

Dissenting Opinion of Gary Born

1. I agree with nearly all of the conclusions and a number of aspects of the reasoning in the Tribunal's Award. I write separately, however, regarding the Tribunal's decision that the State of Libya ("Libya" or "Respondent") is not responsible under customary international law for the coerced seizures and looting by its military forces of property belonging to the Tekfen-TML Joint Venture ("TTJV"), Tekfen İnşaat ve Tesisat A. Ş. ("Tekfen") and TML İnşaat A. Ş. ("TML") (collectively, "Claimants"). In my view, and with great respect for the Tribunal, those actions by Libyan military forces plainly violate well-settled and fundamentally-important protections of international law.¹

2. Despite my respect for the Tribunal and its analysis, I am convinced the evidentiary record leaves no reasonable doubt that, during the night of 22 February 2011, the Respondent's uniformed military troops forced the Claimants' civilian employees, who had sought their protection, to surrender vehicles and other valuable property belonging to the Claimants. The precise character and value of that property is uncertain (principally because matters of quantum have been, by agreement, reserved for later phases of this arbitration). What is unmistakably certain, however, is that looting of civilian property by the Respondent's armed military forces occurred on 22 February 2011 and that this violates basic protections of international law, for which the Respondent is responsible.

3. The Tribunal questions aspects of the evidence presented by the Claimants regarding the looting of their property. In my view, the Tribunal's criticisms are immaterial to the issue in dispute and, in any event, clearly erroneous.

4. The Tribunal's criticisms of the Claimants' witnesses and other evidence are immaterial because, even accepting all of those criticisms without reservation, the evidentiary record establishes that *some* property belonging to the Claimants was unlawfully looted by the Respondent's soldiers; that fact compels a conclusion that the Respondent violated its international obligations to provide the Claimants with full protection and security. The possibility that more, or less, of the Claimants' property might have been taken by the Respondent's soldiers, or that the Claimants' witnesses might, or might not, have exaggerated the full extent of their losses, is irrelevant to the fact that the Respondent's troops unlawfully seized *some* amount of the Claimants' property – for which the Respondent is plainly responsible. The Tribunal's criticisms would be relevant, as the Parties agreed and the Tribunal directed, to a subsequent phase on damages and quantum, but they do nothing to alter the Respondent's violation, as a matter of principle, of its international obligations.

5. The Tribunal's criticisms of the Claimants' witnesses and other evidence are also, in my view, plainly erroneous. Unsurprisingly, evidence describing the midnight looting of frightened civilians at gun-point by undisciplined troops in an isolated desert outpost during the 2011 Libyan civil war is less detailed and tidy than the evidence in many international disputes. Nonetheless, viewed with care, the Claimants' witness testimony is neither inconsistent nor lacking in credibility, as the Tribunal apparently concludes; rather, in my

¹ I also disagree with other aspects of the Tribunal's analysis, including its conclusions regarding the Claimants' alleged abuse of rights for pursuing two arbitrations (against different parties, under different instruments) and the status of GMMRA.

view, that testimony presents an entirely credible, and equally uncontradicted, portrait of armed Libyan soldiers coercing unarmed foreign civilians to surrender vehicles and other property. Indeed, it is the Tribunal's factual hypotheses that are both contradicted by the evidence and implausible. These conclusions are not necessary to a decision that the Respondent breached its international obligations, but they underscore the wrongful character of the conduct of the Respondent's troops.

I. A STATE IS RESPONSIBLE UNDER CUSTOMARY INTERNATIONAL LAW FOR ITS MILITARY TROOPS' FORCIBLE SEIZURE OF ALIEN PROPERTY

6. The Tribunal rightly accepts that the Agreement between the Republic of Turkey and the Great Socialist People Libyan Arab Jamahiriya on the Reciprocal Promotion and Protection of Investments of 25 November 2009 ("BIT") permits the Claimants to assert claims against the Respondent under customary international law, including claims based on conduct that pre-dates the entry into force of the BIT. In the Tribunal's words, the "Claimants have the ability to bring CIL claims against Libya for alleged breaches that predate the entry into force of the Treaty."²

7. In my view, this conclusion is unavoidable. There can be no serious dispute that international law historically provided protections for aliens against unlawful actions by host states. The International Law Commission correctly summarizes the position: "The individual is the subject of many primary rules of international law, both under custom and treaty, which protect him at home, against his own Government, and abroad, against foreign Governments."³ Among the best examples of such protections is that concerning an alien's right to full protection and security – a right which was (and is) specifically directed to protecting individual foreign nationals from unlawful or inadequate governmental action.

8. There is no substance to the Respondent's suggestion that, because the right to full protection and security was historically implemented, in most settings, by means of diplomatic protection undertaken by the alien's home state, these rights are incapable of being invoked by aliens themselves. Here, as the Tribunal observes, Article 8 of the BIT expressly provides the Claimants the right to have disputes "in connection with" protected investments resolved by international arbitration.⁴ That provision plainly encompasses, and enables the Claimants to pursue, claims against the Respondent under customary international law, including claims for violations of the Claimants' right to full protection and security. The Claimants' right to pursue, and the Tribunal's power to decide such claims, is no different from the Claimants' right to invoke, and the Tribunal's power to apply, other rules of international law, including the substantive provisions of the BIT itself.

9. The Tribunal also rightly acknowledges that the Respondent was obligated to afford both the Claimants and their property full protection and security under international law. More specifically, the Respondent was obligated "to exercise such due diligence in the protection of foreign investment as [is] reasonable under the circumstances."⁵ Moreover, it is undisputed that if, instead of protecting the Claimants and their property, the Respondent's

² Award, ¶ 7.7.92.

³ Exh. RLA-138, ILC Commentary to Article 1 ¶ 4.

⁴ BIT, Art. 8(1) (jurisdiction over disputes "in connection with his investment").

⁵ Exh. RLA-041, ¶308.

security forces themselves looted the Claimants' property, that would constitute a grave violation of the Respondent's obligations under international law.

