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### Contested Governance

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*Published in:*  
Journal of Intervention and Statebuilding

*DOI:*  
[10.1080/17502977.2016.1199479](https://doi.org/10.1080/17502977.2016.1199479)

**IMPORTANT NOTE: You are advised to consult the publisher's version (publisher's PDF) if you wish to cite from it. Please check the document version below.**

*Document Version*  
Publisher's PDF, also known as Version of record

*Publication date:*  
2016

[Link to publication in University of Groningen/UMCG research database](#)

*Citation for published version (APA):*  
Lamont, C. K. (2016). Contested Governance: Understanding Justice Interventions in Post-Qaddafi Libya. *Journal of Intervention and Statebuilding*, 10(3), 382-399. <https://doi.org/10.1080/17502977.2016.1199479>

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MAPPING THE NEXUS BETWEEN TRANSITIONAL JUSTICE AND  
PEACEBUILDING



## Contested Governance: Understanding Justice Interventions in Post-Qadhafi Libya

Christopher K. Lamont

### ABSTRACT

This contribution reflects upon the nexus between transitional justice and peacebuilding through a study of how transitional justice practices in post-Qadhafi Libya interacted with broader efforts to establish governance institutions in the aftermath of Libya's 2011 armed conflict. It argues that dominant practices of transitional justice, promoted by external actors, prescribed narrow state-centric justice interventions that were ill-suited for a polity in which the state was highly contested. In fact, transitional justice proved divisive in Libya because attempts to project state-centric liberal justice practices were limited by their targeting of weak institutions that lacked local legitimacy and their inability to reconcile alternative normative frameworks that challenge the modern state. In addition, the weakness of Libya's state institutions allowed *thuwwar*, or revolutionary armed groups, to dictate an exclusionary form of justice known as political isolation. Drawn from fieldwork conducted in Libya, this contribution provides lessons for both peacebuilding and transitional justice practice that call for a rethinking of teleological notions of transition and greater engagement with notions and concepts that fall outside dominant practices.

### KEYWORDS

transitional justice;  
statebuilding; peacebuilding;  
Libya; martyrs

Over the course of the last two decades, the increasingly professionalized body of practice known as transitional justice, defined by core international legal norms and standards (United Nations 2010), spearheaded the establishment of a broad range of legal and quasi-legal mechanisms to address legacies of past violence in a number of countries emerging from conflict (Bell 2009, 8–9). This contribution explores the tension between transitional justice practices and local justice discourses through a study of justice interventions in post-Qadhafi Libya. Here it is argued that dominant state-centric approaches to justice obscure local sites of contestation and resistance to statebuilding that contributed to a return to armed conflict in the years following Qadhafi's October 2011 ousting. Furthermore, this article also highlights the nexus between transitional justice and peacebuilding by examining how external justice interventions failed to resonate among Libyans.

Drawing upon fieldwork conducted in Libya during January 2013, which included interviews conducted at the Ministry for Families of Martyrs and Missing Persons, the Free

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Media Centre in Tripoli, representatives of international organizations in Libya, and additional discussions outside of Libya with Libyan civil society practitioners, academics and officials from 2013 to 2015, this article examines Libyan demands for justice alongside assumptions that underlie transitional justice practice, in particular, and peacebuilding more broadly.<sup>1</sup>

This contribution begins with an overview of transitional justice and peacebuilding before going on to explore local justice discourses under Qadhafi. It is noted that during the later years of Qadhafi's rule justice demands empowered Islamist voices to contest Qadhafi's *Jamahiriyya*, as Qadhafi's particular brand of autocracy was known. This empowerment was achieved through the making of martyrs from victims of Qadhafi's brutality. However, rather than giving voice to victims, Saif al-Islam Qadhafi (Muammar Qadhafi's son and for a time the most influential member of Qadhafi's inner circle) sought to co-opt victims' groups by opening legal processes in which limited claims could be pursued against the state. Next, transitional justice in the aftermath of the 2011 conflict is explored. It is noted that the International Criminal Court's intervention briefly resulted in what can be described as an international justice moment. Indeed, this moment was short-lived as local actors effectively pushed the ICC aside, perhaps most gruesomely illustrated by Muammar Qadhafi's murder at the hands of local militia. This contribution then goes on to highlight how transitional justice discourses in Libya adopted a form that was both distinct from international practice but also highly retributive.

Transitional justice discourses in Libya placed an emphasis on martyrs, as a distinct and symbolic category of victimhood, and demanded the political exclusion of individuals and groups deemed unsuitable to play a role in crafting a post-Qadhafi state. The result of this disconnect was that international statebuilding practice, which prescribes a liberal democratic endpoint to transitions from conflict, served to mobilize multiple sites of resistance that could draw upon sub-national and supra-national identities and ideologies to challenge externally driven attempts to statebuild successive internationally recognized governing authorities. In part, this was because statebuilding processes disempower voices that advance alternative political orders that do not privilege the state, and which fall outside liberal democratic and market economy-based modes of governance (Chandler 2006).<sup>2</sup> Therefore, as is discussed in the following section, in societies marked with deep legacies of structural violence and inter-group disparities, transitional justice as a building block for liberal statebuilding can prove more corrosive than restorative to already frayed social bonds. And resistance to international norms and practices of transitional justice should be interpreted not as recalcitrance, but rather as attempts to advance alternative political orders (Arnould 2016).

