



Pre-Assessment Mission, Libya

16-23 november 2011

To assess the current state of Libyan institutions critical to developing the rule of law, such as the courts, prosecution, and Bar, and to probe allegations and counter allegations relating to alleged violations of international law that a free Libya must address.

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PREFACE



Flames are schizophrenic phenomena – sometimes destructive, sometimes a harbinger of new life about to emerge. As dusk fell on Tawourgha, flames began licking up the sides of the homes and shops abandoned in the aftermath of the terrible siege of the brave city of Misrata. In a country that had endured decades of rule by an

eccentric tyrant, and a seven-month war replete with unspeakable atrocities, did these flames signal an end, or the beginning of a new round of conflict?

Libyans face hard choices and immense challenges. Emerging from the flames of war, Libya is grappling to build a new society defined by a version of the rule of law acceptable to its citizens. Decades of harangues from the Green Book have ill-prepared the present generation for this task. Moreover, months of war have hardened young men and women. As one young Libyan lawyer described it, the rebellion of 2011 has created a “revolutionary legitimacy,” allowing the rule of law to be overwhelmed by invoking some grievance or memory from the Revolution.

The challenge for this generation of free Libyans is to steer a course through the multiple hazards of revenge, extremism, autocracy, and corruption. Many Libyans fear these outcomes; some recognize the challenge and look to meet it. The question for the rest of the world is how to support those attempting to meet the challenge, without offending the “revolutionary legitimacy” rightfully claimed by the Libyans for their sacrifices.

EXECUTIVE SUMMARY

From November 16-23, 2011, ILAC conducted pre-assessment mission to Libya. William Meyer, Chair of ILAC, and Agneta Johansson, ILAC's Deputy Director, accompanied representatives of the Arab Organization for Human Rights on a combined fact-finding and training mission to Libya in the immediate aftermath of the hostilities. Working with the AOHR and representatives of ILAC member Palestinian Center for Human Rights, ILAC traveled throughout northwestern and central Libya to meet with representatives of the judiciary, prosecution, Bar and civil society, as well as the interim leaders of various revolutionary councils.

A primary goal of the ILAC mission was to preliminarily assess the current state of Libyan institutions critical to developing the rule of law, such as the courts, prosecution, and Bar, to determine if assistance by international organizations would be useful to and appreciated by our Libyan colleagues. Based on our discussions and observations, we came away with the strong sense that a substantial number of Libyans among the revolutionary forces sincerely want to see a democratic Libya based on the rule of law. However, it was also apparent that, in the aftermath of the Revolution, Libya at present lacks of any sort of centralized national governance or control. Formal institutions, to the extent that they even existed under the Gaddafi regime, no longer function. Finally, it was obvious to us that time is of the essence. Every day of delay causes additional death, suffering and societal polarization.

A second goal of the ILAC mission, given the immediacy of the Revolution and its aftermath, was to probe allegations and counter allegations relating to alleged violations of international law that a free Libya must address. Accordingly, the joint team visited various sites in Tripoli, Misrata, Zawiya, Sabrata, Zliten, Al-Khoms, Tawourgha, and Sirte to investigate and interview witnesses concerning current conditions, and a variety of alleged incidents involving Gaddafi forces, rebel forces and NATO. While the report of the AOHR will address many of the team's specific observations, the ILAC team confirmed that Libya faces substantial past, present and future human rights issues.

Finally, ILAC participated in intensive training provided by the AOHR for more than 60 Libyan lawyers, judges, prosecutors and members of civil society in human rights law and principles. The work of the AOHR in this regard, including training provided by personnel from PCHR, was exemplary. Equally important, the enthusiasm and commitment of large numbers of younger Libyan lawyers and activists confirmed that assistance by international organizations would be useful to and appreciated by those working for a free Libya governed by the rule of law.

Based on these observations, the pre-assessment team recommends to Council that ILAC and its member organizations (a) immediately begin engaging the Libyan legal

community concerning rule of law development and reform priorities, and (b) promptly thereafter begin implementing programs to address these priorities. Toward that end, the pre-assessment team recommends that planning begin immediately to convene a conference of Libyan legal professionals and civil society actors to outline their rule of law priorities directly with donors and implementing organizations that can assist with Libya's transition. In view of the present absence of effectively functioning national rule of law structures, the pre-assessment team recommends that this conference focus on local Bar and civil society activists, who have demonstrated a commitment to and willingness to work for the establishment of the rule of law.

The pre-assessment team further recommends that Council authorize the preparation of a needs assessment mission, to travel to Libya shortly after the conclusion of the conference. This mission will work with Libyan stakeholders to plan the detailed implementation of programs outlined at the conference. In addition, the needs assessment mission will examine the progress made in establishing effectively functioning national rule of law structures in Libya, and make further recommendations to Council regarding any additional assistance that may be useful in that regard.

LIBYAN RULE OF LAW INSTITUTIONS

The Pre-Revolutionary Environment

To understand the current state of Libyan institutions, one must understand the history of governance in Libya prior to February 17, 2011. Libyan courts, prosecutors, and the Bar have had minimal contact with the outside world, and learned the law through the prism of Col. Gaddafi's "unique" ideology. Though the availability of Internet access in recent years loosened informational strictures to an extent, the slate upon which a free Libya will be written is significantly influenced by the past.

Organic Law: Until Italian forces gained control of the area around Tripoli in 1911, Libya was ruled by the Ottoman Empire. Italian occupation ended in favor of United Nations administration in 1943. When it became a sovereign state in late 1951, Libya was the first nation to gain independence through UN administration. Independent Libya became a constitutional monarchy ruled by King Idris I. The discovery of oil in 1959 provided Libya, once one of the poorest countries in the region, with substantial new wealth.

