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The State of Libya
Transitional Justice and the Rule of Law

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Joint Submission by the Civil Network for Transitional Justice and No Peace Without Justice
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A. Introduction

1. The Civil Network for Transitional Justice (CNTJ) is a network of Libyan NGOs created in January 2014 to monitor the implementation of Law no. 29 on Transitional Justice. Since April 2014, the CNTJ developed contacts and working methods with a number of key actors involved in the Transitional Justice process in Libya, including GNC members and members of the Committee of the 60 (Committee for the drafting of the Constitution) in order to create productive and fruitful interactions and synergies between State institutions working on Transitional Justice and local NGOs, and develop and increase awareness on the need to enhance information-sharing and mutual confidence between civil society and public institution, also with the involvement of international organisations working in the field of Transitional Justice and Human Rights.

2. No Peace Without Justice (NPWJ) is an international non-profit organisation founded by Emma Bonino and born of a 1993 campaign of the Transnational Radical Party that works for the protection and promotion of human rights, democracy, the rule of law and international justice. NPWJ’s International Criminal Justice program focuses both on international and national efforts to restore the rule of law and provide accountability and redress for the victims of crimes under international law, be they through the International Criminal Court, or through ad hoc Courts or Tribunals, national prosecutions or other accountability processes. The overall objective of the International Criminal Justice Program is to ensure that whatever solution is adopted, it is shaped and implemented so that it can contribute to the restoration of the rule of law, it is responsive to the needs of stakeholders and it adheres to the strictest human rights standards. NPWJ has been working on the Libyan transition since early 2011 and has been on the ground since early October. It has a permanent presence in Tripoli since March 2012 and has been working to create a network of Libyan actors to engage different sectors of Libyan society on transitional justice.

3. In this report, NPWJ and the Civil Network for Transitional Justice outline urgent concerns (paragraphs B to H) on the issues that threaten to durably undermine the establishment of a transitional justice system and provide recommendations (paragraph I) that should urgently be implemented in the country.

4. Paragraph B underlines that the conditions in which the judicial system operates in Libya often do not meet the requirements for further progress to be achieved.

5. Paragraphs C to G focus on specific impediments linked to legislative provisions of the Gaddafi’s era that are still in force but also to new sets of laws and measures taken by the transitional authorities. The latter are in contraction with the goal of an impartial justice system and pose a grave threat as they drive the country away from the path of reconciliation and rule of law, thus fuelling the cycle of violence and counter-retributions.


B. Challenges posed by Libya’s transition

The establishment of an effective transitional justice system, which addresses both past and ongoing human rights violations, is crucial for the future of Libya. Transitional justice mechanisms can durably put an end to the cycle of violence.
7. Libya’s political evolution is multifaceted and remains trapped within a split and factional political framework that does not offer a vision or a path leading out of the transition. While the central authorities remain divided and contentious over the power sharing issue, Libyan society still has to heal the scars of the revolution, which not only are still very visible on the buildings and roadsides of the country but are clearly perceptible in the Libyan legislative and institutional system. Libya’s challenges have been made most evident by the turbulent period of political volatility and violence between armed groups that has engulfed Libya since mid-May 2014 and led to a deteriorating human rights and humanitarian situation and to further polarisation of the political spectrum.

8. Libya’s political future and long-term stability will be defined by how transitional justice processes and other important elements of the post-Gaddafi and post-conflict transition are implemented, such as the laws that marginalise certain constituencies and those on the prosecution of crimes committed during the Revolution. These elements play a critical role in developing a new covenant for Libyan citizens and will have serious ramifications for the development of political and societal institutions and their ability to protect and expand the civil and political rights of Libyans. The few seeds of transitional justice mechanisms already implanted in the Libyan legislative system have the potential to channel current tensions and frictions into inclusive and open processes, fostering a culture of dialogue, responsibility and accountability within Libyan political dynamics.

