

MIZAAAN*

THE NEWSLETTER FROM
LAWYERS FOR JUSTICE IN LIBYA
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LETTER FROM OUR DIRECTOR

Al Salamu-Alaikum

I am very excited to welcome you to the first issue of *Mizaan*, the newsletter from Lawyers for Justice in Libya. Its publication comes a year after the start of the 17 February Revolution and the creation of LFJL on 1 March 2011 – and what a year it has been!

I remember that first call of 1 March so clearly – we were seven people, most of whom did not know each other, compelled to come together to do something, anything, to contribute to the incredible events unfolding in Libya. We introduced ourselves: Feras Gadamsi (Dubai), Ibtisam Al-Kilani (Paris), Marwa Elborai (New York), Farah Beitelmal (Madrid), Mariam Elhadri (Pennsylvania), Rayan Faris (New York) and me (London). We were all Libyan and all living in the Diaspora – we were wary at times but knew that we had to shed the paranoia instilled in us by the previous regime and trust each other fully. The membership has changed since (see our [Core Team here](#) and [Meet Mariam here](#)) and we are very excited to have Sufian Creui and Tarek Eltumi be part of the LFJL team, but will always be indebted to the founding members, and they will always be part of the fabric of what makes LFJL what it is today – an independent non-governmental organisation which

exists for, works for, and is passionate about, the defence and promotion of justice in Libya through the promotion of human rights, the rule of law and democracy.

And so we began... by advocating for legal intervention (through the mechanisms of international justice, including the International Criminal Court), for the international community to engage with Libya, and by supporting lawyers on the ground in Libya in whatever way we, as lawyers, could. To that end, we assisted in identifying lawyers and in the creation of the investigative committees of the National Transitional Council (NTC), and in the training of a number of the lawyers on the fundamentals of human rights and documentation of violations. The lawyers were also trained on the documentation of international crimes, including crimes against humanity. As the conflict began to look as if it would become an armed one, we drafted – on behalf of the NTC and with a team of International Humanitarian Law experts at the School of Oriental and African Studies – guidelines on the rules of detention and targeting in a non-international armed conflict.

*Mizaan is the Arabic word for 'scales', including the 'scales of justice'.

IN OUR WORK, WE WOULD NOT EXIST WITHOUT THE SUPPORT OF, AND COLLABORATION WITH, OUR INCREDIBLE PARTNERS, AND THIS NEWSLETTER IS NO EXCEPTION.



These guidelines were an attempt to operationalise the laws of armed conflict for a civilian population that had taken up arms. For a taste of some of our other projects, as well as key events of this incredible year, in Libya and for LFJL, since our start on 1 March, follow the timeline of our journey which begins [here](#).

Mizaan intends to provide a platform for the discussion of key issues arising on Libya's road to establish a state in which human rights are protected and promoted, the rule of law is sovereign and democracy is enshrined. In this inaugural issue, we aim to provide a survey of where we are one year after the 17 February Revolution, including the challenges ahead. We highlight some of these in '[Thoughts](#)'. *Mizaan* also updates our subscribers of our activities, past and future – you can read about our last workshop in '[Sousse Workshop: Closing Statement](#)'.

In our work, we would not exist without the support of, and collaboration with, our incredible partners, and this newsletter is no exception. It is a wonderful honour for us to have so

many of those partners writing for us in the first issue of *Mizaan*. I want to thank Abdudayem Gharabli, Judge Alasaby, Samraa Naas, Laila Bughaighis, Nizar Mhani of the Free Generation Movement and Anas El Gomati of the Sadeq Institute for their incredible and personal reflections in '[17 February Revolution: One Year On](#)', each from a different perspective. I also want to thank [Amal Alamuddin](#) of Doughty Street Chambers, [David Williams](#) of the Center for Constitutional Democracy and [Layla El-Wafi](#) of Women4Libya, who provide insights into key challenges facing Libya. Amal looks in depth at the options by which Saif Al-Islam Gaddafi can be tried, David highlights one of the often forgotten areas of the election process, districting, which could have potentially serious consequences, and Layla looks at why women must not be politically marginalised in the new Libya. I also want to thank our partners, and dear friends in Libya, who have contributed insightful pieces: [Wesam Al-Saghir](#) celebrates Misrata's first elections,

[Judge Marwan Tashani](#) highlights the key challenges facing Libya in relation to the building of an independent judiciary and [Khaled El Abbar](#) explores the issues raised by the creation of Libya's first national human rights institution, the Council for Human Rights and Fundamental Freedoms in Libya.

Reading the list of contributors to this inaugural issue is very humbling for us at LFJL – we are truly privileged to be working with some of the most talented legal professionals, inspirational activists and innovative analysts and thinkers, both in Libya and internationally. We hope that we continue to work in this collaborative way with our existing partners, and with new ones, in order to ensure a future for Libya that is reflective of the many voices our country has, so that we build a Libya that is democratic and truly reflects its pluralist society.

Finally, we are very grateful for the incredible efforts of Amelia Odida, our guest editor for this issue – without her dedication, *Mizaan* would have remained a concept and not the rich collection of views and insights you find here. We would also like to thank our Arabic editors, Ibrahim Al-Sharif and Salma El-Naqqash, for their extensive efforts to ensure this issue reaches our Arabic readership. I hope you enjoy reading the articles you see now, and please do let us have your thoughts on any piece! You can join the conversation on Twitter at twitter.com/#!/LibyanJustice or on our Facebook page www.facebook.com/LibyanJustice.

Elham Saudi

Elham Saudi

Director

THE PERIL AND PROMISE OF DRAWING ELECTORAL DISTRICTS IN LIBYA

David C. Williams

Libyans have already shown the world that they can work a miracle by throwing off a dictator. Now they must make another miracle: the peaceful transition to a wholly new, stable, equitable, and democratic political system. One of the chief pillars of any democracy is the electoral system. Electoral systems are technical and rarely understood, but they have enormous implications for Libya's future. Different electoral systems divide political power in different ways and give rise to different types of political parties and different systems of politics. Some may help Libya to a better future; others may lead to further turbulence or capture of the government by a single group. The choice of Libya's electoral system is therefore momentous and must be made in full awareness of what is at stake.

Electoral systems that use majority/plurality voting in single member districts are very familiar to most people. They appear simple, but in fact their apparent simplicity hides a number of perils and promises. Single member districts are geographical constituencies that elect only one representative to the legislature. In plurality voting systems, the candidate who receives the most votes is elected, even if the candidates so split the vote that no-one receives more than half of the votes. Majority voting systems are similar, except that to win, a candidate must receive a majority of votes; if no-one receives a majority on the first ballot, the top two vote-getters generally face off in a run-off election, so that one must receive more than half the vote.

Libya's new electoral law calls for most of the legislature to be elected in this way. It is a common system around the world. Few people, however, understand

fully that the drawing of district lines has enormous significance for Libya's future political system. It seems a technical issue, but in fact district lines can be drawn to exaggerate the power of certain groups and to shape the kind of politics that Libya will have. Typically, these lines are drawn behind the scenes, so ordinary citizens do not understand how important they are.

How Districting works

Let us imagine a simple polity: it has four districts, each electing one person, and one hundred voters, twenty-five in each district. Of the one hundred voters, forty-eight belong to the Red Party, and the other fifty-two belong to the Blue Party. If the Blue voters and the Red voters are evenly distributed throughout the country, then very likely the ratio of Blue voters to Red voters will be the same in each district: thirteen Blue voters and twelve Red voters. However, if that is the count in every district, then the Red voters are a minority in every district and so will lose every district. In other words, although the Red Party commands forty-eight percent of the votes, they receive zero percent of the legislative seats. In Libya, for example, if one party holds a majority of the votes in all the districts of Benghazi, the other, smaller parties will manage to elect no-one at all.

Districting can have these effects because majority voting is a winner-takes-all system. In any given district, the winning candidate goes to the legislature and therefore holds all the legislative power from that district. The losing candidates, by contrast, go home, and exercise none of the legislative power from that district. Minority parties tend to be a minority in most districts, and so they lose most districts. Majority parties, by contrast, tend to be the majority party

in most districts, and so they win most districts, far out of proportion to their share of the electorate. This tendency for majorities to win more than their proportional share is called the majority premium. If the district lines are drawn blind, without conscious intent to affect the balance of power, the majority will predominate.

However, it is possible to draw district lines with conscious intent to redress this imbalance. Due to the fact that it is possible to draw very complicated district lines, districters have broad discretion about whom they want to include in a district and whom they would like to exclude merely by shifting the lines around. To eliminate the majority premium, we need only create districts in which the minority party is a local majority. Again, let us imagine a simple polity: four districts, one hundred voters, twenty-five Red voters and seventy-five Blue voters. By carefully drawing district lines, we end up with the following: District One has fifteen Red voters and ten Blue voters; District Two has fifteen Blue voters and ten Red voters; and the other two districts are entirely made up of Blue voters. We have deliberately drawn the lines around District One in such a way as to ensure that the Reds are the majority. Ergo, they control twenty-five percent of the districts (one in four), which is exactly their share of the electorate. They have proportional power, and the majority premium is gone.

Possible negative effects of Districting

Unfortunately, it is also possible to use the power of districting in bad ways—via a process called gerrymandering. If, for example, a minority party controls the districting process, it can actually ensure that it wins a majority of the seats in the legislature.

THE DISTRICTERS CAN CHOOSE HOW MUCH POWER THE VARIOUS PARTIES WILL HAVE AND WHAT ISSUES WILL BE MOST PRESSING IN THE NEW REPUBLIC

Gerrymandering

Imagine another polity: four districts, one hundred voters, thirty-nine Red voters, and sixty-one Blue voters. If the Reds control the districting, they will likely draw the following lines: District One has twenty-five Blue voters, and the other three each have thirteen Red voters and twelve Blue voters. In other words, although the Blue voters number sixty-one percent of the population, they are a majority in only one district—twenty-five percent of the legislature.

How did the Red districters manage to rig the elections this way? They used a gerrymandering technique called packing. They packed District One full of Blue voters. As a result, the Blues won District One by a land-slide, but then they had too few voters in the other districts to win any of them. In this case, the voters—sixty-one percent of them Blue—did not actually decide who would control the legislature; the districters did. With thirty-nine percent of the voters, they managed to gain control of seventy-five percent of the legislature. So long as the Reds stay in control of the districting process, they will probably also stay in control of the legislature—regardless of what the voters want.

The Power of Districting

In short, districting is like magic. By carefully drawing lines, districters can ensure that a minority party controls zero legislative seats; or that the majority and minority parties have seats in exact proportion to their numbers; or that a minority party actually controls the majority of the seats in the legislature.

In addition to controlling the relative legislative strength of the different parties; districters can control which

issues will seem most pressing to the legislature. For example, imagine a polity in which some people are socialists and some free marketeers. The districters carefully draw lines so that one district contains only socialists, who are different in every other way except for being socialists, and the other district contains only free marketeers, again who are different in every other way except for being free marketeers.

When searching for a successful campaign strategy, candidates try to campaign on the most popular issues. In the socialist district, they might try to campaign on their tribal identity or their environmental program or their international policy, but the voters of their district have many different views on those subjects, so the candidates get a very mixed reception. If the candidate campaigns as a socialist, by contrast, he will receive overwhelming support, so socialism will be the key plank in his platform. In the district full of free marketeers, the candidate will end up with a free market platform for the same reason. In the legislature, the central dividing line between these two candidates will be their economic philosophy, and as a result that issue will be what these legislators argue about and spend their time on. If the districters divide the whole country in the same way, the legislature will be wracked with agitation about economic philosophy. If, by contrast, the districters had divided voters according to tribal identity, with each district packed with voters from one and only one tribe, then tribalism would have become the key issue plaguing the legislature.

In short, the districters can choose how much power the various parties will have and what issues will be most pressing in

the new republic. This makes districters very powerful people, not only at the start of a new democracy as Libya now is, but throughout the country's political life. As a result of social mobility, district lines must be regularly re-drawn to ensure that all districts contain the same number of people. It is therefore not possible merely to adopt a set of district lines and then to stick with it.

Due to the level of political power vested in districters, it is very important that Libya should have a good, clear process for choosing them; that the districters should do their work in an open and transparent way; and that they should be subject to clear rules and processes. In Libya, as in many other countries, the election commission will probably be tasked with drawing these lines. Libyans should therefore understand that the election commission's work will not be purely technical, bureaucratic, and interstitial. The commissioners will not merely be fleshing out the electoral law; they will also be delineating the shape of Libyan democracy.

