

# Accountability for Serious Crimes under International Law in Libya: An Assessment of the Criminal Justice System





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P.O. Box 91  
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Ministry of Foreign Affairs of the  
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## Table of abbreviations

ACHPR	African Charter on Human and Peoples' Rights
AComHPR	African Commission on Human and Peoples' Rights
AP I	Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts
AP II	Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of Non-International Armed Conflicts
ARSIWA	Articles on the Responsibility of States for Internationally Wrongful Acts
CAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CCP	Code of Criminal Procedure
CRC	Convention on the Rights of the Child
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
DPED	Declaration on the Protection of All Persons from Enforced Disappearance
GNC	General National Congress
GC IV	Geneva Convention relative to the Protection of Civilian Persons in Time of War
GNA	Government of National Accord
HRC	Human Rights Committee
IAC	International Armed Conflict
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICPPED	International Convention for the Protection of all Persons from Enforced Disappearance
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
IHL	International Humanitarian Law
IMT	Nuremberg International Military Tribunal
IACtHR	Inter-American Court of Human Rights
LNA	Libyan National Army
LPA	Libyan Political Agreement

NTC	National Transitional Council
NIAC	Non-International Armed Conflict
SCSL	Special Court for Sierra Leone
SJC	Supreme Judicial Council
OHCHR	Office of the High Commissioner for Human Rights
UDHR	Universal Declaration of Human Rights
UNSMIL	United Nations Support Mission in Libya
WGDA	Working Group on Arbitrary Detention

### Table of treaties, standards and jurisprudence<sup>1</sup>

*Code of Conduct for Law Enforcement Officials*, UN Doc. A/RES/34/169, 17 December 1979.

*Basic Principles on the Independence of the Judiciary*, Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, 26 August–6 September 1985.

*Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*, UN Doc. A/RES/43/173, 9 December 1988.

*Basic Principles on the Use of Force and Firearms by Law Enforcement Officials*, Eighth UN Congress on the Prevention of Crime and the Treatment of Offenders, 27 August–7 September 1990.

*Basic Principles on the Role of Lawyers*, Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, 27 August–7 September 1990.

*Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions*, UN Doc. E/1989/89, January 1991.

*Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*, AComHPR Doc. OS(XXX)247, 2003.

*Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity*, UN Doc. E/CN.4/2005/102/Add.1, 8 February 2005.

*Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, UN Doc. A/RES/60/147, 16 December 2005.

*ICRC Customary IHL Database*, Study on Customary International Humanitarian Law conducted by the International Committee of the Red Cross, 2005.

*Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules)*, UN Doc. A/RES/70/175, 17 December 2015.

*The Minnesota Protocol on the Investigation of Potentially Unlawful Death (2016)*, Office of the High Commissioner for Human Rights, New York/Geneva, 2017.

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1. The list includes the instruments and jurisprudence that are most cited throughout the report.

### **Human Rights Committee**

*General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment)*, UN Doc. HRI/GEN/1/Rev.9, 10 March 1992.

*General Comment No. 29: States of Emergency (Article 4)*, UN Doc. CCPR/C/21/Rev.1/Add.11, 31 August 2001.

*General Comment No. 31: Nature of the General Legal Obligation on States Parties to the Covenant*, UN Doc. CCPR/C/21/Rev.1/Add.13, 26 May 2004.

*General Comment No. 32: Right to Equality before Courts and Tribunals and to a Fair Trial (Article 14)*, UN Doc. CCPR/C/GC/32, 23 August 2007.

*General Comment No. 35: Article 9 (Liberty and Security of Person)*, UN Doc. CCPR/C/GC/35, 16 December 2014.

*General Comment No. 36: Article 6 (The Right to Life)*, UN Doc. CCPR/C/GC/36, 30 October 2018.

### **Committee against Torture**

*General Comment No. 2: Implementation of Article 2 by States Parties*, UN Doc. CAT/C/GC/2, 24 January 2008.

*General Comment No. 3: Implementation of Article 14 by States Parties*, UN Doc. CAT/C/GC/3, 13 December 2012.

### **African Commission on Human and Peoples' Rights**

*General Comment No. 3: The Right to Life (Article 4)*, 57th Ordinary Session, 4–18 November 2015.

*General Comment No. 4: The Right to Redress for Victims of Torture and Other Cruel, Inhuman or Degrading Punishment or Treatment (Article 5)*, 21st Extra-Ordinary Session, 23 February–4 March 2017.

### **Working Group on Arbitrary Detention**

*Opinion No. 3/2016 concerning Farida Ali Abdul Hamid and Salim Mohamed Musa (Libya)*, UN Doc. A/HRC/WGAD/2016/3, 15 June 2016.

*Opinion No. 4/2016 concerning Abdul Majed al-Gaoud and Others (Libya)*, UN Doc. A/HRC/WGAD/2016/4, 15 June 2016.

*Opinion No. 6/2017 concerning Yousif Abdul Salam Faraj Ahbara and Others (Libya)*, UN Doc. A/HRC/WGAD/2017/6, 9 June 2017.



## Executive summary

The upsurge in hostilities in Libya since April 2019 has highlighted the devastating impact that impunity for crimes under international law committed by State actors and armed groups has engendered.

Civilians taking no part in hostilities are being displaced *en masse*, unlawfully killed and subject to other violations of international humanitarian law (IHL) and gross human rights violations, including indiscriminate attacks against civilians and civilian objects, arbitrary detention, torture and ill-treatment, enforced disappearance, enslavement, and rape and other acts of sexual violence.

Entrenching their presence in the country, criminal organizations have consolidated human trafficking routes, in relation to which thousands of migrants, refugees and asylum seekers are subject to prolonged detention in official and unofficial detention centres and other crimes, including rape and other forms of sexual violence.

Unabated, these crimes by State and non-State actors continue to be committed against a backdrop of persistent armed conflicts and political paralysis.

Despite UN brokered peace talks and rival groups' signing of the Libyan Peace Agreement (LPA), Libya now effectively has two centers of power: the government of Abdullah al-Thinni, operating from the city of al-Bayda in eastern Libya and supported by the House of Representatives (HoR), and the Presidency Council in Tripoli, which presides over the internationally recognized Government of National Accord (GNA) headed by Fayez al-Serraj. Armed groups either act under GNA control; or act in alignment or alliance with the GNA or with their acquiescence; or act in opposition to the GNA, whether or not aligned with the rival government. The Libyan National Army (LNA), headed by Khalifa Haftar, endorsed by the HoR and operating largely in eastern Libya, is the dominant armed group opposing the GNA.

Libya's political fragmentation did not undermine the unity of the Libyan judiciary, with judges and Prosecutors continuing to discharge their functions under the authority of a single Supreme Judicial Council and applying the same laws and procedures. However, weak and decentralized political structures and the precarious security situation have continued to impede the effective functioning of the judiciary in significant parts of the country. Courts in the west operate at reduced capacity and those in the east and south are mostly closed. While able to operate to a certain extent in significant parts of the country, the Libyan police remain weak and ineffective, with armed groups empowered to arrest and detain individuals without proper judicial oversight or accountability. Based on information provided to the ICJ, including through interviews with sitting judges, Prosecutors and lawyers, criminal justice system actors attempting to investigate and prosecute human rights violations have been threatened, abducted and, in some instances, killed.

As a result, and despite the scale and magnitude of the violations and abuses committed by State and non-State actors, only a handful of investigations and prosecutions of such violations have been undertaken, resulting in a situation of near total impunity.

Any process of dismantling such impunity, addressing the legacy of past and ongoing crimes under international law, and improving the human rights situation in Libya must be based on the establishment of the rule of law and, in particular, restoring a functional criminal justice system.

Such a process does not currently exist in Libya, a situation which the Libyan government and legislature and the international community must do all they can to remedy.

The present report provides concrete law, policy and practical recommendations with a view to initiating such a process and enhancing the ability of the Libyan criminal justice system to deliver genuine accountability.

### *International response with respect to accountability*

On 26 February 2011, shortly after the uprising commenced, the UN Security Council referred the situation in Libya to the Office of the Prosecutor of the International Criminal Court (ICC). The ICC has so far issued arrest warrants against five senior government and security officials – Muammar Gadhafi (now deceased), Saif al-Islam Gadhafi, Abdullah Al-Senussi, Al-Tuhamy Mohamed Khaled and Mahmoud Al-Werfalli – on charges constituting crimes against humanity and war crimes. It is reportedly assessing the feasibility of bringing cases in relation to crimes against migrants transiting from across Africa through Libya to the Mediterranean Sea, and “paying close attention” to the armed conflict currently occurring in and around Tripoli.

