

BUILDING THE NEW LIBYA: LESSONS TO LEARN AND TO UNLEARN

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1. INTRODUCTION

Of the countries where existing political systems were upended during 2011 in the course of the Arab Spring, Libya may have to undergo the most difficult transition during the process of shifting from dictatorship to the democracy with human rights protections that so many revolutionaries aspired to see realized. It needs to move beyond decades of arbitrary rule by Mu`ammar al-Qaddafi, an eccentric despot who effectively dismantled all conventional governmental institutions. In place of one man ruling by fiat, Libya must establish the rule of law.

The shocking level of human rights violations to which Libyans had become accustomed can be appreciated by viewing video footage of the infamous 1984 show trial and public hanging of Sadiq Hamed Shwehdi, a grotesque travesty of criminal justice. A dissident who was arrested for anti-regime activity, Shwehdi was subjected to a nationally televised show trial in a Benghazi basketball stadium, during which he was seated cross-legged on the stadium floor, his hands bound behind his back, looking anguished as observers in the stands hooted and jeered. Immediately after the "trial," Shwehdi was hanged from the

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gallows that had been set up in the stadium.¹ As Shwehdi dangled from the gallows, a young woman, Huda Ben Amir, jumped up and rushed to grab his legs, gleefully yanking his body downward. She calculated rightly that her zeal would impress Qaddafi, and she was subsequently rewarded with riches, winding up among Libya's pampered ruling elite. She served twice as the mayor of Benghazi, a city notoriously hostile to Qaddafi, where her monstrous deed had earned her the hatred of the population and the sobriquet "Huda the Executioner."²

Not only did the regime think it fit to televise Shwehdi's ordeal, but thousands of school children had been brought to the stadium to observe the spectacle and to learn firsthand an indelible lesson—that abject public humiliation and merciless savagery should be meted out to political opponents. Questions about the lasting impact of Shwehdi's televised show trial and hanging are linked to broader questions about the toxic legacy of more than four decades of Qaddafi's iron-fisted dictatorship, which involved routine recourse to cruel torture, kidnappings, disappearances, protracted incommunicado incarceration, and murders of Libyans suspected of disloyalty. Were the mentalities of many Libyans being so warped and coarsened by their regular exposure to atrocities that they wound up thinking that recourse to lethal vengeance was normal? Or, did revulsion at Qaddafi's excesses instill a determination to ensure a future when criminal justice would adhere to international rules and when respect for human rights would be secured? It is too soon to predict where things will stand five years from Qaddafi's overthrow, but in the immediate aftermath of the revolution, one could identify developments supporting both of these eventualities.

¹ See Cameron Robertson et al., *Libya Archive Reveals Pictorial History of Qaddafi's Brutal Reign*, GUARDIAN, (July 18, 2011), <http://www.guardian.co.uk/world/video/2011/jul/18/libya-muammar-gaddafi> (detailing the public hanging of Sadiq Hamed Shwehdi, which took place after a show trial that included "forced confessions" before a rowdy audience).

² See Nick Meo, 'Huda the Executioner'—Libya's Devil in Female Form, TELEGRAPH (Mar. 6, 2011, 6:00 AM), <http://www.telegraph.co.uk/news/worldnews/africaandindianocean/libya/8363587/Huda-the-executioner-Libyas-devil-in-female-form.html>.

2. CAUSES FOR WORRY

For anyone concerned to see the rule of law established after Qaddafi's overthrow, the manner of Qaddafi's own death was an ominous portent. Videos made from cell phones recorded his last minutes after his capture by rebel forces on October 20, 2011.³ Young rebels fighting in the informal militias were shown assaulting a dazed and disheveled Qaddafi after he was found cowering in a large sewer pipe—a last minute attempt to escape in a convoy from his Sirte hiding place having gone awry. The jerky videos, in which what is happening to Qaddafi is often obscured by those crowding around him, do prove that Qaddafi was screamed at, repeatedly pummeled, and roughly dragged about. Soon there was blood copiously streaming down the left side of his head and onto his chest. With looks of terror and bewilderment alternating on his countenance, he seemed to struggle to understand what was happening to him. How he died is not shown in the videos and remains uncertain.⁴ A subsequent investigation by Human Rights Watch uncovered evidence of brutal beatings and summary executions of captured members of Qaddafi's convoy, including his son Mu'tasim, but, on receiving the NGO's report, the Libyan authorities maintained that the deaths were battle-related, which was indicative of their disinclination to prosecute the perpetrators.⁵

Qaddafi's corpse, showing bruises and wounds but with much of the blood wiped away, was later placed on public display next to that of his son for several days in a meat locker in Misrata, a city where his regime was bitterly detested. Libyans formed long lines

³ See, e.g., RussiaToday, 'We Need Him Alive!' Earliest Graphic Video of Gaddafi Capture, YOUTUBE (Oct. 21, 2011), <http://www.youtube.com/watch?v=F-ZZzveRO6A&skipcontrinter=1> (last visited Jan. 23, 2013) (depicting the brutal treatment of Qaddafi in the wake of his capture).

⁴ See, e.g., HUMAN RIGHTS WATCH, DEATH OF A DICTATOR: BLOODY VENGEANCE IN SIRTE 28–29 (2012), available at http://www.hrw.org/sites/default/files/reports/libya1012webwcover_0.pdf (describing the militia fighters' capture and abuse of Qaddafi leading up to his death).

⁵ See *id.* at 46–47 (noting an inconsistency between evidence gathered by Human Rights Watch and the Libyan authorities' contention that Qaddafi, his son, and a number of loyalists were killed during battle).

to view the stinking, decomposing corpse.⁶ As others gaped and gloated, a sober onlooker expressed well-founded misgivings: "On the one hand, I celebrate this day, but the uncertainty is profound. What has Gaddafi done to these people, these young boys who killed him? They knew nothing else. But now they must learn something else, another way, or we will never move on."⁷

Qaddafi's captors had a better option—turning their captive over to the International Criminal Court (ICC). An obvious way of strengthening the rule of law would be to enhance ties to international law and international institutions such as the ICC. As of October 2012, among the worrying signals that the road ahead could be rocky, one could observe indications that powerful forces in post-Qaddafi Libya were resisting collaboration with the ICC and acting in ways that belied the frequent promises that human rights would be respected in the new Libya. On June 27, 2011, the ICC had issued an arrest warrant charging Qaddafi with committing crimes against humanity. Had Qaddafi been put on trial in The Hague, he finally would have had to confront in a public forum the wide range of criminal offenses that he had committed since the onset of the revolution. Had Libyans been able to observe him being prosecuted for his crimes by judges using international law, they could have seen a model to emulate that could have provided lessons about the reforms that needed to be instituted in Libya's skeletal, shaky legal system. As it was, Qaddafi's extrajudicial execution and the undignified display of his corpse inadvertently reinforced the idea that horrendous brutality should be avenged by an equal measure of brutality, a lesson that can only have nefarious consequences in the circumstances of present day Libya, where lawlessness prevails in many quarters and where groups that feel aggrieved over past wrongs are eager to settle scores.