Professor David C Williams is John S Hastings Professor of Law at the University of Indianapolis and Executive Director at the Center of Constitutional Democracy. Williams has written widely on constitutional design, the constitutional treatment of difference, and the relationship between constitutionalism and political violence. As Executive Director of the Center for Constitutional Democracy, Williams consults with a number of reform movements abroad.

MISRATA AND THE WEDDING OF DEMOCRACY

Wesam Al-Saghir

Libyans were unable to practice democracy for several decades whilst they lived under the control of one of the most oppressive dictatorships of our times, and one which promulgated the falsehood that we lived in the 'era of the masses'. Libyans now march towards the launch of a new era of freedom, emancipation and democracy. In an experience which was the first of its kind after years of drought, the people of the city of Misrata launched a pioneering election in the free state of Libya to elect the city's local council.

The call to undertake this challenge first came from civil and political activists in the city through the institutions of civil society and the 24 December Youth Movement to Reform Local Councils. This started with a sit-in, which continued for more than twenty days, in Midan El-Adalah, in an attempt to pressure the local council to hold an election to select its members. On 2 January 2012, the local council responded to the call and announced in a statement that it had agreed to an election of the local council. It called on the institutions of civil society, trade unions and other associations, and active political figures in the city, to establish a process to elect a local council in the city, including an outline of the necessary financial expenses required to complete the process. In response, a group comprising approximately one hundred civil society organizations and a number of independent political figures met and decided that an independent high committee for the local council elections in Misrata (the High Committee) must be formed to manage the entire electoral process, including the

election mechanism, the designation of constituencies, budgeting, and the appointment of the members of the relevant sub-committees. The meeting selected eight persons to be members of the High Committee, and a proposal was submitted to the local council to issue a decree naming these members. This decree was issued on 17 January 2012, approving the members of the High Committee. The High Committee started work immediately to approve the electoral districts, to develop a mechanism for the election which meets the aspirations of the people of the city, and, more importantly, to put in place the process to complete the planned election.

The High Committee devised a road map for the creation of ten electoral districts. It adopted the principle of "one person, one vote". The road map also adopted a ratio of representation based on the population of the smallest constituency, which had a population of 15,000 people. Thus, each member of the local council would represent a constituency of 15,000 people. Using the population of the city of Misrata as set out in the 2006 census, and applying a statistical adjustment, the population of the city was estimated at 281,892 for 2011. This number was then divided by 15,000 to determine that the number of seats in the new local council would be 18. The High Committee decided to add 10 more members, one member from each constituency, to increase competition between the candidates at the geographical level.

The committee set out, in the same road map, the conditions applicable to voters and candidates, the most important of which – in relation to candidates – is the requirement to secure the endorsement of twenty people from that candidate's constituency. The road map also set out a

timetable for the completion of the entire election process.

The High Committee put forward the road map for public consultation, incorporating comments which were received in the final version of the road map.

The **first stage of the electoral process** began on 31 January with registration on the electoral register. This was made possible by the introduction of 78 polling stations across the constituencies. The electoral register was due to be closed on the 10 February, but the High Committee decided to extend registration until 13 February to give the opportunity for wider participation for all the citizens of the city. At the close of the electoral register, the number of registered voters exceeded 100,000.

The **second phase started** with the opening of nominations for membership of the council. This phase lasted from 7 to 11 February, with the number of candidates at the close numbering 245 from all constituencies. Following the announcement of the initial list of candidates, 13 – 15 February were designated as the dates during which the public may contest the inclusion of any candidates. The High Committee, taking into account the complaints filed by the public and the conditions and criteria set out in the road map, disqualified 26 candidates announcing a final list of 219 eligible candidates.

16 – 18 February was designated as the campaigning period, and on 20 February, the voting day, **the third stage begun**. The people of the city of Misrata headed to the polling stations at eight o'clock in the morning to cast their votes in ballot boxes borrowed from the high committee for elections in the state of Tunisia, and to decorate

EVERYONE WAS EAGER TO PARTICIPATE IN THE FIRST DEMOCRATIC EXPERIENCE OF ITS KIND INSIDE THE LIBYAN STATE, AND THE VOTING PROCESS PROCEEDED IN A BEAUTIFUL ATMOSPHERE FILLED WITH JOY AND PLEASURE

their left index finger with election ink imported specifically for the process from the UK. Everyone was eager to participate in the first democratic experience of its kind inside Libya, and the voting process proceeded in a beautiful atmosphere filled with joy and pleasure, in the presence of a group of observers from civil society organisations from within Misrata and from other Libyan cities, and under the scrutiny of local and international media. Voting was closed at eight o'clock in the evening. Immediately, the counting of votes started, and this continued in some polling stations until three o'clock the following morning. On the evening of 21 May, at a press conference held at five o'clock by the High Committee, the results of the election were announced. 28 candidates were declared as the new members of the local council of Misrata. The committee announced a 24 hour period from the time of the announcement

for the submission of any challenges to the final results. None were received; the people in the city were satisfied with the selected candidates. On 25 February, a meeting was held at the headquarters of the High Committee to elect the president and vice president of the local council through a simple majority election process among the elected council members. Article 6 of the rules of procedure relating to local councils issued by the National Transitional Council stipulates that, in the case of the president or his deputy, a simple majority of the votes (50+1) must be obtained. The High Committee decided that, in the event that none of the candidates receives this majority, a second round would be conducted among those with the highest number of votes. This would be done for both the position of president and that of the vice president.

The presidency was won by Mr Youssef Mohammed Ben Youssef,

and the position of vice president by Mr Mohammed Hadi Al-Jamal, and thus Misrata completed its electoral experience successfully and with distinction. This led to one international observer who had followed the process closely to comment "any observer of Misrata today would believe that Misrata had been holding elections for more than twenty years". The success of the electoral process in the city Misrata is a Libyan success par excellence.

Wesam Al-Saghir is a lawyer and human rights activist and a member of the independent high committee for the local council elections in Misrata. He is the Managing Director of the Libyan Organisation for Peace and Human Rights and a lecturer in criminal law at Misrata University's School of Law.

INSIGHTS

WHY WOMEN? WHY NOW? ENGAGING, EDUCATING, AND PROMOTING LIBYAN WOMEN

Layla El-Wafi

On 23 October 2011 the National Transitional Council (NTC) formally announced Libya's liberation. This officially marked the end of the 17 February Revolution, but it also signalled the start of the hard work ahead for the country to re-imagine itself without the former corrupt regime and to re-build its political, economic and social infrastructure and institutions. The task ahead for the NTC is formidable: re-establish internal security and access to justice including re-integrating militia groups and border control; stabilise the economy and re-start the oil sector; and re-establish essential services like health, education and utilities. Also, and perhaps most importantly, the NTC will oversee the first democratic elections scheduled for June 2012, where new members of the General National Congress will supervise the drafting of a new constitution.

Given the above concerns, why should the NTC, local city councils and the general public care about engaging, educating and promoting women during Libya's transition? Why should the NTC pay special attention to ensure that women are given key roles and responsibilities in the decision making processes and institutions that are tasked with establishing Libya's elections and the constitutional drafting process later this year?

Because that is what we fought for...

The Libyans who protested, fought and died during the Revolution did so for many reasons. At the core of their purpose was a desire to establish a free, democratic and fair country where everyone – men and women – had equal opportunity to economic prosperity and access to good

public services irrespective of their family name, tribe or political allegiance. It is estimated that over 30,000 people lost their lives and thousands more were injured and displaced from their homes. These sacrifices were made in order that the country be ruled by a representative government run by qualified professionals chosen by transparent methods. If we exclude half of Libya's population from this process we cannot claim to be a democracy and by doing so, we dishonour the sacrifices made by it during the Revolution, as well as by so many who fought for justice long before. There is a risk of continued violence and instability if the new government and constitution do not adequately consult and represent all Libyans.

Because we cannot afford not to...

The Arab Human Development Report authored by scholars and consultants across the Arab world and commissioned by the United Nations Development Programme (UNDP), emphasises the inclusion of women and gender sensitive policies in order for countries in the region to achieve economic development and prosperity. The legacy of underinvestment in Libya's infrastructure, which was further devastated by the recent conflict, means that Libya will need all of its human capital and resources to re-start and re-build. It would be a great dis-service to current and future generations if over half of the population's skills and resources are under-utilised and their views and concerns over-looked. Libyan women are highly educated and qualified. They comprise approximately 60% of university graduates, are represented across most professions, and have been working in the private and public sectors,

for decades. In addition to this, as a result of the high death toll of men during the conflict, it is likely that more families than before will need to rely on female members for their economic needs. For this reason, it would be unwise for an economic policy to ignore the economic empowerment and representation of women during Libya's transition.

Because Libya and the international community have already committed to...

On 31 October 2000 the United Nations Security Council unanimously adopted Resolution 1325 requiring member states to adopt a gender perspective that includes a focus on the special needs of women and girls during and after a conflict. As a result of this resolution, all member states were urged to respect women's rights and support their participation in peace negotiations in post-conflict reconstruction. UNSCR 1325 (together with subsequent resolutions 1820, 1888, 1889 and 1960) are binding international law (pursuant to Article 25 of the UN Charter) which reaffirms that women must play an important role in the prevention and resolution of conflicts, and are an essential resource in post-conflict reconstruction and governance. This body of international law requires the NTC to engage with women and promote their involvement in a systematic and structured way. Their involvement should not be limited to civil society, professional and private sphere, but more importantly, it must include their roles in governance and reconstruction. Such integration must not be done simply by appointing one or two women as token representatives or as a symbolic way for Libya to prove its credentials to the West.

THE NEW LEADERSHIP SHOULD BE BRAVE AND VISIONARY IN HONOURING THE SPIRIT OF LIBYA'S REVOLUTION AND INCLUDE ALL OF LIBYA'S PEOPLE

Because we have the chance to dream big...

Libya has a unique opportunity to re-establish itself as an inclusive democratic society. Libya can be a model for the region and for the world. It has the unique opportunity to learn from the experiences of Tunisia, Egypt and of other countries that have come out of conflict and dictatorship. Although cultural and religious values should be respected in this process, they must not be used as an excuse to undermine human rights, equality before the law and the important contribution of women outside of the home. All Libyans need to participate in the process of rebuilding Libya, including the election preparations and constitution drafting processes, which should be done by transparent and consultative methods. This is not an issue exclusive to women but also applies to minority groups,

Libyans in small cities and rural areas. The new leadership should be brave and visionary in honouring the spirit of Libya's Revolution and include all of Libya's people in this process.

The 17 February Revolution was a success for many reasons. Women played a key role, which has already been acknowledged by NTC officials and others. Irrespective of what role women had before, during or after the Revolution, the country now needs its best resources to stabilise and transition to a democratic and fair country: its people – men and women. It is crucial for the NTC and the wider public to take active steps to include women in decision-making and establish gender sensitive processes. Common (and sometimes unintentional) barriers to excluding women should be addressed and avoided. These steps should be 'mainstreamed' or considered in the wider context of Libya's stabilisation and reconstruction. Women's leadership should

not be limited to 'women's issues' like family affairs, redressing sexual violence or protecting women from further abuse faced in the public or in homes.

I hope that next time you are asked the question: "*Why women, why now?*" you will reply to say: "*why not?*"

Layla El-Wafi is of mixed Libyan and Egyptian heritage and is an English qualified lawyer working in London specialising in finance and infrastructure projects. Layla is actively involved in civil society initiatives both in the England and in Libya including the Women4Libya campaign, part of the Libyan Civil Society Organisation (LSCO).