9. Rudiments of transitional justice mechanisms are present in the Libyan legislative system, such as Law no. 29/2013 on Transitional Justice and the 19 February 2014 Ministerial Decree on Legislation to Redress the Situation of Victims of Rape and Violence, which aims at establishing transitional justice mechanisms in cases of sexual and gender-based violence (SGBV). However, their implementation remains stalled. Focusing on the implementation of current transitional justice laws will provide Libyan civil society actors and political forces with achievable and concrete goals and build-up those mechanisms of reconciliation and pacific resolution of conflicts that can represent key elements for developing broader and inclusive political discussions on the respect of human rights, democracy and the rule of law. Ensuring that transitional justice mechanisms remain at the center of the national dialogue is one of the main tools for the Libyan authorities to build up those critical State institutions, such as the justice system, that can guarantee equality in front of the law, accountability and personal responsibility for all citizens. These are fundamental elements without which a democratic, peaceful and stable regime cannot be established or sustained.

10. The second necessary element on which Libyan institutions need to focus to realise an inclusive and comprehensive transitional justice process is an understanding of the vast scope of violations, which include the systematic cruelty of 42 years of dictatorship, the brutal suppression of the 2011 uprising by the regime and the responsibility to hold accountable members of revolutionary forces for crimes committed during and after the Revolution, including torture of detainees and revenge attacks against communities perceived to be supporters of the former regime. Instruments like the Political Isolation Law or the laws on veterans and wounded, as well as the handling and prosecution of those individuals still incarcerated for conflict-related crimes, need to ensure that the principles of personal responsibility, fair trial and equality in front of the law are upheld, also to facilitate an atmosphere conducive to reconciliation that is based on transitional justice and the rule of law.

11. Ensuring that the political discourse focuses its attention on developing shared, open and fair transitional justice mechanisms can remove attention from current tendencies to look outside the country for political backing and support, reducing the risk of external actors fuelling cycles of violence and “counter-retribution”. Focusing on transitional justice can help weaken the negotiating position of those who are seeking and retaining power through the commission of violations.
Transitional justice mechanisms offer the best tools to engage Libyan forces in envisioning their future.

C. Law No. 29 on Transitional Justice

Law No.29 could be a cornerstone of transitional justice in Libya through its three pillars and the legal and administrative tools it creates. It is fundamental that its implementation proceed swiftly and impartially for it to fulfil its goals.

12. On 2 December 2013, the General National Congress promulgated Law No. 29 on Transitional Justice, which repeals Law No. 17 on Laying a Foundation for National Reconciliation and Transitional Justice. Law No. 29 represents a critical element of the transitional justice process in Libya and offers both administrative tools to initiate an inclusive and comprehensive approach to past and current human rights violations and political and legal instruments to reform the current body of Libyan law.

13. The law rests on three main pillars, namely: 1) the establishment of the Fact-Finding and Reconciliation Commission, which is tasked with conducting investigations into severe and systematic human rights violations committed under the former regime and since its fall, revising legislation linked to transitional justice and seeking accountability and reparations for victims. A board of nine members appointed by the legislative authority will head the Commission. It will operate for four years, with the possibility of a one-year extension, and will submit a final report with recommendations to the legislative authority; 2) the establishment of the Victims’ Compensation Fund to provide for reparations, including compensation for material damage, memorialisation, treatment and rehabilitation to victims identified by the Commission; and 3) revision of current legislation with the aim of reforming State institutions and repealing those laws issued by the previous regime that do not have a legitimate or constitutional basis.

14. Although the law encompass all the main principles of transitional justice and seeks to achieve a factual reconstruction of events, redress and accountability, thus facilitating national reconciliation and dialogue, the process through which the law was drafted and adopted did not include a broad consultation nor does it foresee an outreach campaign to engage the population in its work. This is evident in the selection process for the nine members of the Commission: although the GNC was supposed to finalise the selection process by 1 May 2014, the level of applications and the quality of the prospective commissioners was insufficient for the selection of any commissioners. Due to the political instability since mid-May 2014 and the general elections of 25 June 2014, the process to establish the Commission was halted and has never resumed. Moreover, although the law foresees the cooperation with civil society organisations, it is unclear if it will allow for a dynamic truth-seeking process that will allow for public hearings and the full involvement of victims in the work of the Commission.

