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Middle East and North Africa Programme: Libya Working Group Meeting Summary

Libya: Establishing the Rule of Law

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INTRODUCTION

This paper is a summary of the discussions during the sixth Libya Working Group meeting, convened at Chatham House in May 2012, to consider policy suggestions and recommend action points for the international community with regard to the future of Libya, with a particular focus on the establishment of the rule of law.

The discussion was divided into three sessions. The first session aimed to set out the current situation as a framework for understanding the rule of law in Libya. The overview examined key elements such as security, politics, the economy, public expectations and efforts at re-establishing the state. The second session explored the challenges of reinstating the rule of law. The third session explored issues of criminal justice and reconciliation.

Key points that emerged from the meeting were as follows.

The constitution

- What will be stated in the constitution is the starting point. Implementation, and enforcement where necessary, will be vital.
- Some are promoting the idea that public opinion takes precedence over the rule of law. This is potentially worrying for the drafting of the constitution. It would also be detrimental if Libya had a constitution that was too easily amended.
- It is not clear what choices will be made in drafting the new constitution with respect to the relationship between religion and the state, the hierarchy between different sources of law, degrees of decentralization, economic principles and the protection of minorities.

Transitional law-making

- Under the National Transitional Council (NTC), 38 laws have been passed. Areas of concern related to them include the lack of proper process in drafting some laws and the lack of transparency; the question of legitimacy regarding the number of laws coming from what is an unelected body; and the difficulty in ascertaining which laws have been repealed.
- Libya has just emerged from a long period in which the law was used in part as a tool of oppression. There are fears that the laws

being passed are not purely in the public interest, but rather have served the interests of specific groups (such as protecting members of the NTC from future prosecution and appeasing militia groups).

- The lack of transparency in the way the laws have been drafted is damaging to the re-establishment of the rule of law.
- Some laws were well-intentioned but badly thought through, risking unintended consequences.
- It is encouraging that the Supreme Court is now scrutinizing laws that have been challenged.

Transitional justice

- Law 38 on transitional justice is a step towards the rule of law, but unfortunately dealing with detainees and torture victims is not seen as an issue requiring urgent attention.
- The circumstances of the trial of Saif al Islam al Gaddafi had yet to be settled. It was suggested that an ‘innocent’ verdict might be impossible, should the trial take place in Libya, as it would be perceived to ‘betray the revolution’. There were some exceptionally talented judges, but there were serious problems with regard to the judicial system (such as the lack of witness protection); it was clear, however, that Libya did not want to hand over Saif al Gaddafi for trial by the International Criminal Court.

Democracy in the future

- Three key areas were identified as essential to the success of the transition: maintaining the pace of the political process, guaranteeing security and restoring the economy.
- The elections were likely to be held without much delay – a matter of weeks only. But democracy does not result from elections alone, and the focus should be on creating a ‘democratic culture’ as well as establishing democratic institutions, notably a strong and independent judiciary.
- Wholesale repeal of laws enacted in the previous era would be a mistake: the oil and gas laws were good ones, for example

- Restructuring the police and army so that they were credible, accountable and serving the interest of the people would be a long-term task.
- A particular feature of the institutional structures inherited from the previous regime was a concentration of decision-making with individuals rather than departments. New institutional capacity was required urgently but would take time to grow.
- The establishment of the Reconciliation Commission was applauded. It was seen as potentially extremely useful, but it remained unclear how it would operate and which crimes it would cover.

The meeting was held under the Chatham House Rule and the views expressed are those of the participants. The following summary is intended to serve as an *aide-mémoire* to those who took part and to provide a general summary of discussions for those who did not.

The Chatham House Rule

'When a meeting, or part thereof, is held under the Chatham House Rule, participants are free to use the information received, but neither the identity nor the affiliation of the speaker(s), nor that of any other participant, may be revealed.'

CURRENT CONTEXT: MAINTAINING THE POLITICAL PROCESS

Three key areas were identified as essential to the success of the transition: maintaining the pace of the political process, guaranteeing the security of the country, and restoring the economy. While progress had been made in these areas, challenges remained.

As a backdrop to discussions it was noted that Libya currently does not have a functioning state, and there were frequent references to the weakness of state institutions. It was remarked that a particular feature of the institutional structures inherited from the previous regime was a concentration of decision-making in individuals rather than departments, and that this weak institutional capacity must not be continued into the new government.

Reform of the political process was regarded as a key factor in the development of the economy and security sector. Concerns were expressed that the momentum for reform might not be sustained beyond the election.