10. The Tribunal also correctly concludes "that the acts of an organ of the State are attributable to the State," that "the military is unequivocally a State organ" and that the "Respondent does not dispute [either] point."⁶ Thus, it is undisputed that, if the Respondent's military forces looted – that is, seized or appropriated, through the use or threat of force or other forms of coercion – property belonging to the Claimants, that would constitute a violation of Libya's obligations of full protection and security under international law. Simply put, international law holds a state responsible for the actions of its military forces when, rather than protecting foreign nationals, those forces seize or appropriate the property of those nationals through the use or threat of force or other unlawful injury.

II. THE EVIDENTIARY RECORD ESTABLISHES THAT LIBYAN MILITARY FORCES UNLAWFULLY SEIZED THE CLAIMANTS' PROPERTY

11. The Tribunal does not dispute the foregoing legal principles, and instead apparently concludes that, as a factual matter, none of the Claimants' property was taken by the Respondent's armed forces; relatedly, the Tribunal also apparently concludes that, although looting by the Respondent's soldiers occurred, it was only the looting of personal effects belonging to the Claimants' employees individually, not of property belonging to the Claimants themselves. In the Tribunal's words, "Mr Davarci's evidence relating to the taking of TTJV's vehicles [is] unreliable" and "the most plausible description of what happened is contained in the testimony given by Mr Halicilar in his statement in the Contract Arbitration,"⁷ where he only states that the GMMRA soldiers took personal belongings by force.

12. That evidentiary assessment is clearly erroneous. Although a mistaken assessment of the evidence does not necessarily warrant a dissent, in these circumstances the character and gravity of the Respondent's deliberate wrong-doing, perpetrated against entirely innocent civilians, requires a separate opinion. Among the highest aims of international law, and particularly guarantees of full protection and security, is safeguarding vulnerable foreign citizens from predatory conduct by state officials. In my view, the Tribunal's mandate requires identifying and sanctioning violations of those guarantees.

A. The Evidence Establishes that Libyan Military Forces Unlawfully Seized Some of the Claimants' Property

13. First, it is in my view impossible to review the evidentiary record and avoid a conclusion that *some* of the Claimants' property was unlawfully seized by the Respondent's armed forces. The precise character of that property, and the full extent of the Claimants' losses, is not capable of determination during this phase of the arbitral proceedings. Rather, as the Tribunal previously ordered, all issues of quantum are for resolution in a subsequent phase of the proceedings: "the Tribunal has concluded, for reasons of cost effectiveness and to avoid duplication, that ... the arbitration should proceed in phases, with the first phase being restricted to a consideration only of *Claimants' claims regarding Respondent's international responsibility (damages, if any, being reserved for a later phase)* for its alleged

⁶ Award, ¶¶ 7.7.61-7.7.62.

⁷ Award, ¶ 7.7.32.

failure to protect Claimants and their investments as outlined in their Request for Arbitration and in the Terms of Reference.”⁸

14. Whatever the eventual assessment of the Claimants’ losses, however, it is in my view clear on the existing record in this phase of the arbitration that the Respondent’s troops unlawfully seized *some* of the Claimants’ property. That is sufficient to conclude, with respect to the only relevant issue in this phase of the arbitration, that the Respondent breached its international obligation of full protection and security.

15. Whatever other factual disputes may exist, it is undisputed that the Claimants maintained several camps in remote areas of the Great Saharan Desert, some 1200 km from Benghazi, in southeastern Libya. The Claimants’ largest camp, named the Main Camp (or Kufra Camp), was located about 140 km from Kufra City (or Al-Jawra), a remote desert town of around 25,000 inhabitants and a military garrison of around 500 soldiers; the Main Camp housed most of the Claimants’ workers (as noted in the Award, some 1,000 foreign and local staff) and property in Libya.⁹ The Claimants also maintained smaller camps at Tazerbo, Sarir, Bozerik, Km 90 and elsewhere.¹⁰ The Claimants’ various camps were each guarded by 15-20 unarmed local security personnel (who, like the Claimants’ employees, were not permitted by Libyan law to carry weapons).¹¹

16. It is also undisputed that, during the early days of the Libyan revolution, beginning on approximately 17 February 2011, incidents of theft and gunfire occurred at or near the Claimants’ Main Camp, Tazerbo Camp and other worksites. Among other things: (a) armed locals stole two trucks from TTJV truck drivers on 17 February;¹² (b) armed locals in pick-up trucks forced TTJV employees at the Tazerbo and Bozerik Camps to surrender unspecified supplies;¹³ (c) armed locals approached various of TTJV’s camps, forcing TTJV’s workers to provide various supplies, sometimes firing their weapons, on 18, 19 and 20 February;¹⁴ (d) TTJV’s personnel working on the Project were relocated from Tazerbo Camp (and other camps) to the Main Camp between 20 and 22 February, where efforts were made to erect barriers to protect workers from further attacks;¹⁵ (e) TTJV made various requests for military protection by Libyan military forces (the number of these requests is disputed, but that is irrelevant for purposes of the present claim);¹⁶ and (f) the TTJV workers eventually fled from Kufra Camp and elsewhere in a convoy during the early morning hours of 24 February, leaving behind virtually all of their equipment and supplies.¹⁷

17. Likewise, it is undisputed that a squad of 10-12 armed Libyan soldiers arrived at the Tazerbo Camp in the evening of 22 February, under the command of Officer Abdul Selam, putatively to protect the 200 to 300 workers who resided there. (There is a dispute as to whether this military protection had been requested by TTJV, but the resolution of this issue

⁸ Tribunal’s email to the Parties, dated 21 December 2016 (emphasis added). *See also* Award, ¶ 2.1.6(a).

⁹ Award, ¶¶ 3.4.9-3.4.10.

¹⁰ Award, ¶ 3.4.10.

¹¹ Award, ¶ 3.5.2.

¹² Award, ¶ 3.7.6.

¹³ Award, ¶ 3.7.6.

¹⁴ Award, ¶ 3.7.8.

¹⁵ Award, ¶¶ 3.7.9, 3.7.15.

¹⁶ Award, ¶¶ 3.7.11, 3.7.13.