Following challenges by Libya and the accused, and after examining the functioning of the Libyan criminal justice system, the ICC determined that the case against Abdullah Al-Senussi was inadmissible, while the case against Saif al-Islam Gadhafi was admissible. A key factor in the ICC’s reasoning was that Libyan authorities had access to Abdullah Al-Senussi but not Saif al-Islam Gadhafi. The ICC’s other findings with respect to the significant challenges impacting an accused’s fair trial rights in Libya did not prevent them from concluding that Libya had primary jurisdiction over Abdullah Al-Senussi.

Aside from the ICC referral, there have been only limited efforts at the international level to ensure gross human rights violations and abuses are being monitored or investigated. The most recent resolution issued by the UN Human Rights Council on 20 March 2019, which preceded the outbreak of hostilities in April 2019, called on the Libyan judicial authorities to “increase efforts to hold those responsible for crimes accountable,” without recognizing the significant obstacles to doing so.

States’ engagement with Libya and ICC decision-making therefore seems premised on an assumption or assessment that the Libyan criminal justice system can and does function without hindrance, in accordance with its own domestic laws and procedures, and in compliance with international law and standards.

The present report challenges such assumptions, including by providing a thorough assessment of the capacity of Libya’s criminal justice system to investigate, prosecute and remedy gross human rights violations and violations of IHL in accordance with international law and standards, as well as the substantive, procedural and practical challenges that hinder the capacity of the Libyan criminal justice system to discharge its functions fairly, consistently, in defence of victims’ rights and in compliance with the accused’s fair trial rights.

### *Challenges with respect to accountability under Libya’s criminal justice framework*

This report concludes that any investigation and prosecution of crimes under international law conducted by Libyan authorities is unlikely to meet the standards necessary to ensure fair and effective justice.

Since 2011, Libyan efforts to investigate and prosecute crimes under international law have been extremely limited, with the exception of Case 630/2012 against 37 former Gadhafi-regime members (*37 Gadhafi-regime members* case). Despite announcements by Libyan authorities that investigations had commenced in response to some complaints about widespread violations and abuses in detention facilities, the Office of the High Commissioner for Human Rights (OHCHR) and the UN Support Mission in Libya (UNSMIL) reported that they are not aware of any investigation or prosecution of armed group members, including those affiliated to the State, for post-2011 crimes. The status of domestic arrest warrants issued against Mahmoud al-Werfalli, commander in al-Saiqa Brigade in the LNA, for extrajudicial killings, Abdelhakim Belhaj, leader of the Islamist al-Watan Party and former head of the Tripoli Military Council, and Ibrahim Jadran, a Libyan militia leader, for “attacks, crimes and leading armed groups in Libya” is unclear. Other arrest warrants for crimes under international law may be based on political considerations, such as those against the GNA Prime Minister, Fayez al-Sarraj.

A web of amnesties, immunities and defences continue to pose significant barriers to accountability in Libya. Efforts by authorities since 2011 to remedy the inadequacies of the legal framework, including those on the criminalization of offences and modes of liability, remain incomplete. These inadequacies include:

- Insufficient or inappropriate criminalization of offences, in particular torture, enforced disappearance, arbitrary deprivation of life, rape and other forms of sexual and gender-based violence, slavery, and codification of modes of liability including superior responsibility;
- Failure to criminalize war crimes and crimes against humanity;
- Failure to exclude the defence of superior orders for manifestly unlawful orders; and
- Expansive or overbroad application of amnesties and immunities, insofar as they prevent the investigation and prosecution of crimes under international law, in particular crimes committed during and after the 2011 conflict and crimes committed by public officials in the performance of their duties.

Libyan laws also do not comply with the accused's rights to liberty and to a fair trial under international law and standards. With respect to the pre-trial phase:

- Expansive powers accorded to the Public Prosecutor with respect to certain crimes "against the State" restrict the due process guarantees afforded to the accused;
- Evidence gathered by members of armed groups, who are not independent, impartial and competent authorities, may also be improperly relied upon during investigations and trials;
- Powers accorded to the investigating judge and Public Prosecutor are not compliant with the right to liberty insofar as they can detain accused persons without independent and impartial judicial control, and without an explicit right to *habeas corpus* for an undefined period of time and on arbitrary grounds; and
- The Code of Criminal Procedure (CCP) does not sufficiently guarantee the right to legal counsel or to adequate time and facilities to prepare a defence.

At the trial stage:

- The independence and impartiality of the judiciary is not sufficiently guaranteed;
- The accused's rights to be present at trial and to appeal errors of law is restricted;
- The use of information obtained or extracted through torture or ill-treatment as evidence is not precluded at trial; and
- There is no effective system for ensuring appropriate security measures are taken to protect witnesses.

The Penal Code and the CCP do not adequately guarantee the right to an effective remedy and reparation for victims of crimes under international law, insofar as:

- There is no right to claim reparations against the State;
- Amnesty laws bar effective access to satisfaction, rehabilitation and guarantees of non-repetition where amnesty has been granted and civil claims against persons who have unlawfully deprived former Gadhafi-era officials of their liberty; and
- Other laws and policies granting compensation do not require an assessment of the whether the award is proportionate to the gravity of the violation and bar effective access to satisfaction, rehabilitation, restitution and guarantees of non-repetition.

The inadequacies of the Libyan legal framework have continued to provide fertile ground for human rights violations and abuses, including violations of the right to liberty, the right to a fair trial and the right to be free from torture and other ill-treatment. Since the 2011 uprising, arbitrary detention has been practiced on a continuous and widespread basis, with thousands of people including migrants, refugees and asylum seekers being detained without charge, without being brought before a judicial authority and without access to counsel or family. In the *37 Gadhafi-regime members* case, the accused had limited access to counsel, to the evidence against them and to trial hearings, and their rights to examine and cross-examine witnesses were severely curtailed. Public access to the trial was restricted, and the prosecution case, supporting evidence and judgment were not made public. The Court also repeatedly dismissed the accused's allegations that witness statements were obtained through torture or ill-treatment without conducting an investigation, placing the burden of proof on the defence to verify them.

#### *Key recommendations*

The findings in this report ought to inform States policies and decisions in relation to engagement with Libya, including on accountability issues. The report sets out a list of recommendations for international actors, including UN bodies and States, with respect to taking steps to ensure perpetrators of crimes under international law are brought to account. Key recommendations are:

- The UN Human Rights Council should establish a Commission of Inquiry or similar mechanism, with a mandate to monitor, document, establish the facts and report on gross human rights violations in Libya, including with a view to collecting and preserving evidence of crimes under international law for future criminal proceedings before national or international courts;
- States should exercise expanded jurisdiction, including universal jurisdiction, to investigate and prosecute crimes under international law committed in Libya, including when the perpetrator is within their territory or otherwise under their jurisdiction;
- States should fully cooperate with and adequately fund and provide resources to the ICC, with a view to enhancing its capacity to conduct investigations and prosecutions in relation to the situation in Libya, enforcing related arrest warrants and bringing alleged perpetrators of crimes before the court for trial; and
- States and UN actors should refrain from entering into or implementing agreements with Libyan authorities, including in relation to the detention of migrants, refugees and asylum seekers and the provision of arms, in situations where it is reasonably foreseeable that violations of international human rights law, IHL and/or international refugee law might occur.

The report also sets out recommendations for Libyan actors to implement when the political situation permits. Although the current context in the country makes legislative reform all but impossible, it is important to clearly identify what legal provisions need to be repealed, amended or introduced if accountability is to be ensured consistent with international law and standards. These include:

- Enacting new legal provisions or amending existing ones to criminalize torture and cruel, inhuman or degrading treatment or punishment, enforced disappearance, arbitrary deprivation of life, rape and other forms of sexual and gender-based violence, slavery, war crimes and crimes against humanity in line with international law and standards, and to codify superior responsibility in respect of all crimes under international law;
- Amending or repealing laws on amnesties and immunities to ensure full compliance with international law and standards, and ensure they are not a barrier to the investigation and prosecution of crimes under international law or the provision of reparations;

- With respect to investigations and prosecutions, ensure that detainees have the right to legal counsel from the moment of arrest, throughout pre-trial proceedings and during trial and have the right to access family and medical care at all times; preserve the accused's right to re-trial following trials *in absentia*; ensure the right to appeal questions of fact and the right to review upon discovery of new facts; and revoke military tribunals' jurisdiction over civilians and gross human rights violations; and
- Establish an immediate moratorium on the death penalty, with a view to its abolition.



## Chapter 1 – Introduction

Libya is unable to investigate, prosecute and remedy gross human rights violations and crimes under international law in full compliance with international law and standards. In respect of areas of the country that are not under the effective control of the officially recognized government, the challenges are obvious. Despite the political and territorial fragmentation within the country, the Libyan judiciary and Prosecutors, and to a lesser extent the police, have remained relatively unified and operative across the country whether in the west, east or south. However, unless applying international law directly, law enforcement authorities and the judiciary apply domestic laws and procedures that do not meet international law and standards with respect to the penalization of crimes under international law and the codification of modes of liability, the application of amnesties and immunities, the rights to liberty and to a fair trial amongst others, and reparations to victims. Even where rights are protected under domestic law, available information about the limited practice in the investigation and prosecution of crimes shows that justice sector actors are violating rights under international law.

