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ILAC Rule of Law Assessment Report:

Libya 2013

This report details the findings of a team of experts from member organisations of the International Legal Assistance Consortium (ILAC) based on an assessment of justice sector institutions in Libya.



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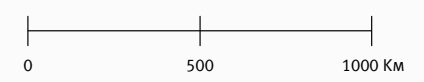
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List of Abbreviations

ABA-ROLI	American Bar Association-Rule of Law Initiative
ACHPR	.....	African Charter on Human and Peoples' Rights
ANHRI	.....	Arab Network for Human Rights Information
AOHR	.....	Arab Organization for Human Rights*
BFHRC	.....	Basic Freedoms and Human Rights Council
CSO	.....	Civil society organization
EMHRN	.....	Euro-Mediterranean Human Rights Network
FFRC	.....	Fact-Finding and Reconciliation Commission
GNC	.....	General National Council
HJC	.....	High Judicial Council of Libya
HJI	.....	High Judicial Institute of Libya ("Judicial Training Institute")
HRW	.....	Human Rights Watch
IAP	.....	International Association of Prosecutors*
IAWJ	.....	International Association of Women Judges*
IBA	.....	International Bar Association*
ICC	.....	International Criminal Court
ICG	.....	International Crisis Group
ICPS	.....	International Centre for Prison Studies
IDP	.....	Internally displaced person
ILAC	.....	International Legal Assistance Consortium
INGO	.....	International non-governmental organization
ISLP	.....	International Senior Lawyers' Project*
LBA	.....	Libyan Bar Association
LFJL	.....	Lawyers for Justice in Libya
LLO	.....	Libyan Lawyers' Organization
MENA	.....	Middle East and North Africa
MHESR	.....	Ministry of Higher Education and Scientific Research of Libya
MoJ	.....	Ministry of Justice of Libya
NATO	.....	North Atlantic Treaty Organization
OMCT	.....	World Organization Against Torture (Org. Mondiale Contre la Torture)
PCHR	.....	Palestinian Center for Human Rights*
PILPG	.....	Public International Law and Policy Group*
Sida	.....	Swedish International Development Agency
TNC	.....	Transitional National Council
UNDP	.....	UN Development Programme
UNHCR	.....	UN High Commissioner for Refugees
UNODC	.....	UN Office on Drugs and Crime
UNSMIL	.....	UN Support Mission in Libya

* *ILAC member organisations*

Executive Summary

From 15-24 January 2013, an eight-person team of experts from member organisations of the International Legal Assistance Consortium (ILAC) conducted an intensive review of numerous justice sector institutions in Libya. This review also examined several crosscutting issues facing the justice sector in the aftermath of the 2011 revolt.

The ILAC team found that the justice sector in Libya currently faces a variety of simultaneous challenges. Unquestionably, the two greatest – and interrelated – challenges are security and the fate of roughly 8,000 ‘conflict-related’ detainees still being held without charges or representation. The absence of security for justice sector personnel has led judges and prosecutors to indefinitely delay the processing of detainees’ cases. The continued confinement of these individuals in state-run and non-state prisons, often under harsh conditions, in turn exacerbates the sense of lawlessness that contributes to the lack of security.

At the same time, the justice sector faces the difficult task of dealing with allegations of significant abuses by revolutionary forces during and after the 2011 uprising. Imbued with ‘revolutionary legitimacy,’ anti-Gaddafi fighters are heroes to many Libyans, who are willing to overlook alleged excesses and even atrocities committed in the name of the Revolution. Victims, along with many in the international community, view the situation far differently, and decry the lack of prosecution of revolutionary wrongs. With irregular revolutionary forces still actively operating throughout Libya, the lack of security has made addressing these issues both politically and personally dangerous for justice sector personnel.

The justice sector’s ability to act independently during the current transitional period is also degraded by its lack of legitimacy. This issue is complicated by the fact that the justice sector is both the object of transitional reform efforts, and the vehicle for the transitional prosecution of past abuses. Thus, any extensive vetting of justice sector actors (judges, prosecutors, People’s Lawyers, private lawyers) will significantly impact the system’s ability to process cases. Yet, as one interlocutor in the Ministry of Justice put it, “how can the same judges suspected of misbehaviour during the Gaddafi regime sit in judgment of alleged Gaddafi supporters?”

Another factor contributing to the justice sector's lack of legitimacy is that the process of attaining full independence for many institutions remains incomplete. Structurally, full independence requires not only scrutiny of on-going links between the justice sector and the executive, but also a review of the legislation and practices affecting these institutions. This process is far from complete for the judiciary, prosecution, the Ministry of Justice, and the private Bar.

Justice sector reform in Libya faces numerous other issues. Despite Gaddafi-era propaganda, the status of women in the justice sector – both as professionals and members of the public seeking justice – raises significant concerns. Though women predominate at law faculties, they frequently comprise a small minority of judges, prosecutors, governmental officials, and active members of the private Bar. Few women hold positions of authority in these institutions. Additionally, Libyan legislation and government policies fail to effectively address issues of violence against women and gender bias.

Other issues arise from the fact that those responsible for implementing these reforms typically spent their working lives subject to the perverse ideology and informational isolation imposed during 42 years of control by the Gaddafi regime. This lack of exposure to internationally recognized concepts and practices is hampering the process of reform, and frustrating those who genuinely seek effective change.

Finally, the Libyan justice sector at present is struggling with a lack of coordination and communication between the various actors. Independent but co-equal institutions have not yet developed mechanisms for efficiently and effectively working together to serve a common public goal.

Efforts to create ad hoc judicial bodies to handle transitional justice in Libya such as the Fact-Finding and Reconciliation Commission (FFRC) are constrained by the lack of legislative clarity for their mission. Equally important, creating and training new ad hoc judicial, prosecutorial and defence institutions would be far more time-consuming than enhancing the capacity of existing structures. Given that the prolonged detention of thousands of 'conflict-related' detainees, and need to reach some resolution regarding offenses allegedly committed by revolutionary forces, delay to create a new system is not an attractive option. Thus, while ad hoc institutions may have a role in such matters as fact-finding or reparations to victims of human rights abuses, the ordinary courts provide the only existing system remotely capable of processing the existing prosecution caseload.

Based on these findings, the ILAC team developed a set of recommendations for use by Libyan authorities and international partners. These recommendations focus on concrete steps that can be taken in the near and medium term to advance rule of law reform in Libya. In part, these recommendations require action by Libyan authorities and institutions. Other recommendations contemplate joint programs, where international partners can provide Libyan professionals with comparative insights, and allow the Libyan partners to develop Libyan solutions utilizing international experiences and expertise.

Ultimately, the shape and course of the rule of law in Libya is for Libyans to decide. The ILAC team was impressed with the professionalism and commitment of many Libyans involved in the reform effort. ILAC hopes that this assessment and the accompanying recommendations will assist Libyan reformers and their international partners in moving forward to develop the new Libya earned through the bravery and sacrifice of the Libyan people.

I. Introduction

In an uprising that began two years ago, the people of Libya overthrew Colonel Muammar Gaddafi, ending one of the longest contemporary periods of one man-rule in the Middle East and North Africa (MENA) region. Colonel Gaddafi came to power in a 1969 coup and controlled the country for four decades. Through a combination of repression, co-optation and selective largesse with oil revenues, his regime substantially subverted both rule of law principles and legal institutions. In the wake of the Libyan revolution, calls for political liberalization and economic reform have been accompanied by demands for the rule of law.

In Libya and the neighbouring countries of Tunisia and Egypt, political openings were achieved quickly, with elections and constitution-building processes underway within 18 months of the initial uprisings. However, these political processes have been characterized by rancour and periodic violence. This acrimony, in turn, exposed not only the divisions sown by decades of autocratic rule, but also the fragility of state institutions previously denied the necessary independence and resources to play their intended role in society. Further steps are needed to bolster the democratic legitimacy of the new Libyan state through the establishment of impartial and effective rule of law institutions.

At a time when the political revolution in Libya has brought about an irreversible political break with the country's past, the rule of law is more important than ever as a means of securing its future. This report explores the challenges to re-establishing the rule of law during Libya's current political transition, and sets forth recommendations for how they may be overcome.

A. ILAC in Libya

The International Legal Assistance Consortium was established in 2002 as a mechanism to coordinate the work of international and regional actors involved in rebuilding justice systems and establishing the rule of law in countries that had experienced conflict. ILAC consists of 50 member organisations worldwide representing over three million judges, prosecutors, lawyers and academics. During its first ten years, ILAC has carried out assessment missions and/or initiated legal reform programs in thirteen countries.¹ Through making its assessment reports public, ILAC seeks to contribute to better-coordinated and more effective international support to post-conflict rule of law reconstruction, recognize the primary role of national rule of law actors, and help them identify both gaps and opportunities for reform.

ILAC's engagement with Libya began less than a month after the country was declared liberated on 23 October 2011. Between 16-23 November 2011, ILAC conducted a pre-assessment mission to Libya, along with representatives of two regional ILAC member organisations, the Arab Organisation for Human Rights (AOHR) and the Palestinian Centre for Human Rights (PCHR). The mission members travelled throughout north-western and central Libya, and met with representatives of the judiciary, prosecution, bar, civil society, and interim leaders of local revolutionary councils. The mission combined training activities with a fact-finding survey in the immediate aftermath of the hostilities, and resulted in the publication of both an ILAC pre-assessment report² and a civil-society fact-finding report.³

The pre-assessment team recommended to the ILAC Council that ILAC and its member organisations immediately engage the Libyan legal community concerning rule of law development and reform priorities. Based on these recommendations, in February 2012, ILAC together with its member organisation the American Bar Association Rule of Law Initiative (ABA-ROLI) organized a conference in Tunis entitled "Libya, Rule of Law Priorities." This conference brought together Libyan legal professionals and civil society actors to outline their rule of law priorities, and to meet with ILAC member organisations interested in supporting the rule of law in Libya. The resulting report was published simultaneously in English and Arabic, and is still frequently referred to as a useful summary of early judicial reform priorities by Libyan interlocutors.⁴

1 International Legal Assistance Consortium (ILAC), *Annual Report 2011: Ten Years of Rebuilding Justice Systems* (2012), available at <http://www.ilac.se/publications/>.

2 ILAC, *Report – Pre-Assessment Mission, Libya: 16-23 November 2011* (2011), available at: http://www.ilac.se/download/reports_documents/mission-reports_documents/LIBYA_FF_REPORT_111221.pdf.

3 Palestinian Centre for Human Rights (PCHR), Arab Organisation for Human Rights (AOHR), and ILAC, *Report of the Independent Civil Society Fact Finding Mission to Libya* (January 2012), available at: <http://www.ilac.se/2012/01/09/ilac-report-on-libya/>.

4 ILAC and American Bar Association – Rule of Law Initiative (ABA-ROLI), with the support of

After the Tunis meeting, three ILAC member organisations began working in Libya with national partners on priority rule of law issues. The Public International Law and Policy Group (PILPG) has worked primarily with civil society actors on popular participation in transitional justice and constitution-building processes, ABA-ROLI provides support to the Libyan private bar, and the newly formed Libya branch of the Arab Organisation for Human Rights (AOHR) has undertaken human rights trainings and a monitoring role.

B. The ILAC Assessment

In January 2013, following up on recommendations from the Tunis Conference, a team of experts from six of ILAC's member organisations carried out a needs assessment concerning the rule of law and the justice system in Libya. The team examined the needs of the justice sector, the demands likely to be imposed on it in the context of Libya's on-going transition to democracy, and ways in which support might be provided in overcoming these challenges. The assessment team was composed of distinguished legal and human rights professionals with diverse backgrounds and areas of expertise.

- Mr. Pim Albers (Netherlands), Independent Expert, American Bar Association Rule of Law Initiative (ABA-ROLI); Advisor to the Ministry of Justice, Netherlands.
- Ms. Haidi Ali (Egypt), Senior Researcher, Arab Organisation for Human Rights.
- Dr. Mark Ellis (UK/USA), Executive Director, International Bar Association.
- Ms. Elizabeth Howe (UK), Chief Crown Prosecutor, England and Wales; General Counsel of the International Association of Prosecutors (IAP).
- William Meyer: Lawyer, ILAC Chair and Assessment Team Leader
- Ms. Rita Reddy (Malaysia), Lawyer and Human Rights and International Law Specialist, International Senior Lawyers' Project (ISLP).
- Ms. Marianne de Rooij (Netherlands), Senior Judge, Netherlands; Secretary and Treasurer, International Association of Women Judges (IAWJ).
- Rhodri C. Williams: Lawyer, ILAC Program Manager for Libya and Assessment Team Rapporteur

the Swedish International Development Agency (Sida), *Workshop Report – Libya, Rule of Law Priorities: February 20-23, 2012, Tunis, Tunisia* (2012) available at: <http://www.ilac.se/ilac-libya-conference-in-tunis/>

The assessment team was accompanied and greatly assisted by Ms. Zainab Al-Touraihi, Researcher at the Hague Institute for Global Justice. In parallel with the assessment mission, human rights training courses for Libyan judges, prosecutors, police officers, lawyers, and civil society activists were held in Tripoli and Benghazi by the PCHR and AOHR. The training team was composed of Mr. Bassam Aqra, Training Director for the PCHR, as well as Mr. Moataz Osman, Assistant to the Secretary-General of the AOHR, and Eslam Abo Elenien, Researcher at the AOHR.

In preparing the assessment, the team spent nine days in Libya interviewing political officials, parliamentarians, civil servants, members of the judiciary, representatives of the private bar, civil society organisations, and key international organisations, donors and NGOs. During the assessment trip, the team met with over sixty Libyan interlocutors and nearly twenty international officials. Given the sensitive nature of some of the issues discussed in this report and the current security situation in Libya, the sources interviewed are frequently identified only in general terms, as a matter of prudence. Their names are known to the authors and to ILAC. The assessment relies on statistical data and legal documents where possible, but experienced the same challenges noted by other observers in accessing such materials.⁵

One key finding in the report concerns the difficulties presented by the current security situation in Libya, including continuing instability and periodic bouts of inter-community violence and attacks on the security services. At the time of the mission, rising tensions in the East and South prevented the team from undertaking significant travel outside of the capital, Tripoli. However, members of the team did meet with legal professionals in Khoms, Misrata, Sabratha and Zawiya. Beyond the assessment trip, this report is also based on an extensive review of available reports and documentation related to the rule of law in Libya, as well as interviews conducted during the pre-assessment mission, by phone and during preparatory and follow-up trips to Libya by ILAC staff.

⁵ Celine Bardet, Pieter du Plessis and Aly Mokhtar, "Formulation of a security sector and rule of law plan for Libya – Final Report" (Delegation of European Union, October 2012), 5.

II. Historical Background

Libya is a sparsely populated country with little experience of democratic self-governance. Many of Libya's legal traditions took root during the country's long history of Ottoman and Italian rule. However, its current judicial and rule of law institutions were only established after independence in 1951, during the stable but only nominally democratic rule of King Idriss I.

The monarchy was overthrown in 1969 in a coup led by Colonel Gaddafi. His 42 years of rule was characterized by tremendous growth in both the population and wealth of the country, the latter arising primarily through the exploitation of Libya's oil reserves. At the same time, democracy and the rule of law were suppressed, with independent institutions such as courts weakened, co-opted, or bypassed entirely. However, as in other states in the MENA region, legal and judicial institutions have shown surprising resilience, and have emerged damaged but not entirely discredited from decades of suppression.

A. Population and geography of Libya

Centred on the continent's northern coast, Libya is the fourth largest and one of the least densely populated countries in Africa. Along the Mediterranean coast lies a narrow strip of fertile lowlands, where 80 percent of the population lives. These coastal lowlands in the east and west are separated by a stretch of 500 kilometres of wasteland desert known as the Sirtica. Though each of the lowland areas is backed to the south by highland steppes, southern Libya is dominated by the vast Sahara Desert, a barren wasteland of sand and rocky plateaus. Libya has no rivers or perennial watercourses and, since precipitation ranges from light to negligible, less than two percent of the country receives sufficient rainfall for settled agriculture.⁶

With an estimated population of 6.5 million, Libya is sparsely populated. Libyans are relatively homogenous, with 90 per cent of the indigenous population composed of Arabic-speaking Sunni Muslims of mixed Arab and Berber ancestry. Western Libya is the most populous region, with Tripoli and other major cities such as Zawiya and Misrata hugging the coast. This region, known as Tripolitania, shares historical and cultural links with nearby Tunisia, Algeria, and Morocco to the West. Eastern Libya is

⁶ Helen Chapin Metz (ed.), *Libya, a country study* (Library of Congress, 1987).

referred to as Cyrenaica (or *Barqah* in Arabic) and has been more closely associated with the Arab states of the Middle East. It is dominated by Libya's second city, Benghazi. This stark topographical division is reflected in the on-going tensions between Tripolitania and the Benghazi region in post-revolutionary Libya, with the south playing a less pronounced role.

Another factor complicating the Libyan scene is the influence of roughly 140 tribes or clans throughout the country. Though some Libyans suggest that "tribalism" is a misnomer for regional factionalism promoted during the Gaddafi years, these groups nevertheless played an important part in the overthrow of the regime, and still exert a strong countervailing force to efforts at re-establishing centralized control.

The Amazigh (Berber) and Tuareg communities constitute small but significant linguistic minorities along Libya's western border. Living on fringes of this majority Arab/Berber society has been a small minority of black Africans with Libyan citizenship, and larger numbers of black expatriates imported by the Gaddafi regime to provide cheap labour. A significant subgroup of the former, known as the Tawerghans, descended from slaves, with cases of slavery in Libya documented into the 1930s.⁷ Racial intolerance, discrimination and outright violence against both blacks and irregular migrants remain significant issues in Libyan life.⁸

The Libyan economy is dominated by oil, which accounts for over 60 per cent of GDP and 95 per cent of the country's revenue.⁹ Though subjecting the Libyan economy to the volatility of the petroleum market, these resources nominally give Libya a per capita GDP that ranks among the highest in Africa. During the Gaddafi years, these resources were siphoned off by a regime permeated by corruption, kickbacks, strong-arm tactics and political patronage.¹⁰ The challenge facing the new government is to find ways to use Libya's relative wealth to create a stable and prosperous state.

⁷ John Wright, *The Trans-Saharan Slave Trade* (New York, 2007).

⁸ See "Pogrom," *The Economist*, 12 October, 2000.

⁹ International Monetary Fund, "Libya—2013 Article IV Consultation Concluding Statement," (06 March 2013).

