Conference report

Libya and human rights: the way forward
Monday 11 April 2011 | WP1127

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Introduction

Human rights and humanitarian concerns are at the heart of the United Nations (UN) Security Council Resolutions 1970 and 1973, as reflected in the London conference held on 29 March 2011. The UK government's response to Libya is informed by the strategy paper on *The Protection of Civilians in Armed Conflict.* However, given the rapidly evolving situation in Libya and the heavy toll on civilians, it is important that the Government consults widely to ensure that policy is as well informed, rigorous and practical as possible.

Assessment of the human rights situation in Libya

The current focus is, inevitably, on the immediate crisis in Libya. However any assessment of the human rights situation in Libya should also consider the longer term.

Libya has ratified most human rights treaties and protocols and a substantial record of its performance in relation to those instruments has accumulated over the past decade. Its periodic reports to the various UN treaty bodies show there is a substantial gap between *de iure* and *de facto* protection of human rights. Deeply ingrained, systemic patterns of abuse across a range of human rights issues in Libya are further compounded by profound infrastructural problems. These are issues that will continue to affect the human rights of vulnerable groups in Libya well beyond the current crisis. The challenge is to target effective protection strategies and identify the appropriate actors to deliver those strategies both now and in the future.

There are specific concerns about the strategy of the Qadhafi regime in pitting tribes against each other in an apparent bid to avenge opposition to his rule. It is also suggested that the use of foreign mercenaries is seen as akin to Libya having occupied its own territory with a foreign army. Worryingly, there are reports that pro-government forces have been instructed to carry out gender based violence. There are particular concerns regarding the plight of the Berber communities (Amazigh) living in the Jabal Nafusah region of western Libya which have been discriminated against for many years, but whose vulnerability has increased significantly with the crisis. The seriousness of this issue is underlined by reports of refugees from Nalut (a town in the Jabal Nafusah region) who have fled to Tunisia amid concerns that Qadhafi plans to rid Libya of the Amazigh.

There are fears that Qadhafi aims to stay in power at any cost, perpetuating a climate in which gross violations of human rights and crimes against humanity are not only possible but are being perpetrated. There is criticism too of Qadhafi's sons, with a particular concern about Saif al-Islam and the lengths he may go to in order to avenge any opposition to the regime. It is thought that the Berber community is particularly vulnerable.

The UN Security Council Resolution 1973 aims to protect civilians but there is a concern that this is not possible as long as Qadhafi remains in power. If Qadhafi were to go, the Libyans would have an opportunity to rebuild their nation; encompassing Islamic, Sunni and Maliki, securing human rights and protecting minorities through the rule of law.

In the experience of UK officials in previous negotiations with Libya, there were effectively two states in operation: the relationship with the Ministry of Justice was positive and constructive (the former Minister is now in the Interim Transitional National Council); the other 'shadow state', accountable to Qadhafi and operated by the security apparatus had its own police, court and prison systems, which dealt with political prisoners and any individual deemed a threat to the regime. The UK government had limited ability to engage with this "Libya", on any level. This experience was reflected by non-governmental organisations (NGOs) which had similarly made limited progress with the security services over human rights issues.

Human rights concerns were a key trigger to the protests which began in February 2011, following the arrest of Fathi Tirbil, a human rights lawyer seeking justice for the families of prisoners massacred at Abu Salim prison in 1996. Once it became clear that these protests threatened the survival of the regime, the 'gloves came off' and the security services were given free reign to act whilst the civil system of government became increasingly sidelined. The subsequent escalation of human rights abuses, including extra-judicial killings, detention and intimidation of journalists, have been widely reported and documented.

At a diplomatic level, the UK government's response to the crisis in Libya has focussed on mobilisation of the international community to isolate the regime. In addition to input to the drafting of the UN Security Council Resolutions, other diplomatic efforts have included the conference on Libya held in London on 29 March 2011. The Libya Contact Group established at this conference to coordinate the international response to the crisis, scheduled to meet in Doha on 13 April. It is hoped that a coordinated international response to the crisis will convey the message to the current regime that it cannot continue to pursue its current approach.

The UK government has been supporting both the International Criminal Court (ICC) and the Human Rights Council (HRC) in their efforts to fact-find and to compile evidence with the aim of ensuring accountability for human rights abuses. The government has repeatedly pressed for full and immediate access to Libya for both the ICC and the HRC in order that they might undertake their important work.

The Interim Transitional National Council (ITNC) has issued statements setting out an impressive and ambitious vision on human rights commitments for the future government of Libya. The international community has impressed on the ITNC that they will be held to account for standards of behaviour both in their conduct during the crisis and, should they find themselves in power, in living up to these commitments.

Organisations with access to Libya have documented a series of recent violations. These include evidence of the extra-judicial killing of captured fighters and, in government controlled areas, the brutal repression by the security services and bands of armed "volunteers" of any protest, leading to an oppressive climate of fear in and around Tripoli. It was also reported that the regime's forces have destroyed water supplies and power generation facilities and there is emerging evidence of the use of anti-personnel land mines along transport routes.