In September 1969, a military coup led by Colonel Muammar Gaddafi overthrew the monarchy. Shortly thereafter, the Revolutionary Command Council issued a Constitutional Proclamation dated December 11, 1969. Though the Proclamation supposedly was a temporary measure, no other constitution was ever published. The Proclamation outlined a socialist state with broad brush strokes. It referred only cursorily to the judiciary, with no substantive delineation of the structures.

For the past 35 years, Libyans have been inculcated with a political theory which originated with a speech By Col. Gaddafi on April 3, 1975. The doctrine was later published in *The Green Book*, which grew eventually to three volumes. This tome espoused "The Third International Theory," which some have described as a system of direct democracy that combines Islam and socialism, derived in part from tribal practices. It nowhere mentioned the judiciary or the legal system. Many of these principles, along with a variety of other prescriptions for a Libyan cultural revolution, dominated Libyan political and legal thought until the recent Revolution.

On March 2, 1977, the regime published the Declaration on the Establishment of the Authority of the People. Though replete with socialist rhetoric, it provided that the official name of Libya be "The Socialist People's Libyan Arab Jamahiriya" and the Holy Koran its Constitution. Nominally republican in form, this unique system was an intellectual creation of Col. Gaddafi. The Declaration embodies some of the ideas expressed in the Green Book, though the parts II and III of the Green Book post-date the Declaration.

Since 1977, no additional organic documents were created. Instead, Libya lived under the principles of the Green Book, and the mercurial decisions of Col. Gaddafi.

The nature of power under the Gaddafi Regime. Under the Green Book, a complicated system – unlike any other system previously devised – controlled political life through a theoretical direct democracy.¹

Governance under Gaddafi's political theory called for the total decentralization of decision-making, such that citizens would rule through roughly 600 Basic People's Congresses. All citizens were members of a local Basic People's Congress. Each such Congress elected a Basic People's Committee, which handled executive and administrative functions for its respective Congress. In fact, the Basic People's Committees maintained ideological and political control over all aspects of economic, political and social life.

Each Basic People's Committee also appointed a local representative to the General People's Congress, a large body with hundreds of members that theoretically served as both a unicameral legislature and executive body. However, the General People's Congress met for only two weeks per year. Actual governance was carried out by the General People's Committee, which functioned as a cabinet, though typically without the formal trappings. At least at certain times, the Secretary General of the General People's Committee served as a *de facto* Prime Minister.

Further complicating the governance structures were approximately 1500 administrative communes supervised by so-called local Revolutionary Committees, whose function was to further the cause of the revolution. In reality, Revolutionary Committees had no governmental function, but instead were Col. Gaddafi's sentinels at the local level. Secretaries of Revolutionary Committees were personally selected by Col. Gaddafi, to guard against political dissent and ensure that citizens follow sanctioned ideology.

The Revolutionary Committees reflected the reality of life in Libya prior to February 17, 2011. Though he declined to hold any formal position, all power was vested *de facto* in Col. Gaddafi.

At the same time, other state structures were similarly emasculated. The Libyan Army – in contrast to the armed forces of neighbors such as Egypt and Tunisia – was an ill-equipped, poorly-trained institution consigned to “guard” the southern desert. Military power instead resided in the so-called Gaddafi Brigades, independent units stationed in the Tripoli vicinity. These Brigades did not exist to protect the Libyan nation, but to protect the Gaddafi regime. Brigades were well-funded, often living in large, self-contained, and relatively lavish garrisons

¹ Much of the following description is derived from *Arab Political Systems: Baseline Information and Reforms – Libya*, published in 2006 by the Carnegie Endowment for Peace. However, as the article's authors openly admitted, these structures of were under constant revision, and often were not the subject of any law or other written description. Many Libyans interviewed by the ILAC team echoed this theme: the rule of law under Gaddafi can only be described as *ad hoc*, such that no one actually knew the full content of any system or law.

and socializing among their own. Each was commanded by a member of the Gaddafi's family or another loyal subordinate. Interaction between the Brigades, even at the command level, was minimal, part of Gaddafi's effort to forestall the formation of an independent, integrated opposition.

The Law under Gaddafi: A basic tenet of the rule of law is the existence of a body of law clearly defining rights and obligations, as well as powers and limitations. Libyan lawyers repeatedly spoke of the absence of any meaningful body of substantive law under the Gaddafi Regime.

Under the Constitutional Proclamation of 1969, Constitution was annulled. Existing provisions of laws "which are not in conflict with the provisions set forth in this constitutional proclamation" theoretically remained in effect. Further, the Proclamation directed that all "decisions, statements, and orders issued by the Revolutionary Command Council since September 1969 and before the issue of this constitutional proclamation shall have the power of law and supersede all contrary provisions." However, according to Libyan scholars, no serious attempt was made to determine which existing laws survived. Instead, it appears that most pre-Revolutionary laws simply were ignored.

The arrival of the Green Book heralded even further complication. Though having no force of law, the word of the Leader nonetheless carried tremendous weight. But the Green Book was a rambling set of principles and maxims, not a body of law, making application in a judicial sense practically impossible.

The continually evolving polyglot of Congresses and Committees issued directives that superficially appeared to have the force of law. Many of those, however, either were ignored in practice or fundamentally contrary to basic international principles. For example, the Code of Honor of March 1997 instituted a system of collective punishment for wrongdoing, under which families, towns and municipalities were held responsible for the actions of individuals in their midst. Under the law, they were subject to collective punishment such as the dissolution of the local People's Congress or the denial of government services, including utilities, water and infrastructure projects. In a similar vein, Law 20 of 1991 on the Promotion of Freedom imposed the death penalty for anyone whose continued existence would lead to the disintegration of Libyan society.

The Judicial System under Gaddafi: Prior to 1969, Libya followed the Egyptian civil law model – maintained in the early post-revolutionary years – of dual law and *shari'a* courts. In 1973, the systems were merged, with the secular court system retained, but its jurisdiction expanded to include religious matters. However, the Revolutionary Command Council also proclaimed *shari'a* as the principal source of all legislation and established a High Commission to examine all existing legislation in order to make it consistent with *shari'a* principles.