### Transitional justice, statebuilding and peacebuilding

Numerous studies have highlighted transitional justice's vulnerability to 'instrumentalization' or 'hijacking' on the part of local elites who are portrayed as recalcitrant or external actors who fail to take a principled stand when promoting transitional justice abroad (Peskin 2008; Subotic 2009). This contribution argues that transitional justice's instrumentalization is symptomatic of the field's emergence from within a liberal peace paradigm that prescribes state-building as a conflict resolution tool (Sharp 2015, 155–159).<sup>3</sup> To be

sure, over the past decades liberal peacebuilding has become deeply embedded in a state-centric peacebuilding practice. Beginning with former United Nations Secretary-General Boutros Boutros-Ghali's 1992 *Agenda for Peace*, in which Boutros-Ghali embraced post-conflict peacebuilding as a pillar of the post-Cold War United Nations (Helman and Ratner 1992–93, 7), peacebuilding for the United Nations took on an almost exclusively statist form (Martin 2016). Nevertheless, despite statebuilding's repeated failures (Chandler 2006; Richmond and Franks 2009), transitional justice advocacy and the international donor community continue to prescribe state-centric transitional justice processes, within a wider framework of rule of law programming, for societies where the act of state-building and understandings of political authority are highly contested, and draw upon political traditions that contest the legitimacy of the nation-state. Indeed, existing literature often frames transitional justice interventions in the context of building new institutions to displace existing social orders that are framed as having formed as coping mechanisms for conflict (Chesterman 2005, 154–164).

The result is that ostensibly neutral transitional justice norms and standards, such as those set out by the United Nations in 2010, are integrated into state-building processes that are inherently exclusionary and divisive for societies with competing sub-national and supra-national sites of resistances to the state (Arnould 2016). As Leebaw (2008, 117) points out, transitional justice aims both to be responsive to local practices, but also to transform and displace these practices associated with past violence. This inherent tension, whereby transitional justice serves the dual goals of legitimation in the context of local practices and legitimation of the state, has generated a growing interest in local justice practices (Thomson and Nagy 2014, 11–30). Nevertheless, transitional justice's focus remains narrowly framed by its troubleshooting approach to resolving legal dilemmas emerging from transitional processes following a period of authoritarian rule, conflict or both. Thus, despite efforts to bridge transitional justice practice and peacebuilding (Lambourne 2009, 28–48), transitional justice remains far from transformative. As Gready and Robins (2014, 2) point out, the balance sheet for transitional justice remains 'at best ambiguous and at times disappointing, critiqued for example, for treating the symptoms rather than the causes of conflict'.

It is the failure to problematize teleological assumptions underlying how we think about transition within the democratic transition paradigm (Linz and Stepan 1996) and theoretical models of human rights norm socialization (Risse and Sikkink 1999, 1–38; Sikkink 2011, 96–125), that has contributed to the reproduction of a body of practice that is ill suited to addressing the underlying causes of conflict. Indeed, democratization scholarship, and its contemporary practice, emerged from political transitions from military to civilian rule in Latin America. These scholarly frameworks and practices were later applied to understanding transitions from single party communist rule in Central and Eastern Europe. In the end, they provide far too narrow a conceptual framework for understanding contemporary transformations in societies where statehood is contested, or displaces alternative political orders. It is statebuilding's challenge to longstanding social bonds and ideologies, which both precede and supersede the modern state, that makes statebuilding an abjectly non-neutral project. As Sadiki (2009) noted in his critique of Western democratization policies crafted toward the Arab Middle East, these frameworks were too deeply embedded in Western notions of statehood and democratic practice to find transformative resonance in the Middle East. For example, in Libya alone, a

myriad of groups ranging from the Libyan Muslim Brotherhood and the Libyan Islamic Movement for Change to Ansar al-Sharia have all voiced opposition to attempts to mitigate the place of Islamic law in the making of a new Libya. Thus, in addition to the West lacking any material leverage over Libya's post-Qadhafi elites (Boduszynski 2015), at an ideational level, even if the West did muster the political will to impose democratic preferences, this would have only deepened conflict among Libya's competing political actors who lacked a shared vision of the Libyan state.

### Justice advocacy under Qadhafi: contesting the *Jamahariyya*

Demands for justice had long played a crucial role in mobilizing resistance to Qadhafi's regime in Libya's marginalized eastern regions (Chorin 2012, 148), and also highlighted contested visions of Libyan statehood. To be sure, the 1996 Abu Selim prison massacre, which claimed over 1,250 lives, left a deep imprint in Libya's east. A majority of victims at Abu Selim, who would come to be acknowledged as martyrs, came from in, or near, the eastern communities of Benghazi and Derna. In fact, during the 1990s, eastern Libya was at the epicentre of a conflict waged between the Libyan state and the Al Qaeda-affiliated Libyan Islamic Fighting Group (LIFG), *Al Jama'a al Islamiyyah al Muqatilah fi Libya*. The LIFG, from its strongholds in eastern Libya, waged an internal armed conflict to overthrow the Qadhafi regime and also provided fighters to Al Qaeda-affiliate groups in Afghanistan, Algeria and Iraq. Later, the LIFG reconstituted itself as the Libyan Islamic Movement for Change (LIMC) and joined ranks with the opposition National Transitional Council (NTC) in Benghazi during the 2011 conflict to bring about Qadhafi's ousting.

The integration of former LIFG fighters into the anti-Qadhafi ranks, which at the time also included senior officers who had defected from Qadhafi's armed forces, imported significant ideological and inter-personal divisions into the revolutionary militias, known as *thuwwar*. In 2011, the NTC presided over disparate militias that included both former army officers from Qadhafi's armed forces, which waged a brutal military campaign against the Islamist LIFG in the east, and former LIFG leaders who waged a violent campaign to establish an Islamic state. From the perspective of former Islamist fighters from the LIFG, the NTC under the leadership of Mahmud Jabril, a former close associate of Saif al-Islam Qadhafi, had the appearance of being led by senior defectors from the Qadhafi regime rather than genuine revolutionaries.