1 March 2011: First meeting of the founding members to form Lawyers for Justice in Libya

17 March 2011: The United Nations Security Council passes U.N. Resolution 1970, referring the crimes committed in Libya to the ICC

March 2011: LFJL succeeds in obtaining a declaration of the solidarity of French lawyers with Libyan lawyers during the conflict and in demanding that the French president act urgently to protect civilians in Libya

April 2011: LFJL assists in the creation of local legal committees to investigate crimes against humanity, war crimes and other human rights violations in key locations across Libya, including in Benghazi, Misrata, Zintan, Nalut and

Tripoli. These committees were, in turn, appointed by the NTC as official fact-finding committees

8 April 2011: LFJL conducts a training course in Cairo, Egypt with the ICC and Libyan lawyers on fact-finding and documentation of crimes against humanity and of human rights abuses for possible international prosecution

15 April 2011: LFJL commences its Video Evidence Database for collection of evidence of human rights abuses to be used by international judicial systems

23-29 April 2011: LFJL advocates for a draft resolution and urgent appeal in Banjul, the Gambia in front of the African Commission and responds to the Gaddafi regime's denial of abuses

THE REVOLUTION IS NOT COMPLETE WITHOUT AN INDEPENDENT JUDICIARY

Marwan Tashani

Since the independence of Libya, its judicial system has been through many stages in its history which have contributed to its formation and structure. Firstly, the affirmation in the constitution of 1951 of the independence of the judicial system, the declaration of a unified judicial system and the statement in article 42 that “judicial control is exercised by the supreme court and other courts” together formed the foundation stone on which the Libyan judicial system was built. The journey began with the adoption of regulations and legislation governing judicial work in the form of the unified supreme court law, the civil and commercial procedures code and the criminal law procedures (1953), followed by the adoption of the law regulating legislative procedures (1958) and the judicial system law (1962).

We can say that the second stage started after the coup of September 1969, when work continued under the same regulations until law no. 78 for the year 1973 was issued on the subject of unifying the judiciary, under which Islamic Shariah procedures and civil law procedures were merged together. This stage was particularly harsh on the Libyan judicial system and its independence, with intervention in its jurisdiction and compromise of its neutrality commonplace. The main cause was the tyranny of the head of the state in Libya and his adoption of what he called the ‘Jamhriyah’ system, which contributed further to the disruption of the Libyan judicial system.

The diligent observer may notice the existence of a deliberate and systematic attempt to tamper with this system as the defender of the rights and freedoms

which represent the mainstay of any state and a guarantee of its stability. The start was through the restructuring of the Supreme Court by law no. 6 for the year 1982, which did not include jurisdiction over constitutional cases, thus cancelling the constitutional domain of the Supreme Court.

The regime went further than that when it cancelled the position of the public prosecutor by law no. 4 for the year 1983. This continued for more than nine years until it was brought back in response to the pressures arising in the context of the Lockerbie case.

The former regime adopted further legislation which interfered with judicial work and which obstructed its progress towards independence. For example, the regime cancelled the private law profession for nine years by law no. 4 for the year 1981 relating to the administration of private law. Another example can be seen in the establishment of a special judiciary parallel to the ordinary courts and prosecution offices which introduced the people’s court and the popular prosecution office established by law no. 5 for the year 1988 and which was infamous for its wrongful and unfair rulings against anyone who challenged the regime.

The independence of the judiciary was compromised yet again with the establishment of the state security court and prosecution office pursuant to the high council for judicial bodies law no. 27 for the year 2007 and the adoption of a large number of laws granting immunities for public officials affiliated with the regime. Those immunities meant that public officials were able to avoid justice and punishment. Moreover, legislation was passed which prohibited litigation in certain cases, such as law no.

7 for the year 1988 which banned claims related to property. However, perhaps the strangest event was the adoption of laws restricting the discretion of a judge to order compensation for damages. This was achieved by law no. 213 for the year 2003 which set an upper limit for compensation ordered against the government and some companies.

Legislation was adopted which obliged parties in any claim to present their claim before a local committee before submitting it to an ordinary court, a condition that restricted the constitutional right of the citizen and his right to litigate without restrictions.

This proliferation in the adoption of laws without due consideration has led to discrepancy and confusion in the content of these laws which has confused the courts and puzzled the judges in interpreting these laws in their rulings.

The regime further exercised its control over the judiciary and influenced its independence through the minister of justice’s role as the president of the high council for judicial bodies, and the membership of the general secretary of the ministry of justice in the high council for the judiciary which has the authority for the appointment, promotion, transfer, dismissal and discipline of judges. The disintegration of the independence of the judiciary was further demonstrated by the appointment of non-judges to the top of the judicial pyramid, such as the appointment of an intelligence officer with the rank of general as deputy from 2002 to 2007, and the appointment of an academic professor and a member of the revolutionary committees as president of the Supreme Court from 2005 to 2009.

The weakened role of the judiciary is further highlighted by the inability of state institutions to enforce final court

rulings especially those rulings which contradicted the desires and directions of the political authority, including the failure to enforce rulings for the payment of compensation for the period of imprisonment for political prisoners.

Notwithstanding what has been recounted of the violation of the executive and political authority of the principle of the independence of the judiciary, and its blatant interference in the core work of the judiciary during the span of the former regime, judges did not succumb to these interventions but tried, fought and stood powerfully to maintain the integrity and the independence of the judiciary, among them were judges independent in their character and conscience but who, in body, belonged to a dependent judicial council.

Prominent examples of judges defending the independence of the judiciary include:

- the cancellation of the decree no. 7 for the year 2000 of the minister of justice with respect to the restructuring of the administrative law directorate in the appeals court in Benghazi issued on 16/10/2000 following the appeal presented by the head of the department, declaring the decision of the minister tainted by abuse and misuse of power (appeal no 31/2000 of the court of appeal of “Aljabal Alakhdar”).
- the Supreme Court's acceptance of an appeal by a judge against the constitutionality of the text of article 93 of law no. 6 for the year 2006, on the subject of the judicial system, which gives immunity for the decisions of the high council for judicial bodies and bans any appeals against its decisions. The Supreme Court repealed the article, declaring it

unconstitutional in appeal no 5/55 on 11/11/2009 and hence guaranteed the right of litigation for all.

We have now reached the third stage in the history of the Libyan judiciary, that after the 17 February Revolution. With that revolution came the calling of Libyans for the independence of the judiciary, the sanctity of its message and the importance of ensuring that it is supported and reinforced, granting it alone the authority to address all cases and to entrust to it alone the responsibility of dealing with all who violate the law whether before the 17 February Revolution or after it. The independence of the judiciary was emphasised in the constitutional declaration issued on 3 August 2011, articles 32 and 33 proclaiming the independence of the judiciary, banning special courts, guaranteeing the right to due process and banning any immunity granted to administrative decisions from judicial review.

Law no. 4 for the year 2011 adjusting the law of the judiciary revoked the leadership of the minister of justice of the high council for judicial bodies, formed a judicial council led by the head of the Supreme Court, with the general deputy for the court the deputy of the council and with a membership consisting of the heads of the courts of appeal in a step to support the independence of the judiciary and to separate it from the executive authority. This law also revoked the immunity previously granted to the decisions of the high council for judicial bodies.

Despite the efforts of the National Transitional Council to establish the principle of the independence of the judiciary and working to activate it and providing all guarantees for it, certain

crises and the nature of the conflict have resulted in cases of intervention in the work of the judiciary such as the dealings of the NTC in the case of the assassination Colonel Abdulfatah Younis. The head of the NTC appeared alongside the investigation authority in the media and made accusations of people who were not called upon nor questioned. The discretion given to the judicial committee in appointing the heads of some judicial forums was also compromised when, for example, the head of the local council of Misrata recommended to the president of the NTC the specific names that should be appointed as chiefs of the courts and prosecution offices in Misrata. Finally, the continuing detention of many of the members of Gaddafi's brigades and figures of his regime without questioning nor according them any due process further illustrates the weakened role of the judiciary in ensuring the supremacy of the rule of law.

In the end, we see that the transition from a revolutionary state to a peaceful one requires time and effort. The reinforcement of the principle of the independence of the judiciary demands fast and effective steps such as the capacity building of judges technically and academically to cope with the post-revolution situation. In doing so, it is also important to increase the knowledge of comparative law and to give experts the opportunity to study the inconsistencies and problems within the current judicial system, and the obstacles that obstruct its independence and neutrality.

It is imperative to work carefully on the drafting of legislation, to ensure the inclusion of all the principles which ensure the independence of the judiciary, the separation of power, the jurisdiction of the constitutional courts and the

WE MUST NOW FIGHT FOR JUSTICE, EQUALITY AND DIGNITY; AND NOTHING CAN GUARANTEE THIS EXCEPT AN INDEPENDENT AND NEUTRAL JUDICIARY

organisation of legal immunities in the forthcoming Libyan constitution. We must revise the law no. 6 for the year 2006 relating to the judicial system and add to it a method for the appointment of the deputy and the head of the Supreme Court, highlighting the importance of choosing them from amongst the judiciary through an election and the need to ensure the financial and administrative independence of the high council for judicial bodies from the ministry of justice.

It is important to the development of a truly independent judiciary to ensure the prohibition of legislation which may violate the authority of the judiciary by establishing special courts and special committees outside the ordinary judicial system, to improve the financial circumstances of the judges and to improve their living standards in order to avoid corruption and dependency, and to expel any judges proven to be corrupted after a due process that involves questioning as well as a fair opportunity to defend any charges and appeal any decisions to be expelled. In addition, it is important to provide the necessary support for security

institutions and to provide a suitable, secure environment for judges and courts and to enable the mechanisms to enforce judicial rulings, as there is no meaning to any ruling if there is no way to execute it voluntarily or by force. Further, the development and the training of judicial assistants; writers, administrators, and experts, is necessary as is the reform of the courts to develop their buildings and to introduce automation and IT systems widely into the judicial process.

It is vital to establish an independent entity to unite judges, and to defend the independence of the judiciary, becoming an instrument of pressure on the government to direct it in the right direction. This entity can contribute to the development and training of judges, to elevate their professional and technical standards and to spread the culture of human rights and to promote the adoption of legislation which promotes judicial work.

Lastly, the development of the judiciary in Libya in a manner which ensures its independence, neutrality and integrity requires massive work and effort from all, including research papers

and studies to address the deficiencies in the current legislation and to introduce new balanced laws which meet the demands of independence, enforce the rule of law, and protect freedoms and rights so that we may reach the dream state, a state where the law prevails, a state which is subject to accountability, is interested only in the benefit of its citizens and is ruled by an honest judiciary independent of other state institutions under the umbrella of constitutional and judicial protection. To achieve the aims of the revolution of freedom, we must now fight for justice, equality and dignity; and nothing can guarantee this except an independent and neutral judiciary.

Marwan Tashani is a judge, human rights activist and head of the committee for documentation and follow-up of the detainees and mercenaries. Judge Marwan Tashani works in the Department of Legal Affairs and Human Rights in the interim National Constitutional Council.

INSIGHTS

THE POLITICAL CONCEPT OF HUMAN RIGHTS ORGANISATIONS IN THE NEW LIBYA

Khaled El Abbar

It is counter-intuitive that a human is required to struggle and to resort to violent means in the form of revolutions in order to obtain the rights of every human.

The theory of human personal rights and duties has evolved with the evolution of humanity: it has developed through the principles of Confucius and Zoroaster; through the laws of Hammurabi and Justinian; and through the ethical theory in Christian thought. It was later developed in Islamic culture within the framework of “Shura” – the consultation process between the ruler and the ruled – and was demonstrated by the words of Omar Ibn al-Khattab, the great Islamic ruler, in his support of the rights of citizenship of a Coptic boy facing abuse at the hands of the son of the Muslim ruler in Egypt: “When did you enslave people when their mothers gave birth to them free?”

A person's rights within his local community are the foundation for the mental and psychological development of his perception of those rights; and for his moral relationship with the wider society, including the human rights of other people, in the space of so-called “political reality”, and how he develops his own principles of respecting human rights anywhere in the world.

We cannot endorse the idea that human life is established in its entirety on the idea of struggle, despite the plausibility of this perception. Having said that, we see that the international challenges facing developing and small communities are what dictate the context in which human rights are introduced within these communities, and Libya – as a developing country

and a small human society – was the subject, like others, of conflict and international challenges.

Inside Libya, the governing political dictatorship closed all the outlets for any aspiration and ambition to evolve the ideas on human rights as promoted by international organisations. These organisations were working to enforce human rights through calls for independent institutional structures, which – by virtue of this very independence – would be capable of ensuring the protection of these human rights.

The regime justified its restriction and violation of the Libyan citizen's human rights, by branding these calls misleading. It even shamelessly accused these organisations and the international community concerned with human rights of being employed by imperialists, conspiring against the Libyan state. It continued to propagate confused ideas of a struggle, attempting to use them to conceal Gaddafi's horrible abuses and to justify the absence of the ‘imperialist’ organisations and civil society, and to unleash repressive, security devices within the community.