¹⁷ Award, ¶ 3.7.19.

is largely irrelevant to the Claimants' looting claim.)¹⁸ There is also no dispute that, instead of providing protection, the Libyan soldiers first demanded supplies (including food, diesel fuel, spare parts and truck tires, which were provided from TTJV's stores) from TTJV's staff, and then either seized or forced TTJV employees to surrender various of their personal property.¹⁹ In those circumstances, the appropriation of property belonging to TTJV (in the form of diesel, spare parts and tires) is sufficient alone to constitute a violation of the Respondent's obligations to afford full protection and security to the Claimants and their investment.

18. Finally, although there is a question as to how many TTJV vehicles were ultimately looted, it also appears to be undisputed, and in any event is indisputable, that the Libyan troops unlawfully seized at least one truck (and, in my view, two additional trucks) belonging to TTJV on the night of 22 February. Again, that seizure alone constitutes a violation of the Respondent's obligations of full protection and security.

19. The quantum of the Claimants' losses may be small (and might not warrant significant expense in further arbitral proceedings aimed at quantifying the loss). But the underlying conduct was indisputably a serious violation of vitally-important international obligations that, in my view, no international tribunal should countenance. Simply put, instead of fulfilling their duty to protect unarmed foreign workers and their property, the Respondent's troops threatened and unlawfully forced those workers to surrender at least some of both their own and their employer's property. The financial consequences of that conduct have been reserved for further proceedings, but it is in my view an unequivocal and grave violation of fundamental protections of international law.

20. In sum, on this ground alone, the Award's conclusions on this issue cannot be accepted. They are contrary to essentially undisputed evidence and they disregard the Tribunal's procedural directions, which reserved issues of damages and quantum to later phases of the proceedings.

B. The Tribunal's Assessment of the Evidence of Looting by Libyan Soldiers on 22 February Is Mistaken

21. Second, and in any event, the Tribunal's assessment of the evidence (submitted by the Claimants) of the events that took place on the night of 22 February in the Tazerbo Camp is in my view impossible to accept. In my view, that assessment seriously misreads the evidentiary record, while also applying unrealistic and inappropriate standards to evaluation of the evidence.

22. Preliminarily, it bears emphasis that the facts relevant to the looting claim occurred during a three or four-day period in February 2011, during the Libyan civil war, involving chaotic and threatening circumstances at a remote desert location. The Respondent has provided no relevant evidence regarding these events (including, for example, witness testimony from its military personnel or governmental staff in the region, from GMMRA personnel, or from workers at other contractors in the region (including ANC), or

¹⁸ The Tribunal concludes that the Claimants' employees did not, as they testify they had, request military protection for the Tazerbo Camp. Award, ¶ 7.7.21. As discussed below, I believe that this conclusion is a clearly erroneous reading of the evidentiary record (as well as being highly implausible).

¹⁹ Award, ¶ 3.7.15.

documentary evidence).²⁰ The relevant evidence has been provided exclusively by the Claimants – principally in the form of witness testimony, which was uncontradicted by any evidence from the Respondent. As also noted below, the Claimants’ witnesses were not cross-examined by the Respondent or questioned by the Tribunal about significant aspects of their testimony relevant to this claim (and which the Tribunal finds unsatisfactory).

23. Relatedly, the critical events occurred on a single night (of 22 February 2011), under circumstances that can only be described as highly chaotic and understandably distressing to those who were present. As detailed below, and largely acknowledged in the Award, an unarmed group of Turkish and other foreign workers at Tazerbo Camp had been repeatedly threatened and looted by armed local tribesmen and therefore sought Libyan military protection during the period between 17 and 22 February 2011.²¹ Armed Libyan troops eventually arrived at Tazerbo Camp, in the evening of 22 February, but instead of providing the protection that had been sought, the soldiers demanded, with increasingly threatening and abusive behavior, that the TTJV personnel give them both company property and personal effects.²² It would, in my view, be wholly unsurprising that the targets of that looting, in those circumstances, would have fragmentary or differing recollections regarding the events of that night; in fact, as discussed below, the witness evidence that was submitted is almost entirely consistent and credible.

24. It also bears emphasis that the Claimants’ looting claim was not the focus of attention in either the Parties’ submissions or the evidence at the Hearing. On any view, the quantum of the claim for looting at Tazerbo Camp is substantially smaller than the Claimants’ other claims (which involved allegations that the Respondent failed diligently to protect hundreds of millions of dollars of the Claimants’ property). As a consequence, less attention was inevitably, and reasonably, devoted to the looting claim in the Parties’ witness statements and other evidence than to the Claimants’ other claims. As discussed below, this also bears on various of the Tribunal’s criticisms of the detail and character of the Claimants’ evidence regarding this claim.

25. Against that background, the Tribunal received evidence from two witnesses, both testifying at the Claimants’ request, about the looting of property from the Tazerbo Camp by Libyan troops: (a) Mr. Muhsin Davarci, TTJV’s Earthworks and Pipeline Installation Chief, who was present at the Tazerbo Camp during the relevant events on 19-23 February; and (b) Mr. Selcuk Halicilar, TTJV’s Construction Manager, who was located at the Main Camp during the relevant events on 19-23 February, but who spoke (intermittently) by telephone with Mr. Davarci. Both Mr. Davarci and Mr. Halicilar submitted multiple witness statements during the course of this arbitration and the related Contract Arbitration and testified at the Evidentiary Hearing. Read with care and in context, those witness statements and the

²⁰ The only arguably relevant evidence provided by the Respondent is a witness statement of Mr. Ali Tayash, who testified that he had “no way of knowing whether” looting by the GMMRA soldiers occurred. Ali Tayash WS 2, at ¶ 6.1. Another witness offered by the Respondent, Mr. Belashar of GMMRA, acknowledged that he was not near either the Main Camp or Tazerbo Camp in February 2011, and therefore “cannot comment on the description in Mr Davarci’s witness statement of what took place at TTJV’s camps at the project site.” Belashar WS 1, para. 45. As a consequence, the Claimants’ witness evidence is entirely uncontradicted.