It must be acknowledged, however, that Libya's Islamists are far from monolithic. Indeed, Islamist voices in Libya include groups that range from the electorally minded Muslim Brotherhood, which traces its origins in Libya to a student movement and maintains close ties with the Egyptian Muslim Brotherhood, to groups such as Ansar al-Sharia that rejected elections and called for the imposition of sharia (Fitzgerald 2015, 178, 201), and whose youth council joined the so-called Islamic State in 2014. Nonetheless, all of these groups demanded more transformative political change than the cosmetic reconfiguration of Qadhafi's Libya under the leadership of reformist regime defectors.

The hostility of revolutionary fighters, who formed militias with names such as the Abu Selim Martyrs' Brigade, towards those perceived as having close ties with the Qadhafi regime illustrates two important dimensions of transitional justice debates that would emerge later in 2011. The first was ideological and operated at a supra-national level. Islamists wanted a more fundamental uprooting of the state and for new institutions to be

established in compliance with Islamic law, albeit in practice this meant different things to Libya's Islamists. References to Islamic law, and Islamic political thought, brought Islamist movements into conflict not only with rival local actors, but would also frame a conflict between Islamists and an external community of professionalized rule of law practitioners who sought to transpose Euro-centric notions and vocabularies of democratization and justice to Libya's transition. However, as Sadiki (2009) cautioned in his study of democratization in the Arab Middle East, the paradigms that internationals brought with them to the region were not neutral. Sadiki reminds us that 'Knowledge-making practices in the study of Arab politics are not neutral: They are embedded in the historically biased attitude of Euro-American ideas towards Islam and Arabism' (2009, 11). Western knowledge-making practices thus reinforced the exclusion of local sources of authority that did not fall within Western conceptions of the liberal state. For example, local Islamic institutions, such as Office for Islamic Legal Opinions, *Dar al-Ifta*, were constructed as threatening human rights and the rule of law (Advocates for Human Rights 2015), despite the fact that many of these institutions often enjoyed more local legitimacy than newly created and externally supported judicial institutions.

Second, at the sub-national level, justice demands also betrayed deep regional and inter-communal divisions. As early as 2003, Saif al-Islam Qadhafi sought to diffuse growing unrest in the east by extending an offer of a diluted form of transitional justice to victims of the regime's war on the LIFG. This came in the form of acknowledgement of deaths at Abu Selim. Death notices were for the first time issued for families of Abu Selim detainees. These notices were then followed by the offer of financial compensation to 112 families of Abu Selim victims. It is not coincidental that Saif's package of measures for the Abu Selim families occurred at a time when Libya began a process of adopting the features of liberal statehood as part of its process of reconciliation with the United States and the United Kingdom in the form of a discussion of a new constitution (Chorin 2012, 151–155), which had it ever been drafted would have been Libya's first constitution since 1951.

Nevertheless, Saif's attempt to balance the regime's need to protect those implicated in the Abu Selim massacre against demands for justice failed to placate victims' families who continued to push for accountability and acknowledgment, not just financial compensation. In 2007, 30 victims' families filed a claim against the Libyan government in the North Benghazi Court. Later, in 2008, Fathi Terbil, a Benghazi lawyer, established the Coordination Committee for Families of Victims (Chorin 2012, 153). From 2008 until 2011, the families of Abu Selim victims remained active in pushing for accountability. In 2009 the families even published a list of demands, which included the prosecution of those responsible for the prison massacre (Chorin 2012, 154).

The Abu Selim case imparts two more important lessons for understanding justice demands in post-Qadhafi Libya. First, it is an illustrative example of the fact that caricatures of the Qadhafi regime which emphasize the almost comical excesses of its leader, or present Libya as being left *tabula rasa* for an internationally guided statebuilding project, underplay significant legacies of the past (Vandewalle 2015, 17–30) that complicated efforts to establish a post-Qadhafi state around the NTC.

Second, Abu Selim also helps us understand the symbolism of notions of martyrdom, which will be discussed in greater detail later, and the deep distrust Libya's Islamists held towards Libyan institutions around which a state was to be built. First among

these was the NTC. In 2011, the international community swiftly recognized non-Islamist technocrats who had defected from the Qadhafi regime as the internationally recognized governing authority for all of Libya. Indeed, at the time it appeared as if defectors from the Qadhafi regime would guide Libya's transition process, and in effect continue the liberal reform programme initiated under Saif al-Islam, but prematurely terminated by Muammar Qadhafi.

With the NTC led by Mahmud Jabril, a US-educated former head of Libya's National Economic Development Board, and its surrogate armed forces led by Qadhafi's former Minister of Interior General Abd al-Fattah Yunis,<sup>4</sup> many of those engaged in fighting Qadhafi's forces during the summer of 2011, such as former LIFG leader Abdelhakim Belhaj, appeared far removed from the political process of statebuilding unfolding in Benghazi. Moreover, the fact that the NTC's representatives cultivated their support in western capitals and issued policy declarations with a Western audience in mind, while Islamist leaders in turn gathered in Istanbul to negotiate a radically different vision of a future Libya also underscores how contested post-Qadhafi state-building would be once the fighting ended in October 2011.

Libya highlights how contested visions of statehood make state-centric peacebuilding and transitional justice practices corrosive to attempts to bring conflicted political actors together in the aftermath of conflict. The liberal state is a particular form of governance that is often highly contested, and statebuilding efforts will inevitably act to empower one set of local actors at the expense of another. As the next sections will illustrate, transitional justice came to assume greater salience as a statebuilding tool because of its ability to disempower those who sought to challenge the new state.