Gaddafi succeeded in his vision to divide Libya into two teams. One is a revolutionary team, keen on independence from foreign domination. This team took control of education and information systems and strongly promoted the idea that “the noble purpose of the ruling political system to maintain national independence justified Gaddafi's right to seize all means of power and justified the use of extraordinary powers based on his dedicated vision for the protection of Libyans from foreign aggression.” While the other team, of Libyan social activists, demanded a right

to political participation and put forward the principles of social and economic change and the right to enjoy the wealth of the state. They were seen as conspirators, allied to the tools of colonialism, which were themselves disguised under the name of international organisations for human rights. This team was accused of being “empowered by the foreigner.” This flawed division mimicked the prevailing international division between Western capitalism and social communism which promoted its repressive ideas under the slogan of the “clash of the hard-working against the evil empire.” This concept, based on the need for state control of political organisations authorised to consider human rights and to set the legal frameworks governing the state's work, is still widespread in Libya, even after its big revolution against social injustice and political repression.

At the Cairo conference (3rd-4th December 2011) on “strengthening the capacity of national human rights in North Africa in conflict and post-conflict situations”, we put forward our criticism of this understanding and of the approach of the Libyan transitional authority to developing the principles and values of human rights through a paper on why Libya is the only country in North Africa that does not have a national human rights institution. We now have the Council for Human Rights and Fundamental Freedoms in Libya, established and authorised by the National Transitional Council as a body under its umbrella, to consider the consolidation of the values of human rights and to advance their development and to ensure their implementation in Libya.

WE SEE THAT THE INTERNATIONAL CHALLENGES FACING DEVELOPING AND SMALL COMMUNITIES ARE WHAT DICTATE THE CONTEXT IN WHICH HUMAN RIGHTS ARE INTRODUCED WITHIN THESE COMMUNITIES, AND LIBYA – AS A DEVELOPING COUNTRY AND A SMALL HUMAN SOCIETY – WAS THE SUBJECT, LIKE OTHERS, OF CONFLICT AND INTERNATIONAL CHALLENGES

Evidence of the ingrained governmental thinking which adopts a comprehensive and unilateral view of leadership and monopolises the solutions as well as the guarantees of public freedoms and human rights can be found across a number of areas. For example, the interim Libyan government fails to support civil organisations and fails to grant facilities to its young people who emerged during the crisis. Further, the interim authority is entrusting the tasks of defending and enshrining human rights to government officials who have previously held ministerial posts in the Gaddafi regime. The fact that the President of the Council for Human

Rights and Fundamental Freedoms in Libya was director of the Gaddafi International Charity and Development Foundation is the clearest evidence of this ingrained governmental thinking. This decision highlights most simply the proven failure of the Libyan transitional government to extend the roots of trust within civil society; the proven failure of the Libyan transitional government to help citizens to fulfil their responsibilities towards their rights; and the proven failure of the Libyan transitional government to be aware of the contradictions and conflicts of interest between the duties of civil institutions and the role of government.

Khaled Khalifa El Abbar is a lawyer qualified to appear before the appeals courts in Libya and a member of the National Committee for Investigations. He has participated in a number of conferences and workshops on the constitution, elections and the status of human rights in Libya and North Africa. Khaled received a certificate of recognition from the Abu Salim Families for his support in their struggle to determine the fate of their sons who were killed under Gaddafi's rule.

REFLECTIONS - 17 FEBRUARY

REVOLUTION: ONE YEAR ON

IN THIS SECTION, WE TAKE THE TIME TO REFLECT ON THE STATE OF THE LIBYAN NATION A YEAR AFTER THE FEBRUARY 17 REVOLUTION. THE REVOLUTION WAS EXPERIENCED BY ALL LIBYANS. HERE, WE HEAR A SELECTION OF LIBYAN VOICES REFLECTING ON AN INCREDIBLE YEAR. THEY ARE VOICES WHICH ARE HOPEFUL, PROUD, SAD AND INSIGHTFUL, BUT ABOVE ALL ELSE, THEY ARE LIBYAN.

THE ACTIVIST

Nizar Mhani

2011 was the year of the activist, not least in Libya, home of arguably the most complete and most definitive revolution of them all. The Free Generation Movement was born during the birth of our revolution. It was born in February from the concept and the spirit of activism. It was inspired by great activists of the past and by the brave Libyan heroes of the present. The heroes we call the 'spark' - these are the men, women and children who took to the streets of Benghazi in waves of uncompromising defiance. They are the heroes who inspired a nation to rise and inspired a people to finally say 'NO'!

Today, the Free Generation Movement finds itself comprised of the very cross section of society that took part in the uprising: doctors, entrepreneurs, mothers, fathers, students, professionals. Looking around the Movement, none can claim to have even the mildest experience of political activism in Libya. A claim shared by the millions who stood against Gaddafi and his regime. A claim shared by those who became soldiers, those who became medics tending to their injured friends, those who became widows and those who became the loved ones of a martyr. Libya was not accustomed to defiance and Libyans not accustomed to defying. Yet now, the Libyan Activist is born.

Today, many Libyans call themselves activists. Many took part in rallies, post liberation. Many called, and continue to call, for greater openness and transparency from our transitional authorities. Many demonstrated to the world that, in the wake of an armed uprising of tanks and missiles, Libyans are able to sit peacefully and protest non-violently. And results have been achieved: an improvement in women's political participation; a change in the Election law; changes in the working of the transitional authorities; elections for local councils. But there is yet more to be done, yet more sacrifices to be made and yet more work to be done. The Free Generation Movement, a group of independent activists, remains positive.

We are 'optimists without illusions', we are aware of the problems we face but have the confidence to know that we can solve them, a confidence which arises from our appreciation of how far Libya has come.

The liberation of the east, followed by the liberation of the west and finally the liberation of the capital was truly magnificent. But the true liberation comes in the realisation that Libyans are capable of extraordinary things. The realisation that Libyans can achieve things once considered merely dreams. The realisation that the birth of the Libyan Activist coincides with the birth of a new Libyan nation. This is our true liberation.

THE BIRTH OF THE
LIBYAN ACTIVIST
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Nizar is one of the founders of the Free Generation Movement, a group of independent activists who led civil disobedience campaigns during the February 17 Revolution in Gaddafi's perceived stronghold of Tripoli. The Free Generation Movement is committed to pushing for a free, democratic, forward thinking Libya through socio-political awareness, humanitarian support and youth initiatives.

REFLECTIONS - 17 FEBRUARY

REVOLUTION: ONE YEAR ON

THE MARTYR'S WIFE

Samraa Naas

The night of February 15th was the night where everything started. I was sitting with Mohamed (*rahamahu Allah*) and friends at a charity party having a great time. Suddenly, the phone rang and I heard a guy shouting, "The revolution's started! The revolution's started!" We all looked at each other, hearts started racing and men stood up from their seats, preparing to leave. I still remember I was smiling and yet tears were filling my eyes. I had mixed emotions – fear and worry mixed with an acute sense of happiness and pride that brave men and women had the courage and lit the spark, not knowing that this was just the beginning of a very long journey, a journey in which I would lose the most important and dearest person in my life, a journey in which I would have my first child without her father witnessing it, a journey that would end in our beloved country being liberated and finally becoming free.

Mohamed and his friends left to join the revolution. From that day, life changed forever. Mohamed was spotted and recognised in the crowd. He was soon wanted and we were no longer safe.

We were soon separated as he was out in the streets and I stayed with a family I had never known before close to Katibat Alfadeel. I slept and woke up on the sound of explosions, gun shots and ambulance sirens. I prayed and prayed for our men to win. I hardly saw Mohamed except for early mornings before sunrise when he would sneak to our place just to make sure I was fine. We would eat breakfast together and he'd leave again soon after.

On the 20th of February while watching through the window, we saw armed men jumping over the walls and finally entering the home where we were staying. I will never forget how every girl

and woman in the house armed herself with a knife. We were prepared for everything, but not for what was coming. The armed men dropped their guns and asked for shelter. In total disbelief of what just happened, we took the weapons but asked the men to leave. There was no place for them among us. Later that day, we heard of Benghazi's liberation. We were free, FREE! We immediately set off to the North Court where thousands and thousands of people had congregated. Those days will forever be engraved in our memories.

The 19th of March, 5 am, I will never forget that sound. The sound of shelling from far away, getting closer and growing louder by the minute. I will never forget the disbelief in Mohamed's eyes; the sadness and pain visible on his face. He was tired and I just wanted to hug him and have him rest but that was impossible. Benghazi was under attack and he had to go out like every single brave man that day. Mohamed was one of those who would never come back home. We carry the courage and strength of our Martyrs into the Libya they helped create but could not experience. May our generation and those to come remember them, always.

May all our Martyrs rest in peace.

Samraa is the widow of the martyr Mohamed Nabous, the voice of the Libyan people coming out of Benghazi at the start of the 17 February Revolution and founder of the Libya Alhurra television channel, the first independent news broadcaster since 1969. Mohammed (*rahamahu Allah*) was martyred on 19 March 2011.

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REFLECTIONS - 17 FEBRUARY

REVOLUTION: ONE YEAR ON

THE LAWYER

Abdudayem Gharabli

Gaddafi considered lawyers in Libya a threat to his absolute authority. He did everything possible to control them or at least marginalize them. The Libyan Bar Association was the battle field between independent lawyers who wanted to run it as an active civil society organization that stands for human rights and respect of the rule of law, and those who wanted it to be another puppet in the hands of the oppressive regime. The arrest of Fathi Terbel - the lawyer of some families of the victims of Abuslim Prison Massacre on 15 February - ignited the revolution two days before the date set for it in social networks. The Court House of North Benghazi became the gathering site of revolutionaries with a notable presence of lawyers and jurists. The brutal attacks against peaceful demonstrators in Benghazi and the arrest of Abdulahafid Ghogha - the former head of the Libyan Bar Association - prompted a protest by fellow lawyers and jurists in South Tripoli Court House on 20 February that led Saif el-Islam Gaddafi to send his top aides to negotiate the ending of the protest with the promise of releasing Ghogha on the same day.

Lawyers and judges in Azzawia, Zentan, Misurata, Al-Baidda and other Libyan cities were at the vanguard of the peaceful movements calling for an end to tyranny and some even joined the military effort to achieve that goal. Like thousands of our fellow citizens hundreds of our colleagues were arrested, tortured, and some martyred.

We lawyers and legal professionals feel proud of our role in this great revolution. Those of us who survived this upheaval deserve to celebrate the first anniversary of the revolution with joy, optimism, and a great sense of responsibility. However, we should be mindful of the challenges we face during this social and political

transformation process that is taking place in our country. We should be at the forefront of the forces that are making the change so we may assert the values that were fought and longed for as part of our political and legal systems. We believe that the foundation of the new democratic state must be a constitution that enshrines human rights and ensures full participation for all citizens in the political process. The first step towards drafting the constitution is the election of the General National Congress that is due in June this year. Drafting and enacting an election law to elect the GNC proved to be a cumbersome process. The great enthusiasm shown by an emerging civil society, complemented by the support of international organizations such as the United Nations Support Mission in Libya and the EU Libyan Mission, compensated for the lack of experience of the drafting committees and the public's lack of awareness of electoral systems. Participation by lawyers and jurists in the drafting and commenting on the various drafts of the election law was notable and highly effective.

More hard work is needed in the days and months ahead. Lawyers and jurists should play major roles in drafting the constitution, ensuring that the constitution reflects the values of what the 17 February Revolution stood for: the rule of law, equality, respect and protection of human rights first among them; freedom of speech and freedom of association; peaceful transition of power through free elections; independence of judiciary; empowerment of women; fairness in distribution of national wealth through sustained and balanced economic and social development. Lawyers and jurists should organize awareness campaigns in all Libyan cities and villages about importance of the constitution and its contents with the aim of influencing the drafting committee to be responsive to public opinion prior to putting a draft constitution for referendum.

Lawyers and jurists should work hand in hand to reform the Libyan justice system by freeing it from the incompetent political appointees inherited from the infamous exceptional courts. Lawyers should join other professionals such as accountants, auditors, engineers ... etc. in mounting an aggressive and effective campaign against corruption. Calls for transparency in awarding contracts for public projects, appointment and accountability of all public employees, as well as good governance of all branches of the state and control and supervision of public spending, should be reflected in effective legislations and institutions that can make them part of the public life in Libya.