The judiciary under Gaddafi was comprised of four tiers of courts:

- Summary Courts to hear disputes involving small amounts, located in most small towns.
- Courts of First Instance, which were the primary courts and located in each area that formerly had constituted a governorate in 1975.
- Courts of Appeal in Tripoli, Benghazi, and Sabha.
- The Supreme Court sitting in Tripoli.

However, at various times, the Gaddafi Regime also created “special” courts such as People’s or Revolutionary Courts to try matters involving political or economic offenses. It appears that such courts appeared and disappeared almost at random, depending on the prevailing views of the Regime.

The Bar: Under Gaddafi, Libya had no independent nongovernmental organizations. According to anecdotal information supplied by Libyan lawyers during the ILAC team’s visit, when Col. Gaddafi took power, the Libyan Bar consisted of five Bar associations in Tripoli, Benghazi, Zawiya, Misrata and Green Mountain (a heavily forested, fertile upland area in northeastern Libya). According to these sources, when the organized Bar proved to be an impediment to his plans, Col. Gaddafi abolished these Bar associations.

Later, as part of his effort to present a more modern face to the West, new local Bar associations were formed. However, in what lawyers viewed as an effort to keep the profession weak and divided, the new structure called for 25 different bar associations under the umbrella of a national Libyan Bar Association, controlled by Col. Gaddafi. Some lawyers indicated to the ILAC team that corruption among the Gaddafi supporters was rampant, with some members of the Bar simply purchasing their law licenses rather than spending time graduating from a law faculty. Such rumors could not be confirmed.

Nonetheless, throughout the years of Gaddafi’s rule, a number of reports indicated that lawyers attempted to express independent views to the regime. While some of these activities may be exaggerated or fictional, there is evidence that, even under the Gaddafi regime, some members of the Bar were among the few Libyans calling for reform. During those same years, however, the official Libyan Bar Association apparently was fully controlled by and subservient to the regime.

Libya in February 2011: When the Revolution began in February 2011, the Libyan system, put politely, was idiosyncratic. Years of isolation, coupled with the somewhat bizarre ideology of Col. Gaddafi, created unique, atypical legal structures. Libyan professionals, relative to judges and lawyers in other countries, lacked accurate information concerning Western or even other Arab legal systems. What they knew was the Libyan system with its theoretical quirks and deadly history. A challenge for them is to avoid resorting to the familiar, and instead to build a free Libya based on a new rule of law paradigm consistent with the values that drove their Revolution.

The Post-Revolutionary Environment

When the ILAC team visited, Libya had the feel of a country on an adrenaline high. The Transitional National Council's "Declaration of Liberation" was issued on October 23, 2011, less than a month before we arrived. While the team was in country, news broke of the capture of Gaddafi's son, Saif al-Islam and later his head of security, Abdallah al-Senussi. Jubilation spread through the streets on both occasions.

We also found throughout Libya a palpable sense of eager expectation coupled with a lingering fear. The hopes and dreams that had fueled the Revolution remained strong, yet the specter of another Iraq, Afghanistan or Lebanon lay just below the surface for many educated Libyans. Many recognized that there was a race to an outcome, and that for the rule of law to prevail over rule of the gun or car bomb, action was required. But where to begin?

The Plan for Transition. On August 3, 2011, the TNC passed a "Constitutional Declaration," which is intended to serve as an interim constitution of Libya for a period of ten months. This Declaration lays out a variety of basic rights and freedoms. Part Four describes certain "Judicial Guarantees," including that there shall be no crime or penalty except by virtue of a written law. It also calls for the independence of the judiciary, and provides that all existing legislation shall continue to be effective in so far as it is not inconsistent with the provisions of the Declaration.

According to the timetable published by the TNC, it expects to remain in power until the election of a new General Assembly in April 2012. The latter is expected to act under the provisional constitution for another twelve months, until April 2013, during which time a formal constitution will be drafted and submitted to a plebiscite for approval.

The Constitutional Declaration also required the interim TNC to form an interim government within 30 days after the announcement of liberation. The issuance of the "Declaration of Liberation" on October 23, 2011, started this clock. And, on November 22, 2011, the TNC met this deadline by naming a new interim Government headed by Prime Minister Abdurrahim el-Keib.

The Situation on the Ground. When the ILAC team arrived in November 2011, the TNC existed on paper, but had little effective control of the country's institutions. The country in practice was ruled by local Revolutionary Councils – themselves a somewhat ominous throwback to the Gaddafi ideology – often headed by talented Libyan professionals with little or no experience in governance. Police or even organized military were nowhere to be seen. Unlike Egypt or Tunisia, the Libyan Army could not and did not provide interim stability and some sense of law and order.

Instead, checkpoints manned by local militias controlled towns and even neighborhoods. Detention centers for alleged Gaddafi soldiers and loyalists were run by local

militia guards, typically nervous young men with a thirst for revenge and no training except their personal experiences with jailers under the Gaddafi regime.



Libya of 2011 is a land of containers. At nearly every turn, the ubiquitous cargo container was used by both sides in the conflict to construct checkpoints, as fortifications, for offices, and as detention and torture centers (see p. __, below). These containers continue to characterize much of Libya in the immediate post-Revolutionary period, symbolizing the ongoing ad hoc nature of the new Libyan institutions.

At the same time, most of the formal rule of law structures that existed under the Gaddafi regime either disappeared, or were being run on some type of *ad hoc* basis. For example, many courthouses in major cities were destroyed, damaged or taken for other uses during the Revolution. Thus, the Misrata and Sirte courts were at the heart of their respective sieges, and suffered major damage

On the other hand, lawyers in Tripoli reported that courts were functioning at about 40% of their normal level. In Misrata, lawyers reported that the courts were functioning to handle civil cases and “emergency” criminal cases, and that the local council had been petitioned to fully open those courts within one month.