The purpose of the report is to assess Libyan laws and policies and the criminal justice system through which they are administered, as well as their capacity and performance in ensuring accountability for gross human rights violations and related crimes under international law. More specifically, the report aims to:

- Assess whether the domestic legal framework and its application in the limited situations in which crimes have been investigated and prosecuted complies with Libya's international legal obligations and international standards;
- Provide Libyan and international lawyers, judges, human rights defenders, civil society, government officials, politicians and academics with an in-depth analysis of the domestic legal framework in light of international law and standards; and
- Provide recommendations to Libyan lawmakers, executive authorities, the judiciary and international actors aimed at advancing accountability and preventing impunity.

The scope of this report is necessarily limited by the context. It is unable to address those parts of Libyan territory that are ungoverned or governed by non-State actors, largely because of the severe constraints in accessing information regarding such areas and the actors within them. The ICJ acknowledges that, given the fragmentation of the territory, the recognized executive authorities are currently not in a position to fully discharge their obligations in respect of those areas not within their control. Nevertheless, other State organs including the police, Public Prosecutor and the judiciary have some capacity, albeit limited, to exercise their powers across the territory in relation to the investigation and prosecution of crimes. Although State actors may not be able to implement the recommendations in this report across the entire territory or in practice, such recommendations are nonetheless valuable to future reform initiatives. Furthermore, the recommendations directed at international actors remain vital to ensuring accountability for crimes in Libya.

The report contains 6 chapters, which provide an overview of the international law and standards applicable to Libya, and the compliance of Libyan domestic law and practice with them. Through this framework, the report identifies the substantive and procedural shortcomings that constitute an impediment to the achievement of accountability with a view to tailoring relevant recommendations to the identified gaps and shortcomings.

Chapter 1 offers some background to the historical and political context in Libya, including the 2011 uprising and subsequent conflict, the role of armed groups and the current state of affairs regarding domestic and international investigations. Chapter 2 addresses the legal framework applicable to Libya, including the international treaties to which Libya is a party and their implementation in the domestic legal system, and the duties deriving therefrom. Chapter 3 discusses the substantive challenges to accountability faced by Libya, including the definition of crimes, the mode of liability of superior responsibility and the defence of superior orders, the obligation to investigate and prosecute crimes under

international law, and amnesties and immunities. Chapter 4 deals with the procedural challenges to accountability that exist during the pre-trial and trial phases. Accordingly, it analyses those rights that are germane to the pre-trial phase: the right to liberty; the right to be informed promptly of the charges; the right to legal counsel; the right to family visits; the right to be brought promptly before a judge; the right to adequate time and facilities to prepare a defence; the right to remain silent; and the right to *habeas corpus*. With respect to the trial phase, it examines the following rights: the right to trial before a competent, independent and impartial tribunal; the right to a public hearing; the right to be represented by counsel; the right to call and examine witnesses; the right to be tried in one's presence; the right to appeal; and trials by military tribunals. Chapter 5 discusses the right to a remedy and reparation for victims of crimes under international law and the extent to which the Libyan domestic legal framework promotes or impedes the enjoyment of this right. Finally, chapter 6 sets out recommendations for Libyan authorities and international actors.

### 1.1 Historical and Political Context

The 42-year rule of Colonel Muammar Gadhafi's regime was beset by the commission of widespread and systematic gross human rights violations, including arbitrary arrest and detention, enforced disappearance, torture and ill treatment, the oppression of women, minority groups, political dissidents and government critics, and the curtailment of freedom of expression, association and assembly.<sup>2</sup> On 15 February 2011, families of victims of the 1996 Abu Salim prison massacre<sup>3</sup> and activists took to the streets of Benghazi demonstrating against the arrest of Fathi Terbil, a lawyer and representative of some of the Abu Salim victims' families.<sup>4</sup> The demonstration sparked country-wide protests against the Gadhafi regime,<sup>5</sup> which were violently suppressed by the Libyan security forces, including the army and police.<sup>6</sup> An armed conflict erupted between a number of revolutionary militias formed in response to intensifying protests – enjoying NATO air support<sup>7</sup> – and forces loyal to the Gadhafi regime.<sup>8</sup> Months of protracted fighting ultimately culminated in the fall of Colonel Gadhafi and his authoritarian rule.<sup>9</sup>

The internationally recognized National Transitional Council (NTC) sought to fill the governance vacuum. The NTC promulgated the Constitutional Declaration,<sup>10</sup> which made provision for the enactment of laws to hold general elections. Article 30 of the Constitutional Declaration provided for the election of an interim government until the adoption of a new Constitution; no deadline was imposed for its adoption.<sup>11</sup> Following

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2. Report of the Secretary-General on the United Nations Support Mission in Libya, UN Doc. S/2011/727, 22 November 2011, para. 19.

3. According to reports, at least 1,200 prisoners at the Abu Salim prison in Tripoli were killed after one guard was killed in a detainee protest over their mistreatment from 28 to 29 June 1996. Human Rights Watch, *Libya: Abu Salim Prison Massacre Remembered*, 27 June 2012.

4. Report of the Secretary-General on the United Nations Support Mission in Libya, UN Doc. S/2011/727, 22 November 2011, para. 3; Human Rights Watch, *Arrests, Assaults in Advance of Planned Protests*, 16 February 2011.

5. Report of the Secretary-General on the United Nations Support Mission in Libya, UN Doc. S/2011/727, 22 November 2011, para. 3; Al Jazeera, *'Day of Rage' Kicks off in Libya*, 17 February 2011.

6. The Guardian, *Libya Protests: More than 100 Killed as Army Fires on Unarmed Demonstrators*, 20 February 2011; Human Rights Watch, *Libya: Commanders should face Justice for Killings*, 22 February 2011.

7. UN Security Council Resolution 1973, UN Doc. S/RES/1973, 17 March 2011, para. 4.

8. Report of the Secretary-General on the United Nations Support Mission in Libya, UN Doc. S/2011/727, 22 November 2011, para. 3

9. *Ibid.*

10. For an unofficial English translation of the Constitutional Declaration, see [https://www.constituteproject.org/constitution/Libya\\_2011.pdf](https://www.constituteproject.org/constitution/Libya_2011.pdf).

11. Article 30 tasked the General National Congress (GNC) with appointing a body to formulate a draft constitution, due within 60 days of its first meeting, to be approved by the GNC and put to a yes-or-no referendum, requiring a two-thirds majority of voters, within 30 days. Upon promulgation, the GNC would adopt legislation on general elections in accordance with the provisions in the constitution and, following a subsequent election, certify the election results and invite the newly elected legislative authority to convene within a period not exceeding 30 days, effectively dissolving the GNC.

elections on 7 July 2012, the NTC's term in office ended with a transfer of power to Libya's newly elected parliamentary authority, the General National Congress (GNC) on 8 August 2012.<sup>12</sup> Although the transfer of power to the GNC was initially peaceful, the governance arrangements pursuant to the election ultimately sparked a new cycle of conflict and political bodies and the armed groups aligned with them sought power.<sup>13</sup>

Increasing popular dissatisfaction with the GNC, manifested in street demonstrations, compelled them to address questions surrounding the legitimacy of its tenure. The GNC established the February Committee, tasked with drafting an amendment to the Constitutional Declaration to authorize presidential and legislative elections, and drafting an electoral law. The February Committee submitted a draft amendment<sup>14</sup> to the Constitutional Declaration, which was adopted by the GNC in March 2014.<sup>15</sup> It also submitted a draft electoral law,<sup>16</sup> adopted as Law No. 10 of 2014, which established a process for the election of a new permanent legislative authority in Benghazi to be named the House of Representatives(HoR).<sup>17</sup>

Elections for the HoR<sup>18</sup> took place on 25 June 2014. Its inauguration was overshadowed by division between members of the HoR and GNC, reflected in the boycott by thirty HoR members over the decision to move the HoR to Tobruk and in the refusal of some GNC members to recognize the HoR's legitimacy.<sup>19</sup> The GNC, supported by a coalition of militias known as *Libya Dawn* – established partly in response to Khalifa Haftar's Operation Dignity against Islamists in 2014 – continued to function as a *de facto* legislative authority over certain areas in Libya.<sup>20</sup>

Following a legal challenge filed by some HoR members and GNC members, on 7 November 2015 the Supreme Court declared that the HoR had not been established in line with procedures outlined in the Constitutional Declaration.<sup>21</sup> However, proponents of the HoR contended that the Court issued its decision "under duress."<sup>22</sup> The GNC had attempted to influence the composition of the Supreme Court, including by appointing its President, bypassing the competent Supreme Judicial Council (SJC).<sup>23</sup> The HoR, in turn, endeavored to guide the make-up of the SJC by drafting a law that would reinstate the Minister of Justice as a member.<sup>24</sup> The law, however, failed to pass.<sup>25</sup>

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12. 2011 Constitutional Declaration, art. 30.