### After the Jamahariyya: Islam, the state and justice

In October 2011 Libya's NTC was stacked with former regime technocrats and reformists who guided Libya's transition process through a war waged against Qadhafi loyalists. However, with Libya's new leaders having close ties to the old regime, formerly marginalized political voices began to look to transitional justice as a means to disempower a new elite that was perceived as being too close to the old order. In fact, in 2011, a leading Islamist figure pointed out, 'This was not an NTC that represented all of Libya. The real Libya. ... Libya is a conservative country; how come there were not conservative people in the NTC?' (Fitzgerald 2015, 183). For Libya's disparate Islamist voices, the principal unifying factor was the call for sharia, or Islamic law, to be the source of all legislation in the new Libya.<sup>5</sup> In addition, many influential Libyan Islamists had spent time in Afghanistan, Algeria and Iraq. However, Ashour (2012, 6) argues that many of those who fought abroad returned disillusioned by the warlordism that marred these conflicts and viewed the collapse of Qadhafi's state as an opportunity to focus their efforts on Islamist politics at home.

Indeed, this early contestation of the legitimacy of Libya's NTC, which won international recognition during the 2011 conflict but was widely perceived by armed groups fighting on its behalf as illegitimate, highlighted the divide between those in Libya whom the international community saw as interlocutors and those who sought to establish alternative political orders. The uncomfortable fact that the NTC enjoyed international recognition but lacked domestic legitimacy was visible even prior to the fall of Tripoli, as the NTC

proved unable to exercise control over the myriad of groups that had by mid-2011 taken up arms against Qadhafi. While elections for the NTC's successor governing authority, the General National Congress (GNC), brought about Libya's first peaceful transfer of power in the country's modern history, as the NTC chose not to contest the 2012 elections, the sense of optimism that the new legislature would be able to guide a statebuilding process with a minimal international 'footprint' was quickly dashed. In the end, political decision-making was made not within the legislative body, but on the streets of Tripoli where armed groups held ministries hostage in return for legislation that would prescribe vengeance for those identified as remnants of the old regime, impunity to those considered revolutionaries, and symbolic recognition and compensation for families of those identified as martyrs. In fact, when elections were held for the GNC's successor parliament, the House of Representatives (HoR), in 2014, Libya was already again in a state of civil conflict. The refusal of the GNC to recognize the election of its successor government, and the HoR's exile to Tobruk, left Libya in 2015 as a country with two competing governments vying for both domestic and international legitimacy and a myriad of armed groups, over which neither parliament can exercise effective control.

There is no question that Qadhafi left Libya with overlapping legacies of violence that transcend Islamist politics, ranging from structural violence that pitted Libya's regions, tribes and various other communities against each other through unequal access to the nation's resource wealth to widely publicized public killings, some of which were televised by the regime to a national audience. The United Nations Support Mission in Libya (UNSMIL) recognized the urgency of transitional justice for Libya, and it made transitional justice a key priority for the new mission. Although UNSMIL was not a governing body, its mandate restricted it to providing assistance to local elites and it could not directly intervene in Libya's governance, UNSMIL nonetheless attempted to shape the country's transitional justice process. In a report released just one year following the end of the six-month conflict waged in 2011, UNSMIL argued, 'the transition to building a new Libya requires coming to grips with the past and facilitating reconciliation based on principles of transitional justice' (2012, 1). Significantly, this report did not make a single reference to Islamic political thought or traditions and instead provided a catalogue of past crimes followed by a diagnosis in the form of proposed transitional justice mechanisms and truth-seeking processes. The NTC subsequently adopted a number of laws to establish a national framework for dealing with the past. For example, Law No. 17, adopted in 2012, on the Establishment of Rules of National Reconciliation and Transitional Justice signalled Libya's first national transitional justice law, while Law No. 26, also adopted in 2012, put in place a system of vetting for public officials.

However, UNSMIL's attempt to provide an international best practice framework for locally initiated transitional justice legislation sat uncomfortably beside the widespread perception among Libyans that transitional justice was primarily about acknowledgement of martyrs and the discrediting and disempowerment of former regime officials rather than a tool for rule of law promotion. Of course, regardless of UNSMIL's preferences, many community leaders had the capacity to prevent the enforcement of transitional justice measures within their respective communities. Therefore, even with a growing corpus of transitional justice legislation and dedicated transitional justice institutions emerging during 2012, by 2014 Hanan Salah's observation that transitional justice in



Libya was ‘no more than ink on paper’ (2014) illustrates just how far the gap had grown between state practice and actual developments on the ground.

Alongside this gap, there was a broader consensus that accounting for the past was to exclusively target the former regime, although the scope and breadth of this targeting was contested. Yet, as Qadhafi’s killing illustrated, groups that waged war against Qadhafi under the revolutionary banner were also implicated in numerous alleged criminal acts of an international character such as crimes against humanity and war crimes; however, as emphasized in an interview with a Tripoli-based non-governmental organisation (NGO) representative in January 2013, for the new post-Qadhafi governing authorities alleged revolutionary crimes were not to be investigated, or even acknowledged by the GNC.

### *International criminal justice: complementarity without a state?*

The international community helped reinforce the narrative of a cleanly waged revolutionary armed struggle against the *ancien regime* through the International Criminal Court’s certification of arrest warrants against only one side of the conflict. Moreover, pronouncements by the ICC Chief Prosecutor Moreno-Ocampo about alleged atrocities that were popularized within Libya and abroad, such as his singling out of stigmatized ethnic groups in Libya for having perpetrated mass rape against Arab women—a charge for which no physical evidence ever emerged—added to a sense of impunity among Libya’s revolutionary armed groups, which subsequently targeted members of minority communities for revenge killings.