Similarly, a number of judges and prosecutors from the Gaddafi era attended the human rights training offered by the AOHR in Tripoli, and suggested that nothing out of the ordinary had happened. They opined that the only problems with the judiciary were lack of computers, understaffing and case management concerns. They rejected any notion that the judiciary under Gaddafi suffered from any lack of independence, and asserted – against overwhelming

evidence to the contrary – that the judiciary was a bulwark of protection of individual rights under that regime.

Given the history of the Libyan judiciary’s subservience to the regime, it is difficult to imagine that many existing judges, particularly senior judges, could legitimately serve in a democratic Libya. On the other hand, some thoughtful Libyans expressed concern that total lustration, similar to the de-Baathification steps taken in Iraq, could leave the judicial system with no experienced judges and prosecutors, while creating a cadre of former regime loyalists embittered by their loss of professional standing and income. Any new Libyan authority will face such problems as it seeks to rebuild a free Libyan nation.

Some tentative steps apparently are being taken. In late September, the TNC’s interim Minister of Justice, Mohammed al-Alagi, approved a measure to abolish the country’s state security prosecution and courts, and the state security appeals court. In meetings with the ILAC team in mid-November 2011², Mr. Alagi indicated that the judiciary had been separated from the Ministry of Justice to enhance its independence. He stated that new laws or amendments had been or were being presented to the TNC to define the objects of transitional justice, to reorganize the Supreme Court to permit Libya to formally join the ICC, and to set forth new substantive laws on the judiciary and human rights. However, as of this writing, the ILAC team is not aware that any of these items have been adopted.

Lawyers and the Revolution

Putting aside the formal structures, lawyers were among the leaders of the Revolution. In the early days of the rebellion, articles in the New York Times described how the rebel government was headquartered in the Benghazi courthouse, while the former bar association building was filled with artists, musicians and activists, churning out posters, banners and revolutionary rock songs. *Der Spiegel* described the courthouse in Benghazi as “The Nerve Center of the Libyan Revolution.” An article in the March 19, 2011, edition of *Economic and Political Weekly* concluded: “Lawyers, more than any other group, were instrumental in paving the way for the Libyan

In a March 2011 article entitled Benghazi’s lawyers, Libya’s revolutionaries, author Ahmed Shokr describes how lawyers became leaders of the anti-Gaddafi forces in Benghazi. He quotes Salwa al-Deghali, a law professor and member of the TNC:

“I’m a lawyer. I know how to bring cases before court. But I’m not an experienced politician,” says al-Deghali. “We have never had any real organizational experience in Libya, through parties or independent professional associations. Suddenly, we have an entire city to run.”

The article indicates that, in the year leading up to the revolt, Benghazi Bar Association members campaigned for legal reforms and an end to corruption within their association. Their efforts crystallized around a

² Khalifa Ashour replaced Mr. Alagi as Minister of Justice shortly after his meeting with the team, as part of the above-described creation of a new interim government.

uprising and several prominent members of the Benghazi Bar Association are now part of Libya's rebel organisation, the National Transitional Council.”

Perhaps most important for the present, there is ample evidence that lawyers are actively working to establish the rule of law in a post-Revolutionary Libya.

- Lawyers from around the country continue to be heavily represented in the Transitional National Council, working to reestablish national structures that will facilitate the development of a state based on the rule of law.
- As reflected by the attendance at the AOHR training sessions in Tripoli, lawyers are vitally interested in the promotion of human rights in a free Libya. Later, over 150 lawyers attended the ceremony honoring those who attended the AOHR training sessions, as well as several Tripoli lawyers imprisoned for months in Gaddafi's jails.
- In Misrata, working with the local revolutionary council, lawyers and law professors have established two committees to investigate, respectively, crimes that may fall within the jurisdiction of the International Criminal Court and other crimes that do not meet those requirements. These lawyers are working with insufficient resources and training in a shattered city, yet are moving forward to establish the rule of law as the basis for rebuilding their society.
- Among the Libyan Diaspora, groups of lawyers worked through the Revolution to address the war-time issues. Now, they are turning to the task of planning for future rule of law systems in a thoughtful, systematic manner

campaign to oust the former association head, a Gaddafi loyalist. Gaddafi apparently met with Benghazi lawyers in early February 2011, and attempted to placate them with promises of reform. Though the head of the bar association was dismissed one week before the uprising, it was too late. The article quotes Ms. Deghali as saying:

“We might have been satisfied with this in the past, but after Tunisia and Egypt, we knew we could ask for more. And once they started firing on protesters, we knew there was no going back.”

However, according to Shokr, the Benghazi lawyers saw the challenges ahead. “For years we had no Constitution. We just had a Green Book. Now we are starting from scratch,” says al-Deghali. Asked about the kind of Libyan society they seek to build, Hana al-Gallal, a lawyer and human rights instructor, had no illusions that translating revolutionary ideals into practice will be an easy task.

“Gaddafi’s regime left us with no real institutions and a lot of mutual fear. The revolution allowed us to discover the dreams that we share in common, and it will give us an opportunity to build a democratic society.”

The Trial of Saif al-Islam

On June 27, 2011, the International Criminal Court charged Saif al-Islam, the son of Col. Gaddafi, with two counts of crimes against humanity, including murder and persecution. While the team was in Libya, news broke that Saif al-Islam had been arrested in southern Libya. The arrest triggered jubilation around the country; the celebratory weaponry lasted well into the evening in Tripoli.

But with the arrest of Saif al-Islam came the issue of where and by whom he would be tried. Under Article 17 of the Rome statute, the ICC will assert jurisdiction if the Libyan State is unwilling or unable genuinely to carry out the investigation or prosecution. According to various press reports, the TNC decided that Saif al-Islam will be tried in Libya, and ICC prosecutor Luis Moreno-Ocampo has concurred.