¹⁰ "Shady Dealings Helped Qaddafi Build Fortune and Regime," *New York Times* (24 March 2011).

B. History of Libya before Gaddafi

For about 350 years, Libya was a peripheral part of the Ottoman Empire. As with many former Ottoman provinces, Libya has a mixed legal tradition combining Sharia law with a civil law concepts dating back to the 1877 introduction of the Ottoman 'Majalle' or civil code. While Sharia primarily governed family and personal status issues, the Majalle set forth rules on more secular topics incompletely regulated by Sharia.¹¹

With the imposition of Italian rule in 1911, the Italian civil, criminal and commercial codes displaced the Majalle, while leaving the Sharia system untouched.¹² Under colonial rule, Libya was incorporated as an Italian province, and the courts in Libya were part of the Italian system. For instance, while a three-tiered court system was set up in Libya with a Court of Appeals based in Tripoli, final appeals on claims against the Italian state were heard by the Court of Cassation in Rome.

Armed resistance to Italian rule continued throughout the colonial period, including a persistent insurrection in the East led by a local Arab leader, Omar Mukhtar. This rebellion resulted in the formation of exceptional Italian military courts known formally as 'Tribunals for the Defence of the State' and informally as 'flying courts'. Such courts were constituted at the site of uprisings, and issued peremptory death sentences to numerous Libyans accused of insurrection including, in 1931, Omar Mukhtar.

The repressive nature of Italian rule worsened after the Italian fascists took power under Benito Mussolini in 1922. During the 1930s, a policy of forcing native Libyans into concentration camps is estimated to have led to the deaths of up to 100,000 people, or 50% of the population of the East at the time.¹³

After World War II, Libya was initially administered by the United Kingdom and France. In 1951, Libya became the first colonial country to achieve independence in a process facilitated by the United Nations. The new state emerged as a constitutional monarchy under King Idriss I, a member of the influential Sanussi clan in the East of the country. Although general elections were held for a bicameral legislature in 1952, political parties were formally banned shortly thereafter.

Initially, Libya was set up to be a federal state, with the capital moving periodically between Tripoli and Benghazi. However, in 1963 the constitution was amended to introduce a centralized, unitary system.¹⁴ In terms of foreign policy, the Kingdom aligned itself with the United States and the United Kingdom, supporting Arab inde-

¹¹ Chapin Metz, 203.

¹² Interview, ICG Libya, 19 January 2013.

¹³ Lindsey Hilsum, *Sandstorm: Libya in the Time of Revolution* (London: Faber and Faber, 2012), 12.

¹⁴ Chapin Metz, 58.

pendence in the region but eschewing the more radical Arab nationalism propounded by leaders such as Egypt's Gamel Abdel Nasser.

In some senses, little changed during the monarchy. The country remained one of the poorest and most sparsely settled in the world, although the discovery of oil in 1959 would have far-reaching consequences. Thousands of Italian settlers remained, holding important administrative positions and farming much of Libya's most arable land.

The justice system similarly remained largely unchanged, with the Italian codes remaining in effect after World War II and most courts staffed by Italian, English, Tunisian and Egyptian judges. The penal and civil codes were reformed in the early 1950s by the famous Egyptian legal scholar Abd Al-Razzaq Al-Sanhuri.¹⁵ The resulting codes retained many Italian influences, but introduced some innovations such as the introduction of an 'indictment chamber' as part of the criminal charging process.¹⁶ Sharia law and courts continued to function alongside the formal system.¹⁷ The first Libyan university was not established until in 1955 in Benghazi. Eventually, a law faculty was established there in 1962, the same year that the Libyan Bar Association was founded.¹⁸

¹⁵ These reforms resulted in a new Penal Code and Code of Criminal Procedure.

The 1953 Libyan Penal Code can be found at: <http://archive.org/details/LibyanPenalCodeenglish>.

¹⁶ Interview, ICG Libya, 19 January 2013.

¹⁷ Chapin Metz, 203.

¹⁸ European Commission, "Higher Education in Libya" (updated July 2012), 3.

C. The Gaddafi years, 1969 – 2011

Upon seizing power in September 1969, Colonel Gaddafi introduced an idiosyncratic version of Arab socialism that purported to build on direct democracy, guarantees of rights and dignity, a redistributive ethos and the traditions of Sharia law. Although the regime periodically invested in social reforms and oversaw a period of sustained population and income growth, the Gaddafi years are now viewed as a time of squandered opportunities. Ultimately, the regime remained in power for 42 years by co-opting or destroying public institutions, driving many Libyans into exile, pushing most of the remaining population into a state of political apathy, crushing both political opposition and private initiative, dividing cities and tribes against each other, and exercising tight control over oil revenues in a manner that fostered waste and corruption.

An array of purportedly democratic institutions provided a screen behind which Gaddafi and his associates exercised absolute power through a set of parallel institutions and a ruthless internal security regime. In legislative terms, from the earliest days the Gaddafi regime encouraged the proliferation of multiple laws, regulations and institutions with no clear hierarchical order.¹⁹ An initial Constitutional Proclamation of 11 December, 1969 annulled the 1951 Constitution, but failed to replace it with a new basic law.²⁰ Instead, the regime promulgated quasi-legal statements such as Gaddafi's 1973 speech in Zuwara declaring a 'Cultural Revolution,' and the rambling policy manifestos later set out in his three-volume 'Green Book.'²¹

While the 1969 Proclamation continued all earlier laws and decrees not in conflict with revolutionary principles, the 1973 Zuwara speech annulled prior laws pending their replacement with laws compatible with Sharia.²² In fact, a committee had been set up in 1971 to review all legislation for its compliance with Sharia, but relatively modest changes were made.²³ Some of the most debated amendments involved the introduction of harsh physical punishments into the Penal Code, but these sanctions were rarely applied in practice.²⁴ While the practical effect was the continuation of the monarchy's legislative framework with relatively minor modifications, the institutional effect was farther-reaching. With Sharia ostensibly integrated into the national laws, the separate system of Sharia courts was no longer needed and they were fully incorporated into the ordinary court system in 1973.

¹⁹ Chapin Metz, 67.

²⁰ Chapin Metz, 186.

²¹ ILAC, "Pre-Assessment Mission, Libya: 16-23 November 2011" (2011), 6.

²² Chapin Metz, 221.

²³ Ann Elizabeth Mayer, "Reinstating Islamic Criminal Law in Libya", in Daisy Hilse Dwyer, *Law and Islam in the Middle East* (Greenwood Publishing Group, 1990) pp. 99–115 ((1990).

²⁴ Chapin Metz, 204.

Perhaps more significant, throughout the 1970s Gaddafi developed a unique ideology focused on the ‘Jamahiriya’ or ‘state of the masses’ principles. In 1975, Gaddafi’s first Green Book was published, describing a political system based on consultative direct democracy. Three years later, a second Green Book elaborated a comprehensive economic theory that prohibited wage labour and rental relationships as inherently exploitative, and espoused a right for every person to the resources necessary to meet their own material needs. In 1978, laws were passed effectively confiscating and transferring all rental property to those leasing it. Other laws subjected all private businesses to the control of revolutionary ‘People’s Committees.’²⁵ These laws effectively destroyed the private sector, resulting in the mass emigration of educated Libyans and leaving the country entirely dependent on oil revenues, which were tightly controlled by the regime.

The late 1970s saw an increasing number of repressive measures, such as the creation of ‘revolutionary committees’ meant to protect the Jamahiriya system. These committees consisted of “zealous, mostly youthful individuals with modest education” and quickly developed into a de facto network of secret police.²⁶ Revolutionary committees rapidly became ubiquitous, monitoring neighbourhoods, workplaces and academic institutions (including law faculties), arresting dissidents, and not infrequently executing them after impromptu trials by ad hoc ‘revolutionary courts.’

During the 1980s, the regime engaged in a policy of setting Libyan communities and tribes against each other.²⁷ By adjusting public investment in local infrastructure such as housing, schools, hospitals, and agricultural projects, Gaddafi favoured client tribes and punished areas deemed disloyal to his regime. For instance, the systematic lack of investment in the East was one of the factors underlying Benghazi’s central role in the 2011 uprising.²⁸ In some cases, Gaddafi’s tribal patronage amounted to ethnic engineering, creating grievances that led to some of the worst violence of the 2011 conflict and rivalries that continue to haunt Libya today.²⁹

By the late 1980s, a global oil glut coupled with sanctions imposed in the wake of the 1988 Lockerbie bombing created a deepening political and economic malaise. While most Libyans responded with political apathy, several coups were attempted and an Islamist insurgency led by Afghanistan veterans later rocked the country’s eastern region.³⁰ Popular anger over the June 1996 massacre of 1,300 political prisoners – mostly Islamic fighters captured in the East – at Abu Salim prison in Tripoli created further grievances that would fuel the 17 February, 2011 uprising against the Gaddafi regime.

25 Chapin Metz, 139.

26 Chapin Metz, 197.

27 Chapin Metz, 64.

28 Hilsun, 10.

29 UNHCR “Housing, Land and Property Issues and the Response to Displacement in Libya” (2012).

30 Hilsun, 87-8.

i. Control of the judiciary and special courts

In his 1969 Constitutional Proclamation, Gaddafi affirmed certain fundamental judicial principles, such as equality before the law and the presumption of innocence. Thereafter, the regime left the regular judicial system essentially unchanged, but regularly bypassed it with a series of exceptional and military court systems in order to prosecute political crimes. This arrangement allowed the formal judicial system to emerge from the Gaddafi era somewhat untainted by public resentment.

On the other hand, the Gaddafi regime shared a number of tactics for control of the regular judiciary with other authoritarian regimes in the MENA region.³¹ Foremost among these was the imposition of executive authority over the judicial system through, in the case of Libya, a ‘High Council of Judicial Bodies’ with responsibility and authority over the judiciary. The High Council was chaired by the Secretariat (now ‘Ministry’) of Justice, effectively placing the judiciary within the executive branch. The Secretariat used its control over salaries, promotions and transfers to reward judicial officers for doing its bidding and to punish them for recalcitrance.³²

However, in addition to the regular court system, Gaddafi created a series of special courts primarily intended to try political and security crimes against the state. The earliest of these courts – the so-called People’s Court – was established in 1971 to try members of the former royal family and others accused of pre-Gaddafi crimes.³³ In January 1977, a new People’s Court was formed to try political detainees suspected of dissident activity. One former prisoner tried in the People’s Court described to the ILAC Team how he was imprisoned for 15 years – from age 22 – accused of seeking to set up a political party.³⁴

In the early 1980s, with the Gaddafi regime’s encouragement, revolutionary committee members established revolutionary courts that held public, sometimes televised, trials and executions of those charged with crimes against the revolution.³⁵ This period coincided with a complete prohibition of the legal profession in 1981 and the creation of a corps of People’s Lawyers employed by the Secretariat of Justice.³⁶

31 Euro-Mediterranean Human Rights Network (EMHRN), “The Reform of Judiciaries in the Wake of the Arab Spring – Proceedings of the Seminar, 11-12 February 2012, Rabat” (2012).

32 Bardet, du Plessis and Mokhtar, 26.

33 Chapin Metz, 192.

34 Interview with Libyan Lawyers’ Organization (Zawiya, January 2013).

35 Chapin Metz, 47.

36 Chapin Metz, 206.

Eventually, the People's Court was formally established with Law 5 of 1988, to try political and security crimes against the state.³⁷ This new structure included an appeals court and a prosecution service, the People's Prosecution Office.³⁸ Members of the People's Court were in theory elected by the people of Libya, but were actually Gaddafi appointees.³⁹ Though the law required members of the People's Court to be independent and "subject in their judgments to the law and their conscience," the court was accused of routinely violating defendants' rights to a fair trial.⁴⁰ Under the procedures adopted by the People's Court, prosecutors could suspend defendants' due process rights, such as the right to counsel and access to evidence.⁴¹ Internal Security agents prevented lawyers from accompanying their clients during interrogations, or obtaining access to the case files.⁴² According to several sources, judges in the People's Courts often lacked legal training and were installed based upon their political loyalties.⁴³ According to reports at the time, such abuses also occurred in the regular criminal courts, but were both more frequent and more severe in the People's Court, prompting some lawyers to refuse to take cases before that Court.⁴⁴

In 2005, international pressure led Libya's central legislative assembly, the General People's Congress, to request the abolition of the People's Courts.⁴⁵ The Conference duly adopted Law No. 7 abolishing the People's Court and the People's Prosecution Office on 12 January 2005.⁴⁶ Cases pending before People's Courts at the time were transferred to regular criminal courts. Judges and prosecutors from the People's Court either were integrated into the regular judicial and prosecution systems, or returned to non-legal jobs they had held prior to their assignment to the People's Court. However, earlier decisions by the People's Courts were not reviewed, and most of those previously imprisoned remained behind bars.⁴⁷ Later, an equally repressive 'State Security Court' was introduced to try political crimes ostensibly involving terrorism.⁴⁸

37 Arab Network for Human Rights Information (ANHRI), *The Long-Aged Dictatorship: 40 Years of Qaddafi Rule in Libya*, found at <http://www.anhri.net/en/reports/libya/>.

38 Chapin Metz, 122.

39 Freedom House, "Countries at the Crossroads: Libya" (2011), found at <http://www.freedomhouse.org/report/countries-crossroads/2011/libya>.

40 Human Rights Watch (HRW), "Libya: Words to Deeds: The Urgent Need for Human Rights Reform", (January 25, 2006).

41 HRW, "Truth and Justice Can't Wait: Human Rights Developments in Libya Amid Institutional Obstacles" (December 2009).

42 HRW 2009; ANHRI.

43 *Libya court suspends trial of top Gaddafi-era intelligence official*, Reuters, 11 September, 2012

44 HRW 2006.

45 Freedom House.

46 Bureau of Democracy, Human Rights, and Labour, United States State Department, "Libya 2005" (08 March, 2006); Amnesty International, "Libya: Submission to the UN Universal Periodic Review: Ninth session of the UPR Working Group of the Human Rights Council", (November-December 2010, 12 April, 2011).

47 HRW 2006.

48 HRW, "Libya: Carry Out UN Calls for Reform" (November 2010).

In practice, judges and prosecutors were frequently expected to serve in 'special courts' – and faced the possibility of transfer to career-ending judicial backwaters for refusal. These practices blurred the line between judges who volunteered to serve in 'special courts' out of political conviction, and those forced to do so at the risk of ruining their careers. The resulting ambiguity, in turn, has fuelled a fierce debate over the nature and scope of proposed vetting processes for the judiciary.

ii. Control of the Bar

Shortly after the 1969 coup, the Bar Association – along with most other Libyan structures – came under the control of the regime. The newly established Revolutionary Command Council blocked the activities of the Bar, and Bar leaders were assassinated, exiled and imprisoned. Though Gaddafi gained control the Bar's official structures, the evidence suggests that individual practitioners were more independent-minded.⁴⁹

When the legal profession was abolished in 1981, private lawyers were allowed to continue working but only if they agreed to become 'People's Lawyers,' employees of the Directorate of Justice tasked with providing free legal aid. The creation of this cadre of lawyers, which still exists as a directorate of the Ministry of Justice, was initially seen as consistent with the philosophy of paternalistic control behind the Jamahiriya system: if the state provides judges and prosecutors, why not lawyers as well? In practice, People's Lawyers were paid a derisory monthly wage, and legal professionals told ILAC that clients clandestinely maintained the same arrangements with their lawyers as before the reform. As a result, the legal profession was forced into illegality until 1990, when Gaddafi again shifted course to seek approval – or at least tolerance – from the West.⁵⁰

iii. International rehabilitation and 'reforms' in the 2000s

The Gaddafi regime professed to espouse human rights and ratified a broad array of international and regional human rights conventions, including the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), the Convention on the Elimination of all forms of Racial Discrimination (CERD), the Convention on the Elimination of Discrimination Against Women (CEDAW), the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment and Punishment (CAT), the Convention on the Rights of Child (CRC), and the International Convention on the Protection of the Rights of all Migrant Workers and Members of their Families (ICRMW).⁵¹

49 ILAC, 'Pre-Assessment Mission, Libya' (2011), 9.

50 EMHRN, 76-9.

When criticized on human rights grounds, the regime invoked both its international law commitments and domestic law principles in asserting its full respect for human rights. For instance, in 1996 – the same year that Gaddafi’s security forces massacred 1,300 political prisoners in Abu Salim prison in Tripoli – Libya filed a report with the UN Committee on Economic, Social and Cultural Rights. In it, Gaddafi’s Libya proclaimed its adherence to guarantees of legal remedies through both ordinary and Peoples’ Courts, as well as extensive legislative guarantees, all containing “no provisions that deviate from, violate or contradict the provisions of the international instruments to which the Libyan Arab Jamahiriya is a party.”⁵²

Despite this ostensible commitment to human rights, Libya’s international reputation failed to improve. By the late 1990s, Gaddafi’s son and presumptive heir, Saif Al-Islam Gaddafi, became associated with a reform ‘opening’ meant to improve the regime’s standing, both domestically and abroad. This initiative included economic measures designed to encourage greater foreign investment, and international cooperation on a variety of matters. On the domestic front, the ‘opening’ offered a degree of political liberalization and legal reform, as well as half-hearted efforts to address past grievances such as the Abu Salim massacre and property confiscations. Though widely trumpeted, this ‘opening’ provided scant real reform.⁵³

Efforts at legal reform during the 2000s were similarly incomplete. For instance, in 2003, the government announced the formation of committees of legal experts to review and propose amendments to the penal codes.⁵⁴ By 2005, the government had proposed a new penal code and code of criminal procedure. The new laws were ostensibly based on “broad lines and concepts” from the Great Green Charter for Human Rights, and sought to replace imprisonment with fines in a number of categories of crimes.⁵⁵ However, Libyan lawyers openly criticized the draft amendments at a public meeting of the Tripoli Bar Association. The government continued to revise the draft amendments, but they were not adopted prior to the Revolution.⁵⁶

51 UN Human Rights Commission, Report of the High Commissioner under Human Rights Council resolution S-15/1, UN Doc. A/HRC/17/45 (2011), paragraph 18. It has also ratified the first Optional Protocol to the ICCPR, as well as the Optional Protocol to the CRC on the involvement of children in armed conflict (OP-CRC-AC). Libya is also a party to the Convention on the Non-Application of Statutory Limits to War Crimes and Crimes against Humanity, as well as the African Charter on Human and Peoples’ Rights and the 1949 Geneva Conventions and both of the two Additional Protocols.