Thus, although United Nations Security Council Resolution 1970 referred Libya to the ICC’s jurisdiction, and the court’s rapid intervention in the form of three arrest warrants against Muammar Qadhafi, Saif al-Islam Qadhafi and Abdullah al-Senussi proved in the long term to have harmed international justice. To be sure, prosecutorial strategy, in particular the question of whether to target all sides to a conflict, has generated significant controversy at the UN ad hoc tribunals and at the ICC (Peskin 2005). In the case of Libya, while the 2011 arrest warrants highlighted the apogee of international justice’s foray into the country, the failure of the court to address serious and systemic crimes perpetrated on the part of the *thuwwar* reinforced the perception of immunity among anti-Qadhafi fighters and diminished the court’s standing as an impartial institution.

Despite Muammar Qadhafi’s arrest warrant’s withdrawal after his death, the ICC effectively abrogated its obligation to seek the transfer of Saif al-Islam Qadhafi and Abdullah al-Senussi. This abrogation took place in the context of clear evidence of the widespread practice of torture in Libyan detention centres and the absence of minimal protections for due process. The admissibility provision of the Rome Statute that established the practice of complementarity, found in Article 17, set a twofold threshold for admissibility before the ICC that requires the court to demonstrate that a state judiciary is both unwilling and unable to prosecute a prospective accused in accordance with ‘due process recognized by international law’. Nevertheless, even in the absence of an internationally recognized government that exercises control over trial chambers in Tripoli, the ICC consistently refused to acknowledge systemic violations of due process in the al-Senussi case that included denial of access to legal representation and solitary confinement during trial.

In a response to death sentences handed down on 28 July 2015 against Saif al-Islam Qadhafi and Abdullah al-Senussi, alongside 30 other former Qadhafi regime officials, by

a court affiliated with the GNC-led government in Tripoli, Human Rights Watch pointed out that the entire process was ‘undermined by serious due process violations’ (2015). Yet, even in the face of ongoing judicial proceedings by a Tripoli-based court acting outside the authority of Libya’s internationally recognized Justice Ministry, the ICC rejected requests by al-Senussi’s legal representatives to reinstate the al-Senussi case before the international judicial body (Human Rights Watch 2014).

As will be highlighted in the next section, international law’s state-centricity, which imagines the ICC as interacting with state counterparts, as opposed to interacting with the non-state groups that exercise control over detention facilities and courtrooms, such as the Zintan militia, or even the GNC government in Tripoli, neither of which are internationally recognized as the legitimate governing authority in Libya, has forced international justice practitioners to invent a fictitious Libyan state. This state, according to ICC judgments, is able to exercise complementarity. However, while the ICC’s failure to pursue the transfer of accused persons left the court largely irrelevant on the ground, it will be highlighted in the next section that this irrelevance is symptomatic of the ICC’s intervention taking place in the context of a failed statebuilding project.

### Faking a state or making a state

The ICC’s foray into Libya not only highlights the state-centricity of international justice, which has constructed an edifice of complementarity on the assumption that the ICC imposes obligations upon states, and interacts with state judiciaries, but also highlights the inherent weakness of externally supported state institutions that are disruptive to social orders that operate at the community, tribal or regional levels. Boduszynski and Pickard’s (2013, 86) description of Libyan politics as constituting a form of ‘intense localism’ provides an apt description of the hostility by which local communities viewed any national authority.

Libya’s layered legacy of violence left Libyans distrustful of political institutions, such as parliaments and political parties, institutions that are essential components of liberal statehood (Vandewalle 2015, 17–3). Although this contradiction was noted by internationals in Tripoli during the first months of the post-Qadhafi statebuilding project, the international community nonetheless invested heavily in strengthening internationally recognized governments, the Benghazi established NTC, the Tripoli-based GNC, and later the Tobruk-based House of Representatives. Meanwhile, at the same time, none of these national governments could effectively exercise authority over Libya’s vast territory.

In fact, Libya’s first internationally recognized post-Qadhafi governing body came into existence through the adoption of a political roadmap that more closely mapped on to the vision for a democratic Libya held by Western states rather than the preferences of Libyans. Illustrative of this international audience to which the NTC appealed was the fact the first document that set out a governing framework for the Council was written in English not Arabic (Bartu 2015, 40). The NTC’s leaders were acutely aware of Western preferences, as many had already familiarized themselves with their Western counterparts as leading figures within Saif al-Islam’s reform movement that sought to open Libya to Western investment during the early 2000s. This close relationship that emerged between former Qadhafi reformists and the Western diplomatic corps amplified the resentment of Libyan Islamists toward the transition and state-building process (Fitzgerald 2015, 183).