However, based on the situation found by the ILAC team at the time of its mission, the issue is not clear cut. The issue of capacity involves a number of factors. First, does the existing Libyan system have the capability to provide Saif al-Islam with a fair trial that meets international standards? Apparently, members of the old system – the Gaddafi system – want the answer to be “yes.” However, as discussed above, the old system at best was dysfunctional and at worst was part of the regime’s control apparatus. Younger lawyers estimate that 70% to 80% of existing judges were corrupted by the old regime. Ignoring corruption and cronyism, those judges worked in a system that was the antithesis of the rule of law. Judges who in November 2011 asserted that the Libyan judiciary’s greatest problems are court management and the absence of computerization, are not ready to try Saif al-Islam.

If the existing system is not capable, does the new, free Libya have the capability to provide Saif al-Islam with a fair trial that meets international standards? As of November 2011, the answer was no. The new interim government faces enormous tasks. The likelihood that Libya in a few months could stand up a new judiciary capable of handling a trial of this magnitude is slim. Indeed, Deputy Justice Minister Abdulbaset Abumzirig – a supporter of trying Saif al-Islam in Libya – was quoted in an article in the November 22, 2011, edition of the *The Telegraph* as saying:

The court is working, but it can't operate because of the weapons on the street. We cannot force judges to work when there are so many weapons.

Even if judges for Saif al-Islam’s trial could be trained in time and provided with the necessary security, is it in Libya’s best interests to devote so much of its scarce judicial resources to such a trial? Libya faces massive other rule of law issues which must be addressed by courts and prosecutors. Taking the country’s best and brightest, and directing them to spend months or years trying Saif al-Islam, may not be the best use of those resources.

The ILAC team recognizes the legitimate desire of many Libyans to see Saif al-Islam tried in Libya. However, the new Libya will be judged by many based upon how this issue is handled. Libyan leaders should carefully consider their options and weigh the costs before choosing their course of action.

POTENTIAL ISSUES INVOLVING INTERNATIONAL LAW

As it emerges from decades of one-man rule and a murderous war against him, Libya faces substantial past, present and future human rights issues. One challenge for the rule of law in a free Libya will be dealing with these many and varied issues.

The focus of the AOHR fact-finding mission was to explore some of these issues, and gain a sense for the nature and extent of problems. The mission had neither the time, expertise nor manpower to fully investigate these issues. Even with respect to circumstances or incidents that were reviewed, the team did not have the ability to do the type of law enforcement or forensic investigation required to establish facts in a judicial sense.

ILAC's goal in participating in this mission, in essence, was take snapshots of possible issues of international law, to provide a sense for what types of issues might be faced by new Libyan rule of law institutions. At the same time, along with the full AOHR fact-finding team, ILAC sought preliminary information on certain incidents, which may be useful for identifying sites, for cross-checking the results of other investigations, and for providing a basis for further investigation by others.

Details concerning the team's findings are set forth in AOHR report. What follows is a summary of the ILAC team's observations, with some snapshots illustrating the issues facing the new Libya.

Abuses by Gaddafi Forces

Throughout the Revolution, reports filtered out of Libya concerning alleged atrocities, including crimes against humanity, by Gaddafi forces. One goal of the fact-finding mission was to explore these allegations, and determine if there was credible evidence to support such allegations. During the mission, the team interviewed more than twenty victims of alleged abuse. In virtually all cases, the stories told by the victims were credible and compelling. We observed no hint of fabrication or coaching – the victims that we interviewed told stories which were both heartfelt and supported by the available circumstantial evidence on the ground.

On November 17, 2011, the team was taken by representatives of the local revolutionary council to the construction site in Al-Khoms. Prior to the Revolution, a British firm working under contract with the Libyan government was constructing a housing complex on this site. According to witnesses, on March 15, 2011, after the Revolution began, the partially-constructed site was taken over as a detention center by Gaddafi forces.



From these stories, the ILAC team concluded that Gaddafi forces had engaged in widespread and systematic torture of both rebel fighters and innocent civilians. While the evidence concerning individual incidents must be properly scrutinized before judicial conclusions are drawn, the ILAC team is firmly convinced that torture by the Gaddafi forces was real and widespread.

In the same vein, it was equally apparent to the ILAC team that Gaddafi forces routinely violated the rules of war. One area of particular concern relates to pervasive allegations that rape was used by Gaddafi loyalists as an instrument of war. Repeatedly throughout our discussions with Libyan rebel officials and civilians, the ILAC team was told of widespread rapes by Gaddafi forces directed at wives, sisters and daughters of persons suspected of involvement in the rebel cause. This allegation was specifically repeated to the team in Ministerial level meetings. Especially in the Misrata area, stories were reiterated of the distribution of massive amounts of Viagra by Gaddafi forces to civilian or mercenary allies, and of instructions to those allies to conduct a campaign of rape.

Unfortunately, the ILAC team was not provided with access to any direct evidence of such atrocities. Instead, these reports were hearsay in nature, often second or third hand. While rebel officials insisted that such evidence existed and had been turned over to the ICC, when pressed by the ILAC team for access to witnesses, officials typically replied that cultural issues meant that victims and their families would not speak out. To do so, the team was told, would place victims in an untenable position within Libyan culture.

The worst abuses apparently occurred in two shipping containers located in a corner of the site. The containers were typical shipping containers, secure and well-sealed. However, we observed a few holes, primarily created by gunfire from the interior of the containers.

One witness, Mohammad Itarhoney, was a teacher in the local school, who indicated that he was detained in May 2011 and accused of incitement against the regime. Mr. Itarhoney stated that he was brought to this site, where he was repeatedly beaten with fists, plastic hoses and electrical cables, as well as electrical shock torture, often while he was handcuffed and blindfolded.



Marks were visible on his back, supporting this account.

