreover, this painstaking study provides the reader with a chronological analysis of the socio-political events that led to the popular revolution against Gaddafi's rule, one of the most totalitarian regimes in the Arab world. Finally, it presents the reader with a thorough legal examination of NATO's military intervention in the Libyan conflict of 2011, its role in protecting Libyan civilians, and its responsibility for violations of the norms of international humanitarian law which may have occurred as a result of its air strikes on civilians and their objects. This voluminous work is essential reading and a mine of information for those interested in the Libyan civil war in particular, and in the Arab Spring in general.

⁴² *Ibid.*, at 482.

⁴³ Generally, see K.J. Heller, 'The International Commission of Inquiry on Libya: A Critical Analysis', in J. Meierhenrich, (ed.), *International Commissions: the Role of Commissions of Inquiry in the Investigation of International Crimes* (forthcoming), available online at SSRN: <http://ssrn.com/abstract=2123782> (visited 18 July 2016).