52 UN Committee on Economic, Social and Cultural Rights (CESCR), “UN Committee on Economic, Social and Cultural Rights: State Party Report: Libyan Arab Jamahiriya”, UN Doc. E/1990/5/Add.26 (16 February 1996), paragraph 32.

53 Robert F. Worth, “Thousands of Libyans Struggle With Recovery of Property Confiscated by Qaddafi”, *The New York Times* (13 May 2012).

54 Amnesty International, “Libya: Rule of Law or Rule of Militias?” (July 2012).

55 HRW 2006.

56 HRW, “Libya: In Repressive Atmosphere, Pockets of Improvement” (12 December 2009).

Meanwhile, continued state interference with the private Bar provoked resistance, particularly in Benghazi. For example, in 2005 the Gaddafi regime reportedly interfered in the work of the Benghazi Bar Association, raiding its office and appointing leaders against the membership’s will. In response, more than one hundred Libyan lawyers protested, issuing a statement demanding that a law be passed to regulate the legal profession and give lawyers control over their Bar association, particularly the right to “choose [the] secretariat from among the ranks of the members of the general conference.”⁵⁷ Six years later, the regime’s detention of Benghazi lawyer Fathi Terbil reportedly sparked the popular protests that turned into the February 2011 uprising.⁵⁸

By 2010, Saif Al-Islam’s ‘opening’ was in visible decline.⁵⁹ According to most observers, his reforms had reached the point of threatening the political and economic vested interests of his siblings and other members of Gaddafi’s inner circle, and therefore had to be reined in. Whatever credibility Saif Al-Islam may have had was subsequently lost when he shocked the Libyan public with a threatening, finger-wagging speech after the outbreak of protests against the regime in early 2011.⁶⁰

One minor legacy of the Saif Al-Islam opening is that it created space for international cooperation, particularly on rule of law issues. For instance, current initiatives by the UNDP, the UN Office on Drugs and Crime (UNODC), and the International Centre for Prison Studies (ICPS) represent continuations of pre-2011 programming.⁶¹

D. The 2011 uprising and its aftermath

i. The 2011 uprising

The arc of the 2011 uprising and conflict in Libya has been well documented. Faced with the outbreak of protests in cities across the north of Libya in February, the regime responded with brutal force. In early March, the Transitional National Council (TNC) held its first meeting, establishing an Executive Committee and a Military Council, and issuing a “Founding Statement.” On 17 March, with regime forces back in control of all of the western coastal area but Misrata and advancing rapidly on Benghazi, the UN Security Council adopted Resolution 1973 ordering a no fly zone and arms embargo on Libya, and authorizing “all necessary measures” to protect civilians. As NATO coun-

57 HRW 2006.

58 Agence France Presse, ‘Libya lawyer – arrest sparked uprising’ (16 February 2012).

59 Hilsum, 182-3.

60 Hilsum, 31.

61 Interview, UNSMIL, 16 January 2013.

tries commenced airstrikes against Gaddafi forces, a military deadlock set in, with rebels holding an eastern front near Ajdabiya, and western outposts in the besieged coastal city of Misrata and the Nafusa Mountains south of Tripoli.

By June, the International Criminal Court (ICC) issued arrest warrants for Muammar Gaddafi, Saif Al-Islam Gaddafi and former intelligence chief Abdullah Al-Sanussi for their role in the violent suppression of protests. In August 2011, the TNC adopted an interim “Constitutional Declaration” for the transitional stage.⁶² The Constitutional Declaration confirmed the TNC as the legitimate authority of the country and set out steps to be taken upon the final overthrow of the regime, including the appointment of a transitional government, elections, the installation of a General National Congress (GNC) and the adoption of a permanent constitution. The Declaration also set out extensive human rights commitments and included a separate section (Part Four) on judicial guarantees, including protections of basic procedural and fair trial rights, the independence of the judiciary, and access to justice.⁶³ Subsequently, the UN Support Mission in Libya (UNSMIL) was established in September 2011 to lead “international efforts to support a nationally led process aimed at building a democratic, independent and united Libya.”⁶⁴

By mid-August 2011, the military tide began to turn. Misratan revolutionary brigades broke the siege of their city and began an assault on Tawergha, a neighboring town inhabited by a visible minority composed of the descendants of slaves. This attack resulted in the flight of Tawergha’s 30,000 residents, all of who remain displaced and stigmatized by charges that they engaged in the rape of captured Misratan civilians.⁶⁵ At the same time, a military campaign led by the anti-Gaddafi stronghold of Zintan in the Nafusa Mountains broke the loyalist resistance there, displacing similar numbers of people from the allegedly pro-Gaddafi Mashashya and Gualish tribes. Both the Misratans and the Zintanis moved toward Tripoli, which fell in September. The country was declared liberated on 23 October 2011 after the capture and killing of Gaddafi in his hometown of Sirte.

⁶² Transitional National Council (TNC) of Libya, “Draft Constitutional Charter For the Transitional Stage: The Constitutional Declaration” (Benghazi, 03 August 2011).

⁶³ NTC, Constitutional Declaration, Articles 31-3.

⁶⁴ UN Security Council, Resolution 2009 (16 September 2011).

⁶⁵ UN Commission of Inquiry, “Full Report”, paragraphs 394-6.

ii. The Transitional National Council

After liberation, the TNC appointed an interim government led by Prime Minister Abdurrahim Al-Keib, which governed the country until elections for the GNC. The transitional period of TNC leadership was marked by on-going instability and a general reluctance on the part of the new authorities to take significant or controversial decisions.⁶⁶ Nevertheless, the TNC made a number of decisions and passed some 30 laws, albeit in a legislative process that was criticized for being less than fully transparent and consultative. While some laws, such as the Election Law of January 2012, were clearly necessary to implement the Constitutional Declaration, others including legislation on transitional justice have been more controversial.

The TNC and its interim government were also faulted for failing to meet basic administrative demands upon them, including the transfer of budgetary funds necessary for local councils throughout Libya to be able to carry out their work. The dysfunctional relationship between the capital and outlying cities exacerbated an already heated debate driven by Eastern politicians about the extent to which Libya’s permanent constitution should incorporate federalism, devolving significant authority to regional governments.

Nevertheless, the TNC did set some important processes in motion, including the creation of a Committee for the Promotion of the Judiciary (“Committee of 17”) in May 2012 to study how the judiciary could be reorganized in order to make it more effective. However, little was done to respond to allegations of on-going human rights abuses by revolutionary brigades and others in Libya, nor to respond to the needs of over 50,000 internally displaced persons (IDPs) who in many cases remained without any realistic prospect of returning to their homes. Security was largely left in the hands of local revolutionary brigades, although there were initial efforts at demobilization and reintegration. These consisted largely of placing local brigades and military councils on the payroll of either the Ministry of Interior (in the guise of the ‘Supreme Security Council’) or the Ministry of Defence (as the ‘Libya Shield’ forces), without taking meaningful steps to establish effective control over or integrate them into a single chain of command.⁶⁷

As previously discussed, during this time, ILAC and its member organisations began working with Libyan partners on rule of law issues. Similarly, on 12 March 2012, the UN Security Council issued Resolution 2040, tasking UNSMIL to assist the Libyan authorities to define national needs and priorities throughout Libya, and to offer strategic and technical advice in five main areas, including promoting the rule of law.

⁶⁶ International Crisis Group (ICG), “Divided We Stand: Libya’s Enduring Conflicts” (14 September 2012).

⁶⁷ ICG 2012.

iii. The post-election situation

Nationwide elections for the GNC were successfully held on 7 July 2012. Nonetheless, instability continued to trouble the country, including fighting between communities in the south, attacks against both international targets and the security forces in the East, and on-going tribal conflict in the West. Misratan militias continued to pursue Tawerghan IDPs, arresting men and boys and subjecting them to arbitrary detention, torture and in some cases extrajudicial execution. Fighting between Zintani forces and members of the Mashashya tribe remaining in the Nafusa Mountains also flared up, with a pitched battle occurring the towns of Mizdah and Shgeiga on the eve of the elections. Several towns perceived as pro-Gaddafi such as Sirte and Bani Walid remained unstable, with a major incursion into Bani Walid in October 2012 seeming to result as much from tribal and political rivalries as the need to assert state control.⁶⁸

The International Crisis Group (ICG) has highlighted the important role of local notables in negotiating ceasefires in situations of tribal conflict. At the same time, the ICG noted that such efforts rarely lead to durable peace in the absence of credible state enforcement capacity and rule of law institutions capable of prospectively resolving disputes in a peaceful and legitimate manner.⁶⁹

Perhaps the single most disturbing demonstration of Libya's current instability was the 11 September, 2012 attack in Benghazi that led to the death of the US Ambassador Christopher Stevens and three other Americans. These attacks, along with an escalating pattern of threats, occupations and violent protests at the GNC in Tripoli and unfounded rumours of a second revolution on the second anniversary of the uprising appear to have increased awareness of the need for security and the rule of law in Libya.

While the interim TNC government took important initial steps to improve the rule of law in Libya, the possibilities for true reform have expanded dramatically with the election of the GNC and its 31 October 2012 approval of a government under Prime Minister Ali Zeidan. As discussed below, the ILAC team believes that, notwithstanding major obstacles, Libya may be poised to move forward with meaningful justice sector reforms in keeping with the ideals of its Revolution.

⁶⁸ Borzou Daragahi, "Libya army has 'no control' in Bani Walid", *Financial Times* (30 October 2012).

⁶⁹ ICG 2012.

iv. Libya's rule of law moment

A number of factors now point toward meaningful reforms involving the independence of the judiciary and the rule of law in Libya:

- The political process is again moving forward after a long debate resulted in a February 2013 decision to elect the constitutional drafting committee. Many Libyan civil society organisations have used the delay to encourage citizens to participate in the forthcoming debates over Libya's future.
- The Zeidan government is strongly committed to reforms in this area. During a recent trip to Geneva, the Prime Minister reaffirmed Libya's human rights commitments.⁷⁰ The present Minister of Justice, Saleh Al Merghani, is a determined human rights campaigner recognized for his courageous legal advocacy during the Gaddafi period, and his early and outspoken criticism of abuses by revolutionary brigades.⁷¹
- Judicial independence has been substantially enhanced through the removal of the Ministry of Justice from the High Judicial Council, which controls the judiciary. Judges, prosecutors, and private lawyers now appear to share a clear commitment to revitalizing the rule of law in Libya.
- The framework for reform is becoming increasingly clear. The Committee for the Promotion of the Judiciary issued its final report in January 2013, the Minister of Justice has forwarded bills on transitional justice to the GNC, the bar associations have completed a new bill regulating the legal profession, and the new national human rights institution – the Basic Freedoms and Human Rights Council (BFHRC) – has begun to work. Finally, the debate over judicial vetting has begun in earnest, providing hope for a quick and effective solution.
- International support is also coalescing. Most notably, donors presently working in Libya stated their support for the new government's 'Security, Justice and Rule of Law Priorities,' and committed to work within the framework of UN coordination of international assistance in Libya.⁷² In addition, the UNDP has begun implementation of a programme of support to rule of law, access to justice and transitional justice. Many bilateral donors and international non-governmental organisations (INGOs) have become similarly engaged.

⁷⁰ "Libya looks to new human rights credentials", *Libya Herald* (26 February 2013).

⁷¹ Borzou Daragahi, "Concern over Libyan justice system", *Financial Times* (31 July 2012).

⁷² Ministry of Foreign Affairs of France, "International Ministerial Conference on Support to Libya in the Areas of Security, Justice and Rule of Law – Communiqué" (Paris, 12 February 2013), paragraph 8.

In sum, as Libya's political transition matures, the energy behind the rule of law debate remains and the urgency for rule of law reform has never been clearer. However, to move forward, rule of law actors must develop clear strategies for dealing with a number of transitional issues.

III. Transitional Challenges in Libya

Though it is now commonplace to refer to a 'new' democratic Libya, the country faces difficulties in moving beyond the legacy of 42 years of dictatorship. The divisions and grievances sown by four decades of Gaddafi's idiosyncratic rule were greatly exacerbated during the eight months of bitter fighting in 2011 that led to his downfall.

Although Libya's initial recovery from conflict and successful elections built on a tremendous surge of optimism, chronic instability and frequent bouts of violence are a reminder of the challenges ahead. The status of rule of law in Libya is emblematic of this dynamic. Rapid and effective engagement by rule of law institutions is key to achieving a successful political transition, yet the reform of these same institutions is central to this transition.

A. The rule of law and transitional justice

When a free Libya without Gaddafi began to look feasible, rule of law and transitional justice were highlighted as key areas for international support to the TNC.⁷³ Transitional justice has been understood as contributing to the rebuilding of rule of law since at least 2004, when then-UN Secretary General Kofi Annan reported on the links between these fields of activity.⁷⁴ The four mechanisms for achieving transitional justice, as set out by the Secretary-General, are truth-seeking, prosecution of those responsible for abuses, reparations to victims, and institutional reform to address structural factors that allowed abuses to happen. Recent analyses suggest that successful transitional justice programs must be 'comprehensive', and use all four mechanisms to rebuild trust in institutions and contribute to long-term reconciliation.⁷⁵

Efforts to rebuild the rule of law most clearly correspond to institutional reform. However, rule of law reform arguably operates along a longer time frame. It encompasses not only "transitional" reforms to address the complicity of judicial institutions in past abuses, but also long-term technical reforms to optimize the effectiveness of such institutions under more ordinary circumstances. Meanwhile, the institutions that are the object of transitional reform may also become involved in addressing other transitional issues,

⁷³ Elise Labott, "Senior officials: U.N. to play key assistance role in Libya", *CNN* (01 September 2011).

⁷⁴ UN Security Council, "The rule of law and transitional justice in conflict and post-conflict societies – Report of the Secretary-General", UN Doc. S/2004/616 (23 August 2004).

⁷⁵ Human Rights Council, "Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, Pablo de Greiff", UN Doc. A/HRC/21/46 (09 August 2012).

such as the prosecution of alleged wrongdoers and reparations programs. Thus in Libya, proposals to vet the judiciary are considered while the judiciary plays a central – and demanding – role in judging those accused of past human rights violations.

This report thus primarily focuses on Libyan rule of law institutions that are both (1) *permanent* rather than temporary or ad hoc, and (2) ‘*ordinary*’, in that they engage in rule of law activities in ordinary as well as transitional situations.

B. Transitional justice in Libya

During and since the Revolution, the new Libyan authorities have consistently embraced transitional justice, national reconciliation, respect for human rights, and rebuilding the rule of law as post-conflict priorities. The international community in Libya has also mainstreamed these issues. Perhaps most notably, UNSMIL has taken the unprecedented step of creating a single unit responsible for rule of law, human rights and transitional justice issues.⁷⁶ However, efforts to define and implement an approach to transitional justice in Libya have encountered difficulties, which have raised both conceptual and practical complications related to rule of law assistance.

Lurking behind many of these issues is the political question of national reconciliation. The 2011 conflict in Libya is often portrayed as a contest between an oppressed population thirsting for freedom, and a ruthless dictator and his retinue. While accurate, others have also noted that the conflict played out between ethnic and tribal communities that respectively were associated with and disadvantaged by the Gaddafi regime. The ICG described the closing days of the revolt as a tense period of both conflict and negotiations, during which some communities that did not actively support the revolution came to terms with it, while others accused of committing crimes on the regime’s behalf were collectively expelled from their homes.⁷⁷

The most obvious losers are the 50,000 IDPs, who primarily come from three communities attributed guilt for crimes on behalf of the regime. Many of the approximately 8,000 ‘conflict-related’ detainees still being held without charges or representation in Libya hail from these communities.⁷⁸ Other non-displaced groups, along with the populations of reputedly pro-Gaddafi towns such as Sirte and Bani Walid, continue to live under suspicion and the threat of armed attack. Meanwhile, the entire desert south remains a military zone characterized by tribal rivalries, institutionalized cross-border smuggling and little state control.⁷⁹

⁷⁶ Interview, UNSMIL, 16 January 2013. The UNDP in Libya is also in the course of implementing a program that includes supporting the capacity of rule of law institutions alongside access to justice for vulnerable groups and transitional justice.

⁷⁷ ICG 2012.

⁷⁸ HRW, “Libya: Slow Pace of Reform Harms Rights” (press release, February 6, 2013).

⁷⁹ Peter Cole, “Borderline Chaos: Stabilizing Libya’s Periphery” Carnegie Endowment for International Peace (October 2012).

Libya’s international law obligations require that the guilt of individual members of impugned communities be determined in accordance with law. At the same time, the country’s political future depends on finding a transitional justice formula that allows such communities to reintegrate into the new Libya, alongside Gaddafi’s victims and the population as a whole. However, recent strict political vetting proposals risk creating a destabilizing alliance between disenfranchised political elites and dispossessed communities.⁸⁰ Whether viewed from the perspective of rule of law, transitional justice or political stability, Libyan authorities must pursue individual accountability and avoid collective retribution.

Early efforts by the TNC to develop a framework for transitional justice were immediately controversial. The TNC’s Law No. 4 of 2011 set up the FFRC and tasked it primarily with victims’ reparations.⁸¹ However, this law narrowly limited its scope to redress for “the violations of human rights and basic freedoms *committed by the Libyan former regime*.”⁸² A subsequent law, No. 38 of 2012, purported to provide amnesty for “acts made necessary by the 17 February revolution.” Law 38 was decried by some observers as a “serious impediment to the establishment of the rule of law in Libya” and a throw-back to “the culture that existed under the Gaddafi regime, where all was justified in the name of the 1969 Revolution.”⁸³

After the July 2012 elections, the Zeidan government sought to redefine transitional justice and expand the definitions of victims and perpetrators. The Minister of Justice has introduced three bills to explicitly override the earlier TNC legislation on transitional justice. These include an amended and greatly expanded version of Law No. 4 that includes a clear mandate for the FFRC to investigate systematic violations against all Libyans, committed by any actors, during the period culminating in the July 2012 elections.⁸⁴ A second bill on the “criminalization of torture, enforced disappearance and discrimination” confirms that no amnesty is permissible for severe violations carried out during and after the 2011 conflict.⁸⁵ The third bill would function to prevent military trials of civilians not subject to the military code.⁸⁶ As of the publication of this report, however, these bills remained pending before the GNC, leaving the FFRC idle and the country without an authoritative set of norms on transitional justice.

⁸⁰ Ibrahim Sharquieh, “An Ill-Advised Purge in Libya”, *The New York Times* (18 February 2013).

⁸¹ National Transitional Council of Libya, Law no. 4 for the year 2011 Concerning National Reconciliation and Transitional Justice (2011).