According to his account, on May 16, he was put in the white container, along with 18 other detainees, many his former students. The external temperature was 45° C, and he estimated that the temperature in the container reached 55° C. The detainees stripped off their clothes and screamed to the guards for air. They had 1½ liters of water for 19 people. Mr. Itarhoney indicated that he held the water and attempted to ration it. When the water ran out, the suffering intensified. One detainee, who later died, asked Mr. Itarhoney to arrange for him to be buried by the sea so that he could have water in his afterlife. One by one, the detainees collapsed – banging on the walls, but calls for help were ignored. Mr. Itarhoney eventually lost consciousness.

According to various witnesses, the white container was eventually opened by the Gaddafi forces on May 20. Five detainees were dead; three more died shortly thereafter. Though the numbers given by various witnesses were slightly conflicting, it appears that ten men died in the white container (nine at that time and one from kidney problems later). Another nine detainees died in the red container from similar abuse; only one survived. In short, according to these witnesses, 19 out of 29 detainees perished in the two containers during late May

The ILAC team believes that officials in the new Libya must address these issues. On one hand, absent a full investigation, society is left to act on rumors rather than facts. Misdirected vengeance in such situations is likely. Trained investigators can approach these issues in a culturally sensitive manner, while still separating fact from rumor. Moreover, experience in other similar societies has demonstrated that silence – rather than benefiting victims – can deepen their suffering.

NATO Airstrikes

After the adoption of Security Council Resolution 1973 on March 17, 2011, NATO allies conducted hundreds of airstrikes in Libya. Throughout this period, Gaddafi spokesmen repeatedly claimed that NATO strikes targeted and/or struck civilian targets in violation of international law. The fact-finding team according requested access and was taken to visit more than a dozen NATO bombing sites. Though the team requested access to a few specific sites, the majority were selected by rebel officials. Such visits did not constitute full investigations, since the team had neither the technical expertise nor equipment to perform forensic analyses. Nonetheless, these site visits, coupled with information provided various rebel officials and witnesses at those sites, offer insights into the nature of the air campaign.

At the outset, it was clear that a number of civilian buildings apparently had been targeted and destroyed by NATO aircraft. Schools, post offices, civilian warehouses – the team visited a variety of sites that unquestionably were built for civilian use. However, that fact does not answer the larger question, since it was repeatedly reported by both rebel officials with whom we met and NATO officials in briefings, that such buildings were used by Gaddafi forces as weapons depots, communications centers, and other military uses. Indeed, ministers in the TNC with whom the ILAC team met indicated that they were not aware of any strikes that

One of the most publicized NATO strikes was the bombing of the Hamadi compound near Zawiyah on June 20, 2011. Khawaildi al-Hamadi served on the Revolutionary Command Council that Gaddafi created when he seized power in 1969. In the NATO attack, the home of Khalid al-Hamadi, the son of Khawaildi, was destroyed. Libyan state media reported that eight children were among 19 people killed in the attack. In late July 2011, Khalid al-Hamadi filed a civil suit against NATO in Brussels District Court, seeking damages for the death of his wife and three children in the NATO attack, and claiming that the home was not a legitimate military target.

News reports quoted NATO officials as stating that it had bombed a “legitimate military target -- a command and control node” in the area, and it could not confirm whether civilians had been hurt. “This strike will greatly degrade the Gaddafi regime forces’ ability to carry on their barbaric assault against the Libyan people,” Lieutenant-General Charles Bouchard, the Canadian commander of NATO’s Libya operation, reportedly said in a statement.

At our request, the team was taken to this site. The so-called Hamadi House is in the middle of a large semi-rural, walled compound near Zawiyah, more than 30 acres in size. The compound appeared to have been a luxurious gardened estate, now largely destroyed or derelict after the war. A number of structures in the compound had been destroyed, but most appeared to have destroyed by rebel forces during the war, rather than by air strikes.

The site of the NATO strike was obvious; the structure was obliterated by one or more massive explosions, either from a cruise missile or some other powerful ordinance. The explosion created a massive crater, and reduced the structure to rubble. However, this structure was

violated the rules of war. Since the team had neither the investigative nor forensic capabilities to fully investigate these air strikes, we were limited to making general observations based on the numerous sites that we visited.

The first general observation was the remarkable precision of the strikes. At virtually every site that the team was shown, the target was obliterated with essentially no, or *de minimus*, collateral damage. Large four-story buildings were reduced to ruin, yet the windows in buildings a few meters away were intact. With rare exceptions, the team saw no evidence of any shrapnel escaping the target site and striking adjacent buildings. In short, most of the sites that we observed largely fit the description of “precision” strikes.

A second observation was the apparent lack of casualties. At many of the sites visited, rebel officials reported no casualties. These sites included military installations, government buildings and purely civilian structures – flattened beyond recognition – yet the team was told by local revolutionary leaders that there were no deaths or injuries.

The reported reason for this outcome, according to rebel officials, was that Gaddafi forces were routinely warned by NATO prior to any strike. With respect to larger or more strategic targets identified by NATO, the team was told that NATO typically broadcast a warning on known Libyan military radio frequencies that the target would be destroyed in a few (typically four) days. Gaddafi forces accordingly would empty the site, so that when it was hit, no one was injured.

With regard to more tactical strikes, Libyan rebel spotters told the team that they would identify locations where Gaddafi forces had taken over a civilian facility, and were using it as a

immediately adjacent to another home. According to revolutionary forces, the home left standing a few meters away and essentially untouched was the home of Khawaildi al-Hamadi.



Revolutionary officials indicated that NATO gave four days’ advance warning by radio that it was going to attack the home. According to them, Khalid al-Hamadi fled, leaving behind his wife, his children and a Sudanese cook, all of whom were killed in the attack. The rebel officials indicated that both Khalid and Khawaildi al-Hamadi now are in hiding, likely in Tunisia or Morocco.