Unlike its neighbors, Egypt and Tunisia, where largely peaceful mass protests led to the rapid overthrow of the local dictators, Libya was wracked from February through October 2011 by

⁶ See Martin Chulov, *Gaddafi's Corpse Continues to Attract Impatient Misrata Hordes*, GUARDIAN (Oct. 23, 2011, 2:47 PM), <http://www.guardian.co.uk/world/2011/oct/23/gaddafi-corpse-attracts-misrata-hordes> (reporting on the crowds that flocked to view Qaddafi's corpse in Misrata).

⁷ *Id.*

intense and destructive military battles that exacerbated fissiparous tendencies, engendering new enmities and aggravating tensions that Qaddafi had deliberately stirred up. Following a policy of divide and rule, he had exploited historic rivalries, strongly favoring some groups and regions at the expense of others. After war broke out, tribes, regions, and communities became polarized, as happened, for example, in the case of two cities along the central coast—Sirte and Misrata. Sirte, a city on which Qaddafi had lavished funding for ambitious projects, remained a bastion of Qaddafi loyalists, and, despite fierce attacks, it held out till the last week of warfare. Misrata, a city that did not enjoy Qaddafi's favor and had quickly sided with the rebels, suffered extensive destruction and losses under lethal military assaults carried out by Qaddafi loyalists. In the aftermath, the two cities were left infected by mutual hatreds that could take a long time to heal.⁸

In a troubling coda to Qaddafi's murder, Omran Shaban, one of the rebels who had apprehended him, was captured in July 2012 by men from Bani Walid, a stronghold of Qaddafi supporters. The latter sought revenge by beating Shaban and repeatedly slashing his chest with razors, inflicting grievous injuries that led to his death.⁹ Shaban's murder then provoked a military attack on Bani Walid from his hometown, Misrata, which, in turn caused denunciations and protests.¹⁰ Allowing such spirals of lethal vengeance to continue could only lead to unremitting violence.

There was no army capable of curtailing the violence, because Libya's military had been deliberately enfeebled by Qaddafi due to his fear of potential coups. He had relied on his security forces to

⁸ See generally Jon Donnison, *Sirte and Misrata: A Tale of Two War-Torn Libyan Cities*, BBC NEWS AFRICA (Dec. 20, 2011, 6:57 AM), <http://www.bbc.co.uk/news/world-africa-16257289>.

⁹ *Gaddafi Captor Dies After Revenge Attack*, FIN. TIMES, Sept. 25, 2012.

¹⁰ *Libyan Militias Shell Former Gaddafi Stronghold Town*, REUTERS (Oct. 17, 2012, 2:22 PM), <http://www.reuters.com/article/2012/10/17/us-libya-clashes-idUSBRE89G1EE20121017>; Kareem Fahim, *Libyan Forces Now Control Restive Town, Officials Say*, N.Y. TIMES, Oct. 19, 2012, <http://www.nytimes.com/2012/10/25/world/africa/libyan-forces-now-control-bani-walid-officials-say.html> (describing the attack on Bani Walid, which resulted in many deaths and the wounding of hundreds and prompted accusations that militias with governmental support had been punishing the town for supporting Qaddafi).

maintain his stranglehold on power. Once he was overthrown, his security apparatus disintegrated, leaving no force that could exert control over the disparate rebel militias that had sprung up to fight Qaddafi, militias whose members seemed eager to utilize their weaponry and who were not above indulging in wanton violence and criminality.¹¹ Their actions were not inhibited by concerns about respecting human rights. Already in 2011, a number of instances had come to light of militias exacting vengeance in a style that suggested that they were copying Qaddafi's methods.¹² In January 2012, credible reports surfaced of tortures being meted out to detainees who were held by militias.¹³

As the months passed, militias kept acting as if they were determined to prove that there were no forces that could stop them from publicly flexing their muscles. The waves of criminality and the manifestations of untrammelled power on the part of intransigent militias seeking to advance their own agendas came to

¹¹ See, e.g., Margaret Coker, *Rival Militias Battle in Libyan Capital*, WALL ST. J., Jan. 4, 2012, <http://online.wsj.com/article/SB10001424052970203550304577138272815070632.html> (discussing Libya's need for a central military command, the lack of which allowed a two hour street battle in central Tripoli to escalate).

¹² See, e.g., *Libyan Rebels Detaining Thousands Illegally*, Ban Ki-moon Reports, GUARDIAN (Nov. 23, 2011), <http://www.guardian.co.uk/world/2011/nov/24/libya-illegal-detentions-un-report> (stating that former Libyan rebels have illegally detained thousands of people, while also engaging in revenge killings of members of Libya's Black African community); Daniel Williams, *The Murder Brigades of Misrata: Gadhafi's Demise Was Just a Part of a Vast Revenge Killing Spree*, SALON, (Oct. 28, 2011, 8:00 AM) http://www.salon.com/2011/10/28/the_murder_brigades_of_misrata/ (asserting that in their quest for vengeance, Misrata brigades have "engaged in torture, pursued suspected enemies far and wide, detained them and shot them in detention"); *Libya: Apparent Execution of 53 Gaddafi Supporters*, HUM. RTS. WATCH (Oct. 24, 2011), <http://www.hrw.org/news/2011/10/24/libya-apparent-execution-53-gaddafi-supporters> ("The evidence suggests that some of the victims were shot while being held as prisoners, when that part of Sirte was controlled by anti-Gaddafi brigades who appear to act outside the control of the National Transitional Council.").