Finally I would wholeheartedly join and lend my personal support to the call made by LFJL Director Elham Saudi that Libyans must not repeat the errors of the past where impunity reigned over accountability; and must remember the reason so many have lost their lives over the last year and in the 42 years before that: to ensure a Libya that guarantees dignity and human rights to all those who live in it – regardless of ethnicity or political affiliation. The 17 February Revolution should not give legitimacy to acts which are illegitimate under international law and our conscience.

Abdudayem is a partner at the leading Libyan law firm Mukhtar, Keblash & Elgharabli, where Abdudayem developed international recognition for his work advising foreign investment in Libya. Abdudayem played a pivotal role in the 17 February uprising, lending his support to the first lawyers' demonstration at South Tripoli First Instance Court on 20 February 2011, followed by playing a pivotal role in the tenacious and dramatic uprising of his hometown Az-Zawiya.

REFLECTIONS - 17 FEBRUARY

REVOLUTION: ONE YEAR ON

THE POLITICAL ANALYST

Anas El Gomati

The streets in Tripoli were filled with a different air. As lanterns began to fill the sky they acted as messages, of the dreams and aspirations of millions. It was on that day we could begin to assess our health exactly one year on, and our future.

In a country, which has witnessed a bloody conflict, much continues to be written on security challenges. These challenges are numerous and evolve given the nature of the post conflict environment. From securing the borders of the vast Saharan territory, to rebuilding the air defence system pummelled by NATO, there is a great amount of work to be done. Internally however, little attention has been paid to understanding the relationship between security and democracy. Though antagonistic relations between civilians and the military have defined the last Libyan century, in our newly liberated nation, we cannot allow domination by militias to become custom.

However, the threat posed by the militias is much greater than a threat to security, it is a threat to Libya's journey towards democracy. Over the past year, we have incurred a great debt to our fallen. Our repayment must take the form of a journey towards a brighter, democratic future for our homeland, in the absence, and in the name, of those lost. The Libyan people have already taken the first tentative steps by displaying a strong enthusiasm for the upcoming elections scheduled to take place on 19 June 2012.

These definitive elections will be an opportunity for Libyans to place the successes and achievements of the past year into a constitution for a democratic nation. At the core of any democracy lies participation, and

as we embark on a year ahead, it is paramount that Libya's democratic discourse begins with the question of ensuring full representation.

Whilst the NTC and the Executive Board are clearly more willing than the Gaddafi regime was to advocate for increased political representation, there is still much more to be done to make the upcoming elections as inclusive and representative as possible.

Creating political space for civilians during the democratic process is the antidote to solving a plethora of security issues. When elections are representative, the government will have the authority to bring the militias into the realm, and under its control, because the government will truly represent the people. Through representative, democratic elections, the tense relationship between the militias and the civilians in Libya may begin to be resolved.

Our hopeful future can be envisaged if the Libyan people are able to challenge traditional notions of power, through new non-traditional means. The challenge is both healthy and engaging, and can allow us finally to mould an indigenous Libyan future.

Anas is founder and General Director of Saedq Institute, an independent policy institute and think tank based in Libya. Saedq Institute is dedicated to fostering good governance in Libya by providing strategic policy solutions through a periodic flow of research and discussion events.

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THE JUDGE

Dr. Saad Alasaby

Everything has positive and negative repercussions, and the Libyan Revolution is no exception. The whole question of evaluation is not a simple or easy matter; hence the concept evaluation is one which itself, is subject to evaluation. As a result, speaking about what happened is too often susceptible to criticism. Nonetheless, those who lived the events may, in many occasions, be regarded as eye-witnesses speaking about an observed reality, and so what is said becomes an embodiment of what was witnessed and observed. And the one who saw is not like the one who heard!

We must acknowledge that from the beginning of our budding revolution it brought together most, if not all, Libyans towards one word and one goal: liberation and the overthrow of Gaddafi and his regime, in a fight to regain their robbed freedom. The unification of the Libyan people behind this one goal highlighted the Libyan people's inherent morality, which the tyrant tried to obliterate over the course of more than four decades. Those who lived through the first year of the revolution saw a different face of the Libyan people: the true face of authenticity, cooperation, sacrifice and altruism. This was at a time when Gaddafi and his collapsed regime conspired to strike all the capabilities of the Libyan people with a variety of weapons, revealing the ugly face which was hiding behind a mask; a mask which was transparent to the keen observer examining the progress of four tainted decades in which all resources were destroyed in an

orderly and systematic manner. This cooperation has helped the Libyan people to overcome an uneasy phase, in which the Libyan people proved that they were able to achieve their aspirations, recording epic battles praised by many.

And if Libyans faced many difficulties in the first phase which preceded liberation, I am almost certain that it was an important stage in the formation of a framework and the development of an outline, through meetings, articles and lectures, of the form of the desired future state.

A key milestone in this process is the interim constitutional declaration, published by the National Transitional Council 3 August 2011. Not void of minor mistakes and lapses, this declaration represents the beginning of a state seeking to set the parameters of a permanent constitution. This process included the adoption of the road map for the future and the subsequent formation of the executive office and the interim government.

Perhaps more noteworthy is the adoption of the election law, and the preceding consultation in relation to the draft law, which, following heavy criticism, resulted in a much altered text. Notwithstanding the significant alterations, the adopted election law was not free of lapses that will constitute obstacles to the conduct of elections according to our predictions. Amongst these difficulties will be the issue of electoral districts and the electoral registers.

What might be noted of the nascent revolution in its first year is that, despite the good intentions of those responsible for it, those who took the reins of the country's administration could not achieve anything noteworthy in light of

the high expectations of the revolution. This will be one of the obstacles that will significantly obstruct the progress of the country. Further, the reluctance of the interim authorities to consult with specialists at the beginning, though finally addressed, has resulted in them losing a great deal.

A further issue is that of the absorption of the revolutionaries into the state structure, for which no accurate or well structured plan has been put in place in order to understand the goals and objectives of the revolutionaries. This issue has been made more complex by the lack of a clear definition of the term "revolutionary" and the lack of understanding as to the role of such revolutionaries during a revolution and in any subsequent state. This confusion was enhanced by the many hasty decisions which have been taken by the National Transitional Council and the interim government to appease public opinion, which were often not well thought out and subject to misinterpretation.

One of the lapses of the country's administration was its inability to activate the judicial system expediently so that those of the Gaddafi regime who corrupted the country from inside and outside could be put on trial. This delay resulted in some unidentified parties releasing certain members of the Gaddafi regime after their detention by revolutionaries in very questionable circumstances.

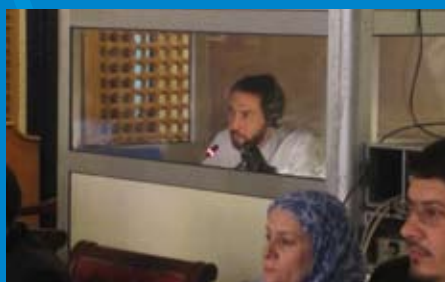
A state governed by the rule of law has been delayed by the slow organization of the regular army and the national security services which has created a kind of confusion for many of the observers, including many of the regional and international bodies.

WHAT MIGHT BE NOTED OF THE NASCENT REVOLUTION IN ITS FIRST YEAR IS THAT, DESPITE THE GOOD INTENTIONS OF THOSE RESPONSIBLE FOR IT, THOSE WHO TOOK THE REINS OF THE COUNTRY'S ADMINISTRATION COULD NOT ACHIEVE ANYTHING NOTEWORTHY IN THE LIGHT OF THE HIGH EXPECTATIONS OF THE REVOLUTION

If each revolution has its merits and its mishaps, then there is still room to reform many areas, and in my opinion, that will not happen except with the assistance of specialists in all areas, and with the expedient trial

of those implicated in the Gaddafi regime, including by extraditing them from abroad, all in accordance with international systems – none of which should be difficult if good faith is demonstrated.

Dr. Saad Alasaby is a judge in the Libyan Supreme Court, a university professor and a member of a number of institutions in Libyan civil society.



4 May 2011: Eye Witness Libya Series commences in coordination with the British Foreign & Commonwealth Office. UK Foreign Minister for the Middle East and North Africa, Alistair Burt, journalists, members of non-governmental organisations and international organisations receive firsthand accounts from Libyans who recently fled the Gaddafi regime in Tripoli

14 May 2011: LFJL attends the Seminar of Counsel Conference of the International Criminal Court in The Hague, the Netherlands

14 May 2011: Prosecutor of the ICC Luis Moreno Ocampo issues a request for arrest warrants for Muammar Gaddafi, Saif el-Islam Gaddafi, and Abdullah Senussi

24 May 2011: LFJL coordinates Eye Witness Libya event in which UK Foreign Minister for the Middle East and North Africa, Alistair Burt, journalists, members of non-governmental organisations and international organisations receive firsthand accounts from the situation in Misrata through a live conference call to the city, as well as eyewitnesses who have returned from Misrata

30 May 2011: NTC releases guidelines on detention and targeting in armed conflict for opposition fighters drafted by LFJL. These guidelines were widely distributed on the ground and have been the focus of academic review by the *Yale Journal of International Affairs* and *EJIL: Talk!*, the Blog of the European Journal of International Law.

Summer 2011: In collaboration with Libya Alahrar TV, LFJL successfully disseminates messages on the treatment of detainees and the laws of armed conflict, to a wide audience to ensure the promotion of adherence to the laws of armed conflict including the Geneva Conventions

8 June 2011: LFJL meets the United Nations High Commissioner for Human Rights Navanethem Pillay in Geneva, Switzerland to provide an update on the human rights situation and challenges in Libya

21 June 2011: LFJL coordinates Eye Witness Libya event in which UK Foreign Minister for the Middle East and North Africa, Alistair Burt, journalists, members of non-governmental organisations and international organisations receive firsthand accounts from the Western Mountain region of Libya

REFLECTIONS - 17 FEBRUARY

REVOLUTION: ONE YEAR ON

THE DOCTOR

Laila Bughaighis

It was a long night for us in Benghazi. All the people were tuned to the news, anticipating the attack on Benghazi after Gaddafi and his son Saif threatened to wipe it all out, and enter each home, each room, and search each cupboard for whom he called traitors. In our case, this meant all of us in Benghazi. Fear could be smelt in the cold, early hours of March 19th.

The hospitals were all ready to receive patients; all surgeons, anesthetists, and nurses were on site, watching the news. All the men in town were armed and ready to die defending their town. This town that had been deliberately neglected and abused for 42 years, simply because it refused to kneel to Gaddafi and his men. Benghazi was always the thorn in the side of the fallen regime. At 3 am, we could hear sounds of explosions, and we read on the news that Gaddafi troops were 50 kilometers away from Benghazi. We had been staying up every night since the revolution started, all dressed up and ready to move. The joy of liberation suddenly tasted bitter. Are they going to come in, kill all the men and rape all the women and children? Is anyone going to help us? Are we going to survive? Should we stay in the hospital or move out as hospitals had been targeted by Gaddafi troops in all other towns. We had a number of dilemmas. Nonetheless, bravery was shining on everyone's forehead; it was the fight for our freedom, for our dignity, for ending a long lasting oppression and demoralizing of our people. At 6 am, the sounds were so loud and we could hear planes circling in the sky.

By 7 am it sounded like we were in a WWII movie – with the bombardment of our town, planes dropping bombs, fear, bravery, patriotism at its highest values flying in the air. Satellite phones were being

used continuously to call everyone outside Libya for help. The sirens of ambulances were going off.

All the doctors and nurses gathered in the Emergency Room (ER), the other wards were closed since the war started, only emergency services were operating in most hospitals. Somehow patients stopped complaining, and all diseases were in remission. Everyone was preparing in silent. Some nurses were sitting quietly reading some Quran, others were praying. The mosques in the town were all calling out for prayers. The hospital emergency room had become a second home for all the staff working in ER. No one went home anymore. Doctors became a multitask force, working on getting aid through the borders, transporting aid to the frontline and other town, transporting injured soldiers, operating, protesting, talking to the media, making reports, and attending meetings with NGOs to coordinate aid.