The National Transitional Council's Constitutional Declaration of 3 August 2011 set out the parameters of the political process in the transition. It was stated that the NTC and transitional government had generally adhered to the timetable set out in this document. A transitional government was appointed within the 30-day timeframe after 17 February 2011, and these appointments were thought to represent a fair compromise between different interest and geographical groups, and a fair balance of expertise.

However, while this document served as a guideline, substantive details remained to be clarified in regard to electoral law and transitional justice. The key criticisms were the opacity of the drafting process, the 'chaotic' way in which the laws were published, and the lack of communication of the laws enacted by the NTC.

The transitional government passed the Electoral Law in January 2012. This defined the new political system including the constituency boundaries and provided for the registration of political parties.

Confidence was expressed that the elections would take place in June or shortly thereafter, as it was argued the Libyan people had no appetite for delay and had already demonstrated a clear desire for participatory politics. Referring to a recent statement by Prime Minister El-Kieb, in which he alleged that 2.7 million people had registered to vote – representing 80% of those entitled to do so – a participant argued that, if correct, these statistics represented a high enough proportion to make the forthcoming elections credible. It was also stated that there was no reason to doubt that the

National Congress would be duly selected and a prime minister appointed. (It was also noted that El-Kieb could be reinstated to this post). Ministerial appointments would then be made by the Prime Minister and confirmed by the National Congress.

Local elections were widely perceived to have been conducted in a transparent fashion in Zuwara, Misrata, Tajura, Alabyiar and Benghazi. It was stated that the timing and consequences of elections in other towns and cities remained to be seen, although they would not necessarily be problematic or damaging to the national electoral process.

Elections in Algeria were seen to mask a continuation of the regime: elections are not necessarily a valid test of public opinion. Hope was expressed that this would not be the case for Libya. With regard to Libya, it was emphasized that democracy does not result from elections alone, and that the focus should be on creating a 'democratic culture' as well as establishing democratic mechanisms.

Current context: guaranteeing security

It was emphasized that the government had not secured a monopoly over the use of force, but security was key to supporting the political process. While there had been tentative steps towards formalizing security, progress in this area had been slower than in the political arena.

International experts commonly look to establish effective Demobilization, Disarmament and Rehabilitation (DDR) processes to deal with post-conflict environments; however, participants disagreed over whether DDR was applicable in the Libyan case.

It was argued that the government had made progress on rehabilitation – evidenced in the payment of salaries to militia fighters and the assignment of some former fighters to the police and armed forces. However, the challenges of demobilization and disarmament remained. Although there were now fewer weapons on the street, Libya was still a heavily armed society. The continued existence of armed groups was highlighted as a worrying situation. These groups operated independently of the state, frequently with points of contact in the Ministry of Interior (MOI) and the Ministry of Defence (MOD). Therefore, there was still a risk that fighting would break out when disputes occurred.

The MOI and MOD had adopted a threefold approach: integrating the militia and revolutionary fighters into the police and armed forces, providing education programmes and offering grants for the establishment of new

businesses. However, in order to implement this strategy they needed to restructure the police and army so that they were credible, accountable and serving the interest of the people. This was a long-term task. There was also a need for individual negotiations with each brigade leader about their future and that of their men. There was uncertainty over the current status of this process.

Border security was identified as an area of significant priority. As Libya was situated in a relatively volatile area, it was emphasized that events in neighbouring countries could pose a significant risk to its stability. Concerns were expressed that elements of the former regime might act from neighbouring countries with the express purpose of causing instability. More traditional risks associated with porous borders, such as smuggling and human trafficking, were also identified. It was stated that the EU was currently running a border security programme in Libya. The events in Northern Mali were thought to have been at least partly precipitated by the events in Libya.

Current context: restoring the economy

It was noted that dependency on the state was a feature of the old regime; for the past 42 years Libyans have been dependent on the state for employment, subsidies and cash hand-outs.

Therefore, although the public sector will remain central, a prominent longer-term problem is that of transforming the economy from a distributive model to a productive model. Participants noted that the development of public services to ensure that Libyans are provided with opportunities for material progression and social mobility was crucial. The success of the Ministry of Labour's approach, seen to be offering sustainable futures for Libyan people rather than just short-term, payment-based solutions, was commended by one participant.