¹³ See, e.g., *Libyan Detainees Died After Torture*, Human Rights Group Says, CNN (Jan. 26, 2012, 11:19 PM), <http://edition.cnn.com/2012/01/26/world/africa/libya-msf-torture/> (discussing the "widespread torture and ill-treatment of suspected pro-Gadhafi fighters and loyalists" in Libya) (quoting Amnesty International).

pose serious threats.¹⁴ In this regard, Libya is in a dramatically different position from that of post-revolutionary Egypt, where a vastly bloated and well-entrenched military institution constitutes a central obstacle to achieving true democratic reform. Lacking any organized army or police force capable of managing the worsening chaos, Libya essentially has the opposite problem.

Over the course of 2012, concerns mounted as Libyans confronted the spreading lawlessness, which included incidents that suggested that armed and well-organized terrorist cells were making inroads.¹⁵ Disturbing signs of a breakdown in law and order in Benghazi proliferated in 2012 as shadowy groups repeatedly attacked international organizations and Western targets. In April, a bomb was thrown at a convoy that included the head of the U.N. mission to Libya, and in May, the Red Cross office was hit with a rocket. The British abandoned their Benghazi consulate after a diplomatic convoy was attacked in June. In August a pipe bomb exploded in front of the U.S. consulate. Like many other Muslim countries, Libya was swept by angry anti-American demonstrations in September 2012 in the wake of a controversy stirred up over a trailer on YouTube for a film produced in Los Angeles called "Innocence of Muslims." Replete with insults directed at the Prophet Muhammad that were deliberately designed to outrage Muslims, the privately produced film was widely blamed on the U.S. government, despite there being absolutely no governmental connection. On September 11, 2012, a Benghazi mob that was protesting the film attacked the U.S. consulate, and in the ensuing mayhem, an organized military assault was launched on a nearby safe house where the visiting U.S. ambassador Christopher Stevens had taken refuge, ending with the death of the ambassador and three of his staff.¹⁶ Because

¹⁴ See, e.g., Borzou Daragahi, *Libya: Armed and Dangerous*, FIN. TIMES, Oct. 10, 2012, at 7 (explaining that members of disbanded militias refuse to relinquish their weapons and warn that they will turn on the "nascent state" if their demands are not met).

¹⁵ See, e.g., Borzou Daragahi, *Libyan Armed Islamists Driven Underground*, FIN. TIMES, Oct. 4, 2012, at 6 (examining the post-election culture of militia violence in Libya and popular perceptions of this problem).

¹⁶ See *US Envoy Dies in Benghazi Consulate Attack*, ALJAZEERA, <http://www.aljazeera.com/news/middleeast/2012/09/20129112108737726.html> (last modified, Sept. 12, 2012); Harald Doornbos & Jenan Moussa, 'Troubling'

Libyans were typically grateful for U.S. assistance during the revolution and because the ambassador himself was a popular figure, the killings suggested that radical Islamist groups with ties to terrorist networks could be targeting Western interests and menacing Libya's nascent democracy.

Another harmful outcome of the civil war was that racial tensions were exacerbated. Qaddafi, who had arranged for himself to be proclaimed the African "King of Kings," was known for courting popularity among Sub-Saharan African leaders by dispensing generous financial subsidies and funding showcase projects. He also invited Sub-Saharan Africans to resettle in Libya, which was an attractive option for many of them, given Libya's relative affluence. As a result, Libya's indigenous Black African minority was swelled by hundreds of thousands of Sub-Saharan African migrants. Once the revolution began, such migrants were alleged to have fought on Qaddafi's side in return for pay. Among Libyans opposed to Qaddafi, a stereotype developed about pro-Qaddafi forces being heavily manned by mercenaries of Black African descent—both migrants and Libyans, a stereotype that led to stigmatizing all Black Africans as enemies of the revolution.¹⁷ This mindset has prompted abuse of Black Africans—suggesting that racial bigotry has gained ground.¹⁸ In the case of Tawergha, a town populated by Black African Libyans, many of whom backed Qaddafi, the inhabitants were terrorized and chased away by rebel forces, leaving a ghost town, which was then vandalized.¹⁹ In a

Surveillance Before Benghazi Attack, FOREIGN POL'Y (Nov. 1, 2012) http://www.foreignpolicy.com/articles/2012/11/01/troubling_surveillance_before_benghazi_attack (reporting on the discovery of important evidence weeks after the attack that suggested that hostile forces had had the consulate under surveillance, but asserting that conclusive proof of who was behind the attack was still lacking).

¹⁷ See, e.g., *Black Africans Come Under Fire in Libya*, ALJAZEERA (Sept. 14, 2011), <http://stream.aljazeera.com/story/black-africans-come-under-fire-libya> (detailing the rise of racist attitudes in post-Qaddafi Libya through video clips and social media postings).

¹⁸ See *Libya: Stop Arbitrary Arrests of Black Africans*, HUM. RTS. WATCH (Sept. 4, 2011), <http://www.hrw.org/news/2011/09/04/libya-stop-arbitrary-arrests-black-africans> (explaining that many migrant workers in Libya have recently been detained because of their race and national origin).

¹⁹ *Libya: Militias Terrorizing Residents of 'Loyalist' Town: Beatings, Shootings, Deaths in Detention of Tawerghans*, HUM. RTS. WATCH (Oct. 30, 2011),

world where the infamous ethnic cleansings that transpired during the breakup of the former Yugoslavia are a searing memory, incidents of ethnic cleansing like the one in Tawergha highlight the urgent need for concerted efforts to reconcile opposing factions.

Corruption constituted another peril. One consequence of Qaddafi's despotic system was the creation of a ruling elite that was free of any accountability. In particular, members of Qaddafi's own family enjoyed flamboyantly lavish lifestyles, with several of his sons becoming internationally notorious for their extravagant spending in locales like St. Barts, London, Paris, Rome, and Venice. With no one to control the Qaddafis' greedy predations, Libya became a petri dish in which corruption metastasized. This led Transparency International to give Libya a 168 ranking, placing it among the world's most corrupt countries.²⁰ As Libya seeks to establish the principle of accountability, essential for good governance, the task of eradicating an ingrained culture of gross corruption looms large.