⁸² *Ibid.*, Article 1 (emphasis added). This provision went on to call as well for “attempts to achieve reconciliation in cordial means between some community groups.”

⁸³ Lawyers for Justice in Libya (LJIL), “LFJL strongly condemns new laws breaching human rights and undermining the rule of law” (Press release, 07 May 2012).

⁸⁴ Draft Law on Transitional Justice.

⁸⁵ Draft Law on Criminalization of Torture, Enforced Disappearance and Discrimination.

⁸⁶ Draft Law Regarding Amendment of the Military Penal and Procedures Laws.

C. Cross-cutting transitional issues

The ILAC team identified several key transitional justice issues that are crosscutting in the sense that they are likely to affect the work of many of the 'ordinary' rule of law institutions discussed in this report.

i. Detention and prosecution of accused Gaddafi-regime supporters

The on-going detention without charge or trial of roughly 8,000 persons alleged to have committed severe crimes on behalf of the Gaddafi regime (so-called 'conflict-related' detainees) is undoubtedly the most serious human rights and rule of law challenge facing the new Libya. While most are allegedly fighters or members of the security forces from the Gaddafi regime, some are political figures such as Saif Al-Islam Gaddafi, the dictator's son and presumptive heir, Abdullah Al-Sanussi, the former intelligence chief, and Baghdadi Mahmoudi, the last Gaddafi-era Prime Minister of Libya.

Many were captured during or immediately after the fighting in 2011, and have been detained without charges or representation for nearly two years. Others have been rounded up since, most notably men and boys from the Tawergha community, who have frequently been detained in armed incursions into IDP camps or arrested at roadblocks.⁸⁷ A handful, such as Baghdadi and Al-Sanussi, were transferred to Libyan jurisdiction from outside the country.

While state authorities hold about 5,000 of these detainees, the remainder are in extra-legal detention centres run by local brigades. In practice, the authorities have frequently had only incomplete control over even official prisons, leaving many of those detained at risk of abuse and torture. The continued detention of most conflict-related detainees, in any case, is illegal under Libyan law due to their long detention without having their case presented to a prosecutor for investigation (see below).

Proceedings have begun in some high profile cases, but these prosecutions have been controversial. Many of these proceedings have utilized exceptional and military court procedures previously used by the Gaddafi regime against its political opponents. Though the NTC abolished the State Security Court in April 2011, the legacy of these exceptional courts remains ingrained in the Libyan justice system.⁸⁸ For instance, reports on the development of a prison and courtroom complex in Tripoli for high

⁸⁷ "UN given assurances over Tawergha refugees' safety," *Libya Herald* (13 February 2012).

⁸⁸ NTC Resolution No. 17 of 2 April 2011, cited in "Lawyers for Justice in Libya and REDRESS Trust's Observations Pursuant to Rule 103 of the Rules of Procedure and Evidence," filed in the Situation in Libya in the Case of the *Prosecutor v. Saif al-Islam Gaddafi and Abdullah al-Sanussi*, ICC-01/11-01/11 (08 June, 2012).

profile members of Gaddafi regime have led to "fears among some jurists that a parallel, politically-motivated special court system overseen by carefully vetted judges is already beginning to rise from the ashes of the former regime."⁸⁹

More immediate concerns relate to the fact that military courts continue to try cases involving civilians, pending GNC consideration of the Minister of Justice's proposal to limit the jurisdiction of such courts.⁹⁰ In addition, despite the abolition of the People's Courts in 2005, the procedures applied by such courts remained in force. These procedures, at least initially, have been applied in post-Revolution proceedings against several regime figures, most notably Saif al-Islam.⁹¹ The ILAC team was informed on several occasions that the Supreme Court in December 2012 had issued a decision prospectively banning all further application of the People's Court procedures. However, the controversial and confused legacy of Gaddafi-era special courts remain a key issue in the on-going complementary proceedings involving high profile regime figures indicted by the ICC.

Meanwhile, urgent steps must be taken to address the plight of lower profile detainees. Many have not been charged, have not seen a lawyer or prosecutor, and frequently remain detained under inhumane conditions and at risk of torture. Toward this end, the Minister of Justice initiated a pilot project in Misrata for transferring all detainees to the exclusive control of the state Judicial Police.⁹² According to the ministerial instruction authorizing this program, a government building in Misrata will be renovated as a state prison, and all conflict-related detainees held in Misrata must be transferred to it no later than June 2013. Staff from other Misrata prisons, who are willing and eligible, will be retrained and hired by the Judicial Police force. ILAC was also informed that teams of outside prosecutors will be brought to Misrata to screen the detainees and ascertain whether a legal basis exists for further detention and indictment in each individual case. However, once detainees have been transferred and screened, the issue of their prosecution remains.

Issues regarding abuses during and after the uprising are also being addressed. The Minister of Justice recently stated that the Ministry will not only seek to raise awareness of Libya's human rights obligations among "rebels, security forces, and other armed groups," but also hold perpetrators accountable where abuses occur.⁹³ In this regard, the Ministry recently initiated an investigation into the deaths of 23 detainees from Bani Walid while

⁸⁹ Borzou Daragahi, "Concern over Libyan justice system," *Financial Times* (31 July 2012).

⁹⁰ HRW, "Libya: Halt Military Trial of Ex-Transition Chief" (press release, 20 December 2012).

⁹¹ "Decision requesting further submissions on issues related to the admissibility of the case against Saif Al-Islam Gaddafi" No.: ICC-01/11-01/11, 7 December 2012.

⁹² Ministry of Justice, Decision by the Minister of Justice number 219, of 2013 regarding Misrata's "Jwiya" Correction and Rehabilitation Institution (18 February 2013).

⁹³ Statement by Justice Minister of Libya Salah Marghani about Libya Chapter of HRW World Report 2013 (06 February 2013).

held in Misrata.⁹⁴ Moreover, under the draft transitional justice law submitted by the Ministry of Justice, the FFRC will be given a clear legislative mandate to investigate allegations of systematic human rights violations. Similarly, both the BFHRC and its civil society partners are required to receive and investigate complaints regarding such crimes.

In all these cases, however, allegations of criminal acts must ultimately be referred to the prosecutor for handling by the judiciary. Here, a paradox arises in that the same judicial officials expected to prosecute such complaints are themselves likely to be subject to vetting processes.

The judiciary's role in redress for past violations also goes to the heart of the security issue. When the ILAC assessment team spoke to judges in western Libya most stated that security had only been an issue in the immediate aftermath of the Revolution. However, their courts had not yet begun to process significant numbers of cases against conflict-related detainees. While the security situation facing the judiciary in the East may involve a broader pattern of attacks on public and security institutions, attacks on the judiciary in the West appear to result from court's exercising their independence to acquit suspects popularly believed to have committed crimes against civilians.⁹⁵ Until public trust in the judiciary is restored, such violence will continue to present a threat.

ii. Vetting of public officials, including judges

Vetting has been institutionalized in Libya since the July 2012 elections, when an 'Integrity Commission' was set up to disqualify candidates for the GNC who had committed abuses on behalf of, or benefitted inappropriately from their association with, the prior regime. Given the number of candidates and short timelines, the Commission was forced to examine many individuals after they had been elected. Although the Commission's rulings are subject to judicial appeal and have in some cases been overturned, observers remain concerned about the vagueness of the vetting criteria and the level of due process accorded to those subject to scrutiny.

While there appears to be a general consensus that judges and prosecutors should continue to serve subject to some form of vetting, there has been little agreement on how to proceed. As discussed below, most judicial officials interviewed for this report contended that a post-2011 process of review, which generally followed the pre-existing procedures used by the Judicial Inspectorate, had accomplished the goal of removing incompetent and politically appointed judicial officials through retirement or transfer to other departments within the Ministry of Justice. This view was not necessarily shared by

⁹⁴ Ashraf Abdul-Wahab, "SSC gunmen threaten to release Jadida Prison inmates", *Libya Herald* (3 April 2013)

⁹⁵ Bardet, du Plessis and Mokhtar.

others with whom the ILAC team spoke. In any event, the High Judicial Council is known to be working on a bill on reform of the judiciary that would include a vetting component.

Judicial vetting has recently become part of a broader and more contentious debate regarding a proposed 'Law on Political Isolation'. Many observers believe that the various proposed drafts of this law include unacceptably vague criteria and would affect an unreasonably broad swathe of public servants and officials. The result would be a complete lustration process, rather than selective vetting, and remove an entire generation of experienced administrators. Such an outcome could short-circuit the democratic process, and foster a destabilizing coalition between disenfranchised elites and the communities currently-stigmatized for their alleged support for the Gaddafi regime. The social collapse that followed the de-Baathification process in Iraq has been invoked as a warning to Libyan politicians.⁹⁶

Nevertheless, judicial vetting remains at the heart of the current debate, with some observers speculating that the vehemence behind the Political Isolation bill may stem from the failure of earlier vetting processes led by the Integrity Commission to cover judicial officials. Driving the debate over judicial vetting is the uncertainty regarding whether judges volunteered or were forced to serve on Gaddafi-era special courts.

iii. Fact-finding and accountability

One of the more sensitive topics in Libyan political life has been redress for human rights violations carried out by anti-Gaddafi elements during the revolution. As set out above, the current government is seeking to reverse the amnesty for such acts passed by the TNC. Moreover, proposed legislation expands the mandate of the FFRC to hear all victims and identify all perpetrators of human rights violations within its jurisdiction. Accordingly, if this legislation is adopted and implemented, abuses by revolutionary forces likely will surface and be referred to the judicial system. For example, the UN Commission of Inquiry has suggested that the destruction of Tawergha and displacement of its inhabitants may constitute crimes against humanity. Such highly controversial acts, implicating current heroes of the Revolution, will present even greater tests of Libyan judicial independence and effectiveness.

⁹⁶ Ibrahim Sharquieh, "An Ill-Advised Purge in Libya," *The New York Times* (18 February 2013).

D. Gender equality and the rule of law

In common with other autocratic regimes in the region, the Gaddafi regime claimed to champion women's rights. While it facilitated significant progress in areas like education and workforce participation, the regime fell short of bringing about genuine equality.⁹⁷ For example, Gaddafi's 'Green Book' confirms that men and women are "equal as human beings", but added that "there must be different prevailing conditions for each one in order that they perform their naturally different roles."⁹⁸ Gaddafi did increase women's access to education and jobs, including in non-traditional areas such as policing, government and the judiciary. However, this policy allegedly was in part aimed at "weakening traditional tribal and religious powers", and advancement for women was conditioned on "total adherence" to the regime's strictures.⁹⁹

Against this background, many observers were alarmed when the then head of the TNC, Mustafa Abdel-Jalil, in an October 2011 speech marking Gaddafi's overthrow announced that restrictions on polygamy would be scrapped in accordance with Sharia law.¹⁰⁰ Mr. Jalil later apologized for the comment, and the TNC adopted a well-received quota that ensured the election of 33 women to the GNC.

Nonetheless, concerns continue. The current Zeidan government only includes two women. In addition, a February 2013 decision by the Supreme Court of Libya reduced the legal barriers to polygamy.¹⁰¹ More recently, the Grand Mufti of Libya condemned a UN Commission on the Status of Women report on women's rights:

The statement from the Grand Mufti noted that the principles contained were "unjust and destructive" It added: "The least of its danger is the undermining of family's structure and its integrity as well as advocating immorality and indecency in addition to rebelliousness against religion and clear objections to the laws contained in the Quran and Sunnah." It said that the Fatwa Office appreciated efforts by civil society organisations to enlighten Muslim women about "their effective role in maintaining the family unit, the tightening of its bond, maintaining of its values and the fundamentals of religion as well as the encouragement of woman's active participation in carrying out her appropriate and decent role in public life."¹⁰²

97 Chapin Metz, 107-15.

98 Muammar Gaddafi, *The Green Book* (undated), 25.

99 "Quaddafi's biggest fans? Libyan women with power", *CBS News* (08 June 2011).

100 Adam Nossiter, "Hinting at an End to a Curb on Polygamy, Interim Libyan Leader Stirs Anger", *The New York Times* (29 October 2011).

101 Jamie Dettmer, "Libya's Women Activists Outraged by Court Ruling on Wives", *Voice of America* (27 February 2013).

102 "Grand Mufti condemns UN report on violence against women", *Libya Herald* (11 March 2013); see also, Nadine Marroushi, "Egypt's Muslim Brotherhood Condemns UN Report on Women"

While there is a near-universal support for Sharia as the country's legal bedrock, debate continues concerning interpretation and what Sharia entails in practice. In the meantime, the concept of different societal roles for men and women is reflected in a tendency in Libyan criminal law to downplay crimes of violence against women in cases where they purportedly deviated from their accorded role. Human Rights Watch has noted a series of unaddressed concerns dating back to the Gaddafi-era:

Libya's penal code considers sexual violence to be a crime against a woman's "honour" rather than against the individual. The code's provisions permits a reduction in sentence for a man who kills a wife, mother, daughter, or sister whom he suspects is engaged in extramarital sexual relations. The law does not specifically prohibit domestic violence and there are no voluntary shelters for victims of violence.¹⁰³

The concept of rape as a crime against honour also complicates efforts to address conflict-related sexual violence. To date, inhibitions against discussing rape, together with concerns about the repercussions to victims should they come forward, have hindered the investigation of alleged mass-rapes in Misrata. The on-going failure to conduct such investigations jeopardizes the access of survivors to medical or psychosocial services, undermines individual responsibility if available evidence is not collected, and permanently stigmatizes entire communities with unproved allegations of rape.

Perhaps most disturbing, the Constitutional Declaration does not include a prohibition on discrimination on the basis of sex or gender in its otherwise progressive catalogue of rights.¹⁰⁴ Contemporary observers are concerned that current political trends could soon erode the fragile gains made during the last decades and block future progress.¹⁰⁵ For instance, human rights activists reacted critically when the Grand Mufti recently called for limiting the right of Libyan women to marry foreign nationals.¹⁰⁶

From a rule of law perspective, one of the most striking observations was the underrepresentation of women in the judiciary and other legal institutions, particularly in light of their predominance among law students. Although there is apparent geographical variation, the underrepresentation of women was particularly noticeable in senior and leadership positions. A common explanation was that female legal professionals were frequently expected to balance their careers with domestic responsibili-

103 Human Rights Watch, *World Report 2013* (31 January 2013), Libya Country Chapter, available at: <http://www.hrw.org/world-report/2013/country-chapters/libya>.

104 Ibid. See Article 5: "Libyans shall be equal before the law. They shall enjoy equal civil and political rights, shall have the same opportunities, and be subject to the same public duties and obligations, without discrimination due to religion, doctrine, language, wealth, race, kinship, political opinions, and social status, tribal or eminent or familial loyalty"

105 Magdulien Abaida, "Opinion: Women are in a state of denial regarding women's rights in Libya", *Libya Herald* (13 December 2012).

106 "Ban Libyan women from marrying foreigners: Grand Mufti", *Libya Herald* (31 March 2013).

ties, and tended to opt for career paths that allowed part-time work and flexibility – at the cost of advancement. On the other hand, the ILAC team was deeply impressed with the dedication and skills of the Libyan women judges, politicians and civil society representatives they met. ILAC shares the view that the uprising created new opportunities for women to mobilize and directly influence the new Libya.¹⁰⁷

¹⁰⁷ Tom Westcott, "Don't just focus on the negatives, Libyan female activist tells BBC interviewer", Libya Herald (09 December 2012).

IV. Rule of Law Institutions in Libya

A. The Judiciary

In Libya, the judiciary is understood as including both judges and prosecutors, with the latter eligible to become judges after reaching the requisite level of seniority. The business of managing the judiciary is entrusted to a 'High Council' that remained largely under the control of the Ministry of Justice during the Gaddafi era, but which has now been more clearly separated from the executive branch.

i. High Judicial Council

Under Law No 6 of 2006, the judiciary was controlled by the 'High Council of Judicial Bodies,' which in turn was controlled by the Ministry of Justice. One crucial reform by the TNC was the adoption of Law No. 4 of 2011, which substantially amended Law No 6 by creating a renamed 'High Judicial Council' (HJC) composed solely of senior judicial officials. The Ministry of Justice and a number of bodies associated with the Ministry (including the Directorates of State Lawyers, People's Lawyers and Law) were completely removed from participation on the Council.

The HJC is currently composed of the Chief Justice of the Supreme Court, as president, together with the Prosecutor General, as deputy, and the Heads of the seven regional Courts of Appeals. The HJC's primary role is the supervision of the judiciary, including employment and personnel decisions concerning appointments, promotions, transfers and secondments. As in many authoritarian countries, executive control (in Gaddafi's Libya, by the Ministry of Justice) over these decisions gave it effective control over the judiciary.¹⁰⁸ Placing these powers in the hands of the judiciary was a crucial step toward judicial independence. Nevertheless, many observers feel that further steps are necessary to separate the HJC from the Ministry of Justice, which still pays judicial salaries and is responsible for the upkeep of judicial premises.

The HJC has the power to establish new ordinary courts at all levels, and to define their geographical jurisdictions. For example, one pending proposal is the creation of a new

¹⁰⁸ EMHRN, 8.

Court of First Instance in Msalata, within the Khoms Appeals Court district.¹⁰⁹ While the power to establish ordinary courts causes little controversy, the HJC also may establish specialized courts, which raises sensitivities in light of the Gaddafi regime's abuse of such courts. However, future reform proposals likely will involve greater court specialization, given the range of judicial activities in Libya (ranging from family and criminal law to administrative and constitutional matters). Experts such as those in the Committee of 17 have noted the need to promote judicial specialization in appropriate cases, in a manner that does not recreate Gaddafi-style ad hoc courts.¹¹⁰

ii. Structure of the Courts

The judiciary in Libya has a unitary, hierarchal system of courts with four tiers. At the local level, *District Courts*, each comprised of a single sitting judge, hear civil and commercial cases involving claims of less than 1,000 Libyan dinars, (approx. US\$780) as well as some family law cases. The next level are *Courts of First Instance*, which take appeals from District Courts and enjoy first instance jurisdiction over all civil, commercial and family law cases not within the jurisdiction of the District Courts.