²¹ Award, ¶¶ 3.4.10(b), 3.7.12-3.7.14.

²² Award, ¶ 3.7.15.

witnesses' oral testimony provide, with increasing levels of detail, a consistent and credible description of the events in question, which is summarized below.

26. Despite this, the Tribunal concludes that there are inconsistencies between the various witness statements of Mr. Davarci and Mr. Halicilar, leading it to discount aspects of their testimony. As discussed below, however, I believe that those inconsistencies either do not exist (in most instances) or are readily explicable given the different locations and focus of the two witnesses and the nature of the circumstances they describe. In my view, disregarding the first-hand testimony of these men – and particularly Mr. Davarci, who was present during the looting at Tazerbo Camp on 22 February – is unconvincing.

27. Mr. Davarci's testimony (both written and oral) about the looting of Tazerbo Camp on 22 February 2011 is unequivocal. In summary, Mr. Davarci testified that:

a. On 21 February, two groups of about 5 men appeared at the Tazerbo Camp armed with AK-47s. They demanded fuel, spare parts and other provisions, which TTJV personal handed over. The men also attempted to take a number of trucks belonging to the Claimants, but TTJV personnel persuaded them otherwise.²³

b. Later on 21 February, Mr. Davarci reported (by telephone) about the events which had just occurred at Tazerbo Camp to his superiors at TTJV, Mr. Halicilar and Mr. Tumer, who were at the Kufra Camp. Mr. Davarci also asked Mr. Tumer to seek protection for the Tazerbo Camp from the GMMRA or the military. Mr. Tumer informed Mr. Davarci that he would do so, although also saying that TTJV had been having difficulties reaching the GMMRA and other parts of the government. A few hours later, Mr. Tumer told Mr. Davarci that members of the Libyan military might come to the Tazerbo Camp in another few hours (which apparently did not occur).²⁴

c. On the evening of 22 February, a unit of 10-12 men from the Libyan military, under the command of Officer Abdul Selam arrived at the Tazerbo Camp in two trucks. Mr. Davarci testified that he knew these men were soldiers from the GMMRA because he had seen them patrol the area in the past.²⁵

d. During the evening of 22 February, Mr. Davarci met with Officer Selam in his office and in the Tazerbo Camp's mess hall. Officer Selam demanded food, diesel and other supplies from TTJV in return for providing protection, which TTJV supplied. Thereafter, TTJV's employees informed Mr. Davarci that the Libyan soldiers were entering their rooms and taking personal belongings. When Mr. Davarci confronted Officer Selam about the soldiers' behavior, he was informed that the soldiers would not provide protection and would not return the employees' belongings.²⁶ Mr. Davarci immediately called Mr. Halicilar and explained the situation at Tazerbo Camp to him. Both men decided that TTJV's personnel should accede to the soldiers' demands and should leave the Tazerbo Camp and head to the Main Camp.²⁷ Mr. Davarci organized a convoy to leave the camp but the soldiers

²³ Davarci WS 1, ¶ 17; Davarci WS 2, ¶ 8; Tr.{Day1/204:22} to Tr.{Day1/205:2}.

²⁴ Davarci WS 1, ¶ 18; Davarci WS 2, ¶ 8; Tr.{Day1/206:17} to {Day 1/208:8}.

²⁵ Davarci WS 1, ¶¶ 19-21; Davarci WS 2, ¶ 9; Tr.{Day1/208:5-23}.

²⁶ Davarci, WS 1, ¶¶ 23-26; Davarci WS 2, at ¶ 10; Tr.{Day1/210:3} to {Day1/212:20}.

²⁷ Davarci WS 1, ¶ 26; Tr.{Day1/212:15-20}.

stopped the convoy and demanded that the TTJV employees hand over a fuel truck. After negotiations, the soldiers instead took another large truck.²⁸

e. During this confrontation, one of the Libyan soldiers demanded the keys of Mr. Davarci's pick-up truck. When Mr. Davarci refused to provide them, the soldier aimed his gun at Mr. Davarci and threatened to take the keys by force. Mr. Davarci's Libyan driver attempted to intervene, whereupon the soldier struck him on the head with his rifle. Mr. Davarci gave his keys (to the pick-up truck) to the soldier and tended to his driver. The soldier took the keys and left them alone. Subsequently, the soldiers also took another large truck (belonging to TTJV).²⁹

f. The convoy that Mr. Davarci had organized left the Tazerbo Camp at 4:00 AM in the early morning of 23 February with 15 to 20 vehicles; the Libyan soldiers remained at the camp, along with the rest of TTJV's vehicles, which were not part of the convoy. The convoy reached the Main Camp on the morning of 23 February.³⁰

28. Mr. Halicilar's testimony (again, both written and oral) corroborated Mr. Davarci's testimony, albeit in a largely second-hand manner, because Mr. Halicilar was not present at Tazerbo Camp on 22 February. Mr. Halicilar testified that:

a. On 21 February, Mr. Davarci reported to Mr. Halicilar and Mr. Tumer by telephone that the Tazerbo Camp had been looted and asked them to seek assistance from the GMMRA or the military. That evidence corroborated Mr. Davarci's testimony that he provided the report and requested assistance. Mr. Halicilar also testified that, although he had difficulty reaching the Libyan army, he eventually spoke with Mr. Abdulsamia Fallah and Mr. Abdulsalem Belashar from the GMMRA.³¹

b. On 22 February, Mr. Davarci telephoned Mr. Halicilar and informed him that Libyan soldiers had in fact come to the Tazerbo Camp. Mr. Halicilar testified that Mr. Davarci "believed that these soldiers were from the army security forces assigned to protect GMMRA."³² Mr. Halicilar also testified that Mr. Davarci told him that he had met with the commander of the GMMRA forces, who reportedly suggested deploying one or two soldiers at the camp in exchange for food, diesel fuel, spare parts and tires.³³ Mr. Halicilar's testimony again corroborates Mr. Davarci's testimony regarding the arrival of Libyan troops on 22 February and their subsequent behavior.

c. According to Mr. Halicilar, Mr. Davarci told him that, while "talks were going on in Mr. Muhsin's office, soldiers began to take the belongings of the workers by force."³⁴ The Libyan military commander (Officer Selam) reportedly explained to Mr. Davarci that "it was in exchange for the protection they may provide in the

²⁸ Davarci WS 1, ¶ 27; Davarci WS 2, ¶ 10.