A further source of worry was that ambitious Islamist factions were demanding to play a role in Libya's government. Like their counterparts in Egypt and Tunisia, Libya's Islamists viewed the demise of secular despotism as opening the door for them to realize their vision of a society ruled by Islamic law. Libya's Islamists felt that they had earned a place in the new order, having figured among Qaddafi's most determined foes and having fought vigorously on the rebels' side. The most prominent Islamist was the military commander Abdel Hakim Belhaj, who in November 2011 wound up as the head of the Tripoli Military Council. In a published statement, Belhaj made it clear that Islamists would demand to play a role in the new system, while also offering assurances that they would abide by the rules of democracy.²¹

<http://www.hrw.org/news/2011/10/30/libya-militias-terrorizing-residents-loyalist-town>.

²⁰ See 2011 *Corruption Perceptions Index*, TRANSPARENCY INT'L, <http://cpi.transparency.org/cpi2011/results/#CountryResults> (last visited Nov. 7, 2012).

²¹ See Abdel Hakim Belhaj, *The Revolution Belongs to All Libyans, Secular or Not*, Posted in *Comment Is Free*, GUARDIAN (Sept. 27, 2011, 2:15 PM), <http://www.guardian.co.uk/commentisfree/2011/sep/27/revolution-belongs-to-all-libyans> (describing the persecution and repression long endured by Islamists who opposed Qaddafi and their contributions to the revolution, and asserting their entitlement to be full participants in a new democratic order).

What the rise of Libyan Islamists to positions of power would mean was open to speculation, because they include both moderate and extremist factions. Nonetheless, past experiences give reason to doubt the solidity of their commitment to democratic freedoms. In those countries where Islamists have gained control or have managed to dictate the political agendas, this has led to decimating civil and political rights and a significant deterioration in the rule of law as highly politicized versions of Islamic law become treated as governing standards. The cases of Iran, Pakistan, and Sudan illustrate how the ascendancy of Islamism correlates with setbacks for democracy, the erosion of freedoms of expression and religion, and severe curbs on the rights of women.²² The fact that Islamist parties made a weak showing in the July 2012 General National Congress elections gave the more secular forces some breathing room. Nonetheless, Libyans had reason to be anxious about whether Libya's Islamists would accept life under a basically secular system. By October 2012, Islamist militias and spokesmen for the Islamist cause were expressing anger over their inability to dictate policies and were becoming more belligerent in their demands for implementing Islamic law.²³ Ahmed Abu Khattala, a prominent Islamist leader who was widely suspected of involvement in the attack that killed the U.S. ambassador, stated in an interview that democracy violated Islamic law and called Muslims who supported secular constitutions "apostates," while expressing contempt for capabilities of the transitional government.²⁴

3. LIBYAN WOMEN'S RIGHTS ACTIVISTS MAKE WAVES BUT ENCOUNTER RESISTANCE

Even without facing an Islamist takeover, Libyan women's struggle to achieve greater equality had to confront setbacks.

²² See generally ANN ELIZABETH MAYER, *ISLAM AND HUMAN RIGHTS: TRADITION AND POLITICS* (5th ed. 2012) (discussing human rights schemes that utilize Islamic criteria to weaken international human rights law).

²³ See Daragahi, *supra* note 15, at 6 (discussing Libya's chaotic post-revolutionary political climate).

²⁴ David D. Kirkpatrick, *Suspect in the Benghazi Attack, In Plain Sight, Scoffs at the U.S.*, N.Y. TIMES, Oct. 19, 2012, <http://www.nytimes.com/2012/10/19/world/africa/suspect-in-benghazi-attack-scoffs-at-us.html>.

Libya's feminists initially felt empowered by the revolutionary upheaval, which raised women's hopes for an expansion of their rights.²⁵ They subsequently encountered indications that their work would not be easy.

Libyans sympathetic to women's aspirations to see discriminatory laws rolled back were dismayed by an event on October 29, 2011, when, in proclaiming the success of the Libyan revolution, the head of the interim government, Mustafa Abdul Jalil, endorsed a retrograde stance on polygamy. Instead of using this historic occasion to promise Libyans that they would see a new birth of freedom and an end to horrors like torture and execution of dissidents, Jalil promised Libyan men that they could henceforth take extra wives with no need to consult their existing wives, repeating this announcement on the following day.²⁶ In so doing, he indicated that his priority was revising Libyan family law in the direction of reinstating rules of medieval Islamic jurisprudence, which gave men unfettered discretion to contract marriages with up to four women at a time. Libya under Qaddafi had retained laws restricting women's rights, including various rules of personal status that derived from Islamic law, but some reforms had been undertaken. These included an attempt to mitigate the harms of polygamy by imposing a requirement that, prior to contracting marriage with an additional wife, the husband needed to obtain the permission of his previous wife or wives.²⁷ Abdul

²⁵ See, e.g., Manal Omar, *Women in Libya and the Arab Spring*, HUFFINGTON POST (Nov. 4, 2011, 6:57 PM), http://www.huffingtonpost.com/manal-omar/arab-spring-libya-women_b_1076873.html (arguing for a greater role for women in Libya's post-conflict reconstruction); Kathryn Spellman-Poots, *Women in the New Libya: Challenges Ahead*, OPENDEMOCRACY (Dec. 23, 2011), <http://www.opendemocracy.net/5050/kathryn-spellman-poots/women-in-new-libya-challenges-ahead> (assessing the trajectory of women's rights in post-Qaddafi Libya).

²⁶ See Adam Nossiter, *Hinting at an End to a Curb on Polygamy, Interim Libyan Leader Stirs Anger*, N.Y. TIMES, Oct. 30, 2011, at A8, <http://www.nytimes.com/2011/10/30/world/africa/libyan-leaders-remark-favoring-polygamy-stirs-anger.html> (describing the reaction of Libyans to Mustafa Abdel-Jalil's call for an unrestricted right to take multiple wives).

²⁷ See Alison Pargeter, *Libya*, in WOMEN'S RIGHTS IN THE MIDDLE EAST AND NORTH AFRICA: PROGRESS AMID RESISTANCE 11 (Sanja Kelly and Julia Breslin eds., 2010), available at http://www.freedomhouse.org/sites/default/files/inline_

Jalil's surprising decision to prioritize cancelling this modest reform, possibly offered as a gesture to placate Islamists, made it seem as if the enormous sacrifices of the revolution had been incurred in order to ensure men's right to take additional wives with no regard for their existing wives' interests and feelings.