It was stated that progress in restructuring the relationship between the state and the economy had been impeded in the transition. Access to funds and discretion over spending had been problematic in the absence of a government with legitimacy conferred by election. For example, public financial management had not been adequately reformed and hospitals were having problems procuring drug supplies.

Mismanagement of public finances was seen as evidence of the lack of government capacity. Reference was made to two headline cases: the overpayment of revolutionary fighters as a result of individuals being registered multiple times, and the scandal surrounding funds allocated for

treatment of the war wounded, which allegedly resulted in funding unrelated treatments in Jordanian hospitals.

However, problems still exist. This was thought to be demonstrative of old structures impeding progress on Libya's development process. The unfreezing of assets and recovery of oil production levels were seen as signs of economic progress. One clear indication of progress was the passing of a budget in which allocations had been made to specific ministries.

ESTABLISHING THE RULE OF LAW

Discussion was centred on the development of public law – specifically on the constitutional options, the judicial system and electoral law. In this session, concern was expressed at the lack of an effective judicial system. There was considerable confusion about where laws originated and what their status was to be in the coming months. It was emphasized that while discussion focused on the specifics of the constitution and laws passed under the NTC, it was imperative that a system for enacting and enforcing the legal system be put in place.

The constitution drafting process

The current Constitutional Declaration will form one of the foundation documents in drafting the new constitution, together with the constitution of 1963.

The constitution drafting process will begin following the election of the National Congress. This body will appoint a 60-member Constitutional Committee, with 20 candidates elected from each of the three main regions. Once a two-thirds majority consensus is reached (i.e. 41 out of 60 votes), the draft constitution will be presented to the National Congress for approval. This will be followed by a national referendum.

Several specific concerns were raised:

- The composition of the constitutional Commission was questioned and it was argued that there is a lack of clarity over who would be elected, through what process and how the drafting would take place. For example, who would advise on the process outside the elected body?
- It was suggested that the timeframe of 120 days might not be realistic: in the cases of South Africa and Kenya longer timeframes had been set.
- The handling of amendments between the Constitutional Committee and the National Congress gave cause for concern. If the draft were to be rejected by the latter, it would be returned to the Constitutional Committee for amendment and then presented again to the National Congress. Concerns were expressed that this could be used to block reform and could continue indefinitely.

- The lack of an allocated time frame for civic engagement and feedback on the draft was highlighted.
- The way in which the referendum is publicized and discussed is of crucial importance, and it was felt that process was not receiving due attention. The short timeframe for public education and consultation on the referendum was considered to be a problem.

Constitutional options

The implications for the judicial system of various constitutional options were discussed. These included the relationship between religion and the state, decentralization and the rights of minorities, and economic policies and natural resources.

Religion and the state

The constitutional declaration currently enshrines Islam as the state's religion. This has implications for the drafting of the constitution. Several important questions will need to be answered under this heading, such as:

- Will a narrow or broad definition of Islam be defined in the constitution, particularly in regard to the adoption of Sharia law?
- To what extent will Islam be treated not only as a state religion but also as a source of law?
- In the event that Islam is the source of law, what will the constitution say about how Islam fits within any other sources of law, and which will take precedence?

Additional points made included the question of whether secularism is necessary for democracy. Some participants highlighted the importance of retaining the secular nature of the Libyan state and addressing any extremist elements that may affect the drafting of the constitution or policy-making. Others contested the extent to which this was a cause for concern, reminding the group that in Benghazi Islamists had only won a single seat. In other local elections too, such as in Misrata, the Muslim Brotherhood was failing to win seats.

Decentralization and rights of minorities

It was argued that there was a problem with respect to the perception of minorities in Libya: a dominant narrative was that no minorities existed; rather, everyone in Libya was Muslim, and every Muslim was Sunni.

There are various constitutional models, which structure the state in different ways. Libya has four different provinces and 22 different districts. The distribution of power, the nature of this power and the degree of financial independence in each district will be crucial in building an inclusive, sustainable state structure. Therefore, the centralization versus federalism debate has been key to discussions on the shape of Libya's future state.

Ensuring that minorities, both ethnic and religious, are granted a stake in the democratic process will be a key challenge. Kenya and Sudan were cited as examples of states that have managed this process. Kenya has different institutions and courts for those who are not Muslim and do not want their affairs to be decided by the state; Sudan has a decentralized state structure, whereby districts can elect to diverge from national legislation where they have a majority.

Natural resources

The extent to which the state retains control of managing and distributing natural resources, in particular revenue arising from oil distribution, was debated in some detail. The constitutions of Sudan and Iraq were cited as possible examples where considerable thought has been given to this issue. Turkey and Yemen were mentioned as two states where control of revenue remains very centralized.

