



LEGAL ADVISER
LE CONSEILLER JURIDIQUE

OLA(2012)0014
15 February 2012

Dear Judge Kirsch,

Thank you for your letter of 3 February, 2012, which inquired about five additional sites struck during the course of NATO's Operation Unified Protector (OUP), and presented further questions relating to three sites discussed in our letter of 23 January. Your letter also commented on several other matters addressed below.

As we discussed when we spoke by telephone on 2 February, gathering and reviewing information of the sort requested in your letter requires considerable coordination. While we are replying to you more quickly than we were able to in response to your 15 December request, it was not possible to complete that work by the requested date of last Friday, 10 February.

Before turning to the specific incidents about which you inquired, I would like to address certain points of a more general character.

As you are aware, we retain concerns about some aspects of the Commission's application of its mandate from the Human Rights Council (HRC), which was given in the specific context of gross repression and manifest human rights violations committed by and against Libyans in the context of political protests in that country. That mandate is to "investigate all alleged violations of international human rights law in Libya, to establish the facts and circumstances of such violations and of the crimes perpetrated" and to make recommendations "all with a view to ensuring that those individuals responsible are held accountable."

NATO is in no doubt that the former regime committed serious violations of international law during the course of the internal conflict in Libya which emerged from its repression. We are not, however, persuaded that examination of the conduct of parties to the Libyan internal conflict implies expansion of the Commission's work to include "investigation" of NATO's actions giving effect to the mandate contained in UN Security Council Resolution 1973.

We understand that the Commission has been conducting a careful review of several incidents involving NATO about which it has had some concerns, and trust that the description of OUP policies and comments on specific incidents contained in our letter of 23 January have been of assistance to the Commission in that work. I was pleased the other evening to hear that, based on that review, the members of the Commission consider that NATO did not deliberately target civilians and did not commit war crimes in Libya. Such a view is of course fully consistent with our own firm belief as set forth in that letter which noted that not one of the targets struck was approved for attack, or was in fact attacked, if NATO had any evidence or other reason to believe that civilians would be injured or killed by a strike.

We would be concerned, however, if "NATO incidents" were included in the Commission's report as on a par with those which the Commission may ultimately conclude did violate law or constitute crimes. We note in this regard that the Commission's mandate is to discuss "the facts and circumstances of ... violations [of law] and ... crimes perpetrated."

We would accordingly request that, in the event the Commission elects to include a discussion of NATO actions in Libya, its report clearly state that NATO did not deliberately target civilians and did not commit war crimes in Libya.

We appreciate the preview of certain recommendations the Commission is considering including in its report, and we welcome the opportunity to offer comments on them.

As a general point, similar to the one just made, we doubt the appropriateness of including in the report recommendations relating to NATO. The Commission's mandate to make recommendations is made in the specific context of ensuring the accountability of those perpetrating crimes and violating international law – a category we believe it is clear does not include NATO.

With respect to the two specific recommendations anticipated in your 2 February letter, we would first recall the statement in NATO's letter of 23 January that OUP has been terminated and that NATO has no mandate to conduct any activities in Libya. As our letter acknowledged – and as since demonstrated by the Commission itself – a wide range of parties may and will gather information relating to strikes, and that information will in turn be given due consideration.

In addition, particularly as there have been very few claims for compensation associated with NATO actions during OUP, we see little rationale for a NATO-specific recommendation on compensation. There is no legal obligation to provide compensation for damage occurring in the course of lawfully-conducted military activities, nor is it the case that establishment of programs for compensation for such damage has become standard or expected practice. Any issues of compensation are accordingly questions of a political

character. It is in fact our understanding that the Libyan representative recently informed the Security Council that a commission is being formed to consider questions of civilian casualties and that his government plans to establish a mechanism to indemnify victims following its investigations. NATO has made clear to the government of Libya its desire and intent to be supportive of this process.

Allow me, finally, to address two possible misapprehensions with respect to NATO activities in Afghanistan. First, neither NATO nor ISAF has in fact established or conducts a compensation program in that country. Secondly, while there is important sharing of information between ISAF and UNAMA, the context of that information-sharing is highly specific – both ISAF and UNAMA have large and long-term presences on the ground, a major purpose of sharing information is to assure the physical security of UNAMA, and any sharing of information is done on the basis of specific operational requirements for such sharing and of institutional relationships and understandings that have been developed over the course of a decade of collaboration. There is no information-sharing agreement applicable to the Commission that would permit NATO to share classified information with it.

Individual incidents. The Commission has asked for comment on five new incidents, and asked further questions with respect to three addressed in our letter of 23 January. These are discussed below in the order found in the Commission's letter of 3 February. As before, the discussion of these individual incidents must be read in conjunction with the general information on targeting and strike execution provided in that letter. In short, however, not one of the targets struck was approved for attack, or was in fact attacked, if NATO had any evidence or other reason to believe that civilians would be injured or killed by a strike. Please note that a number of the incidents below are the subject of further assessment, which will take into account the further information provided by the Commission in its 3 February letter.