13. Report of the Secretary-General on the United Nations Support Mission in Libya, UN Doc. S/2014/653, 5 September 2014, paras. 10-11.

14. The text of the amendment is available at: <https://security-legislation.ly/node/33348>.

15. Report of the Secretary-General on the United Nations Support Mission in Libya, UN Doc. S/2014/653, 5 September 2014, para. 11.

16. *Ibid.*

17. Law No. 10 of 2014 on the Election of the House of Representatives for the Transitional Period, 31 March 2014, art. 16.

18. Since its inception, the HoR has adopted several laws that have critically affected Libya's political trajectory, including the Eighth Amendment to the Constitutional Declaration, temporarily assigning presidential responsibilities and authority to the HoR in the absence of an elected president. See Decision No. 24 of 2014, approving the new ministerial cabinet headed by Prime Minister Abdullah Al-Thinni, and Law No. 3 of 2014 on Counter-terrorism, 19 September 2014.

19. Report of the Secretary-General on the United Nations Support Mission in Libya, UN Doc. S/2014/653, 5 September 2014, paras. 4 and 7-11; Foreign Affairs, *Libya's Legitimacy Crisis*, 6 October 2014.

20. Foreign Affairs, *Libya's Legitimacy Crisis*, 6 October 2014.

21. Decision No. 17 of 2014 on the Unconstitutionality of Article (30), Paragraph (11) of the Constitutional Declaration amended by Constitutional Amendment No. 7, 6 November 2014.

22. Report of the Secretary-General on the United Nations Support Mission in Libya, UN Doc. S/2015/144, 26 February 2015, para. 5.

23. Report of the Secretary-General on the United Nations Support Mission in Libya, UN Doc. S/2016/182, 15 February 2016, para. 55.

24. ICJ, *Challenges for the Libyan Judiciary: Ensuring Independence, Accountability and Gender Equality*, 2016, pp. 20-21.

25. Libyan law lecturer interviewed by the ICJ in March 2016.

This power struggle resulted in the fissure of the governance structure into two legislative authorities – the GNC and the HoR – which operate simultaneously, each with a distinct Prime Minister and ministerial cabinets. While the executive authority affiliated with the GNC, the Government of National Salvation, is now defunct, the HoR continues to lend legitimacy to the government of Abdullah al-Thinni.<sup>26</sup> Consequently, there is lack of clarity regarding which laws apply across Libya, with numerous laws adopted by the two legislative bodies not being enforceable all over the country.<sup>27</sup>

In a bid to resolve the political stalemate, the UN brokered peace talks from early to late 2015 between rival factions, incorporating stakeholders from across Libya's complex and fragmented political landscape. The talks resulted in the adoption of the Libyan Political Agreement (LPA) on 17 December 2015,<sup>28</sup> which envisaged the establishment of the Presidency Council<sup>29</sup> and Government of National Accord (GNA),<sup>30</sup> and the preservation of the HoR as the State's legitimate legislative authority.<sup>31</sup>

Libya accordingly has two centers of power. One is the government of Abdullah al-Thinni – whose mandate is null and void under the LPA<sup>32</sup> – which operates from the city of al-Bayda located in eastern Libya. The second is the Presidency Council, based in Tripoli since 2016, which presides over the internationally recognized GNA, headed by Fayez al-Serraj.<sup>33</sup> According to the LPA, the HoR should endorse the GNA by ratifying the agreement,<sup>34</sup> but it has refused to do so on a number of occasions.<sup>35</sup>

## 1.2 The role of armed groups

Coinciding with increasing political insecurity was the formation of a multiplicity of armed groups across the country, whose loyalties to political institutions or factions regularly shift. While the situation is highly complex, the groups can be roughly divided into three categories, which correspond to their legal responsibilities: those acting under GNA control, whether overall or more operational; those acting in alignment or alliance with the GNA or with their acquiescence; and those in opposition to the GNA, whether or not aligned with the rival government. These groups combine a wide range of political and religious ideologies, including various currents of Salafism, such as the powerful Madkhali current linked to Saudi Arabia.

The groups are largely aligned with the one of the two rival authorities. The GNA relies on armed groups for its own security in Tripoli.<sup>36</sup> Abdul Raouf Kara, leader of the Special Deterrent Force (or al-Rada), for example, is explicitly supportive of the al-Serraj

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26. Al-Thinni was appointed as interim Prime Minister on 11 March 2014 by the GNC after it dismissed his predecessor, Ali Zeidan. On 29 August 2014, following the election of the HoR, Al-Thinni and his cabinet announced their resignation. The following week, however, the HoR reinstated Al-Thinni as Prime Minister, a position he still holds today, though his government does not enjoy international recognition. See Report of the Secretary-General on the United Nations Support Mission in Libya, UN Doc. S/2014/653, 5 September 2014, paras. 12-15.

27. ICJ, *Challenges for the Libyan Judiciary: Ensuring Independence, Accountability and Gender Equality*, 2016, p. 12.

28. United Nations Support Mission to Libya (UNSMIL), *Libyan Political Agreement*, 17 December 2015.

29. *Ibid.*, arts. 1(3), 8.

30. *Ibid.*, principle 14 and art. 1.

31. *Ibid.*, principle 10 and arts. 12-13.

32. Report of the Secretary-General on the United Nations Support Mission in Libya, UN Doc. S/2017/283, 4 April 2017, para. 9; UNSMIL, *Libyan Political Agreement*, 17 December 2015.

33. Report of the Secretary-General on the United Nations Support Mission in Libya, UN Doc. S/2016/182, 15 February 2016, para. 3; Report of the Secretary-General on the United Nations Support Mission in Libya, UN Doc. S/2017/283, 4 April 2017, para. 9.

34. UNSMIL, *Libyan Political Agreement*, 17 December 2015, arts. 1(4), (5).

35. Report of the Secretary-General on the United Nations Support Mission in Libya, UN Doc. S/2016/1011, 1 December 2016, paras. 2-4. See also Atlantic Council, *One Year Later the UN Action Plan for Libya is Dead*, 17 September 2018.

36. European Council on Foreign Relations, *A Quick Guide to Libya's Main Players*, December 2016.

administration.<sup>37</sup> Other groups, such as the Suq al-Jumaa Nawasi brigade, have also pledged loyalty to the GNA.<sup>38</sup>

Khalifa Haftar is recognized as Field Marshall of the Libyan National Army (LNA), composed of a mixture of military units and tribal armed groups, which has expanded its presence across the country and now exercises a significant degree of control over territories with substantial oil reserves in the east and south.<sup>39</sup>

The Islamic State (IS), while scattered and seemingly no longer controlling territory in Libya, remains a threat, as its attacks on high profile targets such as the national election commission, the national oil company and foreign ministry in 2018 demonstrated.<sup>40</sup>

During the eight years following the fall of the Gadhafi regime, Libya has been embroiled in periods of armed conflict between these groups vying for territorial control and for consequent political control for the political institutions or factions they represent. The UN Support Mission in Libya (UNSMIL) was due to host a national conference in the southwestern town of Ghadames in April 2019 to bring together key political stakeholders to discuss elections. The conference, however, never materialized, as the LNA, that is forces under the command of Field Marshall Khalifa Haftar and aligned with the HoR, launched an offensive on Tripoli on 4 April 2019, in a reported attempt to seize control of the capital.<sup>41</sup> At the time of publication of this report, the hostilities in Tripoli have continued unabated and no new date for discussions between the rival parties has been set.

### 1.3 Investigations and prosecutions of crimes under international law

#### 1.3.1 The commission of crimes under international law

The post-2011 period in Libya has witnessed a multitude of State actors and armed groups perpetrating crimes under international law. International organizations, including UNSMIL,<sup>42</sup> the UN Office of the High Commissioner for Human Rights (OHCHR)<sup>43</sup> and the UN High Commissioner for Refugees (UNHCR),<sup>44</sup> report on widespread violations and abuses committed by State and armed groups in Libya under international human rights law and international humanitarian law (IHL). These include enforced disappearance, torture and ill-treatment, rape and other sexual violence against both women and men, unlawful killings, forced displacement, and both direct and indiscriminate or disproportionate attacks against civilians and civilian objects, as well as the prolonged or otherwise arbitrary detention of “thousands of men, women and children.”<sup>45</sup> The upsurge in conflict in Libya’s capital since April 2019 has seen incidence of alleged indiscriminate and disproportionate attacks against civilians and civilian objects.<sup>46</sup>

The United Nations Office for the Coordination of Humanitarian Affairs (OCHA) and the World Health Organization (WHO) reported on 10 June 2019 that the hostilities have

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37. Ibid.