Laws drafted by the NTC

During the transitional phase a total of 38 laws have been passed under the NTC. Several areas were highlighted as being of particular concern: the lack of due process in drafting these laws, the exertion of pressure on the drafting committee, and fears that the laws being passed were not just in the public interest but rather served the interests of other groups (such as protecting members of the NTC from future prosecution and appeasing militia groups).

The lack of transparency in the way these laws have been drafted is damaging in terms of establishing the rule of law in Libya. The country has just emerged from a regime where the law was used as a tool of oppression and was very malleable. Further, participants expressed concern about the promotion of the idea that public opinion is supreme over the rule of law. It

would be detrimental if Libya had a constitution that could easily be amended. Laws were criticized for being well intentioned but badly thought through, with unintended consequences. Laws 35–38 were particularly contentious, and Laws 37 and 38 were cited as examples highlighting the lack of thought in the law-making process. The legitimacy of laws drafted and passed under the interim government was also contested.

Law 36

Law 36 deals with financial assets, intended to freeze the assets of Gaddafi loyalists. It was thought that there were currently 350 people on the list. Since the meeting a new, shorter list has been issued. This included a significant number of joint-venture companies in Libya. It was noted that this was problematic from a legal perspective as no appeal process existed. Thus, on an individual basis no mechanism existed for reviewing a decision to freeze a person's assets.

Law 37

Law 37 prohibits the glorification or praise of Gaddafi and carries a sentence of life imprisonment where this endangers the state.

Law 37 came under severe criticism, particularly in relation to the section prohibiting criticism of the February revolution, which was considered to have serious implications for freedom of expression. For example, if trials were to be held in Libya, defending those on trial would be impossible. A participant noted that this was not necessarily an intended consequence, but it was a very serious one. Another participant commented on the inability to run a democratic election process, as criticism of the NTC during an electoral campaign was effectively illegal.

On a positive note, it was noted that there had been healthy protests in the international legal community. The Libyan Human Rights Commission had taken these issues to the Supreme Court, and it was stated that a moratorium might be declared until the elected assembly came into being.

Since the meeting, the law has been nullified.

Law 38

Law 38 addresses issues of transitional justice. The act contains two central provisions:

Amnesty: The committing of any act deemed necessary to make the revolution successful has a blanket amnesty. It was noted that this amnesty law was unusual; such laws are generally defined by the nature of the crime rather than the perpetrator. The Act entitles anyone purporting to be a revolutionary to complete immunity. This was thought to be a very extreme measure as it could be interpreted to justify acts of rape, torture or violence. It was feared that the NTC might be tolerating a culture of impunity.

However, it was stated that the NTC claims that Law 38 is subject to international law. This was said to be an important point as it highlighted the lack of thought in the law-making process. Those who defend Law 38 argue that the law must be read in conjunction with Law 35, which clarified that any acts found to be in contravention of international human rights law covenants would not be exempt.

Detention: All those in detention must be processed within 60 days of the passing of Law 38. It was questioned how this law could be put into practice while giving sufficient consideration to due process. With approximately 8,000 in state detention it seemed such a timescale was unrealistic for a fair trial for all of those detained – it was estimated that only 50 detainees had so far appeared before judicial review. A participant noted that, as the situation stood, judicial review procedures were not being utilized sufficiently: there were judges and sufficient laws in place. However, it was noted that the criminal procedure code could be clearer.

The lack of development of review processes for detainees and torture victims was taken to indicate that it was not seen as a priority, although a sense of urgency did exist on other issues. On a positive note, it was stated that Law 38 had started to look at the rule of law. Importantly, standards needed to be set and once these were defined, society could determine what constituted illegal detention.

It was stated that militias were holding approximately 4,000 people in detention, in an undefined number of detention centres outside the control of the central authorities.

Legitimacy of NTC laws after elections

These laws will remain in force unless repealed by the newly elected assembly. As previously mentioned, the Supreme Court has already been engaged in challenges to certain laws.

Judiciary

It was noted that there were some extremely talented judges, but institutional problems inherited from the previous constitution meant it was imperative to create a legal framework and corresponding procedures in which justice is central. Essentially, a rule-of-law culture needs to be developed.

