

The role of the judiciary and lawyers in combatting torture in Libya

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1. Introduction

On 27 April 2014, the most anticipated trials since the end of the 2011 Revolution began in Libya. 37 detainees associated with the Gaddafi regime, including his son Saif Al-Islam Gaddafi and Abdullah Al-Senussi, Intelligence Chief under the Gaddafi regime, have been accused of conflict-related crimes and are currently being prosecuted in Tripoli. While this evidences efforts made by the legal profession and the state to prosecute grave crimes, it is not reflective of the overall situation in Libya. Access to justice continues to be, in fact, rarely available and cases that do begin are often adjourned for indefinite periods.

It is worrying to see that the desire to provide transitional justice has seemingly taken priority over combatting current violations. While transitional justice remains a fundamental aspect of providing redress and in ensuring accountability for past crimes, it is vital that it is coupled with addressing issues which continue in post-conflict situations. This new post-conflict era in Libya provides lawyers and judges with the unique opportunity to combat torture and other forms of ill-treatment, thus changing the culture of impunity which has continued on from the Gaddafi era. To understand why this opportunity has yet to be seized, it is worth reflecting on the current prevalence of torture in Libya, why the judiciary and lawyers are currently at an impasse, and what measures need be taken in order to overcome it.

2. Obstacles

a) *The prevalence of torture in Libya*

The legacy, of both the colonial and Gaddafi eras in Libya, has been the establishment of a culture where torture is deemed acceptable in certain circumstances. This has been entrenched further by revolutionary legitimacy, as public opinion frequently deems acts of torture as legitimate if they are carried out by pro-revolutionary forces against suspected Gaddafi loyalists. Violations of international law, such as stress positions, are frequently not considered human rights abuses, even by the survivors of such acts themselves. The extent of these misconceptions was made clear to Lawyers for Justice in Libya (LFJL) during our organisation's constitutional outreach efforts. In 2012, LFJL travelled to 37 communities in order to discuss human rights issues and canvas the opinion of the Libyan public. When discussing with participants the meaning of torture, over 64% were of the opinion that freedom from torture should not be an absolute right and more than 40% felt that there were instances where torture was in fact justified.



The widespread prevalence of torture has continued to be documented in post-revolutionary Libya. Torture is unsurprisingly more frequently reported in detention institutions controlled by non-state actors. This is due to the de facto guards lacking necessary experience or training, lack of oversight,



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as well as the fact that access of detainees to legal representatives or civil society actors is extremely restricted. The United Nations Special Mission in Libya has recorded at least 27 cases where significant information suggests that torture has resulted in the death of detainees. Eleven of the deaths alone took place in detention facilities under the authority of the Government, but which are effectively under the authority of armed brigades, between January and June 2013.



The United Nations Human Rights Council has therefore called upon the Libyan government to urgently increase its efforts to establish full and effective control of detention centres. This is considered vital in order to ensure that all detainees are treated in accordance with international standards and have access to their fundamental rights, notably those relating to due process of law and fair trials. It has urged the state to immediately release all detainees who will not be charged.

b) Insecurity

The political situation in Libya remains highly turbulent. Violence and riots have continued to occur regularly since the end of the Libyan revolution. Most recently, on 16 May 2014, a coup led by General Khalifa Haftar demanded Libya's government hand power to the judiciary and called for the formation of a Presidential Council. Such on-going uncertainty has created significant challenges for the legal profession.

The lack of internal security has meant that it has been difficult to start proceedings on behalf of torture victims. This is particularly due to the reluctance of armed non-state groups to hand over power or to be held accountable to law other than their own. This has made it dangerous to be

publically critical of the actions of such groups. For making such assertions several lawyers, judges and journalists have died, or been injured, as a result of targeted assassinations. The will of armed non-state actors to carry out such violent responses, is only strengthened by the popular belief that torture can be legitimate in certain circumstances.

Although various international standards, such as the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT) and the Istanbul Protocol Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Istanbul Protocol) place an obligation upon states to take 'effective legislative, administrative, judicial or other measures to prevent acts of torture', the Libyan state has thus far failed to provide safeguards to lawyers and judges. Without such, lawyers and judges will continue to be restricted in exercising their professional duties freely, impartially and independently.

c) Legal and institutional obstacles

Judges and lawyers are currently contending with the previous regime's legal infrastructure; the laws of which are not always comprehensible, desirable or easily enforceable. While some efforts have been made to adopt new provisions in line with international human rights obligations, realistic means of anti-torture enforcement remain weak in Libya. For example, Article 2 of the new 2013 Law Criminalising Torture, Enforced Disappearances and Discrimination specifies a person responsible for torture as:

"Anyone who personally inflicted or ordered another person to inflict pain or suffering whether physical or mental, on a detainee under his control for such purposes as obtaining from him a confession for an act committed, or for any reason based on discrimination of any kind or revenge for any cause..."