In a breakthrough, an independent women's conference was held from November 11-15, 2011. Qaddafi had not allowed any independent women's rights NGOs to function, so this was a welcome opportunity for Libyan women for the first time in decades to discuss and set their own goals. Their support for international law was unconditional. Among their recommendations were that Libya should ratify all international human rights conventions, achieve the principle of gender equality in rights and duties, amend existing laws to bring them in line with international and regional conventions that prevent violence against women and girls, fix a minimum forty percent quota for women in politics, employ the media to change the stereotypical image of women, and support programs on women's reproductive health and maternal and child care.²⁸

It came as a disappointment that a women's quota was dropped from the electoral law that was drafted in January 2012.²⁹ Nonetheless, women managed to win seventeen percent of the seats in the July elections.³⁰ This was enough to ensure that they would have some voice in the legislature.

4. CONFRONTING A LEGACY OF ANTI-CONSTITUTIONAL AND ANTI-DEMOCRATIC IDEOLOGY AND PSEUDO-HUMAN RIGHTS

To build up respect for the rule of law, Libyans will have to undertake a strenuous ideological housecleaning, eradicating the

images/Libya.pdf (indicating that a man seeking a second wife must secure judicial permission and obtain a written agreement of the first wife).

²⁸ *Libyan Women Want a Say in Running the New Libya*, TRIPOLI POST (Nov. 19, 2011, 10:15 AM) <http://tripolipost.com/articledetail.asp?c=1&i=7321&archive=1>.

²⁹ See Bourzou Daragahi, *Libya Drops Parliamentary Quota for Women*, FIN. TIMES, Jan. 29, 2012 (documenting a women's rights activist's disappointment that the proposed quota was eliminated from the final draft of the electoral law).

³⁰ Dominique Sogue, *Libyan Elections Give Women a 17% Starting Point*, WE-NEWS (July 18, 2012), <http://womensenews.org/story/the-world/120719/libyan-elections-give-women-17-starting-point>.

traces of Qaddafi's *Green Book*, the tenets of which were constantly extolled in the media and were also taught in educational institutions as part of the official personality cult in which Qaddafi was effectively held up as a kind of prophetic genius. As part of his teachings, Qaddafi insistently denounced democracy as a fraud and asserted that constitutions were meaningless in a state that followed his philosophy, while extolling his own idiosyncratic human rights charter, which was designed to accommodate a policy of crushing all dissent. In the post-Qaddafi era, many Libyans who remain imbued with Qaddafi's ideology will require reeducation to grasp what civil and political rights actually mean.

In the first years after Qaddafi seized power in 1969, Libyans had lived under a rudimentary constitution. Constitutionalism was repudiated in 1977 when the declaration of people's power was issued, inaugurating a so-called "state of the masses" that was denoted by the Arabic neologism *jamahiriyya*. Thenceforth, Libyans had to defer to the teachings of the *Green Book*, which purportedly solved all the problems of government, economics, and society.³¹ According to Qaddafi's *Green Book* theory, Libyans were to govern themselves via an extensive network of committees and congresses, obviating the need for a constitution or for any conventional governmental institutions.³² In reality, these committees and congresses were only window dressing; Qaddafi clung tightly to the reins of power, reserving all-important decisions to his inner circle and relying on strategies typical of police states to compel acquiescence.³³

³¹ See, e.g., Ann Elizabeth Mayer, *In Search of Sacred Law: The Meandering Course of Qadhafi's Legal Policy*, in *QADHAFI'S LIBYA 1969-1994*, 113-37 (Dirk Vandewalle ed., 1995); Hanspeter Mattes, *Formal and Informal Authority in Libya Since 1969*, in *LIBYA SINCE 1969: QADHAFI'S REVOLUTION REVISITED*, 55, 56-62 (Dirk Vandewalle ed., 2008) (analyzing the structure and institutions of Qaddafi's political system and the mechanisms wielded by the regime to secure power and crush opponents).

³² *Id.* at 66-69 (explaining the role and structure of committees under the Qaddafi regime).

³³ See, e.g., Dirk Vandewalle, *Libya's Revolution in Perspective: 1969-2000*, in *LIBYA SINCE 1969*, *supra* note 31, at 9, 28-34 (describing strategies used by Qaddafi to quell all resistance and dissent); Alison Pargeter, *LIBYA: THE RISE AND FALL OF QADDAFI* 97 (2012) (recounting Qaddafi's decision to create the Revolutionary Committees Movement, a paramilitary body whose main purpose was to repress dissidents and "destroy any organization that stands in the way.") (citing

The result was a society whose inhabitants were stripped of civil and political rights, as indicated by the 2010 Index of Democracy published by the Economist Intelligence Unit, which evaluates countries based on electoral process and pluralism, civil liberties, the functioning of government, political participation, and political culture. It ranked Libya at 158 out of the 167 countries surveyed. On a ten-point scale, Norway ranked at the top of the index with a score of 9.80; Libya's score was 1.94. Only a few countries ranked lower, including North Korea, which ranked lowest at 167 and scored 1.08.³⁴

As the potency of human rights ideals made itself felt, Qaddafi found it essential to pretend that he, too, believed in human rights. He obviously could not accept the rights set in international law, which would enable his restive citizenry to stand up to his regime, so he instead presented Libyans with his own twisted version of human rights, which was tailored to ensure the ascendancy of his ideology and to criminalize any dissent. The *Great Green Charter of Human Rights in the Era of the Masses* was issued on June 12, 1988.³⁵ Libyans were taught to treat this charter as the definitive statement of human rights—even though it amounted to a kind of funhouse distortion of human rights principles.

Reflecting Qaddafi's insistence that Libyans uphold his *Green Book*, Article 25 required all citizens to defend Qaddafi's *jamahiriyya* system unto death. Not surprisingly for a charter with such an obvious political bias, basic civil and political rights were omitted. For example, there was no freedom of conscience or religion, no right of peaceful assembly, no freedom of expression or general principle of freedom of association, no equal protection clause, no prohibition of torture, no guarantee against arbitrary arrest and detention, no protection against unreasonable searches, no presumption of innocence for the accused, no guarantee against compelled testimony, no right to legal assistance for the criminal accused, no

Hanspeter Mattes, *The Rise and Fall of the Revolutionary Committees, in QADHAFI'S LIBYA*, *supra* note 31, at 93).