It should also be noted that most of the strikes referenced in the Commission's 3 February letter occurred in the later stages of the campaign, and in particular after the fall of Tripoli. The campaign at this stage was highly fluid and for tactical reasons the regime was using civilian rather than military structures in support of military action. The regime's conventional command and control in particular had been severely degraded and it relied increasingly on non-traditional/informal methods. Such methods did not involve the kind of dedicated structures, wiring, equipment and other infrastructure that would identify a command and control node as "military" in character.

1. 29 August (Bani Walid). This was a major command and control node which was reliant on non-traditional/informal methods to carry out that function. The site was actively controlling regime forces which were attacking civilians in the area. The full targeting procedure described in our 23 January letter was

applied in this case, including that no target was selected for attack, or in fact struck, if there was any reason to believe that civilian casualties would result.

2. 16 September (Sirte). This was a dynamic strike. OUP observed multiple military vehicles with substantial numbers of associated military personnel on the ground over an extended period. Those vehicles were engaging in continuing rocket fire against civilian areas, and authorization was granted to engage them once they were clear of civilians. The vehicles were not struck until they left the populated area where they had initially been observed, and had relocated to an area free of civilians and civilian structures. The two vehicles struck were sufficiently separated that a single precision-guided weapon of the type employed would have been insufficient to destroy them both.

3. Undated (Bani Walid). The only strike at this location took place on 9 September. Two SCUD missiles, which are vehicle-mounted, were stored at this building, which was not a permanent or purpose-built SCUD storage facility. On the basis of its standard targeting methodology as previously described, it was concluded that no civilians were at this isolated facility. It is not known whether the SCUDs were destroyed in the attack.

4. 9 September (Bani Walid). The only strike on this location took place on 5 October. This facility was a confirmed military facility in a walled compound, and was being used at the time of the strike as a command and control facility. On the basis of its standard targeting methodology as previously described, it was concluded that no civilians were at this isolated facility.

5. 10 October (Bani Walid). This was a building in an industrial compound that had been taken over for military purposes and was being used at the time as a command and control node. On the basis of its standard targeting methodology as previously described, it was concluded that no civilians were at this isolated facility.

6. 20 June (Surman). NATO's principal concern with this site was its functioning as a military command and control node, and it was that function that was struck. We remain confident of our information that this was a military site, that there was no evidence of a civilian presence and that all measures were taken to confirm that conclusion, and that the strike was executed in a manner designed to avoid any risk to transient civilians. The weapons storage facility to which the Commission refers was known to NATO, but that target was not engaged on the basis of its proximity to a mosque and school. NATO did not have access to contemporaneous ground observation from reliable neutral observers and cannot make a definitive statement with respect to the reports of civilian deaths.

7. 3 August (Zlitan). NATO information, as indicated in our earlier letter, is that this site was struck on 4, not 3, August. As stated previously, NATO identified this site as a senior regime commander's command and control node located within a residential property. As noted in other contexts as well, this target would not have been struck if NATO had any evidence or other reason to believe that a strike would injure or kill civilians.

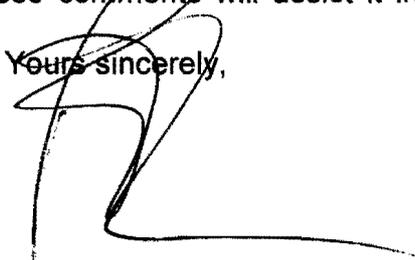
8. 8-9 August (Majer). At the time of these strikes, these buildings had been identified as being used as a staging area for regime forces actively engaged in attacks on civilians and civilian-populated areas. It should be noted that at this point in the campaign regime forces, as well as the mercenaries augmenting those forces, often wore civilian clothing.

Naval and other ordnance. The Commission has also requested information on use of naval weapons. It should be noted that no naval weapons were used in any of the 14 incidents with respect to which the Commission has posed questions. During the course of OUP, approximately 470 naval rounds were fired. No cluster munitions, including CBU-107 or other passive attack cluster munitions, were used during OUP.

Leaflets and warnings to civilians. The Commission's military advisor has separately requested information on leaflets used to warn civilians of possible attacks. Copies of representative leaflets are being provided separately by electronic means. NATO used both physical leafleting and broadcast media to provide warnings, as well as to generally advise both regime forces and civilians on how to act to minimize risk, on literally hundreds of occasions throughout the campaign.

Please be assured that NATO appreciates and values the work of the Commission, and trusts that these comments will assist it in preparing its final report.

Yours sincerely,

A handwritten signature in black ink, appearing to be 'Peter Olson', written over the text 'Yours sincerely,'.

Peter Olson
Legal Adviser

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