Each *Court of Appeals* covers the districts of several Courts of First Instance. There are seven Courts of Appeals in Libya, sitting in coastal regions from Zawiya in the west through Tripoli, Khoms, Misrata, Benghazi and Derna (Green Mountains) in the east, as well as Kufra in the interior. Courts of Appeals hear appeals in civil, commercial and family law cases from the First Instance Courts in their region. However, Courts of Appeal also have first instance jurisdiction over felony crimes and administrative cases. This jurisdiction is exercised through three judge 'circuits' that handle such cases within the geographical jurisdiction of a particular First Instance Court.¹¹¹

The highest court in Libya is the *Supreme Court*, seated in Tripoli. In accordance with Law No. 6 of 1982, which established the Court, it has a number of different functions, including (1) hearing challenges to the constitutionality of legislation; (2) deciding on conflicts of jurisdiction, in particular as between ordinary and special courts; (3) deciding electoral appeals; and (4) acting as a court of cassation. The Supreme Court's cassation function applies in appeals of administrative, civil, criminal and family law matters, each of which are heard by a three-judge panel. The decisions of the Supreme Court are final and binding on all judicial bodies and institutions in Libya. Unlike the lower courts, which are funded by the Ministry of Justice, the Supreme Court is financially independent and funded by the GNC.

109 Interview with judicial officials, Khoms, 22 January 2013.

110 Committee on the Promotion of the Judiciary, Final Report, First Recommendation.

111 Bardet, du Plessis and Mokhtar, 22.

iii. Judges

There are currently about 1,200 judges on duty in the Libyan judicial system. Ordinarily, judicial officials begin their career as prosecutors and are eligible to be promoted to positions as judges once they have attained a degree of seniority.¹¹² Judicial officials that seek such promotions and qualify are required to submit to a performance review by the Judicial Inspectorate. The HJC is ultimately responsible for the appointment of judges.

Senior judges appointed as Court Presidents are responsible for court administration. The President of the court supervises court staff. The President (or in the lower courts a panel of three judges) may also call together the General Assembly of the court, consisting of all judges. Incoming cases are numbered and assigned to court circuits and chambers via the General Assembly.

While the judiciary is well established in Libya, it is still relatively young compared to those in other countries of the region. As previously described, during the Italian colonial period, both the judges and the law they applied were foreign, and the judiciary continued to be dominated by non-Libyans during the monarchy.¹¹³ During the Gaddafi era, the judiciary's reputation, though tarnished, was somewhat preserved in comparison to the ad hoc special courts, which committed the most abusive miscarriages of justice in political cases. There are also notable instances of judges defending their independence and resisting political interference during the Gaddafi era.¹¹⁴

Significant popular distrust of the judiciary nonetheless remains. This distrust is due in part to the on-going judicial vetting debate and the question of whether judges voluntarily participated in Gaddafi's abusive special courts. However, many practitioners indicated to the ILAC team that popular distrust was rooted in the perceived prevalence of corruption in the judiciary, and its corresponding inability to afford Libyan citizens meaningful justice. While generally agreeing that the current judiciary has integrity, these lawyers also lacked confidence in the ability of Libya's judges to withstand pressure from the executive branch.

These concerns were also reflected in the debate over security. The ILAC team spoke primarily with judges from western Libya, where most courts resumed work shortly after the revolution and have since been routinely processing ordinary cases. Due to security concerns, the ILAC team was unable to visit courts in the East and South,

112 The information in this section was derived, except where otherwise indicated, from ILAC assessment team meetings with judicial officials in Tripoli on 21 January 2013, in Khoms and Misrata on 22 January and in Zawiya on 23 January 2013, as well as an interview by the PCHR training team of judges participating in a Benghazi human rights training, 26 January 2013.

113 EMHRN, 75.

114 EMHRN, 80.

where on-going threats have made it nearly impossible for judges to work in some areas.¹¹⁵ However, while judges in the West described the current security situation as satisfactory, some were reluctant to discuss the preparations currently being made for judicial handling of the transitional caseload of ‘conflict-related’ detainees, and abuses alleged to have occurred at the hands of revolutionary brigades.

The risk of violence as conflict-related cases are processed substantially hampers the Courts’ ability to effectively and independently function. These risks are increased by the failure of the judiciary to develop outreach and public communications strategies or capacity. In the post-revolutionary period, the newly free media has been accused of taking a simplistic and uninformed approach to legal and judicial issues. Some observers were concerned that biased media coverage of conflict-related trials could undermine the perceived independence of courts and encourage Libyans to take the law into their own hands.

The current reluctance to discuss or plan for these risks may exacerbate any eventual problems. However, because prosecutors have the primary role in investigating and initiating criminal cases, the greatest initial burdens will be placed on them. As a result, there appeared to be a greater cognizance of security issues and understanding of the need to develop a response among prosecutors (see below).

While there is an existing ethical code for judges, few observers believed that it was up to date and consistently applied. At the same time, the judicial inspection system was generally seen as effective by judges and prosecutors, but less so by practitioners outside the judiciary. Judges also indicated that the Judicial Club, a professional organisation for judges and prosecutors, remained dormant but would be reactivated soon.

Another frequently heard observation was that the justice sector still suffered from the effects of the Gaddafi regime’s effort to divide the judiciary from other rule of law actors such as the private Bar. While judges spoke of the need for training and capacity development, they rarely spoke of enhancing coordination with other sectors of the legal system. Nor did judges raise the issue of actively engaging with current legislative and constitutional drafting processes likely to have a profound impact on their role and independence.

Many judges complained about the effect of their prolonged isolation from regional and international trends and networks. Although many Court facilities are currently in the process of being refurbished, most case management and administration systems appear to still be based on paper files. Some judges complained that they were not free to take a more active role in budget and management issues, both of which remain areas where the Ministry of Justice plays an important role. And, as with prosecutors, low salaries have apparently led to high rates of attrition of senior judges who moved to private practice.

¹¹⁵ “Derna Courthouse bombed”, *Libya Herald* (30 March 2013).

As in other sectors of the legal system, women appear to be underrepresented in the judiciary. For instance, of the 48 judges in the Tripoli South Court of First Instance, nine were women. While the women judges appeared competent, confident and well respected by their male colleagues, some observers felt that the societal responsibility placed on women to deal with domestic matters made them reluctant to take on the additional responsibility of becoming judges.¹¹⁶ On the other hand, the ILAC team was told that many judges only spend half days in court and do much of their paper work from home, suggesting that judges may enjoy more flexibility than other categories of legal professionals.

iv. Prosecutors

In Libya, the Office of the Public Prosecutor (*Niyaba*) is a system of state prosecutors.¹¹⁷ The Libyan system is similar to the French unified magistracy and based on the Egyptian model, which assigns prosecutors the responsibility for the investigation and prosecution of all criminal matters.¹¹⁸

Since prosecutors possess both investigatory and prosecutorial powers, they are considered a part of the Judiciary. As judicial officers, prosecutors are selected by the HJC, which also decides on the number of prosecutors to be hired. While prosecutors interviewed by the ILAC team uniformly praised the recent separation of the HJC from the Ministry of Justice, some complained that prosecutors were not represented. That is, while the Chief Judges of the Courts of Appeals sit on the HJC, the corresponding Chief Prosecutors do not.

The prosecution system is headed by the Prosecutor General, who also serves as the Deputy to the President of the HJC. Recently, controversy arose over whether the Prosecutor-General should be appointed by the President (represented by the GNC) or the General Assembly of the Supreme Court.¹¹⁹ However, according to Libya’s latest filings before the ICC, the issue has been resolved in favour of the GNC.¹²⁰

Under the criminal procedure code, the Prosecutor General is vested with all powers concerning criminal cases. The Prosecutor General also allocates and assigns prosecutors to the various courts. Requests for staff and materials are sent up the chain

¹¹⁶ Interview, High Judicial Institute, Tripoli, 20 January 2013.

¹¹⁷ The information in this section was derived, except where otherwise indicated, from ILAC assessment team meetings with judicial officials in Tripoli on 21 January 2013, in Khoms and Misrata on 22 January and in Zawiya on 23 January 2013.

¹¹⁸ Bardet, du Plessis and Mokhtar, 25.

¹¹⁹ Interview, Ministry of Justice officials, 20 January 2013.

¹²⁰ International Criminal Court, “Libyan Government’s consolidated reply to the responses of the Prosecution, OPCD, and OPCV to its further submissions on issues related to the admissibility of the case against Saif Al-Islam Gaddafi” (04 March 2013), paragraph 6.

of command to the Chief Prosecutor of the particular Court of Appeals, who in turn sends them to the Prosecutor General. The office of the Chief Prosecutor then pursues the request with the Ministry of Justice.

Since prosecutors are part of the judiciary, prosecution offices mirror the courts. Thus, there are prosecution offices for each of the seven Courts of Appeal, each headed by a Chief Prosecutor who reports to the Prosecutor General. Similarly, there are prosecution offices for each First Instance Court, each headed by a Chief Prosecutor who reports to the Chief Prosecutor for the relevant Court of Appeal.

At least in the larger cities, working prosecutors are assigned to specific police stations. For example, the Tripoli South court has five major police stations, and the prosecutors are divided into five groups, one assigned to each police station. The prosecutors at each station are divided into shifts to provide 24-hour coverage for each station. At the beginning of each judicial year, the prosecutors develop a work plan to equitably divide this workload.

In all criminal matters, prosecutors are responsible for investigating criminal complaints, filing criminal cases, pursuing cases before the court, and implementing the final decisions. According to one source in the Tripoli courts, roughly 90% of the cases begin when an investigating police officer contacts a prosecutor. According to the existing law, the prosecutor supervises enforcement officers such as police forces, who could be delegated to carry investigations by a public prosecutor.¹²¹ Under the current criminal procedure law, however, interrogation is not delegable, though in practice these procedures apparently are not always followed.

The remaining 10% of the cases are complaints filed directly with the prosecutor's office by citizens. The Chief Prosecutor in that office will review the complaint and, if the citizen appears to be complaining of criminal conduct, typically refer them to the proper police agency. Occasionally, the prosecutors' office will directly pursue the case. There is no specialization among prosecutors (*e.g.* murder, sex crimes); all handle all types of cases. According to the law, cases are assigned on a numerical basis, *i.e.* if case opened, a case number is assigned and the cases are allocated to prosecutors in turn.¹²² However, at least some Chief Prosecutors may reassign a particularly complicated or important case to a more senior prosecutor if it happens to be drawn by a junior prosecutor. The prosecutors, along with the judiciary, are also responsible for supervising prisons and ensuring the legality of the detention and the treatment of prisoners.¹²³

121 Bardet, du Plessis and Mokhtar, section 4.1.7.

122 Interview, Chief of Judicial Inspection for Tripoli, 21 January 2013.

123 Bardet, du Plessis and Mokhtar, section 4.1.7.

To be appointed as a prosecutor, a person must obtain a law degree and then attend a two-year program at the High Judicial Institute (HJI). Graduates of the HJI are appointed to the general prosecution office, a judicial administrative post, as a People's Lawyer, or to one of the other directorates of the Ministry of Justice. After seven years experience in one of these judicial bodies, the person becomes eligible for nomination by the Judicial Inspectorate. If the nomination is accepted, the person is appointed as a prosecutor by the HJC.¹²⁴

Prosecutors are required to attend continuing education three to four workshops per year organized by the HJI. Compliance with this obligation appears to be high, perhaps because attendance is among the factors that considered by the Judicial Inspectorate when deciding on promotions.

Regarding the cases of 'conflict-related' detainees, prosecutors face even more immediate security concerns than judges. These concerns stem from the inability of the Libyan system to provide security for prosecutors to process these cases "in light of the *de facto* authority exerted by armed militias."¹²⁵ As a result, the ILAC team found that much of the delay in processing such cases arose from the inability to find prosecutors willing to review the files, and either bring charges or release detainees. That is, prosecutors were reticent to either charge suspects and incur the wrath of the detainees' communities, or release detainees and incur the wrath of the alleged victims' communities. This problem is especially acute in Misrata, where thousands of detainees are held in both unofficial and official detention. Accordingly, the Minister of Justice chose Misrata as the first test case for his strategy of transferring detainees to prisons under the exclusive control of the Judicial Police and bringing in outside prosecutors to expedite screening.

Similar issues also have arisen in some ordinary prosecutions, with prosecutors declining to charge or release prisoners, since either course could provoke a violent response. For example, one report indicated that a member of the general prosecution was abducted from his home by an armed militia, blindfolded, and beaten with rifle butts in retaliation for his ordering the arrest of some of their members in connection with a fraud case from 2010.¹²⁶ The security problem is exacerbated by the proliferation of weapons and the effects of the Gaddafi regime's cynical release of 16,000 non-political prisoners, including 500 subject to pending death sentences, in Tripoli during the Revolution.¹²⁷

124 "Lawyers for Justice in Libya and REDRESS Trust's Observations Pursuant to Rule 103 of the Rules of Procedure and Evidence," filed in the Situation in Libya in the Case of the *Prosecutor v. Saif al-Islam Gaddafi and Abdullah al-Sanussi*, ICC-01/11-01/11 (08 June, 2012).

125 Amnesty International, Libya: Rule of law or rule of militias?, p. 33 (July 2012)

126 Amnesty International, Libya: Rule of law or rule of militias? p. 33 (July 2012)

127 Interview Judicial Inspection for Tripoli (Tripoli, January 2013).

However, others suggested that the problem was less acute, at least in some areas. For example, one source indicated that prosecutors in Tripoli never stopped working since returning to work on 21 September 2011. Sources in Tripoli reported that security now is adequate, though it was worse earlier. Transportation of prisoners continues to be a problem, since the judicial police are afraid of being ambushed. Interviews in other cities painted a similar picture, where earlier security issues for courts and prosecutors were being resolved.

Prosecutors also face the perception that they lack objectivity. Perhaps because some prosecutors or their families fought during the Revolution, some observers report a disparity in how suspects are investigated, depending on whether they are viewed as Gaddafi loyalists or members of revolutionary brigades.¹²⁸ That is, prosecutors may overlook or minimize allegations of crimes committed during revolutionary activities, while similar allegations against Gaddafi loyalists are pursued more zealously. Such inconsistencies were formally sanctioned by the NTC in Laws 35 and 38 of 2012, which instituted a blanket amnesty for “acts made necessary by the 17 February revolution” for its “success or protection,” whether such acts were military, security or civil in nature. Even where prosecutors have no such biases, the uncertainty surrounding possible vetting or lustration processes for prosecutors leaves them wary of appearing anti-revolutionary.¹²⁹ In any event, at least as of mid-2012, no cases had been commenced against revolutionaries.¹³⁰

A third issue is integrity. Among prosecutors, corruption and integrity issues were generally downplayed. Current prosecutors – virtually all holdovers from the old system – contended that prosecutors did not succumb to pressure, even under old regime. Similarly, current prosecutors downplayed the lack of qualifications of prosecutors transferred from the People’s Prosecution, indicating that those issues had “worked their way through system.”

Those outside the system, particularly private lawyers, typically saw a different situation. They reported that corruption in the prosecution remained a significant problem. These problems tended to be more in the nature of back-channel influences for preferential treatment, rather than outright bribery. Nonetheless, such activities continued to impact the perception of the prosecution in Libya.

In terms of gender equality, there appear to be few women prosecutors in Libya. For example, it appears that at the time of the ILAC visit, there was only one female prosecutor within the jurisdiction of the Misrata Court of Appeals. The statistics within the jurisdiction of the Zawiya Court of Appeals at the time of the ILAC visit were somewhat better, with six women out of 40 prosecutors.

128 Lawyers for Justice in Libya, ICC-01/11-01/11 (08 June, 2012).

129 Interview with PILPG (Tripoli, January 2013).

130 Lawyers for Justice in Libya, ICC-01/11-01/11 (08 June, 2012).

Prosecutorial manpower did not appear to be a problem. According to one prosecutor, there had been no particular increase in filings over the past few years and the number of prosecutors in his office was adequate. On the other hand, some observers suggested that there seemed to be noticeably fewer people and far less activity in courthouses than prior to the Revolution.

Low salaries are a major complaint among prosecutors.¹³¹ It was reported that for many years prior to the Revolution, prosecutors’ salaries were frozen. At about the time the Revolution started, the Gaddafi regime doubled the salaries prosecutors. However, the present salaries for prosecutors are far below the incomes for private lawyers, so both before and after the Revolution many senior judges and prosecutors have left for private practice.

v. Penal code procedures for detention and prosecution

The Libyan Penal Code and Code of Criminal Procedure define in detail the rights of criminal defendants and the roles of both prosecutors and judges.¹³² These rules have remained largely unchanged since their adoption shortly after independence. After undergoing modest revisions early in the Gaddafi-era, the Codes were again reviewed in the early 2000s, but no amendments were made prior to the 2011 uprising. There has been substantial criticism of various aspects of the Penal Code over the years.¹³³ However, commentators typically felt that the Code of Criminal Procedure generally met international standards, and that the main issue was the lack of implementation of the law.¹³⁴

Under the Libyan Penal Code, crimes are divided into three categories. Misdemeanors are those punishable with a maximum penalty of three years or less and felonies are those involving more than three years. The third category, “aggravated” felonies, is defined by law in a case-by-case manner – in other words, each felony in the Penal Code includes a specific definition of the circumstances under which such a crime should be considered “aggravated.”

131 Lawyers for Justice in Libya, ICC-01/11-01/11 (08 June, 2012).

132 The information in this section was derived, except where otherwise indicated, from ILAC assessment team meetings with judicial officials in Tripoli on 21 January 2013, in Khoms and Misrata on 22 January and in Zawiya on 23 January 2013.

133 HRW 2006.

134 Carnegie Endowment for International Peace, “Libya Resource Page.”

The Code of Criminal Procedure provides for four phases of criminal proceedings: investigation, accusation, trial and appeal.¹³⁵ As in most systems, the police¹³⁶ typically initiate the investigation phase, either as first responders called to a crime scene or to investigate an individual citizen's complaint. For some time after the 2011 uprising, revolutionary brigades largely supplanted the police in activities ranging from traffic control to receiving criminal complaints and arresting suspects in large parts of Libya. However, the current government has made a priority of reforming the police and ensuring that they play their prescribed role in public security and criminal justice.

In criminal cases, the police cannot formally open an investigation, but must instead physically present the suspect and any available evidence to the prosecutor. The police can collect immediately available evidence, such as eyewitness statements, and may take voluntary statements from suspects. However, they are not allowed to interview suspects without the prosecutor's involvement. Similarly, the police cannot undertake searches without a warrant from the prosecutor, which must be based on an official written request, substantiated with any available evidence. In any case where the police exceed their authority, any resulting evidence against the suspect will be inadmissible. A case may nevertheless go forward on the strength of other, non-tainted evidence against the accused.