38. Ibid.

39. Ibid.; Foreign Policy, *While You Weren’t Looking, General Haftar Has Been Taking Over Libya*, 1 April 2019.

40. Report of the Secretary-General on the United Nations Support Mission in Libya, UN Doc. S/2019/19, 7 January 2019, paras. 17-18.

41. The Guardian, *Libyan Strongman Orders Troops to March on Tripoli*, 4 April 2019.

42. UNSMIL & OHCHR, *Torture and Deaths in Detention in Libya*, October 2013.

43. UNSMIL & OHCHR, *Abuse Behind Bars: Arbitrary and Unlawful Detention in Libya*, April 2018.

44. UNHCR, *UNHCR Position on Returns to Libya (Update II)*, September 2018.

45. UNSMIL & OHCHR, *Abuse Behind Bars: Arbitrary and Unlawful Detention in Libya*, April 2018, p. 3.

46. Amnesty International, *Libya: Evidence of Possible War Crimes Underscores Need for International Investigation*, 16 May 2019.



resulted in the killing of 691 persons, including 41 civilians; the injury of 4012 persons, including 135 civilians; and the displacement of around 94,000 persons.<sup>47</sup>

Against the backdrop of impunity and lawlessness, a number of criminal organizations have entrenched their presence in the country and consolidated human trafficking routes bound for Europe. The UNHCR, UNSMIL, OHCHR, the International Organization for Migration (IOM) and various NGOs continue to document and report on widespread and systematic violations and abuses of thousands of migrants, refugees and asylum seekers' human rights in Libya.<sup>48</sup> Additionally, thousands of migrants, refugees and asylum seekers are subject to prolonged detention without access to legal counsel or the possibility to challenge their detention, and have yet to be brought before judicial authorities.<sup>49</sup>

The governance and accountability vacuum has empowered armed groups to arrest, detain, and kidnap individuals without judicial oversight or accountability,<sup>50</sup> further perpetrating crimes. For example, there are a number of operational detention centers across the country that fall outside the reach of the Ministry of Justice, in which detainees are subject to serious violations of human rights, including arbitrary detention, torture, rape and other acts of sexual violence and killings.<sup>51</sup>

### 1.3.2 Investigations and prosecutions by Libyan authorities

Libyans who supported the 2011 uprising hoped it would usher in a nascent democracy and present an opportunity to address decades of gross human rights violations. However, successive transitional governments have failed to ensure accountability and redress for the egregious violations that took place under the Gadhafi regime, or the violations and abuses that occurred during the 2011 uprising and which have continued to be perpetrated by State and non-State armed groups. Indeed, the human rights violations and abuses and alleged war crimes that continue to be committed by State-affiliated militias and non-State armed groups are not being effectively investigated and prosecuted, largely because of the absence of political will, inadequate resources and the frequent threats made against justice sector actors by armed groups.<sup>52</sup>

State and non-State actors alike pose a serious threat to the independence of Libya's judicial system. The justice system remains relatively unified and functioning across the country, with all judges operating under the authority of a single SJC, and judges and Prosecutors receiving remuneration by the internationally recognized Ministry of Justice, and applying the same Penal Code and Code of Criminal Procedure (CCP). Libyan police are also able to operate to a certain extent across the country; in some cases armed groups are integrated into the police forces, and in others law enforcement is carried out by armed groups which have pledged allegiance to executive authorities. However, the justice system is functioning at limited capacity in numerous places. While civil, administrative and family courts continue to operate in most parts of the country, criminal courts are effectively non-functional in numerous places, as criminal justice actors face continuing intimidation, threats and violence by armed groups.<sup>53</sup> In February 2016,

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47. UN OCHA, *Tripoli: Humanitarian key figures and response as of 10 June 2019 (since 4 April 2019)*, at <https://reliefweb.int/report/libya/tripoli-humanitarian-key-figures-and-response-10-june-2019-4-april-2019>; WHO, <https://twitter.com/WHOLIBYA/status/1140628320599642113>.

48. See, e.g., UNSMIL & OHCHR, *Desperate and Dangerous: Report on the Human Rights Situation of Migrants and Refugees in Libya*, December 2018; UNHCR, *UNHCR Position on Returns to Libya (Update II)*, September 2018; IOM Press Release, *IOM Condemns Recent Violence in Libyan Detention Centre*, 3 May 2019.

49. UNSMIL & OHCHR, *Desperate and Dangerous: Report on the Human Rights Situation of Migrants and Refugees in Libya*, December 2018, pp. 29, 39-40, 48.

50. International Crisis Group, *Trial by Error: Justice in Post Qadhafi Libya*, 2013, p. 18.

51. UNSMIL & OHCHR, *Abuse Behind Bars: Arbitrary and Unlawful Detention in Libya*, April 2018, pp. 8-12.

52. Interviews conducted by the ICJ with Libyan judges and prosecutors, October 2018.

53. See e.g. Report of the Secretary-General on the United Nations Support Mission in Libya, UN Doc.

OHCHR observed: “[t]he Libyan judicial system has been the target of crippling, violent attacks with actors such as judges and Prosecutors being subject to killings, assaults, abductions, and threats. Such attacks have caused the system to come to a halt in many areas of Libya, in particular the eastern and central regions, and have compromised the functioning of the courts that remain open.”<sup>54</sup>

With the exception of Case 630/2012 against 37 former Gadhafi-regime members (the 37 *Gadhafi-regime members* case), very few attempts have to been undertaken to investigate and prosecute perpetrators of violations and abuses. In April 2019, it was reported that an Eastern-based military Prosecutor under the authority of the LNA ordered the arrest of 23 military and civilian individuals, including the GNA Prime Minister Fayeze al-Sarraj, accused of “committing crimes or supporting terrorism in Libya.”<sup>55</sup> Shortly thereafter, the GNA Ministry of Defense’s military Prosecutor issued arrest warrants for Khalifa Haftar and six other individuals accused of crimes committed in connection with the bombing of Mitiga Airport on 8 April 2019. No further information is publicly available regarding the charges or the investigative steps that have been undertaken. In January 2019,<sup>56</sup> the public Prosecutor in Tripoli reportedly issued arrest warrants for two prominent armed groups leaders: Abdelhakim Belhaj, Chairman of the Wattan Party; and Ibrahim Jadran, the former commander of the Petroleum Facilities Guard, for “attacks, crimes and leading armed groups in Libya.”<sup>57</sup> The status of an investigation into extrajudicial executions allegedly committed by Mahmoud al-Werfalli, commander in the al-Saiqa Brigade of the LNA based in Benghazi, who is also subject to an arrest warrant issued by the International Criminal Court (ICC) for the war crime of murder, is unclear. The investigation was opened for conduct apparently including the alleged extrajudicial execution of a number of unarmed prisoners. While al-Werfalli appeared to have surrendered to the military police in February 2018 in al-Marj, eastern Libya, he is reportedly no longer in detention. Conflicting accounts report that he escaped from prison<sup>58</sup> and that, in January 2019, the Benghazi Court Martial revoked an arrest warrant against him.<sup>59</sup> The ICJ is not aware whether domestic investigations are still ongoing. Al-Werfalli is currently subject to two warrants of arrest issued by the ICC for the war crime of murder.<sup>60</sup> Al-Werfalli remains at liberty in Libya, is not presently detained, is not being genuinely prosecuted and allegedly murdered another ten victims just five months after the ICC arrest warrant was issued.<sup>61</sup> Despite announcements by Libyan authorities that investigations had commenced

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S/2013/104, 21 February 2013, para. 26; Report of the Secretary-General on the United Nations Support Mission in Libya, UN Doc. S/2013/516, 5 September 2013, p. 7; Report of the Secretary-General on the United Nations Support Mission in Libya, UN Doc. S/2014/131, 26 February 2014, pp. 4, 9; Report of the Secretary-General on the United Nations Support Mission in Libya, UN Doc. S/2014/653, 5 September 2014, para. 53; Report of the Secretary-General on the United Nations Support Mission in Libya, UN Doc. S/2016/182, 25 February 2016, para. 54; Report of the Secretary-General on the United Nations Support Mission in Libya, UN Doc. S/2017/283, 4 April 2017, para. 50. Although the information available is limited, the extent to which the criminal justice and tribunal systems operate for ordinary crimes seems limited. The UN Secretary-General reported in 2015 that *sharia* courts were established in Derna “outside the scope of the State authority;” Report of the Secretary-General on the United Nations Support Mission in Libya, UN Doc. S/2015/144, 26 February 2015, para. 57.