Our hospital was the fourth to accept emergencies and it was still quiet. Only dead bodies of our youth were returned. No one was brought in alive; there were no lives to save at our hospital. The morgue was working to its full capacity, but not the Operating Room (OR). Yet in spite of it all, there were no tears. No tears spilled from anyone, because we were all ready to die for Benghazi. For our freedom.

At home, the hands of the little children were so cold, and their faces were so pale as they heard the sounds of the bombs dropping on Benghazi, and felt their homes shake and the windows rattle.

3:45pm March 19th: everyone was dancing in the streets, the sound of gunfire resounded all over town, and people were chanting their thanks to France and Sarkozy for having saved Benghazi. What a difference to the day before. Help had arrived. Finally we knew we could live, and still be free.

I sat with him as he looked at the floor of the room. He was shy to talk to me. I encouraged him lightly. Then I asked him if he wanted to talk to a male doctor. He said no. He told me how Gaddafi had stolen his life. 'I lived all my life in misery, had to leave school to work to provide for my family. Then now this, he stole my youth and my future. He ruined me, and not only me but others too.' He then went on to explain how they were caught during the early days of the revolution, and how he was tortured and raped by orders of Gaddafi men. He spoke of how he was found by the freedom fighters and then released. He was suffering so much that he needed to be medicated. But he said he wanted to talk, he wanted the whole world to hear his story.

August 30th: chaos at the main central hospital. Injured soldiers were transferred from the frontline to the ER, and there was a shortage of staff, medication, and nearly all the essentials needed for a hospital. Anger was building up due to the fact that the transitional government was not performing well. The joy of the freedom from the old oppressive regime, had transformed into frustration and resentment towards the new government's inability to perform well during the crisis. As the war for the liberation of Libya continued, the country's economy was failing. Everything was expensive and the war lords were in action.

September 17th: she was wearing a dark scarf, and came to the clinic to seek help. I took her to a private office, offered her some water, and sat down to chat with her. She appeared strong, but was shaking. She wanted to terminate the pregnancy. She was crying, and seemed in pain. But the pain was psychological and not physical. She had been raped by Gaddafi men. She was young and single. She felt her life was over. She didn't want anyone to know. She

ONLY DEAD BODIES OF OUR YOUTH WERE RETURNED. NO ONE WAS BROUGHT IN ALIVE; THERE WERE NO LIVES TO SAVE AT OUR HOSPITAL

told me she was a student, but that now she didn't want to study anymore. She said she wanted to live in peace. She didn't understand why they were so mean, 'We are all Libyans' she said, 'how can they do this?' She broke into tears again. I offered her a tissue and took one too.

January 1st: almost a year after the revolution had started in Benghazi. Libya is now completely liberated from the old regime. A new transitional government is in office. The NTC are still controlling everything. Gaddafi is dead, but his era is not yet over.

One year on and the economy is still failing, communication is still difficult, and hospital needs remain the same. The injured have been unwisely sent for

treatment abroad. But we are not worried about this. We worry about the elections. Will we make it in our attempt to become a democratic country? This is the sole question that is on the minds of all doctors. It is the only way we will be able to improve anything in Libya.

This story is the typical journey of each Libyan doctor during the war - whether they followed the soldiers to the front line, or remained in the hospitals. Our minds are still focused on the newly acquired freedom, on the elections, on the government, and on the rights we have been deprived of for too long.

I was involved. Yes, deeply immersed in the work of the revolution. I helped at the hospital, and in the rural areas near the

frontlines. I helped with aid, and supported the survivors of violence. I worked day and night, and still do, but with one thing on my mind: the elections, women's rights, and the one persistent question, "Are we going to make it?"

Dr Bughaighis is a consultant obstetrician and gynaecologist, and a senior lecturer at Benghazi Medical School. She currently chairs the National Protection Against Violence Committee (NPAVC) working under the Libyan Ministry of Health.

28 June 2011: The ICC issues the arrest warrants for Muammer Gaddafi, Saif el-Islam Gaddafi and Abdulla Senussi

22 July 2011: LFJL coordinates Eye Witness Libya event in which UK Foreign Minister for the Middle East and North Africa, Alistair Burt, spoke, along with journalists, members of non-governmental organisations and international organisations, with people who have recently been in Libya and in the refugee camps and heard about the effect of the conflict on women and children in particular

September 2011- January 2012: In collaboration with the Human Rights Clinic of the School of Oriental and African Studies, University of London, LFJL conducts a comprehensive

review of the Libyan Penal Code and Procedures, as well as the practice of security services in recent times, to determine their compatibility with international human rights standards

20 September 2011: LFJL attends the UN Human Rights Council and LFJL Director Elham Saudi is a key note speaker with other key human rights activists from the region including Haitham Maleh of Syria at a side event hosted by the Cairo Institute for Human Rights Studies, LFJL and others

23 September 2011: LFJL Director Elham Saudi participates as a panelist on Chatham House's Milestones in International Criminal Justice and addresses the challenges to the ICC

IN-DEPTH

DOES LIBYA HAVE TO SURRENDER SAIF AL-ISLAM GADDAFI TO THE HAGUE?

Amal Alamuddin

Libyan leaders insist that Colonel Gaddafi's son, Saif Al-Islam, will be tried at home. The Justice Minister announced that Libya is "ready to prosecute him", and the Interior Minister adds that a trial could begin "within weeks, or months".¹

And yet, the International Criminal Court (ICC) has issued a request for his surrender to The Hague to stand trial on charges of crimes against humanity for the killing and persecution of demonstrators during Libya's 2011 revolution.²

Although Libya can challenge the admissibility of an ICC case on the grounds of "complementarity" – the principle that gives national courts priority to try a suspect if they are willing and able to do so – it has not yet done so. Rights groups say that there is no functioning judiciary in Libya to hold a fair trial. It is unclear how advanced any investigation is or what the charges would be in Libya. And to complicate matters, Saif Al-Islam is being held not by the authorities, but by a militia force in Zintan with tenuous links to the National Transitional Council that is ruling the country.

Nobody knows how this will play out: a Libyan (or hybrid) trial under Libyan law? An international trial in The Hague? Both? Or perhaps a trial by ICC judges sitting in Libya? All are legally possible, and ultimately for the ICC Judges to decide since they are currently seised of the case.³

But, as Saif Al-Islam completes nearly fourth months in detention, without access to either a lawyer or a judge,⁴ there is a

more immediate question: can Libya hold him any longer while these questions are worked out? The Libyan authorities say: "in one word, we won't hand him over"⁵ But the ICC judges may well disagree. After Libya sent a letter to the Court stating its decision to hold Saif Al-Islam in Libya for trial, the judges of Pre-Trial Chamber I ordered 'observations' to be filed by Libya, the prosecution, and the ICC's defence office (representing the suspect's interests at this stage), and these have now been received. The Court therefore seems poised to issue an order on this issue soon.⁶

Libya's Obligation to Cooperate

The ICC issued an arrest warrant for Saif Al-Islam on 27 June and sent a request to Libya for his arrest and surrender to the Court in early July. He was arrested by rebel forces in November 2011, and remains in custody, but so far he has not been transferred to the ICC.

Libya is not party to the treaty that created the ICC, the Rome Statute. But it is a member of the United Nations, and under Security Council resolution 1970 – the resolution that referred the situation in Libya to the ICC – it has an obligation to "cooperate fully with and provide any necessary assistance to the Court".⁷ The presumption is that Libya is required to act in accordance with the provisions of the Rome Statute unless the resolution says otherwise.

ICC Surrender Requests: Refusal versus Delay

The Rome Statute requires that states "comply with requests for arrest and

surrender" as soon as possible.⁸

There are no explicit exceptions to this duty. While a *suspect* can challenge the issuance of an ICC warrant on certain narrow grounds,⁹ there is no provision in the Rome Statute (or indeed resolution 1970) that allows a *state* to challenge or refuse to comply with its obligation to surrender the suspect to The Hague.

The drafting history of the Rome Statute suggests that this omission was intentional. Under earlier drafts, a state could "file a written application with the Court" to "set aside or withdraw the request [for arrest and surrender] on specified grounds" – including on admissibility grounds – and to "delay complying with the request" while these matters were pending.¹⁰ But these

¹ See Guardian article.

² According to the ICC Prosecution, Saif Al-Islam was involved in implementing a State policy of widespread and systematic attacks against a civilian population, in particular those considered demonstrators and alleged dissidents.

³ ICC St., arts. 17 and 19.

⁴ See HRW Press Release.

⁵ See ICC, OTP Filing, ICC-01/11-01/11-31 25-11-2011 1/7 CB PT, 15.11.11.

⁶ Order Requesting Observations Regarding the "Report of the Registrar on Libya's observations regarding the arrest of Saif Al-Islam Gaddafi", ICC-01/11-01/11-45 24-01-2012 1/4 FB PT, 24.01.12.

⁷ S/RES/1970 (26 February 2011).

⁸ ICC St., Arts 89(1) and 59(7).

⁹ ICC St., Art. 59(2); Rule 117.

provisions did not end up in the final text of the Rome Statute. Instead, under Article 59(4), a state *cannot* inquire into or challenge the basis for the issuance of a warrant. Traditional grounds for refusing extradition between states – such as nonsurrender for nationals, for political offences, or in the absence of dual criminality – were discussed by the states that negotiated the Statute, but it was decided that they should not apply. Only two narrow grounds for refusal-to-surrender may arise: where a state's existing treaties require extradition to other states (Article 90) or where there are treaty-obligations relevant to immunities (Article 98). Neither of these exceptions applies here, so there is no clear basis for Libya to *refuse* to honour the ICC's surrender-request.

The Statute's drafters did allow for a state to *postpone* the obligation to surrender the suspect under certain circumstances¹¹ or to "consult" the Court if it had difficulties.¹² But ultimately any dispute "shall be settled by the decision of the Court".¹³

A trial in Libya first? Postponing Surrender if Libya is investigating "different conduct"

If the investigation in Libya relates to different conduct than that covered by the ICC warrant, the authorities can consult with the Court about postponing compliance with the surrender-request.

According to Libya's authorities, the scope of their investigation is indeed broader than the ICC's. The ICC case concerns violence meted out to protesters and other alleged dissidents since the start of the revolution in February 2011. The Libyan authorities claim that their investigations cover two tracks: "the crimes [Saif Al-Islam] committed, *including those committed since 15 February 2011*"¹⁴ as well as "five cases of embezzlement".¹⁵

Under Article 94 of the Rome Statute, if "the immediate execution of a request would interfere with an ongoing investigation or prosecution of a case *different from* that to which the request relates, the requested State *may postpone* the execution of the request *for a period of time agreed upon with the Court*. However, the postponement shall be *no longer than is necessary to complete the relevant investigation or prosecution* in the requested State".

This means that, if the Court agrees, a sequencing could take place that would allow a Libyan trial - for conduct that is not being pursued by the ICC - to happen first.¹⁶

This seems to be what the Libyan authorities are hoping for, and what the Prosecutor is supporting.¹⁷ In a letter to the Court, the Libyan authorities announced that "in accordance with Article 94 of the Rome Statute, the issue of the Court's request for the arrest and surrender of Mr Saif al-Islam Gaddafi will be discussed with the Court. *The latter will be officially informed of the [National Transitional] Council's decision later*". Article 94 also appears to have been mentioned in the confidential observations filed by Libya at the Court's request in January 2012.¹⁸ But whether this will be "agreed upon" by the Court is not yet known.

A key question is whether such a *Libya-first* approach would include any sentence handed down by a Libyan court: if this turned out to be the death penalty or a life sentence, Saif Al-Islam would never face an ICC trial. This possibility has not been lost on the Libyan authorities, whose representative stated in November (in a manner that raises concerns about the presumption of innocence), that Saif Al-Islam "will receive the most severe penalty [in Libya]" and then "there will be no need for another trial [at the ICC]".¹⁹

However, the Court may well decide that Article 94 does not apply at all. It could interpret Article 94 as applying only to *requests for general cooperation*, as the article does not mention arrest or surrender. The structure of Part 9 of the Rome Statute – on cooperation – distinguishes in several places between requests for arrest/surrender versus requests for "other forms of cooperation" such as the collection of evidence or interviewing of witnesses. Article 94 (and Articles 93, 96 and 99) have been considered to relate to these other forms of cooperation and they crossreference each other on this basis.