²⁹ Davarci WS 1, ¶ 28; Davarci WS 2, ¶ 11; Tr.{Day1/212 :23} to {Day1/214:24}.

³⁰ Davarci WS 1, ¶¶ 29-30.

³¹ Tr.{Day1/146 :19} to {Day1/148:11}.

³² Halicilar WS 1, ¶ 17.

³³ Halicilar WS 1, ¶ 17.

³⁴ Halicilar WS 1, ¶ 18.

future.”³⁵ Mr. Davarci told Mr. Halicilar that he was worried that the soldiers might take more items, including vehicles and other essential materials. Mr. Halicilar testified that he then told Mr. Davarci to “bring all of the workers to the main camp.”³⁶ Once more, this evidence corroborates Mr. Davarci’s testimony about the increasingly threatening and abusive behavior of the Libyan troops who were present at Tazerbo Camp.

d. Early the next day, as he had been directed in his telephone call with Mr. Halicilar, Mr. Davarci brought all of the TTJV workers from the Tazerbo Camp to the Main Camp and met with Mr. Halicilar. Both men discussed the events that had previously occurred at Tazerbo Camp on 22 February and, according to Mr. Halicilar, agreed that “the soldiers were acting improperly and looting TTJV’s supplies.”³⁷ This testimony also corroborates additional elements of Mr. Davarci’s testimony about the looting at the Tazerbo Camp and the TTJV workers subsequent flight from the Camp.

29. The foregoing testimony by Mr. Davarci and Mr. Halicilar was not contradicted by any witness for the Respondent. As noted above, the Respondent offered no testimony of alternative events (for example, testimony that no soldiers went to the Tazerbo Camp on the days in question, that no looting occurred at Tazerbo Camp, that any property given to the Respondent’s troops was merely loaned, sold, or otherwise voluntarily provided, or that only one (not two or three) trucks were looted). Among other things, the Respondent offered no evidence from any of the soldiers that TTJV’s witnesses said were involved (including either Officer Selam or more senior officers in Kufra City), from any of the Libyan security guards at the Main Camp or Tazerbo Camp, from any other contractors (such as ANC or SNC Lavalin), from any Libyan government or GMMRA employee, or from any other TTJV employee with either first-hand or other knowledge of the events in question.

30. Apparently accepting the substance of this testimony, the Tribunal concludes that “members of the GMMRA Security Battalion went to Tazerbo Camp on 22 February ... and they behaved reprehensibly.”³⁸ That conclusion is, in my view, both correct and inescapable, given the evidence of Mr. Davarci and Mr. Halicilar that the Respondents’ officials plainly used force and threats of force to steal or extort property from defenseless civilian workers at Tazerbo Camp.

31. Despite this, however, the Tribunal says that there are several (limited) asserted inconsistencies in the testimony of Mr. Davarci and Mr. Halicilar and that these limited inconsistencies somehow make their evidence “unsatisfactory” in some manner that bars the Claimants’ claim for looting.³⁹ As summarized below, I do not believe that these asserted inconsistencies are plausible readings of the evidence, which instead provides a coherent and highly credible description of the events at Tazerbo Camp on 22 February.

32. In particular:⁴⁰

³⁵ Halicilar WS 1, ¶ 18.

³⁶ Halicilar WS 1, ¶ 18.

³⁷ Halicilar, WS 1, ¶ 19.

³⁸ Award, ¶ 7.7.21.

³⁹ Award, ¶ 7.7.11(f).

⁴⁰ The Tribunal also criticizes the Claimants for arguing that Mr. Hendekli requested protection from Mr. Bubteina (and the GMMRA) on 21 and 23 February. Award, ¶ 7.7.16. That refusal to accept the Claimants’

a. The Tribunal concludes that Mr. Davarci's testimony describing a request by TTJV (through Mr. Tumer) for military protection which was assertedly made on (in the Tribunal's account) 22 February⁴¹ is contradicted by Mr. Halicilar's testimony.⁴² In the Tribunal's view, Mr. Halicilar offered an explanation for the identity of Libyan troops (i.e., that GMMRA troops controlled the routes in the desert) that was inconsistent with Mr. Davarci having previously requested that Mr. Halicilar seek military protection for Tazerbo Camp. In the Tribunal's somewhat circuitous analysis, if Mr. Davarci had in fact made such a request for assistance, Mr. Halicilar would have testified that he knew that the troops were GMMRA troops because that is what he (or Mr. Tumer) had requested the Libyan government to provide. Accordingly, the Tribunal apparently concludes that Mr. Davarci and Mr. Halicilar were not telling the truth when they (both) testified that TTJV had requested military assistance for Tazerbo Camp.

With respect, the Tribunal's analysis is impossible to accept. In my view, it is implausible to suggest that Mr. Halicilar would have known the identity of the Libyan troops that arrived at Tazerbo Camp on 22 February because he had requested military protection from GMMRA. Mr. Halicilar obviously would have had no way to know on 22 or 23 February whether GMMRA had sent its own troops in response to TTJV's request or had instead requested other Libyan troops in the area to provide support; that would be true in any circumstances, but particularly during the chaotic and unsettled circumstances in February 2011. Moreover, Mr. Halicilar also would not have known at the time whether the Libyan troops that arrived at Tazerbo Camp on 22 February had done so because they had been requested by TTJV or for some other reason (such as heightened military patrols during the Revolution). Finally, there is also only the most tenuous connection between Mr. Halicilar's post hoc explanation for the reasons for his belief in February 2011 about the identity of the Libyan troops and the details of Mr. Davarci's request for military assistance, with Mr. Davarci's and Mr. Halicilar's sworn testimony providing much more direct and reliable evidence about their requests than circuitous surmise. The Tribunal's analysis creates a supposed conflict in testimony, by faulty speculation, when none at all exists.