³⁴ Economist Intelligence Unit, DEMOCRACY INDEX 2010: DEMOCRACY IN RETREAT (2010), available at http://graphics.eiu.com/PDF/Democracy_Index_2010_web.pdf.

³⁵ See THE GREAT GREEN CHARTER OF HUMAN RIGHTS IN THE JAMAHIRIYAN ERA (1988), available at <http://www.unhcr.org/refworld/pdfid/3dda540f4.pdf>.

guarantee of a public trial, no right of appeal from court judgments except where the death penalty was at stake, and no prohibition of the imposition of penalties for acts not previously defined as criminal in the text of a law.

The *Green Charter* included provisions that belonged in a penal code, providing for criminal prosecutions for acts described in broad terms that in the Libyan context could be used to criminalize dissent and opposition. For example, Article 5 prohibited clandestine action, violence, terrorism, and sabotage, with the admonition that any act of hostility towards the *jamahiriyya* in connection with a foreign entity was high treason. In outlawing monopoly or exploitation of religion and stirring up sedition, tribalism, partisanship, factionalism, or internecine fighting, Article 10 provided a basis for criminalizing a variety of oppositional political activities. Article 26 prohibited any act counter to the *Charter* principles. Taken together, these vaguely worded provisions perversely offered a basis for relabeling prosecutions for political offenses as measures to uphold human rights.

Notwithstanding their being stuck with an educational system in which studying Qaddafi's ideas was a central task, many Libyans had managed to gain an appreciation of what genuine human rights involved, as indicated by the event that ignited the revolution. Sparking the protests was the arrest of the human rights attorney Fathi Terbil on February 15, 2011. At great risk to himself, Terbil had sought to represent families of victims of the notorious 1996 Abu Salim Prison massacre in which perhaps twelve hundred prisoners had been slaughtered.³⁶ That Libyans rose in revolt in response to this incident proved that they appreciated the courage of this defender of human rights. It was therefore fair to say that anger over human rights violations was a key factor in the outbreak of rebellion in Benghazi that quickly led to uprisings in other areas.

³⁶ See Sarah Boesveld, *The Arab Awakening: The Beginning of the End for the Gaddafi Regime*, NAT'L POST (Dec. 19, 2011, 10:02 PM), <http://news.nationalpost.com/2011/12/19/the-arab-awakening-the-seeds-of-libyas-uprising-were-planted-long-before-the-arab-spring/> (describing how Terbil's arrest prompted a protest that quickly mushroomed into a local uprising that soon ignited a revolution).

In Libya there is ample evidence of the popularity that human rights ideals enjoy in the abstract, but to shut the door on an era of gross human rights abuses, these ideals must now be transformed into operational guidelines that are accepted and internalized as the governing norms. Meanwhile, events in 2012 like the prolonged incommunicado captivity of Saif al-Islam Qaddafi indicated that the Libyan legal system was falling grievously short in terms of meeting the basic requirements of the rule of law.

5. THE TROUBLING CASE OF SAIF AL-ISLAM QADDAFI

For those hoping to see Libya rapidly adjust to rigorous adherence to international human rights law, the case of Saif al-Islam Qaddafi raised red flags. It suggested that crass political calculations were influencing the functioning of Libya's post-revolutionary legal system.

As the revolution gained momentum in February 2011, Saif al-Islam Qaddafi, the dictator's oldest son and his likely successor, tried to distance himself from the ills of Qaddafi's system. The ambitious Saif apparently calculated that, if he was to accede to power, he had to pretend to share the popular rejection of the status quo. He belatedly acknowledged Libyans' aspirations for freedom, democracy, and constitutionalism. Announcing that major changes were in the offing and that the regime would make concessions in these areas, Saif tried to co-opt the revolutionary pressures. One could see this as a positive sign, indicating that despite Qaddafi's determined efforts to inculcate Libyans with his anti-democratic and anti-constitutionalist philosophy, even his own son and would-be heir had to recognize that the ideals of freedom, democracy, and constitutionalism had enormous appeal.

Hoping to calm the revolutionary turmoil, in a televised address on February 20, 2011, Saif spoke as if work on a constitution would commence forthwith and as if a democratic government would be inaugurated in which Libyans would enjoy freedom, tacitly acknowledging that Libyans were fed up with the *jamahiriyya* system. He further promised that "civilized" laws would be adopted and that "silly" criminal penalties would be discarded, effectively conceding that the legal system was in need of reforms. Seeking to convince Libyans that their aspirations could be promptly fulfilled without a revolution, he lectured:

Today we are at a crossroads . . . We either tell ourselves, “We are Libyans, and this is our country. We want . . . freedom, democracy and real reform, this and that, and this has been planned and agreed upon and was supposed to be done at the forthcoming general congress assembly” . . . [or] we will all seek the judgment of weapons. . . . So I tell you that before we use weapons as a decider and we enter a civil war and total chaos . . . tomorrow we conduct a historic national initiative . . . to adopt a battery of laws initially agreed upon: the press law, the civil society—civilised laws, new laws . . . to widen freedoms, to cancel many of the existing hindrances, the silly existing punishments, and to initiate a national dialogue on a Libyan constitution.³⁷

The revolution continued to gather momentum in the wake of Saif’s speech, making it glaringly obvious that Libyans did not trust him to oversee the reforms for which they called. Saif had made an accurate diagnosis of the grievances that had led Libyans to revolt, but he lacked any credibility as a leader who would put an end to the abuses of the *Green Book* era.

After Saif’s cynical attempt to co-opt the slogans of the revolution failed, he elected to join the pro-regime militias engaged in fighting to crush the rebellion. On November 19, 2011, Saif was finally captured in the desert and brought to the western town of Zintan. It was encouraging to observe the leader of the local council proclaiming his wish to see Saif get a fair trial in Libya. Presumably regretting the way Saif’s father had been abused and killed after his capture, he offered a thoughtful assessment: “There is no point to make a revolution for justice, and then you become the same killers.”³⁸

The fact that Saif was captured alive offered a precious opportunity for Libya’s post-revolutionary leaders to compensate

³⁷ *Gaddafi Son: “We Will Eradicate Them All”*, GUARDIAN (Feb. 21, 2011, 4:25 AM), <http://www.guardian.co.uk/world/2011/feb/21/gaddafi-son-muammar-libya>.