Based on our investigation, it is impossible to determine if the Hamadi House was a command and control center, as contended by NATO. We saw no weapons or munitions in the rubble. There was debris from some satellite dishes, but nothing that was obviously military in nature to the untrained eye. On the other hand, as reflected in the photo below, there appeared to be some structures deep (at least two stories) underground beneath the house. We could not determine whether these were military in nature, or innocent civilian structures.

communications center, to store arms, or for some other military purpose. The spotters with whom we spoke indicated that they would obtain GPS coordinates for the facility, and call them in to NATO. Within a few hours or less, NATO planes would appear overhead, and drop a “flash bomb” (*i.e.* a device that would provide a flash of light and loud sound, but do no damage) to warn those in the building and the vicinity to evacuate. A few minutes later, the building would be flattened.

We also heard reports of areas being warned by leaflets dropped from the air. In any event, the rebels repeatedly reiterated the lack of casualties at many of the sites visited. Of course, in those attacks that could more properly be called combat air support, no warning was given and casualties may have been substantial.

The third general observation from these site visits was the absence, at most of the sites, of any evidence of weapons, munitions, or other military equipment. Some of these sites were targeted directly by NATO, and others were identified to NATO by rebel forces. Regardless, at many sites, we saw no evidence of any weapons, munitions or other military activity. Further, if munitions were destroyed in a civilian structure, those munitions could have created secondary explosions causing collateral damage in the vicinity. Yet, no such damage was observed at most sites. In short, though sites had been destroyed with great precision and no apparent loss of life, at least our team could find no evidence that many of the buildings had ever been used for any military activity.

While some of these findings seemed anomalous, it is difficult to draw any concrete conclusions. Rebel forces with whom we spoke were very grateful for NATO’s support, and seemed highly protective of or apologetic for NATO. The ILAC team is not aware of any plausible reason why NATO would destroy structures with no military value, particularly when warnings allowed anyone inside to evacuate. And the team is unaware of any plausible reason why rebel forces would have NATO needlessly target facilities that they (the rebels) would need as they rebuilt their country after the war.

Post-Revolution Human Rights Issues

The final matter investigated by the fact-finding team related to matters of potential concern involving alleged abuses by rebel forces. These investigations focused on two principal issues: (a) alleged abuses of detainees at centers operated by various local militias or revolutionary councils, and (b) mistreatment of minorities (typically darker-skinned) by rebel forces.

Alleged Abuses of Detainees: Libyan prisons are not pretty places. According to a Human Rights Watch (HRW) report, inmates in 1996 reported the massacre of more than 1200 prisoners in a single day by Gaddafi security forces at Abu Salim prison in Tripoli. For rebel forces, this event became a *cause célèbre*, particularly when mass graves near the prison were

located shortly after the fall of Tripoli in September 2011.

At the conclusion of hostilities, rebel detention centers were opened throughout Libya to house persons allegedly aligned with the Gaddafi regime. Though accounts differed, according to information provided to the team, in November 2011 only two of these centers were under the full control of the National Transitional Council. The rest were operated by local revolutionary councils or militias, often without oversight by any national or international authority. While the exact number was unknown, estimates suggest that somewhere in the neighborhood of 7,000 to 10,000 persons were in detention.

The ILAC team conducted site visits and interviews at two detention centers in the Zawiyah area controlled by the local revolutionary council. While the team was given access to the detainees, and allowed to question them outside the hearing of the guards, the interviews were often hurried and conducted through a variety of translators. The team had no ability to verify any of the detainee's accounts.

The detention centers visited, while crowded, were generally clean and well kept. In fairness, however, it was apparent that officials made intensive efforts to clean the centers immediately prior to our arrival; the team has no knowledge of the conditions prior to such efforts.

While detainees at one facility denied any mistreatment, more than twenty detainees at the second facility claimed that beatings in that facility were widespread. Most stated that they were beaten and tortured after their capture, either at the facility or at prior detention facilities.

Approximately 38 km. east of Misrata, on the edge of the desert area leading to Sirte, lies the town of Tawourgha. Originally, Tawourgha was used as a camp by slave traders bringing black Africans for export from the port in Misrata. When the slave trade was abolished, the slaves settled in the area creating a dark-skinned population.

It appears undisputed that Tawourgha was used as a base for attacks, including artillery fire, on Misrata from March until August 2011. According to an HRW report, Tawourghans interviewed after the war admitted that many participated in attacks on Misrata and supported Gaddafi, whose government claimed that Libyan opposition fighters would enslave them if they took power. Rebel reports, impossible to verify, described civilian volunteers from Tawourgha serving with Gaddafi troops, ransacking homes, and committing serial rapes in Misrata during the war. Militia commanders from Misrata told the team that Tawourghans and other mercenaries had joined the Gaddafi forces during the war based on promises that they could simply pick out homes in Misrata and take them when the rebels were defeated.

Rebel forces retook Tawourgha on approximately August 13, 2011. According to multiple reports, when it was freed by the rebels, the town was emptied of inhabitants. However, the exact reasons remain murky. Some rebel authorities claim that the inhabitants "voluntarily" fled in a misplaced fear of retribution by rebel forces. However, a September 11, 2011, story published in the Sunday Telegraph quoted the officer in charge of the rebel garrison in Tawourgha as saying

We gave them thirty days to leave. We said if they didn't go, they would be conquered and imprisoned. Every single one of them has left, and we will never allow them to come back.

The fact-finding team first visited Tawourgha on November 20, 2011. During our entire time in Tawourgha, we did not observe a single person or animal anywhere in the town, apart from an occasional vehicle passing through on the main highway. There was no evidence of any militia or other presence guarding Tawourgha. On November 20, the town appeared totally deserted of all humans.

Not surprisingly, all prisoners denied any involvement in abuses by Gaddafi forces, and most denied involvement with the Gaddafi forces in any way. The general commentary from the detainees was that all of the detentions were illegal, and that none of them had been charged with any crime. Rebel officials, on the other hand, insisted that all detainees were known Gaddafi fighters.