Relatedly, I also believe that the Tribunal's analysis ignores the fact that it would have been highly unusual if Mr. Davarci had *not* requested military assistance for Tazerbo Camp on 21 February – after the workers at Tazerbo Camp had been threatened and looted by armed local tribesmen. The Tribunal's view is apparently that Mr. Davarci must have thought that these armed raids were unexceptional and took no steps at all to protect himself or his workers from further raids, or even to report this event, and the surrender of TTJV property, to his superiors. That is highly implausible (as well as being contrary to what both Mr. Davarci and Mr. Halicilar testified, without challenge or contradiction). The more obvious and plausible

submissions regarding other matters has no bearing on either the looting of Tazerbo Camp or the credibility of TTJV's witnesses.

⁴¹ The Tribunal mistakenly suggests that Mr. Davarci testified that he requested military assistance only on 22 February. Award, ¶ 7.7.18. In fact, it is clear that Mr. Davarci's evidence was that he requested military assistance on 21 February – unsurprisingly, immediately after Tazerbo Camp had been threatened by armed local tribesmen. Davarci WS 2, ¶ 8; Tr.{Day1/214:9-24}.

⁴² Award, ¶¶ 7.7.17-7.7.20.

conclusion is that Mr. Davarci did just what any responsible manager would have done in those circumstances (namely, call his superiors, report the threats and looting and ask for help). More fundamentally, the Tribunal's view that Mr. Davarci made no request for military assistance requires one to assume that the Libyan troops who arrived some hours later at Tazerbo Camp (but no other TTJV Camp) did so by coincidence, showing up unbidden at a small desert camp hundreds of kilometers away from their barracks in the midst of civil conflict; in my view, it is that conclusion by the Tribunal, not Mr. Davarci's and Mr. Halicilar's testimony, that is impossible to accept.

b. The Tribunal also concludes that Mr. Davarci's request for military assistance at Tazerbo Camp was never made because one of Mr. Halicilar's witness statements did not separately describe that request (instead placing a discussion of the events at Tazerbo Camp "between (but ... not part of)" two other requests for assistance).⁴³ Again, this analysis is wholly unconvincing. Mr. Halicilar's witness statement was directed to the (much more significant) events at the Main Camp, which were the focus of the Claimants' claims and requests for damages.⁴⁴ In my view, the fact that Mr. Halicilar's witness statement included the looting of Tazerbo Camp in one section, rather than another section, has no evidentiary weight. And it certainly has insufficient evidentiary weight to overcome the consistent and unequivocal testimony of Mr. Davarci that he sought military assistance, the corroborating testimony of Mr. Halicilar that this request was made and the extreme implausibility of suggestions that Mr. Davarci and Mr. Halicilar would not have made such a request.

c. The Tribunal also concludes that Mr. Davarci's testimony was internally contradictory, because he supposedly first testified that Libyan soldiers only took a large truck and, after they were unsuccessful in efforts to take Mr. Davarci's pick-up truck, then took a different truck instead. The Tribunal also criticizes the fact that Mr. Davarci's first witness statement did not describe a physical assault on one of TTJV's Libyan workers, while Mr. Davarci later testified that Libyan soldiers (also) took his own pick-up truck and physically assaulted a TTJV worker.⁴⁵ Again, this analysis is wholly implausible (and, for present purposes, immaterial to the issues in dispute).

On any view, Mr. Davarci's testimony was that the Libyan soldiers took at least one large truck belonging to TTJV – a fact that the Tribunal appears to accept.⁴⁶ Moreover, as discussed in greater detail below, the Tribunal misreads Mr. Davarci's evidence, which consistently describes Libyan soldiers taking *two* large trucks (not *one* large truck).⁴⁷ In any event, whether one TTJV truck or two TTJV trucks were looted by the Libyan soldiers, that fact, both independently and together with the looting of supplies, is sufficient to require finding that the Respondent breached its

⁴³ Award, ¶ 7.7.20.

⁴⁴ As described in the Award, the damages sought by the Claimants in relation to the Respondent's alleged failure to protect the Main Camp and TTJV's other equipment (outside the Tazerbo Camp), were quantified at approximately \$94,097,241, and the Claimants' evidentiary and legal submissions were directed principally to these matters; in contrast, the damages attributable to events at the Tazerbo Camp would have been a small fraction of the Claimants' overall claim, with the Claimants' submissions on these issues being similarly limited.

⁴⁵ Award, ¶ 7.7-26-27.

⁴⁶ Award, ¶¶ 7.7.26-7.7.29.

⁴⁷ See below ¶ 31(d).

obligations of full protection and security. The fate of Mr. Davarci's pick-up truck has no bearing whatsoever on this conclusion. The Tribunal's Award provides no response to this inescapable conclusion that the Claimants' property (one or two trucks) was looted by the Respondent's troops.

In any event, there is also no reason to conclude, as the Tribunal does, that Mr. Davarci's testimony regarding his pick-up truck and the Libyan soldiers' physical assault is "troubl[ing]" or "difficult to believe."⁴⁸ Mr. Davarci explained clearly and openly in his second witness statement that he deliberately omitted a description of the looting of his pick-up truck and the related assault on his driver from his first witness statement because of his concerns about his driver's personal safety.⁴⁹ There is no reason to doubt that testimony – which reflects the actions of a responsible man and manager, which Mr. Davarci, by all accounts, was. That is particularly true when the theft of one additional (used) truck is of limited significance, both legally and financially, to the Claimants' claims in this arbitration, giving Mr. Davarci no reason to make up a story about his pick-up truck.

Finally, even if one disbelieved Mr. Davarci's testimony about his pick-up truck, there is no reason to conclude that Mr. Davarci's other testimony about the Libyan soldiers' conduct should be disbelieved. Indeed, the Tribunal apparently accepts this fact, concluding on the basis of Mr. Davarci's testimony that this conduct was "reprehensibl[e]."⁵⁰

d. Relatedly, the Tribunal also concludes that, over time, Mr. Davarci's testimony changed with regards to the number of trucks that were looted on 22 February, and that "the theft of one truck (not his own) became the taking of two or three trucks including his own."⁵¹ In my view, that is unfair and, again, unconvincing.