However, before discussing how these resentments filtered into transitional justice debates, it must be recalled that one of the important legacies of Muammar Qadhafi's 42-year rule was that Qadhafi skilfully avoided falling into the trap of attempting to impose a modern state upon Libya. Following Qadhafi's 1969 coup, Qadhafi never adopted a new constitution and systematically dismantled institutions of the monarchy. This new system was constructed around his *Green Book* ideology, not political parties or state institutions. Attempting to impose statebuilding was a trap that paradoxically every post-Qadhafi government has fallen into. Vandewalle succinctly captured Qadhafi's aversion to state institutions in 1986:

Its state apparatus, destroyed during Italian occupation and held in abeyance during the monarchy, has been declared useless by the *jamahariyya*. The *Green Book* undermined the legitimacy of an apparatus meant to provide consistent administration. The continuous uprooting of the domestic bureaucratic organization in many ways reflected Qadhafi's distrust for a modern state. (35)

At the same time, it was not that the experience of Italian colonialism destroyed a modern Libyan state, but rather it reinforced social relations at the community and tribal levels as a form of resistance to an externally imposed political order. In eastern regions this resistance would be embodied in the celebrated martyr Omar Mokhtar, who was executed by Italian colonial authorities in 1931. After 1969, the effect of the Qadhafi regime's attempt to play Libya's tribal communities off against each other only acted to reinforce the strengthening of non-state identities and social bonds. Thus, despite Libya's post-Second World War monarchy, which was led by the Senussi tribe until Qadhafi's 1969 coup, having established some antecedents to representative democracy, these antecedents were subsumed by 42 years in which the apparatus of the Libyan state was effectively dismantled.

### Contested martyrdom and *thuuwar* justice

It was within the context of a society where notions of modern statehood never coalesced, or were associated with colonial oppression, that transitional justice practitioners sought to import lessons learned from political transitions in Latin America and post-communist Europe to post-Qadhafi Libya. From 2011 until 2014 numerous workshops, training sessions and lectures were organized in Tripoli by international NGOs, international organizations and foreign governments in order to facilitate the country's transitional justice process.

At the same time, it was clear that transitional justice in Libya was not to be impartial. Article 1 of Libya's Law on Transitional Justice, adopted in 2013, established a legal framework for accountability to be restricted exclusively to the *ancien regime*. It stated:

When applying the provisions of this law, transitional justice is meant to address severe and systematic violations of the basic rights and liberties to which the Libyans were subjected by state affiliated apparatus under the former regime. (Law No. 29, 2013)

Thus, the transitional justice law could not be applied to revolutionary armed groups, which by this time had already secured the adoption of amnesty legislation. Taken together with the 2012 amnesty laws (Law No. 35, 2012; Law No. 38, 2012), both the NTC and later the GNC sent a clear signal that transitional justice was to target the

apparatus of the old regime. In particular, Law No. 38 on Transitional Period Special Measures on the one hand referred detainees held in custody after the revolution who were suspected of loyalty to Qadhafi for prosecution, while on the other hand amnestying those who committed crimes on the revolutionary side. Law No. 38 provoked a strong condemnation from Libyan Lawyers for Justice, a diaspora network of Libyan lawyers, who argued that the Law's vague language which amnestied all acts 'made necessary by the 17 February Revolution' acted to enshrine a culture of impunity (Libyan Lawyers for Human Rights 2012). And, with the ICC also not launching any prosecutions for crimes committed on the part of Libya's revolutionary armed groups, there was little threat to revolutionary impunity.

In addition to exclusively targeting the Qadhafi regime, and granting impunity to revolutionary militias, from very early in the process, transitional justice in Libya began to adopt characteristics that challenged existing international legal norms and standards. This was apparent in three respects. First, privileging the martyr over the victim, second, adopting a narrow definition of disappeared persons, and third, the use of purges.

### *Martyrs, not victims?*

In respect to discourses of martyrdom, Libya's *thuwwar* sought to promote measures that privileged those who died as martyrs, or *shaheed*, as opposed to victims. This was not surprising given that the symbolism of the martyr has long been utilized by post-colonial Arab states to legitimize statebuilding projects formed around a single party or individuals (DesGeorges 2013, 484). The centrality of the martyr in statebuilding discourses makes notions of martyrdom potentially crucial to understanding how post-conflict institutions are legitimized in a wide range of settings. In fact, in Tunisia, where discourses of martyrdom were also privileged, official acknowledgement of a martyr's status raised expectations for the redistribution of wealth (DesGeorges 2013, 490–492), and similarly in Bosnia official recognition of martyrdom also played both a symbolic and material function (Bougarel 2007).

While transitional justice scholarship has generated a wide body of literature on victimhood and victim-centred approaches to transitional justice (McEvoy 2014; Robins, 2011), or even the production of victims on the part of transitional justice entrepreneurs (Madlingozi 2010), in the Arab Middle East, and as Bougarel (2007) demonstrates also beyond the Arab Middle East, discourses of victimhood can also act to privilege the *shaheed*. To be sure, martyrs serve as a distinct category that differentiates between victims of abuse and those who had given their lives in the ostensibly holy cause of revolution (Wierda 2015, 172). This distinction was visibly present in public spaces. For example, the streets of Tripoli were flooded with images of martyrs who lost their lives during the course of the armed conflict waged from 17 February to 23 October 2011. The salience of the martyr was also visible in the transitional justice institutions established by Libya's transitional authorities, and informed to whom compensation could be provided. For example, the GNC's refusal to acknowledge any civilian casualties that resulted from North Atlantic Treaty Organisation (NATO) air strikes carried out during 2011 left families of those injured or killed in the NATO air campaign unable to seek redress from transitional authorities (Fetouri 2014).

The creation of Libya's Ministry for Martyrs and Missing Persons after the fall of the Qadhafi regime brought to the forefront this debate that may appear marginal to transitional justice, but was hugely significant for Libyans. This debate, centred on the

determination as to whether or not a victim of the conflict or of Qadhafi-era abuses could be considered a martyr, sought to make distinctions among victims. Furthermore, the notion of martyrdom could not even be bestowed without question to revolutionary fighters, as those killed in friendly fire NATO airstrikes had their martyr status questioned because they had not died at the hands of Qadhafi loyalists (Fieldwork interview 2013).