Police must bring incarcerated suspects before the judicial authorities within a reasonable time. Specifically, the prosecutor must be informed of the alleged crime by the police within 48 hours of an arrest, and must commence an investigation upon receiving this information or otherwise becoming aware of an alleged crime. The Code of Criminal Procedure permits the period of detention to be extended to seven days for certain offences including those "against the state."¹³⁷

If the crime is sufficiently serious, the police will call a prosecutor directly to the scene. In particularly serious cases (e.g. a suspected homicide), a more senior prosecutor such as the chief prosecutor for the jurisdiction will be called in. The prosecutor is authorized to extend detention for another six days and initiate an investigation.¹³⁸ A prosecutor will take over the investigation, and direct the police, including in the collection of forensic evidence.

¹³⁵ Application on behalf of the Government of Libya pursuant to Article 19 of the ICC Statute," No.: ICC-01/11-01/11, 01 May, 2012.

¹³⁶ Unlike the Judicial Police, which fall under the Ministry of Justice, the regular police answer to the Ministry of Interior. However, there is some overlap between these bodies, which are currently in the course of absorbing thousands of former revolutionary fighters in training for their new roles. Bardet, du Plessis and Mokhtar, 15.

¹³⁷ Amnesty International, *Libya: Rule of Law or Rule of Militias?* (July 2012).

¹³⁸ Article 175 of the Code of Criminal Procedure, English translation found at Annex B, "Libyan Government's filing of compilation of Libyan law referred to in its admissibility challenge," ICC-01/11-01/11-158, 28 May, 2011.

If the case is a misdemeanour, the prosecutor is entitled to gather information without the knowledge of the accused and decide whether to send the case to Court. If the alleged crime is a felony, the prosecutor is obliged to investigate it.

During the investigation phase, the prosecutor (rather than a judge or the police) effectively has the primary responsibility to protect the rights of the accused. Thus, the prosecutor, not the police, is supposed to interview any suspects. The investigator is obliged to record all investigative procedures undertaken in relation to a suspect's case and not to publish or otherwise distribute details of the investigation.¹³⁹

During the investigation phase, the prosecutor is required to inform the suspect of the accusations against him.¹⁴⁰ He may also record the suspect's statements. However, Article 106 of Code of Criminal Procedure stipulates that suspects in felony (but not misdemeanour) cases cannot be interrogated without the presence of a lawyer, except where either the suspect is caught in the act or there is a risk of losing evidence. The suspect may also be confronted with witnesses, if his lawyer is present.¹⁴¹ The lawyer may not speak unless permitted by the prosecutor.

Suspects also have the right to view all the investigative materials relating to their case, and any confessions obtained from them through duress are inadmissible in criminal proceedings against them.¹⁴² However, during the investigative phase, the suspects are not always required to have legal representation. A lawyer may be present on the request of the accused during the investigative phase, but a lawyer's presence is not mandatory in every case. Where a suspect requests but cannot pay for a lawyer during the investigative phase, he will be assigned free representation from the Peoples' Lawyers Directorate.

Article 59 of the Criminal Procedure Code mandates that, during the investigation phase "[i]nvestigation procedures and their results shall be considered confidential."¹⁴³ The practical effect of this Article is that during the investigative phase, prosecutors may only disclose summary reports of their investigations to persons not involved in the investigative or prosecutorial team.¹⁴⁴ Disclosure of actual evidence, such as witness interviews or other documentary evidence, or details such as witnesses' names and contact details, before the case reaches the accusation stage violates the Criminal Procedure Code.

¹³⁹ "Application on behalf of the Government of Libya pursuant to Article 19 of the ICC Statute," No.: ICC-01/11-01/11, 01 May, 2012.

¹⁴⁰ Article 105 of the Code of Criminal Procedure.

¹⁴¹ Article 106 of the Code of Criminal Procedure.

¹⁴² ICC Application, May 2012.

¹⁴³ English translation found at Annex B, "Libyan Government's filing of compilation of Libyan law referred to in its admissibility challenge," ICC-01/11-01/11-158, May 28, 2011.

¹⁴⁴ ICC Application, May 2012.

If the prosecutor is satisfied that sufficient evidence exists, the case moves to the accusation stage. The prosecutor obtains permission of their supervisor, and prepares the charges for indictment, including a description of the crime and a list of evidence. This information is forwarded to the Indictment Chamber of the court. The Indictment Judge's role is to ensure that cases referred to trial are adequately and neutrally investigated, that the investigation has remained confidential, that a lawyer has been appointed for the suspect, and that the investigation has been properly recorded.¹⁴⁵ If the indictment is based on insufficient or illegally obtained evidence, the Indictment Chamber can dismiss the case in a written decision that can be appealed to the Appeals Chamber of the First Instance Court.¹⁴⁶ However, if there is sufficient lawfully obtained evidence to support criminal charges, or if a supplementary investigation finds sufficient evidence, the accused is allowed to select a lawyer so that the case may be remitted to trial.

Once the case is presented to the court, defence lawyers take on the primary role in defending the rights of the accused. An indictment cannot be brought against the accused before he is represented by a lawyer, nor may the accused be present in any proceedings before a judge without representation. During this phase, a People's Lawyer will be assigned to defend any indigent defendant. However, the prosecutor's responsibility to protect the defendant's rights continues. For instance, prosecutors are required to move to drop any case if they become aware of mitigating evidence sufficient to throw into question the defendant's guilt.

Lawyers interviewed by the ILAC team indicated that, though these procedures were set forth in the Code of Criminal Procedure, the actual practice may be different. In some cases, upon receiving a file from the police, prosecutors engage in a form of plea-bargaining involving not only the accused, but frequently also the victims. In essence, the implication was that the prosecutor often mediates between these parties to seek a "social solution" involving compensation or other reparation that can divert the case from going to court.

Detention of suspects can be extended to 30 days by a single judge. Thereafter, extensions for up to three months must be authorized by a panel of three judges.¹⁴⁷ Any extension of detention beyond the initial three months must be reviewed by the Chief Prosecutor, and approved by a panel of three judges.¹⁴⁸ The accused must be present in court and represented by a lawyer for these applications.

¹⁴⁵ ICC Application, May 2012.

¹⁴⁶ Article 151 of the Code of Criminal Procedure.

¹⁴⁷ Article 176 of the Code of Criminal Procedure.

¹⁴⁸ Article 106 of the Code of Criminal Procedure.

vi. Judicial Inspectorate

The Judicial Inspectorate is an internal peer review system that applies criteria received from the HJC to analyse the performance of members of the judiciary for the purposes of their promotion or demotion.¹⁴⁹ Judicial Inspectorates are organized by Appeals Courts and only review members of the judiciary. Inspectors must be senior judges who have attained the rank of 'consultant', meaning that they have over 22 years of service and are qualified to sit in cases involving serious crimes. The Judicial Inspectorate department in the Tripoli Court of Appeals, for example, consists of 45 consultant judges, who remain active on the bench while conducting these duties.¹⁵⁰

Inspections and performance assessments are carried out annually and, in some cases, randomly for purposes of promotion. Inspections are carried out by a team of two consultant judges, who inspect samples of the work of individuals subject to review. The team then prepares a report for a competence committee, which gives the judge a grade of competent, above average, average, or below average.

In the past, any person ranked below average for three consecutive years would have been transferred into a less demanding role, such as an administrative position within the Ministry of Justice. The Head of Judicial Inspection for the Court of Appeals in Tripoli maintained that such transfers for incompetence occurred. However, there are questions regarding whether such transfers will continue to be used in the future.¹⁵¹

While interlocutors acknowledged the problem of unqualified 'People's Judges' being integrated into the ordinary judiciary after the dissolution of the People's Courts in 2005, they indicated that most of these judges "returned to ordinary jobs" within a few years. The ILAC team was informed that a systematic review of judges was carried out after the 2011 uprising. In accordance with a decision by the HJC, judges deemed to be political extremists or incompetent were retired or sent to other departments, particularly the Directorates of Law and People's Lawyers. About 10-15 judges were affected in the Tripoli Court of Appeals region.

Beyond routine performance evaluations, the Judicial Inspectorate also deals with cases of alleged corruption and abuse of office. Upon receipt of a complaint against a prosecutor or judge, the Inspection Authority will appoint a consultant judge to inspect the paper record. If it appears that an illegality has occurred or that the accused official has exceeded his or her jurisdiction, the inspectorate will open an administrative

¹⁴⁹ Bardet, du Plessis and Mokhtar, 20.

¹⁵⁰ The information in this section was derived, except where otherwise indicated, from ILAC assessment team meetings with the Judicial Inspection department and other judicial personnel in the Tripoli Court of Appeals on 21 January 2013, as well as meetings with judicial officials in Khoms and Misrata on 22 January 2013 and in Zawiyah on 23 January 2013.

¹⁵¹ Bardet, du Plessis and Mokhtar, 20.

inspection. The accused official has right to defend himself. If the complaint is found by the inspectorate to have merit, the matter is referred to the HJC for disciplinary proceedings, with the accused entitled to legal representation. If it is determined that a criminal act such as bribery may have been committed, a committee of consultant judges from the Supreme Court and the relevant Appeals Court will decide whether to lift immunity from the accused and refer the case to the Prosecutor General. This procedure reportedly has been used only 3 or 4 times in last 20 years.

vii. High Judicial Institute

The High Judicial Institute (HJI) has provided mandatory training since 1993 to law school graduates who wish to become prosecutors, judges, or People's Lawyers.¹⁵² The work of the Institute was suspended during 2012 as a result of the security situation. The Institute may resume training operations as soon as May 2013.

Every year the Institute receives between 3000-4000 applications. An applicant to the HJI must be a law faculty graduate. Seven advisers to the Institute review applications, and conduct oral and written examinations. The written examination covers five topics, namely criminal law and procedure, civil law, family law, administrative law and commercial law. The advisers also ascertain whether the candidate has physical impediments, such as problems with pronunciation, or reflection time taken before answering.

The course at the Institute has generally been two years. Since formal legal education is presumed to have taken place at the law faculties, training at the HJI is primarily practical and carried out in groups of four to six students using a moot court methodology. However, due to the varying standards in the law faculties, supplemental doctrinal training is also required. The training accordingly covers all legal disciplines, including criminal law, civil law, arbitration, and various areas of procedural law, human rights, international law, English computer skills and codes of conduct. Presently, students cannot graduate without passing in computer skills.

Since its establishment, the HJI has taught nineteen classes of judges and prosecutors, each comprising about 100 to 150 participants. During 2000 and 2001, graduating classes were 250, meaning that the Institute has trained a total of about 3,400 judicial officials in the country. The HJI is currently at a crossroads. Its administration has proposals regarding how it can contribute to judicial reform by modernizing its curriculum and providing an improved program of continuing legal education to sitting judicial officers. However, the Institute must engage with other rule of law actors to develop a coordinated contribution to emerging reform efforts.

¹⁵² The information in this section was derived, except where otherwise indicated, from an ILAC assessment team meeting with the High Judicial Institute on 20 January 2013.

B. Ministry of Justice

i. The current role of the Ministry of Justice

Since removed from control of the HJC, the Ministry has been in a delicate position. On one hand, the Ministry handles the budget for the judiciary, and controls several bodies that assist the judiciary. As such, the Ministry plays a significant role in organizing Libya's response to its current rule of law challenges.¹⁵³ At the same time, the Ministry must not impinge on the newly won and fragile independence of the judiciary and the HJC. Thus, Ministry representatives carefully emphasized to the ILAC team that, for example, the judicial and prosecutorial salaries are determined by the HJC, without influence from the executive.

Sensitive to this balance, under the leadership of the current Minister of Justice, Mr. Al-Merghani, the Ministry prepared a 15 month plan (from December 2012 to February 2014) aimed at making Libya "state of law, justice and respect for human rights."¹⁵⁴ The key mechanisms in the plan are twofold. First the plan calls for "activating the role of the courts, judicial departments and prosecutors in order to enhance & establish the rule of law independently and efficiently." The second component involves "reduction of human rights violations" and includes a set of steps to achieve this goal:

- Bringing all detainees under state control;
- Activating judges and prosecutors in the supervision of prisons;
- Developing a complaint unit or ombudsman;
- Reviewing prison conditions to meet national and international standards;
- Increasing security in prisons;
- Training of prison administrators;
- Cooperation between the Ministry of Justice & civil society;
- Prosecution and trial of those accused of crimes against the Libyan people;
- Issuing the legislative framework for transitional justice activities, including fact-finding, hearings and trials, and compensation;
- Developing procedures related to national reconciliation in order to ease the return of the internally displaced and refugees abroad;

¹⁵³ The information in this section was derived, except where otherwise indicated, from ILAC assessment team meetings with high officials in the Ministry of Justice on 17, 20 and 23 January 2013, as well as ILAC meetings with the Minister of Justice on 18 December 2012 and 21 February 2013.

¹⁵⁴ Ministry of Justice, '15 Month Plan' (December 2012).

- Design of a decentralized technical management system to address complaints all over the country;
- Design of a system for dealing with minor cases using the existing 126 district court buildings and employing qualified youth for dealing with such cases;
- Capacity building for lawyers, judges, and administrative staff; and
- Expanding training programs and ensuring their continuity.

As part of this plan, the Ministry submitted three previously discussed transitional justice bills to the GNC, and is exploring how it can support the implementation of recommendations from the final report of the Committee of 17. In addition, as previously discussed, the Ministry is working to transfer all conflict-related detainees to state-controlled prisons, and to provide for the rapid screening of such detainees by temporarily bringing in teams of outside prosecutors.

These efforts, along with a stated policy of investigating and prosecuting perpetrators of post-2011 human rights abuses, are neither noncontroversial nor risk free. Local communities currently holding conflict-related detainees who they believe victimized by them must be convinced that justice will be done if they relinquish control.

These difficulties were recently demonstrated when a revolutionary brigade invaded the Ministry of Justice and forced out the Minister and his staff. The attack came after the Minister announced that any militia continuing to hold prisoners would be regarded as illegal. The militias were unhappy, concerned that the government, following the rule of law, might release some notorious members of the former regime in their custody. In a joint press conference with the Prime Minister after the situation was defused, the message from the Justice Minister was clear: Both Ministers refused to bow to pressure to allow militias to control prisons or hold prisoners. They both stressed that only the Ministry of Justice together with the Public Prosecutor's Office could be allowed to hold prisoners.¹⁵⁵

¹⁵⁵ Sami Zaptia, "All prisons must be under Ministry of Justice control", *Libya Herald* (31 March 2013).

i. Judicial Police

One sub-unit controlled by the Ministry of Justice is the Judicial Police. These police are responsible for the security of courts and state prisons, transportation of detained persons from prison to the court, the personal security of judicial officials, and the enforcement of judicial decisions.¹⁵⁶ Currently there are eight regional offices for the prisons in Libya (a separate network of detention centres for illegal immigrants is overseen by the Ministry of Interior).

A major issue facing the judicial police is the overcrowding of prisons due to the current backlog in processing 'conflict-related' detention cases. Judicial police representatives acknowledged to the ILAC team that this backlog resulted in part from the inability of the judicial police to address the security concerns of judges and prosecutors dealing with this caseload.

Many current judicial police are former revolutionaries who spontaneously assumed these roles during the uprising. In cooperation with UNSMIL, many are currently being trained on human rights issues at the HJI. Some 6,000 former rebels are slated for incorporation into the Judicial Police through this training program, but officials indicated that an additional 4,000 might be added after the completion of the current program.

ii. Directorate of People's Lawyers

As previously discussed, the concept of People's Lawyers arose when Gaddafi regime abolished the private Bar in 1981. During this time, revolutionary committees established revolutionary courts that held public, sometimes televised, trials of those charged with crimes against the revolution. Lawyers were needed to provide at least the appearance of a defence for the accused. Law No. 4 of 1981 accordingly established the Directorate of People's Lawyers within the Ministry of Justice, and accorded it judicial status.¹⁵⁷

The international outcry against an executive-controlled judiciary providing the judges, prosecutors and defence lawyers for those accused of crimes eventually forced the Gaddafi regime to relent. Nonetheless, when the private Bar was reinstated in 1990, the Directorate of People's Lawyers was continued and the Gaddafi regime described it as a corps of highly qualified lawyers who protect the rights of accused persons free of charge.¹⁵⁸ However, People's Lawyers have long been viewed with far less enthusiasm by the

¹⁵⁶ Interview, Judicial Police officials, 23 January 2013.

¹⁵⁷ Bardet, du Plessis and Mokhtar, §4.1.10.

¹⁵⁸ Third periodic reports of States parties due in 1998 : Libyan Arab Jamahiriya, 28/01/99, CAT/C/44/Add.3.

private Bar and segments of the public. All People's Lawyers were Ministry of Justice employees, and all were required to graduate from the HJI along with judges and prosecutors. Some were former judges or prosecutors transferred to the Directorate for reasons ranging from disobedience to incompetence. In short, People's Lawyers were not the sort of independent legal aid or public defender organisations seen in other countries, which provide free, independent legal services for the indigent.

With the collapse of the Gaddafi regime, the Directorate of People's Lawyers continues to exist within the Ministry of Justice. As before, the Directorate is divided into various sections that cover different types of trials, as well as different levels of appeals.¹⁵⁹ However, the role of the People's Lawyers in the new Libya is unclear. Private lawyers speak dismissively of the People's Lawyers, though at least some of the latter apparently received training through UNDP capacity development programs initiated before 2011. The ILAC team was also told that some judges or prosecutors might have been transferred to the Directorate before 2011 precisely because of their independence and insistence on rule of law standards – or their refusal to serve on special courts.

Moreover, critics have yet to propose an alternative system that would guarantee representation to all indigent criminal defendants. Indeed, if the private bar is unable or unwilling to provide legal representation to the current backlog of 'conflict-related' detainees, the People's Lawyers may be the only option.

iii. Directorate of Law

Another sub-unit in the Ministry of Justice is the Directorate of Law established under Law 6 of 1992, which is unchanged from the Gaddafi era. The Directorate includes roughly 80 advisors or 'counsels,' many of whom are former judges and prosecutors. It has two main tasks, namely to provide legal opinions during the legislative process and to draft legislation.

The process of drafting legislation with the GNC was described to the ILAC team as follows: any ministry, Libyan organisation, or NGO can propose new laws through a discussion with the Directorate of Law. During this process, dedicated teams will be created in the Directorate to discuss preliminary ideas concerning a new law proposal, review the existing legislative framework and, if the concept is accepted, prepare draft legislation. This draft is forwarded to the GNC for a first reading. The GNC's comments are returned to the Ministry of Justice and, if appropriate, a revised draft is prepared and submitted to the office of the Prime Minister, which can make further suggestions.

¹⁵⁹ Bardet, du Plessis and Mokhtar, 26.