This definition is narrower than that included in UNCAT as it restricts torture to acts committed against detainees. By restricting acts to detention facilities, the law fails to comply with the broader definition in UNCAT where torture may be committed against a 'person', that is a person who is not necessarily detained. The law also fails to protect the 'third person' which is provided in the international standard. Under Article 1 of UNCAT torture is defined as any act carried out for the purposes of obtaining from a person himself or a

third person information or a confession, punishing him or a third person for an act committed, or intimidating or coercing him or a third person. This fails to provide a sound basis on which to build a comprehensive anti-torture framework, especially in the current environment in Libya where a significant proportion of torture occurs outside official detention facilities. The Law also fails to adhere to the principle of non-refoulement, which guarantees the prohibition of deporting, extraditing or otherwise transferring a person to a state where there are substantial grounds for believing that he or she would be subject to torture.

Attempts to increase accountability for human rights violations are on-going and welcome. The National Council for Civil Liberties and Human Rights (NCCLHR), for example, has recently begun to provide a complaints procedure for those who survive acts of torture. However, this is a limited first step, as notably it has only received 61 complaints throughout the whole of 2013, of which only one was addressed in their annual report.

Further attempts at accountability and redress were made by the Minister of Justice on 19 February 2014 who adopted a text protecting victims of sexual violence by ministerial decree. The decree suggests victims of sexual violence, during the 2011 conflict, should be entitled to reparation measures, including financial compensation, health care, granted training, education, discounts to vehicles, employment opportunities and access to housing, as well as legal support for bringing perpetrators to account. Whilst this was a desirable step in recognising that survivors of sexual violence can be considered victims of war crimes, the decree seemingly lacks any real applicability. This is due to the lack of a realistic mechanism by which to determine beneficiaries or how access to provisions will be secured without further stigmatisation of victims. In this way it threatens to act as merely a tokenistic gesture that will leave victims with little real redress.

3. Specific post-conflict obligations and recommendations

In light of these significant institutional and cultural challenges it would be understandable to simply relegate Libyan lawyers and the judiciary to the sidelines, until other actors have managed to progress the transitional process further. However, there is a pressing need for lawyers and judges to creatively redefine their roles and actively be involved in transition. Indeed this is necessary in order for some semblance of justice, the rule of law, and respect for human rights to result from this period.

The role of judges

According to the Istanbul Protocol, '[a]s arbiters of justice, judges play a special role in the protection of the rights of citizens. International standards create an ethical duty on the part of the judges to ensure the rights of individuals are protected.' Judges are obliged to uphold national laws, and ensure that domestic legislation remains compatible with international standards. In deciding cases impartially and independently, judges also ensure the accountability of perpetrators of torture. Judges should ensure that the power of militia groups should not influence the judiciary and the administration of justice as a whole.



Nevertheless, as much of the role of the judiciary is within the setting of the courtroom, and due to the security situation in Libya causing a de facto suspension of the judiciary on certain occasions, judges must take creative and assertive roles in combatting torture. For example, judges may provide comments on torture laws in Libya, advocate for legal reforms, assist with advising on the constitution, or provide much-needed assistance to external forces. Assistance may take the form of establishing a system to monitor places of detention which would empower judges to make recommendations that could help result in improvement. This would satisfy the requirement under Article 15 of UNCAT where competent authorities are obligated to proceed in conducting investigations promptly and impartially. Judges should further ensure that any statement made as a result of torture is not permitted as evidence in any proceedings, as provided by Article 12 of UNCAT. Such measures, while only temporary, could help contribute to the combatting of torture until the security situation permits more substantial change.

The judiciary must resist calls to take on other roles or powers of state branches during the transitional period. Whilst such calls are understandable in an environment which lacks credible and viable political actors, such actions would only undermine the judiciary's current credibility and violate the country's fragile separation of powers.

The role of prosecutors

As 'essential agents of the administration of justice,' prosecutors have the duty to take an active role in criminal proceedings of the state. In doing so, they must ensure that the prosecution of crimes committed by the state such as grave violations of human rights and other crimes in international law are duly investigated. In particular, prosecutors are obliged to ensure that evidence and information gathered during an investigation has been properly obtained. In doing so, prosecutors guarantee that detainees' fundamental freedoms, such as the right not to be tortured or ill-treated, are not violated during the course of an investigation.



There are currently between 6,000 and 8,000 conflict-related detainees in detention facilities. It is the duty of prosecutors in Libya to ensure that all those in pre-trial detention are charged or released and to ensure the maintenance of effective custody records. Prosecutors, having the specific duty in charging perpetrators, should take active steps to ensure that they are conducted legally and safely. As many cases of torture occur during pre-trial detention, this would help reduce the exposure of detainees to human rights violations and ill-treatment.

Role of other lawyers

Lawyers have a specific obligation and play an important role in ensuring that those subjected to torture and ill-treatment are aware of their legal rights and are assisted with any legal action needed to protect their interests. They must ensure victims have the ability to seek redress within a court, tribunal or administrative authority. As access to justice has been limited in Libya, lawyers should take assertive measures to actively seek cases. Where legal mechanisms are lacking, lawyers should endeavour to exhaust all regional and international mechanisms available to them. While efforts to provide accountability for torture and ill-treatment may be hindered within Libyan courts, lawyers can seek to combat torture by educating various groups, such as students, government officials and activists about the absolute prohibition and the importance of ending impunity for such crimes. Lawyers, who are denied access to detention facilities, should challenge this within the domestic and international forums. Lawyers may also enhance the capabilities of medical professionals by providing training on how to document suspected cases of torture.

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