Saif Al Islam: ICC versus Libyan trial

The ICC has jurisdiction to accept cases, pursuant to Article 17 of the Rome Statute, when a state's national courts are 'unable or unwilling' to carry out investigations or prosecutions. It was noted that Libya had asked the ICC to defer the trial of Saif Al-Islam on the grounds that Libya itself is carrying out the necessary investigations.¹

However, there is a well-documented debate at a national and international level over how Saif Al Islam should be tried. This is focused on the limitations of the ICC remit (which is limited to crimes committed from 15 February 2011 onwards (i.e. from the outbreak of the revolution) and concerns about the capacity of Libya's judicial system to conduct a fair trial. It has been suggested that an 'innocent' verdict would be impossible should the trial take place in Libya as it would be perceived as 'betraying the revolution'. There is also an issue of sentencing should he face trial in Libya, where the death sentence exists.

The question of the capacity of Libya's judicial system was central to discussion. There was agreement that the system had not yet developed to a standard capable of guaranteeing a fair trial in such a high-profile case, and that to try Saif Al Islam under the current system might be damaging for the Libyan judiciary. Importantly, it was stated that many of the necessary crimes were not defined yet in Libyan law, including those relating to evidential laws and crimes against humanity.

Various options were put forward in discussion:

- It was suggested that the ICC and Libyan investigations were not mutually exclusive. It was argued that it was possible for the ICC to examine events after 15 February 2011 and to prosecute any crimes committed in this period. During this time Libyan laws could be passed, so once the ICC case had concluded Saif Al-Islam could be returned to Libya to face trial for crimes committed before the

¹ Since the meeting the ICC has accepted that the arrest warrant may be deferred.

revolution (such as the Abu Salim Prison massacre of 1996, for which he is allegedly responsible).

- It was suggested that Saif Al Islam could be held by the ICC in The Hague for a specific period, to enable Libya to develop its judiciary and try him when it is deemed to be credible. However, it was thought that public opinion would be opposed to this.
- Some participants stated that Libya did have the capacity to try Al Islam, and should do so, in accordance with the principle of complementarity set out in the Statute of the ICC.

Property and land rights

Property rights, or the lack thereof, were thought to be a major issue for individuals who had had property taken from them during the Gaddafi era. A large number of people were trying to claim property back. A participant questioned whether there was any process in place or in prospect to prevent chaos. Another participant noted that the issue of past land seizures could not be ignored and should not be seen as a lower priority.

It was stated that a land claims process had been started approximately 10 years ago. There had been several cases in which people had successfully reclaimed land; however, the process itself was difficult and the burdens of proof were high. The process had been further complicated and frustrated by the huge number of applications. This was cited as an example of the danger faced when good laws from the Gaddafi regime were repealed. The oil sector laws, for example, were thought to be good.

Reconciliation

It was noted that reconciliation would be a natural consequence when society felt that justice had been done. Essentially, the two next steps were identified as the transparent conduct of the elections and a transparent, participatory constitution drafting process.

The need for a reconciliation commission was emphasized as a vital component in the process in dealing with the development of the justice system as a whole. It was not sufficient to have simply a judicial system or a truth commission alone – they worked alongside each other. The Commission on Fact-finding and Reconciliation, established in Law 4, was intended to examine crimes dating back to 1969, throughout the Gaddafi period. It was commented that the commission itself had not been formally appointed,

although its composition was known. Theoretically, it could be extremely useful, but its operation and remit remained unclear.

ABOUT THE LIBYA WORKING GROUP

The Chatham House Libya Working Group, established in February 2011 and convened by Sir Richard Dalton, aims to identify and discuss scenarios for political transition, state-building, transitional justice and economic reconstruction. The Working Group meets four to six times per year and provides a forum for debating new ideas, sharing expertise and disseminating research findings about Libya's future. By bringing together experts from a wide range of backgrounds and sectors for a free and frank exchange of ideas, the project seeks to widen the framework of political debate on Libya, leading to innovative recommendations which influence critical policy decisions.

The Working Group is seeking funding to enable it to continue and build on this work. Pledges towards the total amount would be welcomed. For more information please contact Helen Twist.

www.chathamhouse.org/libya

ABOUT THE MENA PROGRAMME

The Middle East and North Africa Programme, headed by Dr Claire Spencer, undertakes high-profile research and projects on political, economic and security issues affecting the Middle East and North Africa. To complement our research, the MENA Programme runs a variety of discussion groups, roundtable meetings, workshops and public events which seek to inform and broaden current debates about the region and about UK and international policy. We also produce a range of publicly available reports, books and papers.

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