The revised draft is forwarded to the Legislative Committee of the GNC. If approved by this Committee, it is sent for consideration by the GNC. If the GNC approves, the new law is published in the Official Gazette of Libya. According to the Directorate, throughout this legislative process, all relevant societal organisations can provide their comments and suggestions as a part of the consultation process.

As in many new institutions operating in semi-crisis situations, much legislation considered by the GNC does not appear to follow these procedures, but instead follow a more haphazard path to the legislature. The mixture of pre-Gaddafi, Gaddafi-era, TNC and GNC legislation, sometimes with an overlay of international instruments ratified by Libya, creates substantial complications. Coupled with the lack of exposure to modern legislative drafting techniques, those within the Directorate of Law face on-going challenges in meeting the needs of the new governmental structures.

The Directorate of Law also includes a Disciplinary Council, which is responsible for disciplinary procedures against high-level civil servants. Any high-ranking civil servants accused of violating administrative rules of the government or public institutions can be disciplined at the Disciplinary Council. This Council is composed of high-level officials and members of the judiciary, such as a counsel of the Supreme Court, senior officers of the General Prosecution office, and senior officers of the Directorate of Law and appeals courts. Decisions of the disciplinary council can be appealed to the administrative courts. If a high-ranking civil servant is alleged to have committed a criminal offence, the case will be forwarded to the office of the public prosecution.

iv. Training Department and Court Administrative Staff

The administrative staff of courts are managed by Court Presidents but financed via the Ministry of Justice. Although such administrative staff plays crucial roles in the judicial system, the ILAC assessment team was given little information, other than reports that their morale and capacity was currently low.

The neglect of court staff results in inefficiency, inconsistency and perceptions of corruption. Lawyers raised concerns regarding the inability of court staff to serve summons and process, with deleterious effects on the length of trials. Other anecdotal complaints on such mundane issues as inept scheduling and the lack of copying facilities suggest systemic administrative problems that need attention.

Other studies confirm these problems. Earlier findings by the UNDP indicated that court staff does not apply uniform procedures or case management systems, resulting in significant differences in the time necessary to process cases.¹⁶⁰ Administrative staff is also often perceived as facilitating bribery by functioning as ‘spoons’ or intermediaries in corrupt transactions between judges and parties to cases.

Administrative court personnel do not currently benefit from any effective training programs. The Ministry of Justice’s training department apparently is staffed by only four to five people, and may not meaningfully serve court personnel. For this reason, the Committee of 17 in its final report recommended “modernizing clerical work in courts and prosecution departments.”¹⁶¹

160 Interview, UNDP Libya, 20 February 2013.

161 Committee on the Promotion of the Judiciary, Final Report, Eleventh point.

C. Other rule of law institutions

i. The Private Bar and Bar Association

The Libyan Bar Association (LBA) was formed in 1962.¹⁶² Prior to the Gaddafi-led coup in 1969, Libyan lawyers were governed by a national Bar association with five regional bar associations organized geographically to correspond to the five Court of Appeals jurisdictions existing at the time. As previously described, the private Bar was systematically repressed by the Gaddafi regime. In 1981, this repression resulted in the abolition of the private bar, and transformation of all lawyers to employees of the Ministry of Justice.¹⁶³ As Gaddafi later shifted course to seek approval – or at least tolerance – from the West, Law 10 of 1990 reinstated the Bar and the lawyers’ profession.¹⁶⁴

Lawyers nevertheless persisted in playing a key role in opposing regime abuses as well as in supporting the 2011 uprising that removed Gaddafi from power.¹⁶⁵ Several prominent members of the Benghazi Bar Association became part of the TNC, and the Benghazi courthouse and Bar Association were famed cradles of rebellion in the final year of Gaddafi’s rule.¹⁶⁶ In Misrata, lawyers served on the front lines. Five lawyers were killed fighting in the Revolution, and others, including the current chair of the Libyan Bar Association, were wounded in the fighting.

However, perceptions of the legal profession continue to suffer as a result of the Gaddafi years, with rumours persisting that many current practitioners gained the right to practise solely through corruption or preferment. The regeneration of the Libyan legal profession is also hindered by the country’s unstable security situation. Lawyers, particularly those defending unpopular or controversial clients, talk about a lack of security in courts. Even if a court is functioning, a lawyer may not attend a case out of fear for her or his safety. Lawyers representing controversial clients often receive death threats, although there is no evidence of actual physical attacks.

162 The information in this section was derived, except where otherwise indicated, from ILAC assessment team meetings with high officials and other members of the Libyan Bar Association, as well as the bar associations of Tripoli, Khoms and Misrata (22 January 2013), and those of Zawiya and Sabratha (23 January 2013).

163 Chapin Metz; Judge Marwan Tashani, ‘The Revolution in Not Complete Without an Independent Judiciary’, Newsletter of Lawyers for Justice in Libya (April 2012, Issue 1)

164 Law 10 of 1990.

165 Anjali Kamat and Ahmad Shokr, “Why the Libyan revolution deserves support from everyone who believes in democracy,” *Economic and Political Weekly* (19 March, 2011).

166 ILAC, ‘Pre-Assessment Mission, Libya’ (2011) 12-13.

Lawyers in Misrata indicated that “some members [of the Bar] have refused to represent some of the detainees for political and personal reasons.” Lawyers who represent accused pro-Gaddafi supporters are often perceived as mere profiteers.

Amnesty International reported that a lawyer representing alleged Gaddafi soldiers and loyalists described intimidation from armed men present inside prosecution offices and courts during investigations and hearings:

They told me inside the courtroom, “if they walk free, you will pay the price.” I also got several anonymous calls telling me ‘leave the case, or face consequences’... My family is worried, they don’t want me to work on these cases. But this is my duty to uphold the right of defence. Unfortunately, not all my colleagues feel the same, and some don’t come near al- Gaddafi loyalist cases. I was told that I didn’t suffer enough during the Revolution, and don’t have any martyrs in my family, which is why I am willing to take up these cases.¹⁶⁷

Not surprisingly, alleged Gaddafi loyalists find it difficult to retain lawyers willing to defend them. This reticence can be tinged with even more emotion in cases where the alleged victims were themselves lawyers. Thus, in Misrata where the armed conflict was particularly intense, representatives of the legal profession acknowledge the need “to begin reform from among the lawyers themselves.”¹⁶⁸

As of the writing of this Report, Law 10 and its companion regulations still technically govern the legal profession. The LBA is statutorily recognised as the representative body of the legal profession. In line with its predecessors, the LBA consists of regional branches (now seven in total, corresponding with the regional Court of Appeals jurisdictions), which are affiliated to the central national body.

Though a new draft Law on the Legal Profession (the “Draft Law”) is nearing completion, much as with the national government, *de facto* organisations and leaders have emerged at both the national and regional Bars to serve in the interim period. These leaders are not officially elected, but are serving as caretakers until the new Law is passed and new leadership can be elected.¹⁶⁹ Accordingly, the LBA is currently led by provisional Executive Council of eight members (consisting of a president and representatives from each of the regions), which was formed in early 2012. The Executive Council is highly aware of the need for elected legitimacy, and there is an agreement that new elections will be held in the Spring of 2013 or when the Draft Law is approved by the GNC. The regional associations have likewise been governed by caretaker officers.

¹⁶⁷ Amnesty International, *Libya: Rule of Law or Rule of Militias?* (July 2012).

¹⁶⁸ BBC, ‘Libya conflict: Gaddafi ‘cluster bombing Misrata’ (16 April 2011).

¹⁶⁹ Interview, ABA-ROLI Libya (Tripoli, January 2013).

Notwithstanding the goodwill of the post-Revolutionary period, remnants of earlier rivalries – both between the local and national bodies, and among the local branches – are still in evidence. In one interview, a President of a regional Bar made it clear that the LBA was subordinate to the regional bars. He gave the example of amendments to the Draft Law being driven by regional bars and not the central body. This is not unexpected considering that the current structure of the Bar is based on a federation model, where the national body is dependent on regional branches for funding.

Bar members pay membership dues to their respective regional branch. ILAC was informed that in Misrata the current rates are 40 dinars (approx. US\$32) for junior lawyers, 60 dinars for lawyers accredited to appear before courts of first instance, 80 dinars for lawyers accredited appear before Courts of Appeal, and 120 dinars (US\$95) for those accredited to appear before the Supreme Court. Lawyers are requested to make additional contributions to cover extraordinary costs, such special events.

However, only members who are actually practising law are paying dues, and the amount paid is sporadic and limited. The regional branches in turn are to pass on a 25% share of this to the national body.¹⁷⁰ According to one source, this scheme is not currently being followed and the Tripoli Bar is the only regional Bar that is actually providing funding to the LBA. Under these circumstances, the national body has very limited resources; its President does not even have an email address. It maintains one office in Tripoli (shared with the Tripoli Bar) and employs a small administrative staff.

Despite these obstacles, the LBA’s inaugural post-Revolution national conference held in Misrata on 12-13 December 2012 has been described as a “huge success.” Over 300 delegates attended, and were addressed by the Presidents of the GNC and the HJC. The Conference endorsed the Draft Law, initiated development of a professional ethics code and communication strategy, and generally strengthened cohesion within the profession after four decades of division and suspicion.

Nonetheless, there are indications that the dominance of the regional bars – and the Tripoli Bar in particular – will continue. As the Bar Association of the capital city, the Tripoli Bar Association has close relationships with the central government. Moreover, the great majority of Libya’s practising lawyers are in Tripoli. While regional bodies still see themselves as the real centres of authority, some observers suggest that a balance will emerge between them and the central organisation.

Though the LBA nominally represents some 9,000 lawyers, only 3,500-4,000 members actually practise as lawyers. For instance, in the Tripoli Bar, only 50% of the 4,000 members of the Bar practise. The remainder work at other jobs, even though Law 10 prohibits lawyers from working in non-legal jobs.

¹⁷⁰ ‘Strategic Plan 2012-13’(Libyan Bar Association, July 2012), 6 & 15.

Some efforts are being made by the Bar to improve the professionalism of lawyers. For example, in late January 2012, the LBA (still operating under Law 10) announced that all members working in state companies or others entities in violation of Law 10 were required to transfer their registration to a “non-working” classification no later than 10 February 2013. Those who did not voluntarily transfer by that date would be involuntarily re-classified as non-working and, according to the Bar announcement, the authorities concerned will also be informed.¹⁷¹

The current process for admitting new lawyers is less than rigorous. The national body of the LBA regulates a two-year apprenticeship program for law graduates, which is implemented on the regional level.¹⁷² At the end of the apprenticeship, a panel – presently consisting of two lawyers and one judge – theoretically reviews the evidence concerning the applicant’s apprenticeship activities, and determines whether he or she should receive a practising certificate. However, according to one source, to commence practice, law graduates simply need show their graduation certificates to become a member of the Bar and obtain a licence.

Since the Gaddafi regime severely restricted the teaching of foreign languages, practitioners and judges generally have a weak and inaccurate understanding of international and comparative law, and the legal systems of even neighbouring countries. The language barrier also creates difficulty for international organisations in communicating with Libyan organisations and audiences. Nevertheless, after decades of isolation, the LBA has quickly started cooperation with a wide range of organisations, both Libyan and international. So far, however, most of these programs – including cooperation with the newly established BFHRC and the World Organisation Against Torture – apparently involve only the Tripoli Bar.

The Libyan Bar and judiciary traditionally have not enjoyed a particularly collegial relationship. This separation has been exacerbated by the traditional in Libya that private lawyers cannot become judges. Lawyers describe an unofficial policy of judicial “segregation” during the Gaddafi years, which now means that “[s]ome judges think that independence of the judiciary means they should not talk to the others or socialise with them.” At least some lawyers spoke of their desire for a collegial identity, if not an institution, to improve relations between judiciary and Bar, and be a stronger voice supporting the rule of law.

Relations between the LBA as the representative body of the legal profession, and the GNC, seem respectful and workable. Nonetheless, occasional strains appear, such as concern by the Bar that the GNC will attempt to weaken via amendments the Draft Law prepared by the LBA. Bar leaders also noted that the GNC committee responsible for reviewing draft laws refused the LBA’s requests to comment on a range of bills, with the exception of the proposed Labour Law.

171 “Announcement,” provided by the President of the Libyan Bar Association (Tripoli, January 2013).

172 ‘Strategic Plan 2012-13’(Libyan Bar Association, July 2012), 2

ii. Civil Society

During the Gaddafi era, civil society organizations (CSOs) were effectively prohibited but for those led by leading regime figures. This reflected a broader tendency to limit political expression and restrict the right to association.¹⁷³ However, Libya has witnessed a proliferation of CSOs since the 2011 revolution.

Nearly all Libyan CSOs share a spirit of voluntarism that has not only contributed to their rapid rise but also helped them to avoid the risk of becoming ‘captured’ by international donors and their agendas. Most of these organizations have come together spontaneously in order to raise awareness of political concerns. While many have subsequently developed partnerships with international actors, they have done so largely on their own terms. In some cases, such organizations have taken on important quasi-official roles. For instance, the humanitarian organization LibAid cooperated with UNHCR, initially becoming the main Libyan provider of aid to IDPs in the absence of an organized response by the TNC.¹⁷⁴

The spread of internet activism has also been a factor in facilitating CSO participation in political processes. For instance, the Head of the Human Rights Committee in the GNC described making copies of the draft Law on Transitional Justice available to CSOs and legal academics online and receiving comments by email and on a dedicated Facebook page.¹⁷⁵ These developments have also helped to connect activists in Libya with Libyans in the diaspora. For instance, Lawyers for Justice in Libya (LFJL) has drawn on the expertise of diaspora lawyers in drafting rules of engagement adopted by anti-Gaddafi rebels and participating in the ICC proceedings concern Saif al-Islam Gaddafi.

A number of legal CSOs have taken on a particularly important role in documenting the plight of conflict-related detainees and promoting respect for their human rights. For instance, the Lawyers’ Organization for Monitoring Human Rights Violations was organized by Libyan lawyers and made important early attempts to survey the extent of conflict-related detention, as well as the conditions detainees were held under.¹⁷⁶ The World Organization Against Torture is also currently working to build the capacity of both legal CSOs and the private Bar to record evidence of inhumane detention conditions and torture, as well as to provide legal representation to victims.¹⁷⁷

173 HRW 2009.

174 UNHCR 2012.

175 Interview, GNC Human Rights Committee, Tripoli (20 January 2013).

176 Interview, Lawyers’ Organization for Monitoring Human Rights Violations, Tripoli, 16 December 2012.

177 Interview, World Organization Against Torture, Tripoli (21 January 2013).

Many locally based CSOs have focused on awareness raising and advocacy in areas such as women and children's rights. Despite a sense that the progress of women's rights was in tension with calls for religious fundamentalism, most interlocutors reported that such CSOs continued to thrive in the new political space created by the fall of the Gaddafi regime.¹⁷⁸ Other issue-driven CSOs such as the Libyan Lawyers' Organization (LLO) have focused on transitional justice and constitution building. The LLO has sought to increase public participation in these processes by disseminating information and sponsoring workshops that have been held in many of Libya's smaller and more isolated towns, as well as its major cities.¹⁷⁹

iii. Basic Freedoms and Human Rights Council

After years of campaigning, but over the strong objection of many human rights groups,¹⁸⁰ Libya in 2010 was elected as a member of the United Nations Human Rights Council (UNHRC).¹⁸¹ Two years later, based on a recommendation from that same Council, the United Nations General Assembly suspended Libya's membership in the UNHRC, and expressed deep concern about the situation in that country.¹⁸² In September 2012, the UNHRC unanimously recommended that the General Assembly restore Libya's membership, and on 18 November 2012, the UN General Assembly voted overwhelmingly to return Libya to the Council.

One of the explicit grounds cited by the Council for restoring Libya's membership was its establishment of a national human rights institution, the Basic Freedoms and Human Rights Council (BFHRC).¹⁸³ According to information given the ILAC team, the BFHRC is Council is currently working to develop internal regulations in accordance with the so-called Paris Principles, which describe the status and functioning of national institutions for the protection and promotion of human rights. In this regard, the BFHRC has begun the process of seeking accreditation with the UNHRC as a National Institution for the Promotion and Protection of Human Rights.¹⁸⁴

178 Interview, Creative Associates, Tripoli (19 January 2013).

179 Interview, Libyan Lawyers' Organization (18 January 2013).

180 See <http://www.hrw.org/sites/default/files/features/hrc2010/letterLibya.pdf>.

181 "Libya, Thailand elected to U.N. Human Rights Council," Reuters (13 May, 2010).

182 "General Assembly Suspends Libya from Human Rights Council" Press Release GA/11050 (01 March, 2011), available at <http://www.un.org/News/Press/docs/2011/ga11050.doc.html>.

183 "Assistance for Libya in the field of human rights," Resolution adopted by the Human Rights Council, 19/39 (19 April, 2012).

184 The information in this section was derived, except where otherwise indicated, from ILAC assessment team meetings with officials of the BFHRC in Tripoli in January 2013.

The BFHRC was established by the GNC by Law 5 of 2012.¹⁸⁵ While given stature equivalent to a Ministry, the BFHRC is independent from the executive branch, and was formed by and reports to the GNC. The BFHRC is governed by an eleven-person council. By law, four of the members of the Council are women. Within the Council, independent ad hoc committees have been established to prepare independent reports for the Council on topics such as women's and children's rights.

The BFHRC began its initial operations in November 2012. During the ILAC team's visit in January 2013, the BFHRC had only recently moved into its permanent offices in Tripoli, and was still hiring staff and planning for future operations. It plans to establish additional offices, beginning with Benghazi, Misrata, the Green Mountains, the Nafusa Mountains and Sebha. As of January 2013, the BFHRC had between 40-50 employees, although most were still in probation.

The BFHRC has four directorates: Administration, Field Operations and Proceedings, Legal, and Financial. A key aspect of the BFHRC's mission is receipt and investigation of human rights complaints, through its Field Operations Directorate. The investigators hired by the BFHRC are graduates of law faculties. One of the eight investigators the ILAC team met was female, and another was a former member of a militia brigade.

The BFHRC is also developing a plan to train and certify civil society activists and private attorneys as human rights investigators. Under this plan, such certified persons would be empowered to conduct investigations and refer cases to prosecutors, in the same fashion as BFHRC employees. The BFHRC is also attempting to coordinate its investigative activities with other governmental authorities, such as the Human Rights Committee of the GNC.¹⁸⁶

As of January 2013, the Field Operations Directorate has begun accepting complaints, and had investigated approximately 50 cases. Most complainants came on referrals from prosecutor's offices. These complaints cover a variety of topics including most notably detentions and torture, but also other issues such as community property disputes or claims for seized fishing boats.