The question of martyrdom highlights how the focus of Libya's transitional justice process was not to be a dispassionate truth-seeking exercise, or a technical rule of law capacity-building exercise, but rather it played a crucial role in the empowerment of armed groups that had deposed Qadhafi. These armed groups also accessed economic benefits through the Warriors Affairs Commission, which by 2013 had registered over 120,000 revolutionary fighters seeking financial assistance; however, it was noted by a Tripoli-based civil society activist that the number of revolutionary fighters who actually fought in the 2011 conflict was closer to 30,000 (Fieldwork interview 2013).

### *Defining the disappeared*

On the one hand, the international community's promotion of transitional justice through the promotion of Libyan efforts to account for the country's violent past through a holistic package of transitional justice measures stimulated discussions among civil society as to how to address Libya's wide-ranging legacies of human rights abuse. However, efforts to import international best practices in human rights proved futile at best as local actors subverted interventions that were perceived as threatening the *thuwwar's* dominant position in post-Qadhafi Libya. In fact, Marieke Wierda, who led the UN's transitional justice team in Libya, summed up transitional justice in Libya as follows: 'These approaches risked exacerbating Libya's division and will make it more difficult to forge national unity' (2015, 174). While processes by which transitional justice are instrumentalized by local elites have been well documented elsewhere (Subotic 2009), this section on the disappeared will demonstrate how weak state institutions were not only unable to mediate salient transitional justice debates that proved disruptive to contested ideologies and visions of post-Qadhafi Libya.

The question of accounting for thousands of enforced disappearances that took place during Qadhafi's 42-year rule was a question that mobilized victims' communities long prior to the 17 February revolution in 2011. Families of the disappeared won special recognition in the form of a dedicated government ministry that was established in 2012, the Ministry for Families of Martyrs and Missing Persons. However, from the moment the ministry first sought to establish its mandate, it became clear that disappearances were to be treated as a historic legacy of the Qadhafi regime, despite the fact that reports of disappearances continued even after the liberation of Tripoli in 2011. Furthermore, and related to this, was the fact that a vast majority of those being held in detention in Libya after 2011 were held by armed groups and not the nominal state institutions.

Despite clear evidence of continued disappearances at the hands of revolutionary *thuwwar*, the Ministry for Families of Martyrs and Missing Persons could not consider an individual to be a missing person if the date of their disappearance followed the liberation of Tripoli on 23 October 2011. Mervat Mhani, an activist from the Free Generation Movement, a youth organization formed to campaign against the Qadhafi regime, pointed out that 'enforced disappearances after the liberation of Tripoli are referred to the Ministry of

Interior' (Fieldwork interview 2013). And, as noted at the ministry in January 2013, much like the Law on Transitional Justice, the ministry's own mandate restricted the scope of justice to acts perpetrated by the Qadhafi regime (Fieldwork interview 2013). Truth-seeking in post-Qadhafi Libya was thus severely limited in scope and highlights the tension noted by Leebaw (2008) between transitional justice's long-term transformational goals and their potential destabilizing effects if pushed too hard in the short term.

In addition to the ministry's restricted scope in terms of mandate, it also proved unable to gather a national perspective in terms of numbers of disappeared. During a fieldwork interview conducted at the ministry in January 2013, it was clear that many communities outside of Tripoli viewed the ministry with suspicion. A ministry official noted that their list of missing persons from Qadhafi's 42-year rule only contained 2,300 names as of January 2013. In response to the question of what the ministry is doing to compile a comprehensive list of missing persons, the official stated 'we cannot access cities that have not registered their missing'. In short, the newly established ministry was seen more as a Tripolitanian institution than a national Libyan institution. This meant that, in practice, the ministry was unable to operate in communities in the south such as Sabha, and was also unable to hold a planned workshop on the subject of missing persons in Benghazi due to a combination of institutional distrust and a deteriorating security situation for representatives from Tripoli-based ministries.

### **Political isolation**

Perhaps the most politically feared mechanism of *thuwwar* justice, however, was not martyrdom, or a narrow understanding of who was disappeared, but rather political isolation. Political isolation in Libya was the local term that was used to describe the legal framework by which Libya's post-Qadhafi public institutions were to be purged of individuals who were formerly affiliated with the old regime. This process was to be a Libyan variant of the transitional justice practice of lustration, defined by David (2011, x) as the screening or vetting of public officials. Lustration processes have generated significant controversy because often individuals are excluded based on past associations (Szczerbiak 2002). On the one hand, lustration is argued to increase public trust in institutions (Horne 2009), and to prevent repetition of abuses (United Nations 2006), through vetting individuals for public office. However, lustration processes have often been accompanied by accusations of political abuse.

Political isolation was in retrospect an unsurprising move on the part of the *thuwwar*, who feared a loss of privilege or access to jobs in post-conflict Libya. With the international community bestowing recognition upon weak state institutions cobbled around the newly elected GNC, Libya's armed groups needed a means by which they could transition their military power into the spoils of statehood. As noted earlier, however, the primary obstacle to this was the influence Qadhafi regime defectors enjoyed in governing institutions and in weak state institutions that had survived the fall of the Qadhafi regime.

In addition to purging existing public institutions, which were perceived as being populated by civil servants who had benefited under Qadhafi, there was also a strong ideological dimension to political isolation. The push for a purge of public institutions and those holding political office was led by Libya's Islamists. Even before the election of the GNC in 2012, Libya's Islamists were becoming increasingly hostile toward the direction the

NTC sought to take Libya's transition. In particular, Islamists were uncomfortable with pronouncements on the part of technocratic elites suggesting that the NTC was aiming to draft a new Libyan constitution that did not adequately privilege the place of Islam as the source of law and authority. Therefore, for Libya's Islamists, political isolation offered a roadmap for countering the perceived secular challenge by disempowering competing ideological currents that did not sufficiently recognize Islamist notions of governance.