D. Reparation programs for victims

Several reparatory measures for victims have been established by the new Libyan authorities, though these measures are not yet part of a coherent and holistic approach.

15. Since the revolution, a number of reparations programs have been established by Libyan authorities, such as the provision for compensation to former political prisoners under Law No. 50 of 2012. Under this law, all former political prisoners will be provided with 8,000 Libyan dinars for each month spent in prison between 1 September 1969 and 12 February 2011. Other forms of reparation, which have been established by decree or law, include the provision of pensions to the
families of the missing and killed and compensation for the families of those killed in Abu Salim prison. A draft law to redress property grievances arising from the policies of the Gaddafi regime is also under discussion.

16. The 19 February 2014 Ministerial Decree on Legislation to Redress the Situation of Victims of Rape and Violence aims at establishing transitional justice mechanisms in cases of sexual and gender-based violence (SGBV). The Decree seeks to redress the situation of victims of rape and sexual violence in the spirit of transitional justice, which “requires removal of all injustice and redressing the consequences of violation” and foresees compensation and rehabilitation for victims. The decree has not been passed into law and its implementation therefore remains stalled. While the decree focuses mostly on pecuniary reparations and benefits for victims, it establishes that victims are entitled to assistance in pursuing the perpetrators of the crimes and putting them on trial. This provision represents a fundamental element of the transitional justice process developed in Libya and needs to be pursued by the Libyan authorities at the earliest possible moment.

17. While the impetus to ensure redress for victims is commendable, the mushrooming of specific decrees and legislation aimed at different categories of victims risks the development of inconsistent approaches to, or discrimination between, different categories of victims. This risks creating further tensions within Libyan society, making transitional justice in general harder to implement.

E. Institutional reform and the Political Isolation Law

Several of the post-2011 laws, such as the Political Isolation Law, which allows for large-scale exclusions of former regime civil servants, risk to be in violation of international human rights standards.

18. Instead of reforming Gaddafi-era laws, successive interim authorities have passed laws that violate human rights. The passage of these laws has received far less attention than they deserve. The approach of the Libyan authorities to vetting and institutional reform is an area of concern. There has been very limited vetting of new members of institutions, such as the armed forces, police, judiciary and Judicial Police, in terms of personal responsibility for crimes or human rights violations committed by members of the Revolution. By contrast, strong exclusionary measures have been taken against those who served under the Gaddafi regime and they are not compliant with international human rights standards in a number of aspects.

19. One such measure is the Law on Political and Administrative Isolation. In May 2013, Libya’s General National Congress (GNC) overwhelmingly passed Law No.13 of 2013 on Political and Administrative Isolation. The adoption of the law was characterised by overwhelming pressure by militias, which besieged the GNC and several ministries and forced MPs to pass the law under threat of force. Many judges feared for their positions due to the overbroad criteria for removing judges and prosecutors from active duty who had served under the Gaddafi government, as the law stipulates. Judges and prosecutors fear that full implementation of the law would remove a large number of active judges, risking further instability in an already volatile justice system.²

20. The enactment of the Political Isolation Law represented a far-reaching attempt to prevent members of the Gaddafi regime from holding public office during the country’s transition. However, the decision also appeared to fit a precarious pattern in post-conflict Libya, characterised by acts of vengeance and “counter-retribution” aimed at anyone associated with the defeated regime.