54. OHCHR, *Investigation by the Office of the United Nations High Commissioner for Human Rights on Libya: Detailed Findings*, UN Doc. A/HRC/31/CRP.3, 15 February 2016, p. 55.
55. Al-Wasat, LNA Spox: *Military Prosecutor has Issued Arrest Warrants for Al-Sarraj, Maiteeg, Swehli, Al-Ghiriani, Juwaili, Badi, Mangoush, Al-Barghathi, Gnounou and Others*, 12 April 2019.
56. Al-Wasat, *GNA Military Prosecutor Issues Arrest Warrant for LNA’s Haftar, 6 Others*, 18 April 2019.
57. International Center for Transitional Justice, *Libya’s Public Prosecutor Issues Arrest Warrants of Belhaj and Jadran*, 8 January 2019.
58. International Justice Monitor, *ICC Suspect Al-Werfalli ‘Escapes’ from Prison in Libya*, 7 August 2018.
59. Libyan Express, *Libya’s Benghazi Court Removes Arrest Warrant of Al-Werfalli*, 7 January 2019.
60. ICC, *The Prosecutor v. Al-Werfalli*, Case No. ICC-01/11-01/17, Warrant of Arrest, 15 August 2017; Case No. ICC-01/11-01/17-13, Second Warrant of Arrest, 4 July 2018. Al-Werfalli is accused of having illegally executed a number of unarmed persons between June 2016 and January 2018.
61. International Criminal Court (ICC), *Statement to the United Nations Security Council on the Situation in Libya, pursuant to UNSCR 1970 (2011)*, 8 May 2019, paras. 14-16.

in response to some complaints about widespread violations and abuses in detention facilities, OHCHR and UNSMIL reported that they are not aware of any investigation or prosecution<sup>62</sup> of armed group members, including those affiliated to the State, for post-2011 crimes, even in cases where the State exercised effective control. These concerns have been echoed by the UN Human Rights Council, which has called for action to ensure accountability.<sup>63</sup>

The Libyan authorities have also failed to conduct meaningful investigations into alleged war crimes and gross human rights violations and abuses, including the Libya Dawn operation, which involved violations of IHL and international human rights law including abductions, torture, extrajudicial executions, indiscriminate shelling and the destruction of civilian property.<sup>64</sup> Similar crimes under international law were allegedly perpetrated in the name of the LNA's Operation Dignity, and the extrajudicial killing of Muammar Gadhafi and his son Mutasim.<sup>65</sup> Furthermore, no accountability measures have been pursued in relation to the forcible displacement of some 40,000 members of the Tawerghan community, who fled approaching anti-Gadhafi armed groups primarily from Misrata, fearing attacks and reprisals;<sup>66</sup> and the Gharghour massacre in 2013, when militiamen from Misrata opened fire on unarmed protesters in the Tripoli district of Gharghour, causing the deaths of some 46 people and injury of 516.<sup>67</sup>

Certain armed groups, including those affiliated with al-Qaida and IS, have also perpetrated serious human rights abuses and violations of IHL, which may constitute war crimes, without any manifest attempts to bring them to justice.<sup>68</sup>

### 1.3.3 Referral to the International Criminal Court

On 26 February 2011, the UN Security Council referred the situation in Libya since 15 February 2011 to the Office of the Prosecutor of the ICC.<sup>69</sup> Since June 2011, the ICC has issued arrest warrants against Muammar Gadhafi (now deceased), Saif al-Islam Gadhafi and Abdullah Al-Senussi for crimes against humanity, Al-Tuhamy Mohamed Khaled (the former head of the Libyan Internal Security Agency) for crimes against humanity and war crimes,<sup>70</sup> and Mahmoud Al-Werfalli (a commander in the Al-Saiqa Brigade in the LNA) for war crimes.<sup>71</sup>

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62. See generally UNSMIL & OHCHR, *Abuse Behind Bars: Arbitrary and Unlawful Detention in Libya*, April 2018.

63. UN Human Rights Council Resolution 37/41, UN Doc. A/HRC/RES/37/41, 13 April 2018, paras. 3, 26, 29, 31.

64. Report of the Secretary-General on the United Nations Support Mission in Libya, UN Doc. S/2015/144, 26 February 2015, paras. 8, 46, 55.

65. *Ibid.*, paras. 47, 55.

66. Report of the Secretary-General on the United Nations Support Mission in Libya, UN Doc. S/2011/727, 22 November 2011, para. 23; Report of the Secretary-General on the United Nations Support Mission in Libya, UN Doc. S/2013/516, 5 September 2013, paras. 17-18.

67. Report of the Secretary-General on the United Nations Support Mission in Libya, UN Doc. S/2014/131, 26 February 2014, para. 17.

68. Report of the Secretary-General on the United Nations Support Mission in Libya, UN Doc. S/2015/144, 26 February 2015, paras. 17-19; Report of the Secretary-General on the United Nations Support Mission in Libya, UN Doc. S/2016/182, 25 February 2016, paras. 24-29; Report of the Secretary-General on the United Nations Support Mission in Libya, UN Doc. S/2018/140, 12 February 2018, paras. 24-28; Report of the Secretary-General on the United Nations Support Mission in Libya, UN Doc. S/2018/429, 7 May 2018, paras. 18-19; Report of the Secretary-General on the United Nations Support Mission in Libya, UN Doc. S/2019/19, 7 January 2019, paras. 17-18.

69. UN Security Council Resolution 1970, UN Doc. S/RES/1970, 26 February 2011, paras. 4-8.

70. Case No. ICC-01/11-01/13, Pre-Trial Chamber I, 18 April 2013. The warrant was made public in April 2017.

71. Case No. ICC-01/11-01/17, Pre-Trial Chamber I, 15 August 2017; Case No. ICC-01/11-01/17-13, Pre-Trial Chamber I, 4 July 2018.

The ICC is also reportedly “paying close attention to the ongoing armed conflict in and around Tripoli since early April [2019]” and investigating crimes against migrants.<sup>72</sup> In an address to the Security Council on 8 May 2019, the ICC’s Chief Prosecutor stated that her office had collected a body of evidence indicating that “crimes including torture, unlawful imprisonment, rape and enslavement are committed against migrants throughout their journeys and in both official and unofficial detention centers”<sup>73</sup> which implicated individuals, militias and State actors in the human trafficking trade across Libya.<sup>74</sup> She also noted that the Office of the Prosecutor “continues to assess the feasibility of bringing cases before the ICC in relation to crimes against migrants” and “is cooperating with a number of States and organizations to support national investigations and prosecutions that relate to human smuggling and trafficking through Libya.”<sup>75</sup>

In its cases to date, the ICC has issued admissibility decisions in which it has examined inter alia whether Libya is not “unwilling or unable genuinely to carry investigation or prosecution,” whether “proceedings were not or are not being conducted independently or impartially,” and whether, “due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings.”<sup>76</sup> On 31 May 2013, Pre-Trial Chamber I determined that the case against Saif al-Islam Gadhafi was admissible because the Libyan authorities were unable to obtain custody of him.<sup>77</sup> In its reasoning, Pre-Trial Chamber I found Libya’s “national system cannot yet be applied in full in areas or aspects relevant to the case” and, “[a]s a consequence, Libya is ‘unable to obtain the accused’ and the necessary testimony”<sup>78</sup> and therefore unable to prosecute the case.<sup>79</sup> The Chamber noted reports “that conflict-related detainees including senior former regime members have not been protected from torture and mistreatment in detention facilities”<sup>80</sup> and that they were “not persuaded by the assertion that the Libyan authorities currently have the capacity to ensure protective measures” to witnesses.<sup>81</sup> It also noted that “attempts to secure legal representation for Mr Gaddafi have seemingly failed” and that “Libya has not shown whether and how it will overcome the existing difficulties in securing a lawyer for the suspect.”<sup>82</sup>

In contrast, on 11 October 2013, when concluding that Al-Senussi’s case was inadmissible because Libya was investigating the case,<sup>83</sup> Pre-Trial Chamber I found that the judiciary did not lack independence and impartiality, that threats against judicial authorities did not entail a collapse or unavailability of the judicial system and that it could not conclude Libya would not be able to address security concerns impacting access to witnesses and evidence, or ensure Al-Senussi was provided with adequate legal representation.<sup>84</sup>

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72. ICC, *Statement to the United Nations Security Council on the Situation in Libya, pursuant to UNSCR 1970 (2011)*, UN Doc. S/PV.8388, 2 November 2018, p. 3.

73. ICC, *Statement to the United Nations Security Council on the Situation in Libya, pursuant to UNSCR 1970 (2011)*, 8 May 2019, para. 22.

74. *Ibid.*

75. *Ibid.*, para. 23.

76. *Rome Statute of the International Criminal Court*, 2187 UNTS 3, 17 July 1998 (ICC Statute), art. 17(1)(a), (2)(c), (3).