As discussed above, Mr. Davarci explained clearly why he first omitted, and then included, his account of the looting of his pick-up truck.⁵² In my view, that explanation is entirely credible. Mr. Davarci's testimony also reflects the fact that multiple witness statements are submitted in arbitral proceedings precisely in order to provide more details, not to repeat the same things over and over; in my view, there is no reason to leap from Mr. Davarci's inclusion of a more detailed account of the looting in his second witness statement to the conclusion that he was untruthful in either of his statements.⁵³

⁴⁸ Award, ¶ 7.7.29, 7.7.30.

⁴⁹ Mr. Davarci explained in his second witness statement and again orally at the hearing why he had not mentioned the physical violence in his first witness statement. He said that when he gave his first witness statement he "took into account the fact that the person [that had been attacked by the soldiers] is now living in Libya ... and [Mr Davarci didn't] want to create any trouble." Tr. {Day1/215:8-14}. See also Davarci WS 2, ¶ 11.

⁵⁰ Award, ¶ 7.7.21.

⁵¹ Award, ¶ 7.7.28.

⁵² See above ¶ 31(c).

⁵³ In any event, the physical violence aspect of Mr. Davarci's account of the looting does not contradict anything that Mr. Davarci described in his first witness statement. It only fills a gap in his initial description of the events when he only described the fact that (i) the Libyan soldier had aimed his gun at him and (ii) after negotiations between Mr. Davarci and Officer Selam, the GMMRA took another vehicle.

Putting aside the question of whether Mr. Davarci's pick-up truck was looted, it is also clear from Mr. Davarci's witness statements that TTJV was forced to give the looters two trucks (not one truck). The first truck (Truck 1) is mentioned at paragraph 27 of Mr. Davarci's first witness statement where he described the events before the soldiers demanded his pick-up truck: "we did want to give the military the fuel trucks. As a result, we had to negotiate with them *and eventually gave them another large truck*."⁵⁴ The second truck (Truck 2) is mentioned in the subsequent paragraph of the same witness statement, where Mr. Davarci is describing the events that occurred after the soldiers demanded his pickup truck: "Mr. Selam then ordered the soldier to put his weapon down. *They took another truck* after I spoke to Mr. Selam."⁵⁵ The looting of Truck 1 was not revisited in Mr. Davarci's second witness statement or at the Hearing. The only information added in the second witness statement and during the Hearing is that in addition to Truck 2, the soldiers took Mr. Davarci's pick-up truck.

Thus, contrary to the Tribunal's criticisms, there is in fact no contradiction at all in Mr. Davarci's evidence regarding the number of TTJV trucks that were looted: he consistently said that two large trucks were taken. The only disputed issue is whether Mr. Davarci's pick-up truck had in fact been stolen (which, as discussed above, is not grounds for criticizing Mr. Davarci's evidence). I also note that Mr. Davarci was not cross-examined, or otherwise questioned, about this asserted inconsistency in his testimony – which one would ordinarily expect if a witness's testimony is to be regarded by a tribunal as untruthful.

e. The Tribunal also concludes that Mr. Halicilar's description of the looting at Tazerbo Camp was inconsistent with Mr. Davarci's description, because Mr. Halicilar did not include descriptions of the looting of TTJV trucks or gun-point threats in his witness statement.⁵⁶ The Tribunal then reasons that Mr. Davarci's testimony should be rejected, in favor of Mr. Halicilar's. In my view, that is again wholly unconvincing.

It is undisputed that, Mr. Halicilar was not present at Tazerbo Camp and therefore could not report personally about the details of what occurred during the looting on 22 February. Mr. Halicilar made exactly this point, when asked on cross-examination about the supposed contradiction between his and Mr. Davarci's testimony regarding the soldiers pointing their guns, responding that he "wrote down whatever [he personally] recalled," but that "it is more important what [Mr. Davarci] says" about the events of 22 February because Mr. Davarci "is the person who experienced the event."⁵⁷ In my view, that acknowledgement is precisely accurate.

Moreover, the fact that Mr. Halicilar's witness statement did not refer to details of the looting, by way of hearsay reports from what Mr. Davarci had reported, does not in any way suggest that Mr. Davarci's testimony about those events is untrue. There are multiple explanations for the content of Mr. Halicilar's witness statement that are much more plausible than the Tribunal's supposition that Mr. Davarci was untruthful

⁵⁴ Davarci WS 1, ¶ 27.

⁵⁵ Davarci WS 1, ¶ 28.

⁵⁶ Award, ¶ 7.7.25, 7.7.30.

⁵⁷ Tr. {Day1/160:1-8}.

– including, for example, that Mr. Halicilar did not consider it appropriate or useful to provide a detailed second-hand account of matters he did not personally witness, that Mr. Davarci did not tell Mr. Halicilar during their phone call on 22 February about the number of trucks or other supplies that were looted, that Mr. Halicilar did not recall details about the number of trucks that he was told (if he was in fact told) had been looted, that Mr. Halicilar (like Mr. Davarci) did not want to endanger local workers and the like. In my view, a conclusion that Mr. Davarci’s first-hand testimony is false based on what was omitted from a witness statement regarding the second-hand reports of Mr. Halicilar’s witness statement is unjustified.

Moreover, the Tribunal also plainly errs regarding the timing of the events on 22 February. Mr. Davarci explained in his witness statements that, after Officer Selam told him on the night of 22 February that “soldiers would not provide security and would not give [TTJV’s personnel their] valuables,” Mr. Davarci “immediately” called Mr. Halicilar and “explained the situation to him.”⁵⁸ Mr. Davarci also testified that he and Mr. Halicilar then agreed that they “should not resist [the soldiers] and instead leave the camp.”⁵⁹ Thus, at the time of the call from Mr. Davarci to Mr. Halicilar on the evening of 22 February, the pointing of guns at Mr. Davarci and the subsequent assault on his driver had not yet occurred: the pointing of guns and physical assault occurred *later*, after a convoy had been assembled pursuant to Mr. Halicilar’s instructions.