Libya's Law No. 13 on Political and Administrative Isolation was adopted by the GNC in 2013. Although the law was ratified by the GNC, the ratification process was highly irregular. The Misratan militias had effectively held government ministries in Tripoli hostage until the law's adoption. In addition, the law itself was highly problematic. It lacked effective means of enforcement and also dissolved much of the existing state apparatus at the moment of ratification. To be sure, according to Wierda (2015, 159), the political isolation law more closely resembled a purge than vetting practices delineated by the UN. In retrospect, Law No. 13 effectively brought to an end the detente between the *thuwwar* and the facade of civilian governance that was established in the midst of the 2011 conflict.

In the end, the isolation law, subsequently revoked by the HoR in 2015, but maintained by the rival GNC, excluded 14 categories of individuals who held official positions under the old regime and individuals who were involved in particular activities such as the plunder of property or engaged in activities, scientific, social or educational, which promoted the ideology of the old regime (Law No. 13). Yet, despite Law No. 13's broad categories of exclusion, the absence of effective control over state institutions meant that, in effect, many of those who were to be excluded maintained their positions, and the general inability to implement a law that was meant to disempower former regime officials in the end resulted in a further demonstration of post-Qadhafi institutional weakness.

## Conclusions

Transitional justice in Libya highlights the urgent need to rethink justice interventions in polities where state institutions are weak and highly contested. Rather than viewing local actors as instrumentalizers of transitional justice, peacebuilding and statebuilding practices should be acknowledged as generating conflict between local governance practices and transitional justice is just one of the axes along which these conflicts play out. In states where legacies of post-colonial contested statehood leave the modern nation state as just one among many modes of governance advanced by regional political actors, transitional justice could benefit from a wider interrogation of notions and concepts such as martyrdom that fall outside the Western-centric vocabulary that defines the field. Moreover, the state-centricity of transitional justice as a component of statebuilding practice, which privileges external normative frameworks and standards at the expense of local knowledge, focuses on judicial processes, and promotes the establishment of governmental bodies to account for the past, has proven divisive in contexts where notions of statehood are contested. The privileging of state authority on the part of international actors thus not only increases the incentives on the part of local actors to capture nominal state institutions, but also deepens divisions among those advancing alternative notions of statehood, such as for example those articulated by Libya's Islamists. As witnessed in Libya, legislation on political isolation turned transitional justice into a highly divisive political project, which was more about state capture than statebuilding.

Furthermore, teleological approaches to transitional justice are unable to cope with the complexities of justice demands in societies where strong sub-national or supra-national identities challenge the legitimacy of the state. In the case of Libya, we witnessed both, with the intense localism that defines *thuwwar* politics creating situations whereby the ICC was confronted with its most sought-after war crimes suspect being held in the custody of the Zintan militia, as opposed to the state. With a fractured domestic judiciary, where the courtrooms and the Ministry of Justice might not answer to the same governing authority, the ICC has relied on the fiction of Libyan statehood to relinquish itself of its own obligation to Saif al-Islam Qadhafi and Abdullah al-Senussi for crimes against humanity.

Finally, the privileging of the martyr in Libyan transitional justice discourses problematizes Western notions of the victim and victimhood. Martyrdom in the case of the Abu Selim families symbolized the death of individuals in their struggle for the establishment of a more just state at the hands of a non-Islamic regime. For those who died fighting the Qadhafi regime in 2011, a similar parallel was drawn. The recognition of martyrdom was therefore a reaffirmation of the revolutionary struggle in 2011 as having been a struggle that pitted Islamic revolutionary fighters against the *Jamaharriya*. Libya's making of martyrs constitutes a powerful demonstration of how notions drawn from Islamism act contest those drawn from Western liberal democracy, the latter constituting a form of knowledge that contains historically charged biases against forms of knowledge emerging from the former (Sadiki 2009, 11). Libya therefore provides an important lesson for transitional justice and statebuilding practice in societies where there is no consensus as to the endpoint of transition.

## Notes

1. Fieldwork conducted in Libya was supported by a grant from the Office of Public Affairs at the US embassy in Tripoli. Interviews were conducted with representatives of both international organizations and NGOs, including the United Nations Support Mission in Libya (UNSMIL), the Public International Law Group, No Peace Without Justice, and local justice practitioners, which included representatives of the General National Congress (GNC) and local NGOs based in Benghazi and Tripoli.
2. For more on the economic dimension of the liberal transition paradigm, in particular in relation to its narrowing privileging of bodily harm crimes over socioeconomic crimes, see Lai (2016).
3. For a broader application of this argument see Gready and Robins (2014, 3). Also see Richmond and Franks (2009) and Paris (2004).
4. Abd al-Fattah Yunis was killed on 28 July 2011 following his recall from the frontlines to Benghazi. Although the circumstances of his death remain unclear, many close to Yunis believe that he was killed by former LIFG fighters in revenge for the role he played as Qadhafi's minister of interior.
5. In relation to sharia as the source of legislation, Esposito (1998, 325) reminds us that unlike in Western political thought where legislation reflects the popular will, in Islamic political thought limitations are placed on the laws and policies of governments. More specifically, all legislation must be in conformance with Sharia and the state cannot enact laws that are contradictory to it.

## Disclosure statement

No potential conflict of interest was reported by the author.



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