1 “Memorandum Regarding the presentation of Proposed Legislation to Redress the Situation of Victims of Rape and Violence”, Libyan Ministry of Justice 19 February 2014
The passage of the law also reflects the current state of political instability in Libya wherein decisions are politically motivated and often forced at the barrel of the gun rather than agreed upon through public consultation and democratic decision-making.3

21. International and local human rights groups did not necessarily view Law No.13 of 2013 as being illegitimate, arguing instead that it should not be too vague or violate human rights. However, this law will deprive State institutions of some experienced and competent persons, who would be very difficult to replace. Further, the law did not take into account whether potential targets had previously defected or whether they played a role in defeating the Gaddafi regime. Fundamentally, Law No.13 of 2013 is based on the principle of collective responsibility instead of individual responsibility and fosters a political climate that does not favour accountability and fuels cycles of violence and “counter-retribution”.

22. The law, which is applicable for 10 years, lists a wide range of political, administrative and other positions, as well as types of affiliation and conduct, as a basis for excluding individuals from public life. The overly broad and generalised provisions4 and its lack of definitions could potentially apply to anyone who worked within the previous regime, whether they were responsible for violations or not. This is an incredibly dangerous path to take in a country where 60-70% of the population work for the public sector.5

23. While the law provides for certain due process guarantees, including the right to appeal to administrative courts and the Supreme Court, it contains vague, far-reaching and disproportionate criteria, likely to violate the human rights of the individuals concerned. Exceptions to the law were considered but ultimately rejected. One example of the shortcomings of the law relates to Mr Mohammad El-Magariaf who decided to resign as President of the GNC in anticipation of the application of the law to him. He had previously been the Libyan Ambassador to India – one of the positions affected by the law – before leaving the country and engaging in over three decades of active opposition to the Gaddafi regime.

24. A number of challenges to the constitutionality of the law were submitted to the Constitutional Chamber of the Supreme Court, including one by the National Council for Civil Liberties and Human Rights. The Supreme Judicial Council, charged with the application of the law to the judiciary, has proposed amendments to the law to mitigate its impact on the judiciary. Judges and prosecutors took strike action in June 2013, anticipating that the law would further undermine an already weak judiciary. It should be noted that the Libyan armed forces are also subject to another stringent vetting process implemented by the Integrity and Army Reform Commission. Despite these challenges, the law still remains in place.

F. Law No. 38 on Some Procedures for the Transitional Period and Amnesty

Aiming to protect those that took part in the revolution, Law No. 38 provides general amnesty for crimes committed for political motivations, thus maintaining and further promoting a culture of impunity undermining the establishment of rule of law and displaying a lack of regard for Libya’s international obligations.

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4 See for example article 1: “The standard requirements for holding any public positions, refers to the restrictions that must be applied in the cases of those assuming any of the public positions stipulated in [this legislation] from [1] Sept 1969 to the liberation date of [23] Oct 2011 and includes the following […]”.

25. Law No. 38 on Some Procedures for the Transitional Period, also known as the Amnesty Law, was passed by the National Transitional Council on May 2, 2012. The law establishes that there shall be no penalty for “military, security, or civil actions dictated by the 17 February Revolution that were performed by revolutionaries with the goal of promoting or protecting the revolution”. However, the law does not specify which acts should fall under what is effectively an amnesty provision and some brigade members believe the law exempts them from any responsibilities for crimes committed against detainees. The Amnesty Law allows people who committed serious crimes to walk free for political reasons, propagating a culture of selective justice that Libyans fought so hard to overcome and perpetuates the culture that existed under the Gaddafi regime, where all was justified in the name of the 1969 Revolution. Holding accountable all those responsible for serious violations of international human rights and humanitarian law is critical for the new Libya.

26. Law no. 38 represents a serious impediment to the establishment of the rule of law in Libya. The vague terms used in the law could lead to abuses in its implementation, including arbitrary detention. While the government may have limited ability to rein in hundreds of armed militias that are carrying out abuses and operating outside of government control, it can and should make progress on reforming repressive laws that violate human rights and hinder the country’s democratic transition. It is notable that the need for amnesty is in itself an acknowledgement that crimes occurred – otherwise there would be no need for an amnesty in the first place. Notably, the amnesty law was passed along with Law no. 37, which forbids “praising or glorifying Gaddafi, his regime, his ideas or his sons”. Rather precariously, the law claims that Libya is still in a state of war and allows for the imposition of a life sentence on anyone who “harms the state” by glorifying the Gaddafi regime.