³⁸ Chris Stephen & Luke Harding, *Gaddafi’s Intelligence Chief Captured in Southern Desert*, GUARDIAN (Nov. 20, 2011, 3:11 PM), <http://www.guardian.co.uk/world/2011/nov/20/gaddafi-son-pretended-camel-herder>.

for the torment and murder of his father by ensuring that Saif was treated according to the norms of international criminal justice and was afforded a fair public trial for his alleged crimes. As it turned out, the weak central government in Tripoli could not even manage to wrest Saif from those holding him captive in Zintan, who seemed determined to keep him incarcerated there as a bargaining chip. As the months passed and Saif continued to be confined in Zintan and denied access to an attorney or a judge, indications mounted that the Libyan legal system was inadequate to handle a case of this magnitude.³⁹ Viewed in the abstract, the idea of a Libyan court holding Saif accountable might have had merit, but this did not take into account the aggravated chaos afflicting Libya and the political tensions that were spilling over into the functioning of the legal system.

Seemingly determined to downplay the manifest inadequacies of Libya's courts, Libyan authorities resisted making a commitment to turn Saif over to the ICC, which had indicted him for crimes against humanity. Under the Rome Statute, the ICC could assert jurisdiction for reasons such as the Libyan system having proved itself unable to carry out the proceedings or having engaged in an unjustified delay.⁴⁰ Under the circumstances, to ensure that Saif's protracted incarceration did not stretch out indefinitely and culminate in a sham trial in which a verdict calling for his death by hanging would be a foregone conclusion, surrendering him to the ICC was the logical option.

A particularly troubling incident occurred in June 2012, when Melinda Taylor, a lawyer from the ICC assigned to defend Saif, was imprisoned in Zintan along with three of her colleagues after visiting Saif on an official mission to discuss his defense. Libyan officials indignantly accused her of committing crimes including spying, and went on to threaten that the ICC delegation members would be tried for their alleged crimes in proceedings from which

³⁹ See Chris Stephen, *Saif Gaddafi Sets Libya's New Rulers a Test of Commitment to Human Rights*, GUARDIAN (Jan. 7, 2012, 1:10 PM), <http://www.guardian.co.uk/world/2012/jan/07/saif-gaddafi-libya-human-rights>.

⁴⁰ See *Libya: Q&A on the ICC and Saif al-Islam Gaddafi*, HUM. RTS. WATCH (Jan. 23, 2012), <http://www.hrw.org/news/2012/01/23/libya-qa-icc-and-saif-al-islam-gaddafi> (“[ICC] only steps in where national jurisdictions are unable or unwilling to prosecute Rome Statute crimes . . . at the earliest opportunity.”).

the defendants would be excluded. Under international pressures to relent, the delegation's Libyan captors eventually released them after holding them for almost a month.⁴¹ This shocking mishandling of a visit by an ICC delegation was a symptom of the deficiencies of Libya's system of transitional justice. Upon her release, Taylor expressed her conviction that the treatment that she and her colleagues endured, which included their detention without being given any reason for their arrest and the confiscation of confidential ICC documents, proved that her client Saif could not get a fair trial in Libya.⁴²

In yet another worrying development, it was announced in September 2012 that Saif's trial would be delayed for at least another five months after the capture of Abdullah al-Senussi, Qaddafi's former spy chief—the pretext being that Senussi might reveal information relevant for Saif's prosecution.⁴³ In this connection it was not only outsiders who offered criticisms; the head of the Libyan Council on Freedom and Human Rights protested to reporters that the legal steps needed to ensure fair treatment of suspects were being bypassed in what he called “an exceptional justice system which lacks the basis of a fair trial.”⁴⁴ The ICC also became a target of criticisms for failing to find a better way to manage this awkward conflict.⁴⁵

⁴¹ See Luke Harding & Julian Borger, *Libya Frees International Criminal Court Legal Team Accused of Spying*, GUARDIAN (July 2, 2012, 2:26 PM), <http://www.guardian.co.uk/world/2012/jul/02/libya-releases-icc-officials> (explaining the circumstances around the ICC delegation members' release, which the Libyan government characterized as a “humanitarian gesture”).

⁴² Julian Borger, *ICC Lawyer: Saif al-Islam Gaddafi Will Not Get a Fair Trial in Libya*, GUARDIAN (July 6, 2012, 9:35 AM), <http://www.guardian.co.uk/law/2012/jul/06/icc-lawyer-gaddafi-trial-libya>.

⁴³ Ali Shuaib, *Gaddafi Son's Libya Trial to be Delayed by Five Months: Official*, REUTERS, (Sept. 9, 2012, 3:03 PM), <http://www.reuters.com/article/2012/09/09/us-libya-saif-trial-idUSBRE8880F720120909>.

⁴⁴ *Id.*

⁴⁵ See Mark Kersten, *No Winners in ICC-Libya Standoff*, FOREIGN POL'Y (Oct. 8, 2012, 2:50 PM), http://mideast.foreignpolicy.com/posts/2012/10/08/no_winners_in_icc_libya_standoff (proposing that the disputes over where to try Saif and Senussi and the dissension within the ICC about how to handle the cases could ultimately weaken the ICC and also undermine the pursuit of justice in post-Qaddafi Libya).

For those who hoped that Libya would leave behind Qaddafi's arbitrary and cruel mode of criminal justice, the way that Saif's case was mishandled was highly regrettable. Far from teaching Libyans how criminal cases should be conducted, it suggested that the mentalities of many important players in the public arena remained mired in ways of thinking that reflected Qaddafi's own contempt for the law.

6. GREEN SHOOTS OF HUMAN RIGHTS IN INHOSPITABLE SOIL

As indicated, observers of the Libyan scene had ample grounds for concluding that the transition from Qaddafi's despotism to a sound democratic order was going to be difficult and that the disregard for international human rights law that had characterized the previous era was far from over. Nonetheless, there were some factors that pointed in a positive direction.

One of the constructive steps that the Transitional National Council took was to repudiate the lawlessness of the Qaddafi era by quickly seizing the initiative while the war still raged to adopt in August 2011 a Draft Constitutional Charter for the Transitional Stage.⁴⁶ This document indicated in the preamble that the new order would break with Qaddafi's dictatorship, stipulating that the objectives included freedom, democracy, and justice; retrieving the rights looted by the Qaddafi regime; and excluding "injustice, tyranny, despotism, exploitation and dictatorship."⁴⁷ Article 7 provided that the state was to respect human rights and basic freedoms and commit itself to joining international and regional human rights declarations and charters. These positive elements were countervailed by some problematic features, such as the stipulation in Article 1 that Islamic law would be the main source of legislation, which raised the possibility that Islamic criteria could be used to nullify some human rights. Whatever its shortcomings, the issuance of the draft constitution by itself signaled a departure from the anti-constitutionalist policies of the Qaddafi era.