There are concerns over the scale of civilian casualties in areas that have seen fighting, particularly Misratah, and also about the treatment of detainees, particularly by the regime's forces. Information has emerged of the routine torture of captured fighters however the whereabouts of these detainees (and likewise arrested protestors) remains unknown. In a positive move, the ITNC has given the International Committee of the Red Cross (ICRC) access to its detainees. Given that it is a predominantly civilian militia, consideration should be given to training opposition fighters in the laws of armed conflict to which they are bound. This is particularly important should there be any future moves to provide arms.

The documentation of violations is important if there is to be future accountability and to secure justice for victims. The problem is not in the availability of evidence but in its volume and in linking the evidence with those who have ultimate responsibility- the 'chain of

command'. The collection of evidence is critical but remains difficult: the security situation in Libya limits the ability of investigators and fact-finders to operate fully.

This climate of insecurity is also impacting on organisations trying to provide humanitarian relief to civilians. It is compounded by the increasing use of landmines by the regime's forces and by dangers posed by unexploded ordinance. The problem is most acute for those trying to get access to Tripoli but also affects the west of Libya. Air-drops could be considered, notwithstanding the no-fly zone; however as some basic relief, including food and medicines, is getting through, may not be necessary at this stage.

Relief organisations are particularly concerned about refugees fleeing the violence in Libya. Many of them are migrants who need protection from forced return to their own countries, in violation of the principle of *non refoulment*. There are also wider concerns about the status of people overseas, including reports that Libyans in Italy have had student visas revoked on the basis that the Italian government had withdrawn its recognition of the Libyan government. Whilst this questionable course of action may be limited to Italy, it raises concerns regarding the problems faced by Libyans who had been travelling abroad and who are now stranded.

The ICC investigation and the HRC Commission of Inquiry were announced within a day of each other, raising the question of potential duplication. However, they have distinct mandates and should therefore be complementary. The ICC is mandated to deal with international criminal law issues and will be confined to events dating from 15 February 2011. The HRC, by contrast, has a broader mandate both in terms of the subject matter (violations of international human rights law) and the temporal scope. It is not limited to violations that have occurred in the context of this crisis, but may also address previous abuses. This is important to the victims (and their families) of torture and enforced disappearance; both known to have been carried out by the regime over many years. In the light of its findings, the HRC may also make policy recommendations that go beyond the issue of accountability.

During armed conflicts, some violations make it particularly difficult to build and sustain peace post-conflict- for instance, violations against minorities in order to ethnically cleanse an area. An early 'warning shot across the bows', may signal that international crimes of this nature will be prioritised by investigators. Accountability may also take other forms eg transitional justice and via domestic courts. If this course is taken, it should be led by Libyans.

International law encompasses a broad range of instruments relevant to the various investigations and fact-finding commissions. In order to ensure successful prosecutions, it is important to distinguish clearly between international humanitarian law, international human rights law and international criminal law and to apply them appropriately. In support of this, it may be useful to draw on the expertise of eg the International Fact Finding Commission with particular regard to investigations in the context of international armed conflict.

Finally, in relation to the issue of investigations, artificial constraints on their reporting mechanisms, particularly the imposition of unrealistic timelines, tend to have a counterproductive effect with the risk that bodies are rushed into publishing their findings. This notwithstanding, there is a high degree of interest in the first HRC Commission of Inquiry report due on 7 June.

It is important to ensure dialogue and co-operation with other bodies that have initiated their own responses against Libya for serious violations of rights: these include the African Union and, specifically, the African Commission on People's and Human Rights in the African Court. The Committee for the Prevention of Torture in Africa is another regional body with an interest.

Further pressure to abandon the regime could be applied to people around Qadhafi and his sons. However, many of these people will be bound to the regime through fear of reprisals against their families. Similarly, incentives to encourage defections may present difficulties:

the defection of Musa Kusa clearly weakened the regime, but the position that he will not be granted immunity from prosecution may act as a deterrent to others.

The nature of the regime, particularly since the culture of revolution launched in 1973, has evolved into one which is intolerant of contradiction and opposition. In peace-making terms this precludes any political solution which allows either Qadhafi or his sons to remain in power. Qadhafi's removal from power is the 'red line' for many Libyans, who are not prepared to accept any continuation of the regime. There are also strong views amongst the opposition that Libya remain united.

Any approach to conflict resolution in Libya should address state-building and good governance, vital in the long term for securing human rights. The structure of Libya has been badly affected by the conflict. However, the institutional infrastructure of the country has suffered longer term damage over several years of the regime, leaving much work to be done.