77. ICC, *The Prosecutor v. Saif al-Islam Gaddafi and Abdullah Al-Senussi*, Case No. ICC-01/11-01/11, Pre-Trial Chamber I, Decision on the Admissibility of the Case against Saif al-Islam Gaddafi, 31 May 2013.

78. *Ibid.*, para. 205.

79. *Ibid.*, para. 215.

80. *Ibid.*, para. 209.

81. *Ibid.*, para. 211.

82. *Ibid.*, paras. 213, 215.

83. ICC, *The Prosecutor v. Saif al-Islam Gaddafi and Abdullah Al-Senussi*, Case No. ICC-01/11-01/11, Pre-Trial Chamber I, Decision on the Admissibility of the Case against Abdullah Al-Senussi, 11 October 2013.

84. *Ibid.*, para. 308.

In its submissions in the Saif Al-Islam Gadhafi case, Libya had argued that the ICC should not adopt the “the perspective of a human rights court,”<sup>85</sup> a position not directly opposed by the Prosecutor in the al-Senussi proceedings, who submitted that only where due to a “complete absence of even the minimum and most basic requirements of fairness and impartiality [such that] the national efforts can only be viewed as a travesty of justice” should the Court exercise jurisdiction.<sup>86</sup> Both the Al-Senussi and Saif Gadhafi decisions were upheld by the Appeals Chamber.<sup>87</sup>

Apart from the referral to the ICC, States have more recently paid scant attention to the real prospect of domestic accountability in their engagement with Libya in comparison with the scale of gross human rights violations and abuses and the inability of the domestic system to meet international standards. The most recent resolution adopted by the UN Human Rights Council on 20 March 2019, which preceded the outbreak of hostilities in April 2019, called on the Libyan judicial authorities to “increase efforts to hold those accountable for violations or abuses of international human rights law and international humanitarian law accountable,” and noted cooperation between the ICC and GNA in that regard.<sup>88</sup>

States’ engagement with Libya and ICC decision-making is based on an assumption or assessment that the Libyan criminal justice system can and does function in accordance with domestic laws and/or international law and standards. Accordingly, even in the current context, an assessment of the capacity of Libya’s criminal justice system to investigate, prosecute and remedy gross human rights violations and abuses in accordance with international law and standards, or its own laws, is timely. The findings in this report ought to inform States and judicial decision makers’ policies and decisions in relation to accountability in Libya and its engagement with it.

#### 1.4 Research methodology

The factual elements in this report are based on a combination of key informant interviews and secondary material. The security situation in Libya poses significant challenges to the gathering of information, which impeded the collection of documents including case files and court records and determined the extent to which the ICJ could undertake key informant interviews. The ICJ obtained a copy of the judgment in the *37 Gadhafi-regime members* case, which remains unpublished.<sup>89</sup> In all other cases, the ICJ relied on reports published by relevant UN bodies, in particular UNSMIL, the OHCHR, the Working Group on Arbitrary Detention (WGAD) and the Panel of Experts on Libya. Reports issued by reliable media sources and international NGOs, such as Amnesty International and Human Rights Watch, have also been taken into account. The ICJ also conducted interviews with practitioners in the criminal justice system in Libya where possible.

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85. ICC, *The Prosecutor v. Saif al-Islam Gaddafi and Abdullah Al-Senussi*, Case No. ICC-01/11-01/11, Pre-Trial Chamber I, Decision on the Admissibility of the Case against Saif al-Islam Gaddafi, 31 May 2013, para. 195.

86. ICC, *The Prosecutor v. Saif al-Islam Gaddafi and Abdullah Al-Senussi*, Case No. ICC-01/11-01/11, Pre-Trial Chamber I, Decision on the Admissibility of the Case against Abdullah Al-Senussi, 11 October 2013, para. 188.

87. ICC, *The Prosecutor v. Saif al-Islam Gaddafi and Abdullah Al-Senussi*, Case No. ICC-01/11-01/11 OA 4, Appeals Chamber, Judgment on the Appeal of Libya against the Decision of Pre-Trial Chamber I of 31 May 2013 entitled ‘Decision on the admissibility of the case against Saif al-Islam Gaddafi’, 21 May 2014; ICC, *The Prosecutor v. Saif al-Islam Gaddafi and Abdullah Al-Senussi*, Case No. ICC-OI/II-OI/IIOA6, Appeals Chamber, Judgment on the appeal of Mr Abdullah Al-Senussi against the Decision of Pre-Trial Chamber I of 11 October 2013 entitled ‘Decision on the Admissibility of the Case against Abdullah Al-Senussi’, 24 July 2014.

88. UN Human Rights Council Resolution 40/27, UN Doc. A/HRC/40/L.6/Rev.1, 20 March 2019, para. 36.

89. In 2017, UNSMIL and OHCHR published a report recounting the findings of the trial observations and interviews they have conducted throughout the legal proceedings; see *Report on the Trial of 37 Former Members of the Qadhafi Regime (Case 630/2012)*, February 2017. The International Bar Association also published a report on the case; see Mark Ellis, *Trial of the Libyan Regime: An Investigation into Fair Trial Standards*, November 2015.



## Chapter 2 – Applicable legal framework

### 2.1 The applicability of international law in Libya

The 2011 Constitutional Declaration, adopted by the NTC and intended to apply during the transitional period, is silent on the status of international law within the Libyan legal system.<sup>90</sup> Proposed article 13 of the 2017 Consolidated Draft Constitution, which has not been approved by way of referendum and thus has not been adopted, would affirm that “[r]atified international treaties and conventions shall supersede the law but shall be subordinate to the Constitution” and that “[t]he State shall take the necessary measures to enforce such treaties and conventions so as not to conflict with the provisions of this Constitution.”

In a 2013 decision, the Libyan Supreme Court affirmed the primacy of ratified or acceded to international treaties over domestic law, even in the absence of domestic legislation:

[I]t is established that international conventions adhered to by the Libyan State are directly applicable once ratified by the State’s legislative power. They have supremacy over internal legislation. In case of contradiction between the provisions of the international conventions and those of internal legislation, the provisions of the international conventions have priority of application ...<sup>91</sup>

Similarly, the ICJ previously reported that “[c]urrent practice holds that once the Legislative Body has approved a treaty it is directly applicable in Libyan courts.”<sup>92</sup> The Supreme Court decision does not directly address the question in respect of customary international law.<sup>93</sup>

The 2011 Constitutional Declaration states that “Islam is the religion of the State and the principal source of legislation is the Islamic Sharia.”<sup>94</sup> The 2017 Consolidated Draft Constitution employs similar language: “Islam shall be the religion of the State and Islamic Shariah shall be the source of legislation.”<sup>95</sup> The present text does not include the requirement contained in previous drafts that the Constitution be interpreted in line with *Sharia* law and therefore the supremacy of *Sharia* over international law.<sup>96</sup>

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90. 2011 Constitutional Declaration, art. 7: “Human rights and basic freedoms shall be respected by the State. The State shall commit itself to joining international and regional declarations and charters which protect such rights and freedoms. The State shall endeavour to promulgate new charters which shall honour the human being as God’s creation on Earth.”

91. Constitutional Challenge Case 01 of the Judicial Year 57, Decision, 23 December 2013, cited in UNSMIL & OHCHR, *Report on the Trial of 37 Former Members of the Qadhafi Regime (Case 630/2012)*, February 2017, p. 11.

92. ICJ, *Challenges for the Libyan Judiciary: Ensuring Independence, Accountability and Gender Equality*, 2016, p. 14.

93. *Ibid.*

94. 2011 Constitutional Declaration, art. 1.

95. 2017 Consolidated Draft Constitution, art. 6.

96. The ICJ has previously expressed its concerns about the possible supremacy of *Sharia* law over international law in Libya. See ICJ, *The Draft Libyan Constitution: Procedural Deficiencies, Substantive Flaws*, 2015, pp. 26-27; *Challenges for the Libyan Judiciary: Ensuring Independence, Accountability and Gender Equality*, 2016, pp. 14-15. In the 2015 draft of the Constitution, article 7 would have provided that “Sharia shall be the source of all legislation in accordance with established religious doctrines and jurisprudence” and that “the constitutional provisions shall be interpreted and restricted in accordance with the above.” Article 8 of the 2016 draft of the Constitution would have provided that “Islam shall be the religion of the State, and Islamic Sharia shall be the source of legislation in accordance with the recognized sects and interpretations without being bound to any of its particular jurisprudential opinions in matters of interpretation. The provisions of the Constitution shall be interpreted in accordance with this.” These provisions appeared to give *Sharia* primacy over the Constitution and therefore over the interpretation of international law, rendering international law *de jure* subordinated to *Sharia*. If adopted, these provisions would have been at odds with the fundamental international law principle that domestic law cannot justify the non-performance of a binding international obligation. See *Vienna Convention on the Law of Treaties*, 1155 UNTS 331, 23 May 1969, art. 27; International Court of Justice, *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment, 20 July 2012, para. 113.