This provides a further, entirely understandable explanation for why Mr. Halicilar did not say that he was told during his call with Mr. Davarci on 22 February about the looting at gun point and physical assault; those events only occurred hours later, as Mr. Davarci carried out Mr. Halicilar’s direction to convoy the Tazerbo Camp workers to the Main Camp. That is corroborated by the fact that Mr. Halicilar testified that he met with Mr. Davarci on 23 February and that the latter described in detail his interaction with the soldiers, leading both men to “*conclude[] that the soldiers were acting improperly and looting TTJV’s supplies.*”⁶⁰ Again, I do not believe that the Tribunal’s criticisms of Mr. Davarci’s testimony in this regard are convincing.

The Tribunal asserts that Mr. Davarci testified that his call to Mr. Halicilar took place *after* the physical assault on Mr. Davarci’s driver.⁶¹ That is plainly wrong. Both of the witness statements of Mr. Davarci explicitly and unmistakably place the telephone call to Mr. Halicilar *before* the physical assault – and specifically, when the initial looting by the Respondents’ troops began, not *later*, when the troops sought to take Mr. Davarci’s pick-up truck as the workers’ convoy was preparing to leave the camp.⁶² In Mr. Davarci’s words:

“26. After I confronted him, Mr. Selam told me that his soldiers would not provide security and would not give us back our valuables. *I immediately contacted Mr. Halicilar, who was in the Kufra camp.* I explained to him the

⁵⁸ Davarci WS 1, ¶ 26.

⁵⁹ Davarci WS 1, ¶ 26.

⁶⁰ Halicilar WS 1, ¶ 19.

⁶¹ Award, ¶ 7.7.29 n. 197.

⁶² Davarci, WS 1, ¶ 26 ; Davarci WS 2, ¶ 10.

situation and we decided that, for the safety of everyone, we should not resist and instead leave the camp. I was very concerned the situation might escalate and deadly force could be used against us. I was also concerned that our vehicles may be taken by these soldiers, which would strand us in the desert. Mr. Halicilar agreed that the workforce should leave as quickly as possible.

27. I immediately began to form a convoy. When the soldiers saw us preparing to leave, they began to stop us and demanded we turn over some of our trucks. The soldiers were especially interested in obtaining a fuel truck, which we planned to take with us when we left the site. Because of the length of the journey and our need to re-fuel, we did not want to give the military the fuel truck. As a result, we had to negotiate with them and eventually gave them another large truck.

28. *The soldiers then demanded that I give them the pick-up truck that I used to travel around the Project.* At first, I refused since this was the truck that I normally used. Then one of the soldiers pointed his gun at me and told me to give him the truck. Mr. Selam then ordered the soldier to put his weapon down. They took another truck after I spoke to Mr. Selam. In these circumstances, it became clear that the soldiers were not here to protect us but to loot us.

29. Left with no other options, I directed the TTJV workforce to leave the camp. The soldiers remained at the camp.”

The Tribunal ignores this unchallenged testimony and instead refers to oral testimony by Mr. Davarci at the Hearing about a *different* call to a *different* person (Mr. Tumer),⁶³ which has no relevance to the question of timing. Nor is it credible to believe, as the Tribunal’s account would have, that Mr. Davarci sat silently by, while his workers were robbed and threatened, without, as he said he did, “immediately” calling Mr. Halicilar. There is, therefore, once more no conceivable reason to disregard the uncontradicted, first-hand testimony of Mr. Davarci about what was looted on the night of 22 February 2011.

f. Finally, in my view, having seen his testimony in these proceedings, Mr. Davarci was an honest and reliable witness. He recounted in convincing first-hand detail, with appropriate caveats, what happened during a traumatic series of events. He is an honorable man whose testimony ought be accepted, not dismissed on the basis of speculation that he was never asked to address.

33. Finally, the Tribunal also asserts that a letter from TTJV two weeks after its evacuation from Libya (on 7 March 2011) “makes no reference” to “any inappropriate conduct by member of the Libyan military” on 22 February,⁶⁴ and that this undermines the credibility of Mr. Davarci and Mr. Halicilar’s witness testimony.⁶⁵ In my view, that misunderstands both the purpose of the 7 March letter and the surrounding circumstances. The 7 March letter was written by the TTJV pursuant to its Contract with GMMRA, for the

⁶³ Tr. {Day1/214:22-24}.

⁶⁴ Award, ¶ 7.4.12.


⁶⁵ Award, ¶ 7.7.30.

purpose of recording its contractual position (on issues of force majeure and related topics). The letter was not written regarding the Libyan Government's or Libyan armed forces' conduct outside the contractual setting and it is entirely understandable that it would not address those matters (which are not relevant to the parties' contractual rights and obligations).

34. Likewise, the Tribunal's analysis ignores the fact that TTJV confronted enormous technical, human, security and other challenges in late February and early March 2011. The fact that its correspondence – aimed at finding a contractual solution for a project valued in the hundreds of millions of dollars – did not refer to the seizure of several trucks and other supplies by Libyan military forces is more than understandable. TTJV had other, more commercially-significant issues, concerning the future, to attend to; it would have made little sense, or been counter-productive, to catalogue all of the various losses that the Claimants' and their employees had suffered while TTJV sought to find a contractual path forward.

III. CONCLUSION

35. In my view, and with great respect for the Tribunal, the evidentiary record leaves no question but that Libya is responsible under international law for the undisputed looting by its armed forces of some quantity of the Claimants' property. The fact of that looting is undisputed and the only remaining question – regarding the nature and value of what was looted – is not a matter for this phase of the arbitration. Although the monetary losses suffered by the Claimants as a result of this violation of the Respondent's international obligations do not appear to have been substantial, that is neither a matter for this phase of the proceedings nor an acceptable reason to countenance those violations.



Gary Born