27. The blanket immunity of Law no. 38 violates Libya’s obligations under international law to investigate and prosecute serious violations of international human rights and humanitarian law. International law excludes amnesty for serious crimes under international law, such as war crimes and crimes against humanity and all cases of torture. Libya is a party to the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, which requires it to remove all such limitations to the prosecution of these crimes. The Law breaches fundamental human rights and freedoms and represents a significant step backwards on Libya’s path to establishing a country built on human rights, the rule of law and democracy.

28. Law no. 38 constitutes a breach not only of Libya’s international commitments, including those as a signatory to the International Convention on Civil and Political Rights, but also to the Constitutional Declaration of 3 August 2011 through which the NTC derives its legitimacy. Moreover, the absence substantial involvement or consultation with key stakeholders, including civil society organisations, the law lacks a genuine democratic character.

29. Law no. 38 was also passed in an attempt to resolve the situation of large-scale detentions without judicial process, requiring the Ministries of Interior and Defence to take custody of all detainees held by armed groups by 12 July 2012, and to refer cases to the prosecution or allow for their release. The law sets a deadline of two months for the Ministries of Interior and Defence to ensure that the cases of all detainees held by armed brigades be screened by civilian or military prosecutors so that they would either be charged and brought to trial or released. By September 2013, prosecutors have screened few detainees and the vast majority remain in detention without access to any judicial process.

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6 http://www.libyaherald.com/2012/05/07/lawyer-damn-glorification-and-amnesty-laws/#axzz3EiovzCfW
G. The situation of conflict-related detainees

_The number of conflict-related detainees, whose cases remain difficult to prosecute, is one of the biggest challenges of the transitional justice process._

30. Militias are currently holding thousands of people, most of them accused of having supported or fought for the Gaddafi regime. Most of the detainees have not been brought before any judicial authority and are therefore being detained arbitrarily.

31. By September 2013, the total number of conflict-related detainees in Libya was generally estimated to be around 8,000. This figure has remained fairly constant since the declaration of liberation in October 2011. Accurate figures, including a breakdown by detaining agency, are not available. In September 2013, the Ministry of Justice reported that of the estimated 8,000 conflict-related detainees, 4,000 are under the custody of the Judicial Police, the remaining 4,000 are being held by the Military Police under the Ministry of Defence; by the SSC and the Combating Crime Department, both composed mainly of armed brigades and operating under the Ministry of the Interior and by armed brigades not affiliated to any Ministry. The highest concentration of conflict-related detainees, around 2700, is in Misurata.

32. To rein into this situation, the GNC included a provision in Law No. 29 on Transitional Justice, passed on 2 December 2013, setting a new deadline of 90 days (an additional 30-day extension was subsequently granted) from the date of its promulgation for the Ministries of Justice, Interior and Defence to end the detention of those accused in relation to crimes under the previous regime, requiring detainees to be released or referred to the public prosecution.

33. However, the screening process and the investigation of conflict-related detainees have been a major challenge for the public prosecution. Despite some small progress made in this regard in Misurata and Zawiya, thousands of detainees still await judicial process and both the legislative and executive powers do not seem in a position to guarantee the right to due process nor to bring the thousands of detainees held by militias under the central government’s control.

34. The situation of conflict-related detainees remains among the most critical issues to be addressed by Libyan authorities to ensure respect of human rights and due process.

H. Cooperation with the International Criminal Court

_While the implementation of the ICC decision on the transfer of Mr Saif-al-Islam Gaddafi to The Hague is still pending, the role of the ICC seems more than ever crucial in the process of establishment of a transitional justice system in Libya._

35. On 26 February 2011, the Security Council adopted resolution 1970 (2011) in which it decided to refer the situation in Libya to the Prosecutor of the International Criminal Court and further decided that the Libyan authorities should cooperate fully and provide any necessary assistance to the Court and the Prosecutor. On 27 June 2011, the Court issued arrest warrants and requested the transfer of Mr Abdullah al-Senussi and Mr Saif al-Islam Gaddafi, as well as the late Muammar Gaddafi, to The Hague. While the Libyan authorities have challenged the ICC requests to transfer Mr al-Senussi and Mr Gaddafi to The Hague, they initiated on March 2014 a national trial against the two.