In the short term, there is a need to address social and economic rights and to direct efforts at restoring normality- for example, getting people back to work and children back into schools

The UK government is currently considering preparatory work in Benghazi with regard to stabilisation and state-building and there are indications that the ITNC would be willing to accept international support in the future. However, the people of Libya should decide their own future and any external intervention should be at their request and on the basis of strong multi-lateral leadership.

The way forward: the protection of civilians during and post-conflict, and ensuring accountability for human rights abuses committed

Libyan human rights organisations are working to assist and support the work of lawyers 'on the ground'. At present, activity is focussed on the investigation and documentation of international crimes perpetrated since the conflict began and also of human rights violations which have taken place over a longer period.

Lawyers, for example, are being trained in the taking of victim and witness testimony and the documentation and collection of evidence of crimes, ensuring that statements are of the standards required by international courts. The difficulties of this task cannot be underestimated: victims in Libya have an innate distrust of authority; prevailing security concerns inhibit access; and there is a severe lack of funding to resource the work. The lawyers involved in this work are acutely aware of the dangers but they are committed to securing justice for victims and ensuring accountability for the violations that are taking place.

It is recognised that only a small number of perpetrators will ever face prosecution in the ICC so alternative routes to justice are being explored. In future, these could include the African human rights system or via prosecutions through domestic courts. Other avenues may include quasi-judicial and even non-judicial proceedings, such as truth commissions, leading to transitional justice once the conflict is resolved.

It is important to take a wide approach to the issue of accountability otherwise there could be a situation akin to the Former Yugoslavia where resource issues lead to effective impunity for many perpetrators of violations. In FRY, as part of the price for the peace deal, many victims had to accept living with perpetrators as neighbours, with limited possibility that they be called to account.

Experts have provided technical assistance through the production of a short manual on the laws of armed conflict to assist with the instruction of opposition fighters. The manual, with a primary focus on detention issues, has been translated into Arabic, and is being distributed by the ITNC demonstrating an apparent appetite to adhere to international frameworks.

An analysis of international law reveals the main difficulties facing the international community with regard to the situation in Libya. The UN Security Council resolution 1970 included, for the first time, referral to the ICC during an ongoing conflict. Whilst a welcome departure in some ways, this could serve to 'box' the international community in to a long term investigation which is unlikely to bring all perpetrators to justice. Furthermore, resolution 1973 appears to contain some fundamental contradictions to the earlier resolution: 1970 allowing for the investigation and prosecution of Qadhafi, with 1973 authorising 'all necessary measures' to protect civilians, short of landing an army of occupation in Libya. Given some of the legal complexities of the SCRs and the issue of which takes precedence, further clarification should be sought.

It is clear that neither resolution allows for the arming of either party; this could be seen as undermining the ability of the international community to act. Any attempts to circumvent the arms embargo are likely to lead to protracted and complex legal debates. These constraints compound the view that the intervention in Libya is likely to be a long haul. The intervention mandated by Resolution 1973 appears to have been motivated by the principle of Responsibility to Protect (R2P), although this was not made explicit. A genuine commitment to R2P, which calls for the protection of as many citizens as possible even if the entire country cannot be protected, could lead to a *de facto* partition of Libya- an outcome which would be difficult to support from both a legal and policy perspective and which many Libyans have indicated would be extremely unwelcome.

The issue of command responsibility is complex: there appear to be an absence of formal controls within the regime and the chain of command is opaque. The militias have a clear mandate to protect the regime but few orders are documented. It is hoped that this can be partly addressed through statements given by defectors and by a 1990 resolution declaring that decrees made by Qadhafi carry the force of law. However, the latter may only help in establishing command responsibility of Qadhafi himself, not his sons.

The ICC and other criminal processes will only address violations after the fact and the most effective way to protect civilians is to prevent violations occurring in the first place. Clearly this would be best achieved through a de-escalation of the conflict. The engagement of the Arab League is important, but difficult given that every member is itself facing some form of civil protest impacting on their credibility. It should also be recognised that there is a general decline in respect for the Law of Armed Conflict (LoAC).

The process of collecting evidence and testimony is important for reasons other than criminal justice, not least in that it serves to further deligitimise the current regime. At present, many people are reluctant to identify themselves as being involved in human rights work because of the potential danger to families in Tripoli. An assurance of refugee protection by third states would go some way to assuring human rights defenders who may be forced to leave the country for reasons of personal security.

Libya's justice system will not be rebuilt effectively on the basis of human rights alone (although these should inform transitional justice initiatives). Rather human rights in the future will be secured through a functional legal system based on good governance and transparency. To this end, the Libyan legal system would benefit from the input of experts versed in civil law systems rather than relying on expertise from common law systems.

The situation on the ground is heading towards a stale-mate in which civilians are not protected and stability impossible. There is a pressing need to reach an 'endpoint' and there is a widespread view that the removal of Qadhafi and his sons could effectively end the continuation of civil war. The international community should continue to meet its responsibilities and to support the people of Libya, however, the future of the country must rest with Libyans.

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