According to Council staff, the BFHRC has the same investigative authority as the investigative chambers of the courts. However, the Council has no power to enforce its decisions, but instead must refer files to a prosecutor's office for the initiation of criminal proceedings. As of the date of the ILAC team's visit, ten files had been referred to prosecutors. Prosecutors are not required to act on the cases, but are required to report the outcome to the BFHRC. As of the date of the ILAC team's visit, no action had yet been taken by any prosecutor on the referred cases.

185 BFHRC, "2012 Annual Report" (2012).

186 Interview, GNC Human Rights Committee (Tripoli, January 2013).

Field Operations personnel also have visited official and “unofficial” detention centres, and monitored trials. For example, BFHRC personnel have monitored proceedings in Zintan in the trial of Saif al-Islam Gaddafi.

One further aspect of the BFHRC’s work involves training regular police, judicial police and prison managers on human rights issues through its Administration Directorate.¹⁸⁷ The Council will also work to include human rights training into the curriculum for judges, prosecutors and law enforcement personnel.

The BFHRC through its Legal Directorate also has responsibility to review legislation to ensure that it meets national and international human rights requirements. As part of this function, the BFHRC has the power to object to laws or regulations adopted by the GNC. According to the information provided to the ILAC team, as of January 2013, Council had begun exercising this power. The Legal Directorate is also currently designing a plan to monitor legislation, prepare legal opinions on laws and legislations drafts, and prepare legal studies concerning compliance with international standards.

iv. Law Faculties

Law as a profession came late to Libya, and was under constant pressure during the Gaddafi era. The first law faculty was not established until 1962 in Benghazi.¹⁸⁸ Subsequently, this institution was divided into two separate universities in Tripoli and Benghazi. As with many other Libyan institutions, there is scant current statistical data available concerning law faculties. No one with whom ILAC spoke knew definitively how many law faculties there were in Libya. The general understanding was that every university had a law faculty, and the most commonly cited number of public law faculties was twelve, although there was no consensus on this point. While it was also agreed among Libyan sources that several of these universities also had branches with law curricula, there was no agreement on how many additional facilities this involved. One estimate was a total of eighteen public law faculties, including branches.

In addition, there were an unknown number of private law faculties around the country. The ILAC team did not have an opportunity to visit any of these institutions, or obtain data on how many were in existence. According to professors at the public law schools, these private law faculties existed primarily for students who could not qualify for admission to the public law faculties. At the same time, these professors also acknowledged with scepticism the argument that some students went to the private law faculties to obtain more intensive instruction.

¹⁸⁷ Interview with BFHRC (Tripoli, January 2013).

¹⁸⁸ The information in this section was derived, except where otherwise indicated, from ILAC assessment team meetings with representatives of the University of Tripoli Law Faculty and other law faculties in western Libya during January 2011, as well as subsequent interviews with professors at the Benghazi University Law Faculty.

Normally, data on legal education would be available from the competent ministry, in this case the Ministry of Higher Education and Scientific Research (MHESR).¹⁸⁹ However, even among law faculty administrators, no one could identify any specific office or person at the Ministry with responsibility for law faculties. Neither the Ministry of Justice nor the private Bar has any formal contact with these faculties. In effect, law faculties are considered part of the larger university system, with only indirect contact with the competent Ministry and informal contact with rule of law institutions.

It appears that higher education, including law faculties, is governed by Law No. 18 of 2010, which sets forth the conditions and criteria for the establishment of public and private institutions. Faculty deans are appointed by the Minister of Higher Education. According to official reports, each faculty has a committee that includes heads of the departments, a representative of the students and a representative of the faculty staff union, which is responsible for implementing the general policies set by the MHESR. However, academic promotions and curriculum approval are handled at the University level.¹⁹⁰

Perhaps the biggest problem with the public law faculties is that they are inundated with students. Other professional faculties such as engineering or medicine were deemed more prestigious and had significantly higher entrance standards. Authorities set the lower admission criteria for other faculties, such as law and economics, to provide a place for students who could not be admitted to other faculties. Many law students are drawn from the “literature” high schools, rather than the technical high schools, which apparently have different standards.

Thus, law faculty at Tripoli University had in excess of 4000 students though, again, even the senior faculty could not provide exact numbers. This influx has resulted in class sizes of more than 100 in ordinary classrooms built for much smaller numbers, and lecture classes of 400 in lecture halls with a capacity of 200.

While the Benghazi Law Faculty is likewise overcrowded with some 3,000 students enrolled, the faculty has been given greater control over admissions and only accepted 300 students for the current academic year. This was down significantly from previous years’ incoming classes of approximately 700 students. Nonetheless, ILAC was told that instituting more rigorous entrance standards and more stringent degree requirements at other universities would be very difficult, since it would anger many students and their families.

¹⁸⁹ “Higher Education in Libya,” European Commission (2013).

¹⁹⁰ Ibid.

Tuition at the public law faculties is free, and all students receive a stipend of 75 Libyan dinars per month for five years of undergraduate study. Accordingly, though there are some qualified, serious law students, there are also many who are simply registered with the faculty with no serious intention of pursuing a professional career. There are no existing LLM programs in Libya, so students seeking an advance legal education study abroad.

Once again, though there were no accurate statistics, we were told that the majority of law students were women, with some estimates perhaps as high as 70-80%. Apparently, the proportion of women students was similar in most other faculties, with the exception of engineering which was predominantly male.¹⁹¹

The curricula at the various law faculties are apparently standard throughout the country.¹⁹² Students must take prescribed courses in the five departments of the law faculty: general law, private law, public law, Sharia and criminal law. They also have courses in English, Arabic and economics. Students are allowed only one or two elective courses during their four years.

Courses are taught primarily using a traditional theoretical, lecture-based format. Clinical, skills or interactive teaching techniques appear to be the exception at the Law Faculty in Tripoli, apart from a handful of recent Western-provided pilots programs. In Benghazi, a standard component of each course involves a practical element, such as study visits or writing comments on judicial decisions. While the formal part of the class is taught by a professor, the practical component can be taught by qualified assistants.

The pre-eminent law faculty in Libya is undoubtedly in Benghazi. It was the first law faculty, established in 1962 and generally acknowledged to be the best in Libya. Unfortunately, due to the deteriorating security situation during the assessment mission, the ILAC team was unable to visit Benghazi. The limited information concerning that institution came from subsequent discussions with professors.

The ILAC team was able to visit the Law Faculty at the University of Tripoli, the second oldest in Libya, founded in the mid-1980s. The Faculty of Law was originally part of the Department of Human Studies, and was only established as a separate faculty in 1994. The main campus is in Tripoli, but the university (and the law faculty) also has a branch in the suburb of Janzour.

¹⁹¹ According to a report from the European Commission, there were about 341,841 total students enrolled in all universities in Libya in the academic year 2010/2011, with about 59 % of them female. Ibid.

¹⁹² The European Commission reported that there has been a recent effort to standardize about 60-70 % of the content of all subjects at the university level through meetings carried out at various universities and with the heads of the various fields of specialization of the departments. Ibid.

At the time of the ILAC visit, the physical plant at the Tripoli Law Faculty was substandard. The buildings were built in the early 1960s prior to Gaddafi's assumption of power, and were badly deteriorated. The halls were littered with trash, ceilings were falling and the facilities were substandard by any measure. At both the Tripoli and Benghazi law faculties, plans were announced shortly before the Revolution to refurbish the existing buildings, but there has been no subsequent progress in either case.

In Tripoli, the library was padlocked and inaccessible even to the Vice-Dean. Consultants for the European Union were able to access the library on an earlier visit, and reported that the library had a poor collection, with sparse access to legal periodicals, commentaries or treatises for students, and was located in a dark basement location with low ceilings.¹⁹³ Faculty members have no university-provided Internet access, and no access to any Internet-based legal search engines.

The professional faculty at the Tripoli Law Faculty apparently numbered about 100-120 professors, of whom 40-50 were women. (By way of comparison, about half the faculty at the Benghazi Law Faculty are women, and three of the five departments in the Faculty are headed by women.) Most of the Tripoli professors had studied abroad at government expense and had advanced degrees. In fact, as explained to ILAC, professors (at least prior to the Revolution) were able to periodically spend a year abroad studying or doing research at government expense. Accordingly, the professors with whom we spoke believed that the professional faculty at Libyan law faculties were among the most highly qualified in the Maghreb.

While the Benghazi Law Faculty was one of the initial engines for the uprising,¹⁹⁴ outside observers indicate that since the Revolution, several other law faculties remained under the control of professors who had obtained their positions during the Gaddafi regime. While not necessarily anti-revolutionary, these academics are not particularly reform oriented. This concern is especially pronounced for older professors who would have a difficult time readjusting to any significant curriculum or pedagogical changes. Accordingly, there have been no reported changes in the curriculum since the Revolution. When asked, the representatives at the Tripoli Law Faculty vaguely commented that such changes were under review, but very difficult.

¹⁹³ Bardet, du Plessis and Mokhtar, p. 49.

¹⁹⁴ Ahmad Shokr, 'Benghazi's lawyers, Libya's revolutionaries', *Egypt Independent* (10 March 2011).

Some Western organisations apparently have attempted to assist at least the Tripoli Law Faculty. For example, the American Bar Association has provided some non-credit ethics lectures at the Tripoli Law Faculty on a trial basis. Similarly, several months before the ILAC visit, an unidentified UN group had provided materials and personnel to conduct a three-day pilot human rights workshop for 45 selected students, which involved role-playing in various scenarios. Apparently, the workshop was well accepted. However, the program had not been replicated or used as the basis for any follow-on changes in the curriculum. Our Libyan hosts indicated that was not feasible since any such program would need to be available to all 4000+ students, and they did not have the resources to pursue such a major undertaking.

The result is that Libya graduates a large number of students with law degrees, many of whom are not prepared to move into professional roles as lawyers, judges or prosecutors. Some in fact contend that some portion of the current cadre of legal professionals, during the Gaddafi era, simply bought law degrees. In any event, the low quality of undergraduate law training has increased the importance post-graduate training for those pursuing actual professional careers as judge, lawyers or prosecutors.

V. Recommendations

Libya faces a number of simultaneous challenges affecting the independence and effectiveness of the justice sector. Without question, the most pressing priority is to provide adequate security so that judges, prosecutors, and defense lawyers can perform their duties in relative safety.

This task is complicated because many justice sector actors are both the subject and the instrument of transitional justice efforts. Further, while ad hoc bodies may be created in Libya to handle transitional justice tasks, long-term and sustained support to ordinary rule of law institutions is vital, since they provide the only existing system capable of processing the existing caseload. At the same time, the various justice sector institutions must develop mechanisms for effective coordination and communication as they work together to reach shared goals. Toward these ends, ILAC submits the following recommendations to assist Libyan reformers and their international partners in shaping the rule of law in Libya.

The High Judicial Council (HJC) and Judiciary

The security of judges and prosecutors must be substantially improved.

As stressed throughout this report, the judiciary, in cooperation with the government, must increase security measures, to provide an environment where judges and prosecutors can work without fear of threats or retaliation. Given the variations in the nature and severity of security threats in different parts of Libya, government responses should be based on consultations with judicial officials and staff to identify and respond to specific local security threats.

The courts, particularly the criminal courts, must begin operating on a full-time basis and promptly resolve the cases of current detainees. Current plans to provide all 'conflict-related' detainees with a prompt and fair hearing should be implemented without delay. The courts must also be given the necessary tools and capacity to deal with other 'transitional' issues referred to them by bodies such as the FFRC.

The judiciary should address the legacy of perceived corruption and political bias in the judicial system. To address the existing legacy of public mistrust and create the preconditions for long-term improvement of the effectiveness of the judiciary, appropriate steps should be taken to determine the truth regarding allegations of corruption,

bias, incompetence and complicity in political show-trials by sitting members of the judiciary and develop institutional mechanisms to preserve the judiciary's integrity in the future. In this regard, ILAC believes that the recommendations of the Committee for the Promotion of the Judiciary are an important first step.

Training programs for judges and prosecutors should be strengthened and expanded, utilizing the High Judicial Institute. The HJI presents an excellent institutional training platform, but must implement significant changes in order to meet the new challenges facing the judiciary. These changes include updating the content of the training curriculum (particularly in such emerging areas as transnational crime, human rights and commercial law), instilling new technical skills, and adopting improved teaching methodologies based on interactive adult-learning techniques. A substantial, relevant and mandatory continuing education program should also be developed in consultation with sitting judges and prosecutors.

A long-term strategy should be developed for strengthening judicial independence.

While the separation of the HJC from the Ministry of Justice represents a key first step, other measures to secure judicial independence should include (a) a systematic review of the relevant existing legal norms and practice, and (b) involvement in current political processes that will impact judicial independence, such as the drafting of the Constitution.

Coordination and cooperation between all rule of law and transitional justice institutions should be enhanced. Efforts should begin to develop mechanisms for coordination and cooperation between the judiciary, other rule of law institutions, and transitional justice bodies such as the Fact-Finding and Reconciliation Commission (FFRC), in order to improve the effective functioning of the entire system. Any lack of clarity concerning the respective jurisdictions of the various organs should be quickly resolved, and simple, mutually agreed-upon procedures adopted for matters such as referral of complaints or files, as well as reporting back to referring agencies regarding actions taken.

Efforts should be made to identify and remove obstacles to the recruitment and promotion of women judges and prosecutors. A striking aspect of the Libyan judiciary is that, though a substantial majority of law students are women, the proportion of women judges and prosecutors is far smaller. A concerted effort should be made to identify obstacles to the recruitment, hiring and retention of women, and to implement programs to significantly increase the number and promotion of women judges and prosecutors.

Judges and prosecutors should be appropriately compensated to retain trained professionals and minimize incentives for financial corruption. As a practical matter, the state's investment in training senior judicial officials is lost if legal professionals resign due to disproportionately low salaries.

Support should be given to a voluntary judges association, and the participation of judges and prosecutors in international professional organizations. Experience in other countries reflects that a strong association of judges and prosecutors typically enhances the independence and competence of the judiciary, while contact with professional colleagues and the ability to observe best practices on a comparative basis enhances their skills.

The Ministry of Justice

Efforts by the Ministry of Justice to address issues of transitional justice should continue. The Ministry has taken crucial steps to initiate legislation to end impunity, improve conditions of detention and establish the control of the Judicial Police over all conflict-related detainees. The Ministry has also coordinated with the judiciary in developing screening programs for conflict-related detainees and bringing to account those responsible for contemporary human rights abuses. These initiatives should be supported and continue.

Adequate resources and support should be provided to the judicial police. The judicial police should receive proper training in international standards concerning the treatment and security of detainees, as well as support in establishing security for courtrooms and other judicial facilities.

Efforts to strengthen the capacity of the Ministry of Justice should continue. The Ministry of Justice should develop an adequately resourced international cooperation department with sufficient, well-trained staff to evaluate and cooperate with international projects and donor organisations. In addition, the Ministry's capacity to support policy development and legislative implementation should be increased.

Statistical data should be collected regarding key-performance indicators in the justice sector. The lack of reliable data, and the capacity to monitor and evaluate such information are major impediments to justice sector reform.

Mechanisms should be developed to ensure access to justice for the underserved in Libya. After broad consultation, Libya should develop a strategy for ensuring access to justice for the indigent, vulnerable and marginalized. This review should include a systematic analysis of the capabilities and suitability of the People's Lawyers Directorate, and other rule of law actors such as the private bar to meet these needs. A public information strategy should also be developed to inform the public concerning the various agencies handling transitional justice and human rights issues and procedures for filing complaints before these bodies.

Modern court management practices should be implemented throughout Libya. Working with the Judiciary and fully respecting its independence, the Ministry should promote modern court management practices, and ensure that court administrative personnel receive sufficient training and resources to be able to implement these practices effectively and consistently.

Support should be provided to the Directorate of Law. In addition to increasing its capacity to draft effective legislation, the Directorate of Law should develop the expertise to review existing legislation for compliance with international standards, and to provide policy recommendations for implementing new legislative programs.

The Basic Freedoms and Human Rights Council (BFHRC)

A longer-term plan should be developed and implemented for the support and training of the BFHRC. As a new and unprecedented institution in Libya, the BFHRC requires both institutional and human capacity development. In particular, the BFHRC needs to increase the staff's capacity to process complaints, undertake investigations, assess legislative compliance with international conventions, engage in policy-making and promote public awareness of human rights. International exchanges and linkages with other national human rights institutions in the region will be of particular importance.

The BFHRC's relationships with other rule of law institutions should be clarified. To avoid overlap and enhance cooperation, the BFHRC should develop mechanisms for exchanging information with other rule of law institutions, and protocols for reporting and collaboration on matters requiring cooperation, such as the Council's mandate to refer cases to the prosecutor.

The Bar Associations and Private Lawyers

The Draft Law on the Legal Profession should be rapidly adopted and implemented. The adoption of the Draft Law is vital for the development of the profession, as well as improvement of the quality of legal education and the institutionalization of a system of legal aid.

Libyan Bar associations should encourage and promote women practitioners. All Libyan bar associations should develop strategies to identify and overcome obstacles facing women lawyers in private legal practice and in attaining leadership positions in the Bars.

The Libyan Bar Association (LBA) should adopt a code of ethics. The LBA should take the lead in adopting a new ethical code focusing on the profession's core values, including independence, integrity, prevention of conflicts of interest, and confidentiality.

Libyan Bar associations should further develop their capacities to support private practitioners. In order to function effectively, the LBA should develop greater capacity to receive and distribute grants, and to coordinate effectively with international professional organizations and donors. All Libyan Bar associations should increase their abilities to coordinate their activities, and communicate with the Libyan population and media.

The LBA should develop digital legal resources. The LBA should be supported in collating and publishing Libyan statutes, regulations, commentaries, and case law, in line with the principles of the Free Access to Law movement.

Libyan Bar associations should foster volunteerism and access to justice for all. Access to justice is a critical issue in Libya. The various Libyan Bar associations should develop plans for effectively harnessing and managing the pro bono legal skills of their members, and provide the training, resources and effective coordination with other actors to reach this goal.

The Law Faculties

Libyans should undertake a national dialogue among all relevant stakeholders concerning the future of legal education. The various Libyan stakeholders should discuss the need for and content of legal education reform, and develop a national strategy to set standards for public and private laws faculties. Support should be provided for on-line learning, research and dialogue for Libyan law students. Until a national strategy is implemented, support should be provided for on-line "knowledge centers" for Libyan law students who are looking for ways to supplement their coursework.