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36. The ICC can play a critical role in supporting accountability for human rights violations and redress for victims and Libyan authorities are under the obligation to comply with ICC decisions as well as to fully cooperate with the Court and the Prosecutor. Considering the on-going violence in Libya and the continued ICC mandate provided by UNSCR 1970 (2011), it is critical that Libyan authorities and the ICC establishes good working methods mutually beneficial.

37. The ICC represents a fundamental element of the transitional justice landscape in Libya, and it is critical that Libyan authorities include it in their overall strategy to avoid the risk of creating a “two-track” process, with on one side the ICC and the prosecution of senior former regime officials and all the other elements of transitional justice on the other side.

I. Recommendations

In light of the above, the Civil Network for Transitional Justice and No Peace Without Justice recommend to the Libyan authorities to:

38. Develop a robust legal framework for the promotion and protection of human rights by ensuring that the constitution and national legislation are fully compliant with international human rights standards, including by completing the comprehensive review of the penal code, the code of criminal procedure and other legislation;

39. Implement a comprehensive approach to transitional justice through, inter alia, ensuring the appointment of qualified and independent members of the Fact-Finding and Reconciliation Commission, taking into account gender issues and ensuring the coordination of all truth-seeking initiatives. A transitional justice strategy can contribute to defining how Libyan society will go forward, and lay the foundations for a new democratic society;

40. Provide investigative capacity and, where needed, funding to the truth-finding commission that lies at the heart of the transitional justice system and quickly appoint its members should be also a priority;

41. The truth-finding commission has to ensure that outreach and inclusive mechanisms are developed to inform and update the population about its activities and findings;

42. Strengthen watchdogs and mediators alike, in particular the National Council for Civil Liberties and Human Rights (NCCLHR), which should not be considered as antagonists to the government particularly if coming from Libyan civil society. This will guarantee against abuses and help prevent violence;

43. Transitional justice should encompass not just criminal justice but also truth seeking, reparations, and reforms intended to guarantee that such violations do not recur. As a starting point, Libyan authorities should consider instituting a socially dynamic approach to truth-seeking that ensures participation of wide – section of Libyan society particularly victims of past and present violations of human rights;

44. The Law on Political and Administrative Isolation and related vetting legislation and policies should be reviewed to ensure that vetting criteria and the process for their application are precise, proportionate and fair;
45. Any commission for missing persons should be independent and impartial, with the resources and authority to search for and identify all missing persons, regardless of affiliation, and take the necessary measures to support their families;

46. All necessary measures should be taken to ensure a safe environment, free of intimidation, for the trials of members of the former regime and members of the armed brigades, whilst ensuring accordance with internationally recognized fair trial standards;

47. Ensure full cooperation with the ICC and its decisions;

48. In order to ensure maximum efficacy from attempts to address the serious backlog of revolution related cases, a panel of senior members of the judiciary should be created by the Judicial Inspectorate to provide oversight of the work of judges involved in these cases;

49. An amnesty law must be consistent with a state’s fundamental obligations under customary international law while Law No. 38/2012 fails to meet a number of these criteria. The apparent limitation on its application contained in Law No. 35/2012 is ambiguous and does not set out any guidelines for the interpretation of international law, we ask therefore the Government to amend such laws;

50. Pass into law the 19 February 2014 Ministerial Decree on Legislation to Redress the Situation of Victims of Rape and Violence and facilitate its implementation, in particular with regards to its article 3 to ensure that legislative and administrative measures are elaborated to facilitate the prosecution of SGBV cases, starting from the violence committed during the revolution.