Article 89(4) is an alternative justification for delayed surrender where an investigation into different conduct is involved. The title of this article makes clear that it applies to "surrender of persons to the court" and the ICC's surrender request specifically states that Libya should comply with it.²⁰ It provides that

if "the person sought is being *proceeded against*" for a crime different from that for which surrender to the Court is sought, the requested state should consult with the Court. The Court may find that this article applies instead of Article 94, because it clearly applies to requests-for-surrender. But if it did apply, this would not automatically lead to the right to postpone execution of the surrender-request: it merely provides that "*after making its decision to grant the request*", the State shall *consult* with the Court", leaving little room for manoeuvre. Ultimately, Articles 94 and 89(4) present the same obstacles for Libya: concrete investigative steps need to be taken (to satisfy the requirement of "ongoing investigation" or "being proceeded against"). It is the Court that has the final say (the Court must "agree", or "be consulted" following a decision to grant the request). And even if postponement is granted, this may be for a shorter period than the Libyan authorities might hope.

A trial in Libya Only? Postponing Surrender if Libya is investigating the 'same conduct'

If the Libyan authorities are investigating Saif Al-Islam for "substantially the same conduct" as the ICC, as they claim to be, they can file

¹⁰ http://untreaty.un.org/cod/icc/rome/proceedings/E/Rome%20Proceedings_v3_e.pdf, p. 327.

¹¹ ICC St., Arts 89-98.

¹² ICC St., Art.97.

¹³ ICC St., Art. 119.

¹⁴ NTC Letter to ICC, 23.11.11.

¹⁵ Prosecution's Submissions on the Prosecutor's recent trip to Libya, ICC-01/11-01/11-31 25-11- 2011 1/7 CB PT, 25.11.11, para. 14.

¹⁶ Ibid., paras. 8-10. Cf. ICC press release issued on 23 November, Press release, 23.11.11, ICC-CPI- 20111123-PR746.

¹⁷ Prosecutor's second report to the Security Council on Libya, 02.11.2011, para. 41.

¹⁸ Based on the partially redacted reply by the OPCD, available on the Court's website.

¹⁹ Statement by Dr. Salwa Fawzi El-Deghali, in charge of Legal Affairs and Women for the NTC, Press conference with Luis Moreno-Ocampo, 23.11.11 (video).

²⁰ In its request, the Court "REQUESTS Libya to comply with the procedures provided for in articles 59, 89(2) and 89(4) of the Statute and rule 117 of the Rules".

WHILE A *SUSPECT* CAN CHALLENGE THE ISSUANCE OF AN ICC WARRANT ON CERTAIN NARROW GROUNDS, THERE IS NO PROVISION IN THE ROME STATUTE THAT ALLOWS A *STATE* TO CHALLENGE OR REFUSE TO COMPLY WITH ITS OBLIGATION TO SURRENDER THE SUSPECT TO THE HAGUE

an admissibility challenge arguing that they are willing and able to try him themselves. If they succeed, this is a full bar to the ICC exercising jurisdiction over the case. This is not a ground for challenging the surrender request *per se*: it is an argument that the entire case is inadmissible. But it may provide a basis for postponing surrender while the matter is resolved.²¹

Although Article 19(9) provides that “[t]he making of [an admissibility] challenge shall not affect the validity of ... [a] warrant issued by the Court prior to the making of the challenge”, Article 95 would arguably allow Libya to hold Saif Al-Islam while this challenge was being resolved. It provides that “[w]here there is an admissibility challenge under consideration by the Court pursuant to Article 18 or 19, the requested State may postpone the execution of a request under this Part pending a determination by the Court, unless the Court has specifically ordered that the Prosecutor may pursue the collection of such evidence...”

The threshold for challenging admissibility is high. The State must do it “as soon as possible once it is in a position to actually assert a conflict of jurisdictions”.

²² Its investigation or prosecution must target the same “case” as the ICC, which has been defined to mean the same person and “substantially the same conduct”.²³ A national investigation must be underway, which means “the taking of steps [such as] interviewing witnesses or suspects, collecting documentary evidence, or carrying out forensic analyses” to ascertain the suspect’s criminal responsibility.²⁴ And the ICC must be convinced that these steps are genuine.

Some commentators suggest that, even if Libya were genuinely pursuing Saif al-Islam for the same conduct, and filed a valid admissibility challenge on this basis, Article 95 would not in fact provide a basis for Libya to postpone compliance with the request for surrender, for three reasons. First, an admissibility challenge had not been filed at the time of the surrender request, whereas Article 95

permits postponement of a request only while an admissibility challenge is “under consideration”.²⁵ Second, they argue that “a request under this Part” should be understood to mean a request for evidence under Part 9 of the Rome Statute – not a request for arrest and surrender, which is principally (though not exclusively) dealt with in Part 5.²⁶ Third, they argue that Article 95 cannot possibly allow for postponement of surrender-requests anytime admissibility is challenged,

²¹ See also ICC St., Art. 19(8).

²² Kenya Admissibility Decision, Appeals Chamber, para 45.

²³ *Ibid.*, para 39-40.

²⁴ *Ibid.*

²⁵ B. Swart, Arrest and Surrender, in Cassese et al, *The Rome Statute of the International Criminal Court*, p. 1694.

²⁶ See eg www.ejiltalk.org These commentators point to the fact that the second part of the article refers to “such evidence” which suggests the request in question is limited to evidence and not arrest or surrender.

because that would make Article 89(2) – a specific provision that allows for the suspension of a surrender-obligation where there is a double-jeopardy challenge made in a national court – redundant.²⁷

There is, however, no authoritative interpretation of Article 95²⁸ to date and there is a good chance that the Court would adopt a plain-meaning approach to Article 95(1), allowing Libya to suspend execution of the request to surrender Saif Al-Islam to the Court while any admissibility challenge is being resolved. The postponement would only be pending the decision, though, so if and when the case was deemed admissible at the ICC, the obligation to surrender the suspect would resume.

Here again, various obstacles emerge if Libya plans to invoke this article as a basis for postponement. Libya would have to file an admissibility challenge, which it has not done to date; it would have to show that it is carrying out genuine (and possibly fair)²⁹ investigations; and that those investigations relate to the same conduct as that which underlies the ICC charges. The success of any such application would then depend on the view of the Court.

Conclusion

Libya is under an obligation to enforce ICC warrants issued pursuant to the Court's mandate under Security Council Resolution 1970. If it does not comply with ICC requests, the Prosecutor and the Judges can report this to the Security Council. The Pre-Trial Chamber has not shied away from doing so when states have refused to arrest Sudan's President Bashir, but so far there has been no Council action.³⁰ But does Libya breach its international obligations by not surrendering Saif Al-Islam to the Court?

There are two ways Libya could legally avoid surrendering Saif Al-Islam to The Hague: first, it can reach an agreement with the Court under Articles 94 and/or 89(4) of the Rome Statute that it will try him for conduct that is *different to* that described in the ICC arrest warrant, and that the ICC can try him after that. This might mean that Saif would face two trials, or – if the ICC allowed him to serve any sentence he received in Libya as part of the sequencing process – he may never go The Hague.

The second possibility is that Libya files an admissibility challenge, and – relying on Article 95 – is allowed to postpone surrender pending the decision in

admissibility. If Libya wins on admissibility, this extinguishes the ICC case; if it loses, the surrender obligation returns.

Libya has not filed an admissibility challenge, perhaps because of the difficulties in succeeding in such a challenge at this juncture. So it is Articles 94 and 89(4) that the Court is likely to address in any upcoming decision. These articles each contain certain limitations, as discussed above, but may allow for a sequencing of a nature that Libya desires.

Given the apparent violations of Saif Al-Islam's rights as a suspect (including the right to counsel and to be brought before a Judge),³¹ uncertainty about the capacity of Libya's judiciary, reports of torture of pro-Gaddafi detainees in prisons, and an apparent paucity of evidence regarding investigations carried out to date, it must be unlikely that the Court will permit Libya to keep holding Saif in these conditions and "go first" on prosecuting him. The Court will be loathe to set a precedent that makes it too easy for states to put suspects beyond its reach, particularly where human rights guarantees are lacking.

As the defence office has put it: "The NTC has failed to adduce probative evidence concerning the existence of investigations against Mr. Gaddafi... [and the evidence] indicate[s] that the Libyan authorities are either unwilling or unable to conduct proceedings against Mr. Gaddafi in a manner which is consistent with principles of due process recognised by international law..."³²

The Rome Statute does not set out the factors to be applied by the Court deciding on postponement, but Articles 55 and 59 of the Rome Statute require that due process guarantees for suspects be observed, and Article 21(3) reminds us that the ICC must apply and interpret law in a manner "consistent with internationally recognized human rights". The Court's analysis should therefore (as it should in an admissibility challenge) cover not only whether genuine investigations are underway but also the question of whether the suspect will be treated *fairly*. On both counts, the Libyan position currently looks weak.

It has been said that this case is a big test for the new Libya, which is attempting to draw a line under the old Gaddafi regime and show that it is a modern state embracing the rule of law and human rights. If the ICC demands Saif Al-Islam's surrender, and

Libya resists, the case may also become a test for the Security Council – will there be any consequences? And it is a test for the Court, which is expected to issue an order in the weeks to come. One solution that could be discussed in the meantime is to have an ICC Court (with judges who will apply international standards of fair trial) sitting in Libya (where the conflict occurred). The Court can sit abroad under Article 3(3) of its Statute "whenever it considers it desirable". Although this solution raises security and other concerns, it would ensure the safeguarding of international fair-trial rights while keeping justice at home.

* After this article was written, on 4 April 2012, the ICC issued a decision rejecting Libya's request to delay surrender. For more information, see Amal Alamuddin, ICC Calls for Immediate Surrender of Saif Al Islam Gaddafi, available at www.ilawyerblog.com.

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²⁷ See eg www.opiniojuris.org.

²⁸ The drafting history does not specifically address whether this language was intended to cover requests-for-arrest and surrender or not.

²⁹ Public Redacted Version of "OPCD Observations on Libya's Submissions Regarding the Arrest of Saif Al-Islam", ICC-01/11-01/11-51-Red 03-02- 2012 1/18 FB PT (OPCD Observations), 3 February 2012.

³⁰ ICC Statute, Art. 87(7); Prosecutor v. Al Bashir, ICC-02/05-0 1/09-139, ICC-02/05-01/09-140, 12- 13 December 2011. The Security Council can also suspend ICC proceedings under Article 16, but this controversial power has never been used in relation to a "situation" before the Court.

³¹ The Surrender Request asks Libya to respect these rights (in Article 59 of the Statute). Rule 117 of the Court's Rules also provides that "the Court shall ensure that the person receives a copy of the arrest warrant issued by the Pre-Trial Chamber ... in a language that the person fully understands and speaks".

³² OPCD Observations, 3 February 2012.

In 2011, Libya ranked 168 in the Corruption Perceptions Index (CPI) compiled by Transparency International. By way of comparison, Libya is tied with Angola and ranks behind Nigeria (ranked 143), Kazakhstan (ranked 120) and Egypt (ranked 112). Corruption was rampant during Gaddafi's regime and through the misappropriation of state assets, he was able to buy enough loyalty to unleash 42 years of tyranny. Today, over a year after the Libyan people rose against the tyranny and oppression of Gaddafi's regime, Libya still does not look like it will improve on its CPI ranking. Quite the contrary, it will probably fall further behind towards Iraq (ranked 175) or even Somalia (ranked 180). Some may argue that this is an overly pessimistic assessment, and that Libya, following its liberation from the Gaddafi regime, will move towards a democratic state where widespread corruption would become a thing of the past. However, this is an argument that fails to take into account that the central issue is not, in fact, corruption. Corruption is just a symptom of a much deeper problem. The fundamental issue Libya is facing is the fact that this revolution appears to be turning its back on the cornerstone of a democratic system – the rule of law. The lack of adherence to the rule of law is the root cause to many of the problems facing the country.

At present, there is no central authority, different militia groups are controlling various parts of the country, and there is a lack of a comprehensive, functioning justice system. As a result, there has been a proliferation of crimes being committed with impunity, from both militias and armed civilians. Incidents of torture and extrajudicial killings of prisoners have recently been reported by human rights lawyers in Libya. These problems halt Libya's

path towards democracy and may subsequently lead to further conflict.