While the ILAC team had no ability to determine the truthfulness of these claims, in the fact-finding team's conversations with interim Minister of Justice in the TNC, he acknowledged the possibility of scattered abuses, but denied that there was any systematic abuse at these facilities. However, the widespread nature of the complaints indicates that additional investigations are needed to determine the facts regarding the allegations of beatings and torture. Equally important, it was clear to the team – even from the comments of the officials in charge of these facilities – that these detentions were indefinite in nature, with no plan for investigating, charging or determining the guilt of detainees. In large part, this failure was due to the chaotic nature of the rule of law system, described above. Regardless, such conditions are not acceptable, and must be quickly remedied.

Mistreatment of Minorities: Throughout the ILAC team's investigations in Libya, a recurring theme was the apparent post-Revolution disaffection with dark-skinned minorities by certain elements among the larger Libyan population. Such attitudes are not new. Libya did not outlaw slavery until the 1930s. An *Economist* article in October 2000 – supported by the ILAC team's interviews in Libya – described a Libyan "pogram," anti-black violence in which many were killed and injured, including at least



As we approached along the main highway from Misrata, we saw evidence of heavy shelling directed at the town from the highway. Buildings on the edge of the town facing the highway were bullet scarred. At the same time, light poles along the highway showed evidence of being hit with small arms

fire, which could have come from the town.

When the team entered the portion of the town on south side of the highway, we found the main road into that part of town was blocked by a dirt berm. At least in that part of town, the team saw no evidence of fighting. The homes in that portion of town appeared mostly vandalized, not heavily looted, with many personal belongings present but strewn about or broken.



Nor did the team find – on November 20 – any sign of widespread arson or burning. A few rooms or mats were burned, but nothing in the nature of widespread destruction of homes or businesses.

The following day, November 21, 2011, the

team passed back through Tawourgha without stopping, on the way to Sirte. Again, there was no sign whatever of human presence. However, as the team returned from the east at dusk that evening, plumes of smoke could be seen in the distance. As the team neared the village, it was apparent that a number of fires were beginning to burn in Tawourgha. These fires were deliberately set, shortly before the team was to pass through Tawourgha. As we turned around to pass through again, new fires appeared and the flames grew in size and intensity. This situation was eerily similar to the experiences described in the HRW report on Tawourgha, where buildings intentionally were torched before the investigators' eyes.

150 people in Zawiya.

While these attitudes were particularly apparent in the Misrata region, evidence of this hostility was apparent throughout the country. In large part, the resentment arose – or at least was exacerbated by – allegations that these minorities aided Gaddafi forces and committed atrocities during the Revolution.

These attitudes manifested themselves in different ways. The detention centers that the team visited contained dark-skinned foreigners, who were detained, segregated, and labeled as mercenaries. Foreign populations, such as the small Sudanese community in Sirte, reported to the team that they were terrorized and attacked by revenge-seeking rebel soldiers. Entire towns were emptied of their dark-skinned populations.

Based on these investigations, the ILAC team concludes that dark-skinned minorities are being targeted for a variety of attacks by elements among the Libyan population. While these attacks typically are considered revenge, based on allegations that these minorities themselves participated in atrocities on behalf of Gaddafi forces, no legitimate judicial or law enforcement inquiry has established such facts. In any event, accepting that some within these minority communities may have committed abuses, such facts do not excuse the collective punishment of innocent members of those communities. The cycle of revenge must stop, and be replaced with the rule of law that applies equally to loyalist and rebel, majority and minority.

RECOMMENDATIONS

The current challenges to and for the rule of law in Libya are immense and immediate. People are dying.

At the same time, the lack of governmental structures – or even any history of good governance – increases these challenges. Particularly at the national governmental level, there are few if any legitimate, official, reform-minded institutions involved in the rule of law. Instead, these governmental functions are being handled on an *ad hoc* basis, if at all, by local councils or other groups.

ILAC's By-Laws explicitly provide that one of its goals is to work in countries emerging from conflict in co-operation with any relevant United Nations mission. In discussions with the United Nations Support Mission in Libya (UNSMIL), it appears that this mission intends to establish assistance programs with rule of law institutions at the national governmental level when sufficient counterpart authorities exist to support such a mission. Accordingly, the ILAC team does not believe that, at this time, it would be productive to directly engage the

embryonic Libyan governmental authorities or institutions, pending the launch of the UNSMIL rule of law mission.

However, the ILAC team strongly believes that there presently exist a significant number of Libyan legal professionals, principally private lawyers and law professors, who can work and are working outside the national governmental channels on many of the issues outlined above. These professionals are scattered in and outside Libya. Due to the security and communications problems within the country, they are unable to easily consult to develop common strategies to meet pressing rule of law needs.

For this reason, the ILAC team recommends to Council that ILAC and its member organizations immediately begin engaging the Libyan legal community concerning rule of law development and reform priorities. In particular, based on discussions with various Libyan reformers, the ILAC team recommends that planning begin immediately to convene a conference of Libyan legal professionals and civil society actors to outline their rule of law priorities for the next two to four years. In view of the lack of effectively functioning national rule of law structures, the ILAC team recommends that this conference focus on local Bar and civil society activists, who have demonstrated a commitment to and willingness to work for the establishment of the rule of law.

The ILAC team also recommends that ILAC member organizations, donors and other pertinent organizations be invited to participate in the conference. The goal of such participation will be to review the priorities developed by the Libyan participants, and immediately begin to work toward providing international technical assistance where needed and requested.

Finally, the ILAC team recommends that ILAC Council authorize the preparation of a needs assessment mission to Libya, to depart shortly after the conclusion of the conference. This assessment team will work with Libyan stakeholders, and plan the detailed implementation of technical assistance programs discussed at the conference. The needs assessment mission also can examine Libya's progress made in establishing effectively functioning national rule of law structures, and offer further recommendations to Council regarding any appropriate, additional assistance.

ILAC PRE-ASSESSMENT TEAM

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