⁴⁶ See LIBYAN TRANSITIONAL NAT'L COUNCIL, DRAFT CONSTITUTIONAL CHARTER FOR THE TRANSITIONAL STAGE, Sept. 2011, available at <http://www.unhcr.org/refworld/docid/4e80475b2.html> (outlining fundamental democratic principles for Libya's transitional government).

⁴⁷ *Id.* pmb1.

The large Berber minority in western Libya, which may constitute ten percent of the population, rejoiced at Qaddafi's downfall. He had insisted that all Libyans shared a common Arab identity, compelling Berbers to acquiesce in the suppression of their language and culture. When Qaddafi's regime crumbled, the Berber community quickly demanded cultural autonomy.⁴⁸ It was hard to predict how the Berbers' demands would ultimately fare, but the provision in Article 1 of the Draft Constitutional Charter seemed to repudiate Qaddafi's Arab chauvinism, recognizing diversity by stipulating that the state should guarantee cultural rights for all components of society and their languages.⁴⁹

Constituting another promising development, the July 2012 elections to the General National Assembly were widely regarded as free and fair, and resulted in a victory for centrist forces. The well-regarded longstanding leader of the overseas opposition to Qaddafi, Mohammed el-Megarif, was chosen as the country's interim president in August. Living as a fugitive for many years, el-Megarif had written extensively on the evils of Qaddafi's regime.⁵⁰ In October, the human rights lawyer Ali Zidan was elected as the interim prime minister.⁵¹ Such leadership gives rise to hopes that Libya stands a better chance of avoiding a repetition of the abuses that blighted the country for decades.

⁴⁸ See Alice Fordham, *An Exuberant Awakening for Libya's Berbers*, WASH. POST (Nov. 15, 2011), http://www.washingtonpost.com/world/middle_east/an-exuberant-awakening-for-libyas-berbers/2011/11/11/gIQASov7NN_story.html (describing the desire for official recognition of the culture and language of the Amazigh people).

⁴⁹ LIBYAN TRANSITIONAL NAT'L COUNCIL, *supra* note 46.

⁵⁰ See *Mohammed el-Megarif Elected as Libya's Interim President*, GUARDIAN (Aug. 9, 2012, 8:08 PM), <http://www.guardian.co.uk/world/2012/aug/10/mohammed-el-megarif-libya-president> (detailing el-Megarif's exile from and subsequent return to Libya following the revolution, whereupon he established a new political party and was ultimately able to win election as the country's interim president).

⁵¹ Mohamed Eljarh, *New Prime Minister for Libya from the Liberal Bloc*, MIDDLE E. ONLINE (Oct. 16, 2012), <http://www.middle-east-online.com/english/?id=54924>.

7. CONCLUSION

After joyously celebrating their liberation from a tyrant, Libyans were obliged to cope with dangerous mayhem and turmoil. In a setting where central state institutions were fragile, the factionalism and violent actions of competing armed militias that had emerged in the wake of the 2011 revolution constitute major obstacles in the way of achieving a basic measure of security and founding a healthy democratic order. Libya's difficulties in putting the civil war behind it and patching over bitter antagonisms that were fostered by months of bloody conflict have potentially broader significance. They augur ill for the future of Syria, where a much longer war against the al-Assad dictatorship has been intensifying hostilities between political factions, ethnicities, and religious sects.

The period of more than four decades during which Libyans suffered under Qaddafi's thuggish dictatorship had provided them with the opportunity to learn the hard way about the value of democracy, human rights, and the rule of law. Unfortunately, Qaddafi had bequeathed governmental and judicial institutions that were mere shells, meaning that rebuilding Libya would require effortful toil to erect the essentials for an effective government and a well-functioning system of criminal justice.

Adding to the difficulties of a successful transition, decades of living in the miasma of Qaddafi's *jamahiriyya* had fostered mindsets and behavior patterns that were at odds with respect for human rights, and these would need to be unlearned. A sense of the adjustment problems now facing Libyans can be gleaned from the writing of the distinguished Libyan novelist Hisham Matar, whose own life was scarred by Qaddafi's terror apparatus. Matar's dissident father had figured among Qaddafi's many victims, having disappeared after being abducted by Libyan agents in Egypt and imprisoned incommunicado in Libya. For long years Matar remained obsessed with being reunited with his father, but hopes that were initially raised after the revolution were dashed when Matar learned that no trace of his father could be found. In Matar's 2006 semi-autobiographical novel *In the Country of Men*, the reader encounters the perspectives of a young Libyan boy whose dissident father is arrested and savagely tortured and whose spirited mother succumbs to alcoholism as she seeks to numb her sense of oppression. The boy's childhood takes place in

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a setting where Qaddafi and his security apparatus are dominant presences, where daily lives are pervaded by fear and apprehension, and where people are haunted by visions of public executions and tormented by the private betrayals that they commit in desperate efforts to survive. The boy winds up with a personality that is deformed by internalizing the pathologies of Libyan society.

With Qaddafi removed from the scene, Matar recognized the obstacles lying in the way of constructing a new vision of citizenship in democratic Libya, which entailed adopting new ways of thinking, but he refused to despair. He described the momentous task facing his compatriots:

We are of course confronted with the most profound challenge: how to build a democracy in a country whose institutions and civil society have been strangled for 42 years. There will be setbacks, we will make mistakes, but there is no other way to learn. We have defeated Gaddafi on the battlefield, now we must defeat him in our imagination. We must not allow his legacy to corrupt our dream. Let's keep focused on the true prize: unity, democracy and the rule of law. Let's not seek revenge; that would diminish our future.⁵²

⁵² Hisham Matar, *Gaddafi Is Gone: Long Live Unity, Democracy and the Rule of Law*, Posted in *Comment Is Free*, GUARDIAN (Aug. 22, 2011, 3:30 PM), <http://www.guardian.co.uk/commentisfree/2011/aug/22/libya-gaddafi-tripoli-hisham-matar>.