So the question is - how has Libya turned its back on the rule of the law? Ultimately, the responsibility falls on Libya's National Transitional Council (NTC). Blaming the NTC may initially seem overly harsh, as this is just a transitional body managing a very difficult phase after a prolonged armed conflict. However, when you look closely at what the NTC has achieved so far and, more importantly, what it has failed to achieve you start seeing why Libya, as a recent article in the UK's *Guardian* newspaper has described it, is on the brink of "disintegration". Firstly, the NTC has cast aside any notion of the 'rule of law' in Libya by hiding in the shadows and issuing laws and decrees without having a transparent process. To exacerbate the problem, the people of Libya do not know the full membership of the NTC, what the NTC's powers consist of, and the decision making process applied by the NTC. Libyans do not know where the NTC budget comes from and who approves its expenditure. Through this lack of transparency, the NTC has ensured that it cannot be held accountable for its decisions. Lack of transparency has led to a lack of accountability, and so when you ask the militias to give up weapons and return to their homes their answer is, and will continue to be, the same: "Hand our weapons over to whom?"

Secondly, the NTC has appointed an Executive Government headed by Abdulrahim El-Keib to run the country's affairs and help reinstate basic services during the transitional period. However, even before its appointment, the Executive Government had been denied the key tools it needed to perform its function. This was done by, among other things, appointing a Governor of the Central Bank of Libya who takes instructions and reports to the NTC

- and not the Executive - thereby starving the Executive of the necessary funds to implement its decisions and frustrating any attempts by the Executive to integrate the militias into the armed forces. The NTC has also directly appointed a Head of the Armed Forces and, more recently, a Head of the Intelligence Services. While the Executive is completely impotent, discontent is festering. Disputes are being resolved by force and not through the justice system, as demonstrated by the handling of former Gaddafi loyalists who are being held indefinitely by militias outside the formal justice system and in some cases tortured. This situation has prompted several members of the Executive, most notably the Foreign Minister and the Minister of Finance, to vent their frustrations through the media.

Finally, the NTC is significantly and irreparably undermining the entire transition to democracy by issuing Constitutional Declarations, Electoral Laws and appointing Electoral Commissions without a transparent process and without the inclusion of civil society. For example, the Elections Law issued by the NTC allocates 80 seats to political parties, however, the NTC failed to enact any laws regulating the formation of political parties or their funding. This creates an uneven playing field in relation to those 80 seats and may therefore destabilize the new elected body. As a result of this decision and generally the NTC's opaque nature, each step of the transitional process has been met with strong public criticism, demonstrations and in some cases threats of violence. Essentially, the NTC's indifference to the people's calls for greater transparency and participation is undermining its own legitimacy.

Another episode clearly illustrates how the rule of law is not in any way part of the Libyan political discourse. Recently, the NTC reacted to the inauguration of

WHEN YOU ASK THE MILITIAS TO GIVE UP WEAPONS AND RETURN TO THEIR HOMES THEIR ANSWERS IS, AND WILL CONTINUE TO BE, THE SAME: "HAND OUR WEAPONS OVER TO WHOM?"

the self-declared Cyrenaica Provisional Council, which calls for a federal Libya and self-rule in eastern Libya, by proclaiming that it will keep Libya united 'by force if necessary'. The NTC again demonstrated that it is not looking to adhere to the rule of law by issuing threats instead of replying through legal arguments. A more appropriate response would have been to point out that the Cyrenaica Provisional Council cannot legally declare self-rule and that their desire for a federal state should be expressed by putting forward candidates

to the national elections in June which, if elected, can table their ideas within the National Congress' process for writing the constitution. The NTC's threats only fed fuel to the fire and further destabilized an already charged environment.

The current situation is worrying and there is the sense that it can quickly deteriorate into a state of prolonged unrest and conflict. This tension can be greatly reduced and people's fears abated through transparency, accountability and adherence to the rule of law. If tomorrow, the NTC

openly announced its membership, its powers, its internal decision-making processes, wouldn't Libya be a much better place? If it opened up its sessions to public participation and scrutiny, would it not be sowing the seeds of a truly democratic Libya? Wouldn't people have much more confidence in the transitional process towards democracy and feel like they have regained ownership over their destiny? Wouldn't the militias have fewer excuses for not handing over their weapons? So why have we not seen this happen yet?



27 September – 3 October 2011: LFJL trains 30 Libyan lawyers, judges and activists on international human rights law, focusing, among other things, on documentation and fact finding, in collaboration with the Cairo Institute for Human Rights Studies and REDRESS, as well as Amnesty International, the ICC and Physicians for Human Rights

30-31 October 2011: LFJL Programmes Director Tarek Eltumi attends the Cairo Institute for Human Rights Studies and the International Centre for Transitional Justice's Conference on Transitional Justice in Egypt and the MENA Region: Challenges and Responsibilities in October 2011. In conjunction with this conference, Mr.

Eltumi submits a paper entitled 'The ICC, Complementarity and Strengthening the Rule of Law in the MENA context: Prospects of the new Libya'

20-21 October 2011: LFJL appears on Channel 4 News, BBC News and Al Jazeera International to discuss the implications on Gaddafi's death

23 November 2011: LFJL attends and addresses the Deutscher Anwaltverein (the German Bar Association) and the Hanns Seidel Foundation Maghreb's Conference for Lawyers in Transition Processes. In conjunction with this conference, LFJL submits a paper regarding the challenges facing the rebuilding of Libya's judicial system

MEET MARIAM...

Mariam Elhadri is Coordinating Officer of Lawyers for Justice in Libya. Mariam has worked on fact-finding in connection with current investigations into alleged human rights violations in Libya in the period since 15 February 2011. Mariam manages the social media relations for LFJL including its website, Facebook, and Twitter accounts as well as its regular press statements and the Mizaan newsletter.

Tell Us About Yourself?

My name is Mariam Elhadri. I am 24 years old. My family is originally from Tripoli, but I was born and raised in Pennsylvania, in the United States. I am completing my J.D. Law degree this year at the Pennsylvania State Dickinson School of Law.

Why Did You Decide to Join LFJL?

We all knew what Gaddafi was capable of. He had been committing human rights violations for forty-two years. When the uprising against him began, we expected the atrocities would be immeasurable. We formed LFJL with the anticipation of all of the legal challenges that may arise during this conflict, from the collection and preservation of evidence to the administration of justice.

How Would You Strengthen the Practice of Human Rights in Libya?

Human rights should be a way of life in Libya. There are principles that need to be instilled not only at the legal level with equal protections for all, but also taught in our education



systems, and practiced by our public and private sectors. It will be important for governmental, judicial, and private institutions to work together to protect these rights through accountability and transparency.

What is Your Favourite Part of Libyan Culture?

My favorite part of Libyan culture is the traditional Libyan music. It is what connected me to my culture, country, and history while I was thousands of miles away.

Where Were You on February 17, 2011?

On February 17, 2011 I was working on a web site with a friend to get any information, news, videos, or pictures of the events in Libya out to the rest of the world in English. It was because of the valuable evidence we accumulated on the site, that I started working on the investigations with LFJL.

5-6 December 2011: LFJL participates in the International Commission of Jurists' 2nd Geneva Forum of Judges and Lawyers

7 December 2011: LFJL attends the Bingham Centre for the Rule of Law's conference on The Rule of Law in Fragile and Conflict-Affected States

7-9 Dec 2011: LFJL attends the UN Development Programme and the International Centre for Transitional Justice's Grentree II Event: Supporting Complementarity at the National Level: An Integrated Approach to the Rule of Law

24 Jan-29 Jan 2012: LFJL trains 32 Libyan lawyers, judges, and activists on issues of constitution building and election systems

SOUSSE WORKSHOP: CLOSING STATEMENT

Excerpt from the Closing Statement at the 'Elections and Constitution Building – Defining the Future' Workshop in Sousse, Tunisia from 24 to 28 January 2012

When Lawyers for Justice in Libya was preparing for this workshop, we thought we were inviting people from divergent political, legal and social paths, and that their differences would be some of the obstacles to building the new Libya. However, what we have seen during this week here, is one person speaking with one voice to express one fear and one preoccupation, even if this fear took many forms:

- Fear of turning from the dictatorship of the individual to the dictatorship of the collective, seen as a risk with relation to certain groups;
- Fear of being marginalized, whether as a group or region;
- Fear of the violation of any human rights;
- Fear of the abuse of power, and violation of the principles of judicial independence, separation of powers and the rule of law;
- Fear of extremism in all its forms;
- Fear that the next constitution will not contain all our hopes of a free and strong country, which protects public and private freedoms and represents everyone;
- Fear of centralism, federalism, universality and regionalism; and
- Fear of the unknown, of the time constraint and the environment in which to address these fears.

So it appears that Libyans are very afraid. These fears can be summed up as one greater, overarching fear: the absence of a state based on the rule of law, a state

that embodies justice and the rule of law and democracy. This concept of the rule of law began to spread before the 1789 French Revolution, which formed an important turning point in the history of Europe and the world in general and in particular, the history of France because it was a social, political and intellectual movement similar to the intellectual, cultural and political movement which began in Libya at the start of the 17 February Revolution and which you have represented during these few and beautiful days which we have spent together.

The French Revolution paved the way for the emergence of the Age of Enlightenment, expressed by one of its thinkers, Montesquieu, when he said that laws are “the necessary relations arising from the nature of things. In this sense all beings have their laws ... and laws are the relations subsisting between it and different beings, and the relations of these to one another.”

Hence, authority, religion, money, culture and tradition, are all interacting relations and laws are but a translation of this interaction. Accordingly, the law of the state based on democracy and justice which we are all seeking is the law of equality, of the respect of human rights and of justice in the distribution of rights and duties amongst individuals. It is this law that will dissipate the fear which we have expressed here and which is expressed by every Libyan carrying a physical or moral weapon in Libya today in the face of the unknown that lies ahead.

A key principle enshrined in the legal and intellectual movement that was represented by the French Revolution is the principle of progressive legislation. This included the Declaration of Human Rights and Citizenship issued

by the National Constituent Assembly of the French Revolution recognising the natural rights of French citizens as non-transferable and sacred at the top of the legislative pyramid. The progressive legislation ensures that legislative power is subject to constitution principles, with the ruler unable to exercise his power except in accordance with the provisions of the constitution. The ruler is further required to respect the powers delegated to him and not to violate them to avoid his actions being deemed unconstitutional and void for lack of legitimacy.

This highlights our fear of the formulation of a constitution that does not include the freedoms that we wish for nor the guarantees for their respect and promotion. Here I borrow again from another of the thinkers of the French revolution Jean-Jacques Rousseau, who said that good laws lead to the creation of better laws and bad laws lead to worse laws.

Then follows the principle of equality before the law, first confirmed by Islam, to answer our fears. It is founded on the principle that, regardless of origin, religion, colour, political or intellectual affiliations or social status, the human being has intrinsic value and that the state exists to protect this value and to ensure his freedom. A state governed by the rule of law provides equality before the judiciary, to ordinary citizens and officials alike with no one benefitting from any exceptions or personal privileges.

It can be said that the Libya which we seek is a state of law and institutions, dedicated to the protection of the interests of its citizens without favouritism or discrimination, the defence of those interests against every abuse of power from the state, the implementation of laws to protect rights, the creation of the necessary means for the enforcement

of those laws and monitoring that implementation and enforcement where necessary. This state will guarantee participation, ensuring that each individual has a role and a say in making the decisions that affect his life, whether this be directly or through state institutions, organizations and political parties permitted by law.

If we achieve that, we will find that the fear of Rabab, the Amazighi activist, that her culture and language will disappear, and that the insistence of Dr Azzah that federalism is the only solution to achieve social, economic, and political justice for our dear East will have no justification. The fears of Amal, the women's rights activist, for the role of women and their presence in the construction of the new Libya will wear off, and the revolutionary Fawzi will find that the sacrifices of his honourable colleagues did not go in vain, inspiring him to hand over his weapon and start his new role in building the new Libya which respects the principle of judicial independence, addressing the fear we heard in Judge Marwan's voice, which trembled with grief each time the violations which breached this very principle during the past four decades, were mentioned.

LFJL

CONTACT INFORMATION

For more information about what we do, please email us at info@libyanjustice.org

For more information on how to work for us, please email us at jobs@libyanjustice.org

For more information on how to support our vital work, please email us at giving@libyanjustice.org



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