## 2.2 International law binding Libya

Libya is party to most of the principal universal human rights treaties, including the *International Covenant on Civil and Political Rights* (ICCPR),<sup>97</sup> the *International Covenant on Economic, Social and Cultural Rights* (ICESCR),<sup>98</sup> the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (CAT),<sup>99</sup> the *Convention on the Rights of the Child* (CRC),<sup>100</sup> the *Convention on the Elimination of All Forms of Discrimination against Women* (CEDAW),<sup>101</sup> the *International Convention on the Elimination of All Forms of Racial Discrimination* (CERD),<sup>102</sup> the *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families* (CMW),<sup>103</sup> and the *Convention on the Rights of Persons with Disabilities* (CRPD).<sup>104</sup> Libya is also party to the *Arab Charter on Human Rights* (Arab Charter)<sup>105</sup> and the *African Charter on Human and Peoples' Rights* (ACHPR).<sup>106</sup> Libya is not yet party to the *International Convention for the Protection of all Persons from Enforced Disappearance* (ICPPED).<sup>107</sup>

Libya is also bound by IHL, including the four Geneva Conventions (GCs)<sup>108</sup> and Additional Protocols I (AP I)<sup>109</sup> and II (AP II),<sup>110</sup> as well as customary IHL,<sup>111</sup> which apply during armed conflict. Armed conflicts may be classified as international or non-international. An international armed conflict (IAC) exists when there is "a resort to armed force between States,"<sup>112</sup> and is subject to the GCs, AP I (if ratified) and customary IHL.<sup>113</sup>

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97. *International Covenant on Civil and Political Rights*, 999 UNTS 171, 16 December 1966 (ICCPR) (Libya acceded on 15 May 1970). On 16 May 1989, Libya accepted the jurisdiction of the Human Rights Committee under the ICCPR Optional Protocol I; see *Optional Protocol to the International Covenant on Civil and Political Rights*, 999 UNTS 171, 16 December 1966.

98. *International Covenant on Economic, Social and Cultural Rights* 993 UNTS 3, 16 December 1966 (ICESCR) (Libya acceded on 15 May 1970).

99. *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 1465 UNTS 85, 10 December 1984 (CAT) (Libya acceded on 16 May 1989).

100. *Convention on the Rights of the Child*, 1577 UNTS 3, 20 December 1989 (CRC) (Libya acceded on 15 April 1993). Libya is also party to the *Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict*, 2173 UNTS 222, 25 May 2000 (Libya acceded on 29 October 2004); and the *Optional Protocol to the Convention on the Rights of the Child on the Sale of Children Child Prostitution and Child Pornography*, 2171 UNTS 227, 25 May 2000 (Libya acceded on 18 June 2004).

101. *Convention on the Elimination of All Forms of Discrimination*, 1249 UNTS 13, 18 December 1979 (CEDAW) (Libya acceded on 16 May 1989).

102. *International Convention on the Elimination of All Forms of Racial Discrimination*, 660 UNTS 195, 7 March 1966 (CERD) (Libya acceded on 3 July 1968).

103. *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*, 2220 UNTS 3, 18 December 1990 (CMW) (Libya acceded on 18 June 2004).

104. *Convention on the Rights of Persons with Disabilities*, 2515 UNTS 3, 13 December 2006 (CRPD) (Libya ratified on 13 February 2018).

105. League of Arab States, *Arab Charter on Human Rights*, 22 May 2004 (Arab Charter) (Libya ratified on 7 August 2006).

106. *African Charter on Human and Peoples' Rights*, 1520 UNTS 217, 27 June 1981 (ACHPR) (Libya ratified on 19 July 1986).

107. *International Convention for the Protection of all Persons from Enforced Disappearance*, 2716 UNTS 3, 20 December 2006 (ICPPED).

108. *Convention relative to the Protection of Civilian Persons in Time of War*, 75 UNTS 287, 12 August 1949 (GC IV) (Libya acceded on 15 May 1956).

109. *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts*, 1125 UNTS 3, 8 June 1977 (AP I) (Libya acceded on 7 June 1978).

110. *Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of Non-International Armed Conflicts*, 1125 UNTS 610, 8 June 1977 (AP II) (Libya acceded on 7 June 1978).

111. A compilation of customary IHL rules is available at [https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1\\_rul](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul) (ICRC Customary IHL Database).

112. International Criminal Tribunal for the former Yugoslavia (ICTY), *Prosecutor v. Tadić*, Case IT-94-1, Appeals Chamber, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 70.

113. GC IV, art. 2. A NIAC may become international if another State directly intervenes in the conflict

A non-international armed conflict (NIAC) exists when there is “protracted armed violence between governmental authorities and organized armed groups,” or between two or more organized armed groups within a State,<sup>114</sup> when two requirements are fulfilled: (i) the hostilities reach a certain level of intensity and (ii) the armed groups are sufficiently organized.<sup>115</sup> The following factors are relevant to determining intensity: the number, duration and intensity of individual confrontations; the type of weapons and other military equipment used; the number and calibre of munitions fired; the number of persons and type of forces partaking in the fighting; the number of casualties; the extent of material destruction; the number of civilians fleeing combat zones; and the involvement of the UN Security Council.<sup>116</sup> Furthermore, the following factors are relevant to determining whether an armed group is sufficiently organized: the existence of a command structure and disciplinary rules and mechanisms within the group; the existence of a headquarters; the fact that the group controls a certain territory; the ability of the group to gain access to weapons, other military equipment, recruits and military training; its ability to plan, coordinate and carry out military operations, including troop movements and logistics; its ability to define a unified military strategy and use military tactics; and its ability to speak with one voice and negotiate and conclude agreements such as cease-fire or peace accords.<sup>117</sup>

NIACs are governed by article 3 common to the GCs, AP II (if ratified)<sup>118</sup> and customary IHL, which makes significant parts of AP I concerning the conduct of hostilities applicable to NIACs. While common article 3 applies to all NIACs, AP II only applies to conflicts between governmental authorities and organized armed groups and does not apply to conflicts between organized armed groups.<sup>119</sup> IHL governing NIACs directly binds armed groups, which bear accordant obligations,<sup>120</sup> and members of such armed groups may be liable for war crimes under international law.

The essential protections of international human rights law do not cease in times of armed conflict.<sup>121</sup> IHL and human rights law are considered to be “complementary, not mutually exclusive.”<sup>122</sup> IHL is used to reinforce the protection found in human rights treaties, for example in relation to the non-derogability of fair trial rights.<sup>123</sup> While human rights protections continue to apply to the right to liberty and the right to life, their scope of application may be modified in light of IHL when an armed conflict takes place.<sup>124</sup>

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or if a State exercises “overall control” over an organized armed group which is party to the conflict against a State; see ICTY, *Prosecutor v. Tadić*, Case No. IT-94-1-A, Appeals Chamber, Judgement, 15 July 1999, para. 84.

114. GC IV, art. 3; ICTY, *Prosecutor v. Tadić*, Case No. IT-94-1, Appeals Chamber, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 70.

115. ICTY, *Prosecutor v. Tadić*, Case No. IT-94-1-T, Trial Chamber, Judgment, 7 May 1997, para. 562, citing J. Pictet (ed.), *Commentary: Geneva Convention II for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*, Geneva 1960, p. 33; see also p. 37.

116. ICTY, *Prosecutor v. Haradinaj*, Case No. IT-04-84-T, Trial Chamber, Judgement, 3 April 2008, para. 49.

117. *Ibid.*, para. 60.

118. Article 1(1) of AP II sets an autonomous threshold of application, which requires armed groups to “exercise such control over a part of [a High Contracting Party’s] territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.”

119. AP II, art. 1(1).

120. GC IV, art. 3; AP II, art. 1(1).

121. International Court of Justice, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 8 July 1996, para. 25; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004, para. 106; *Armed Activities on the Territory of the Congo (Democratic Republic of Congo v. Uganda)*, Judgment, 3 February 2006, paras. 216-219.

122. Human Rights Committee (HRC), *General Comment No. 31: Nature of the General Legal Obligation on States Parties to the Covenant*, UN Doc. CCPR/C/21/Rev.1/Add.13, 26 May 2004, para. 11.

123. HRC, *General Comment No. 29: States of Emergency (Article 4)*, UN Doc. CCPR/C/21/Rev.1/Add.11, 31 August 2001, para. 16.

124. HRC, *General Comment No. 35: Article 9 (Liberty and Security of Person)*, UN Doc. CCPR/C/GC/35, 16 December 2014, para. 64; *General Comment No. 36: Article 6 (The Right to Life)*, UN Doc.

Since 2011, multiple armed conflicts have taken place on Libyan territory. In 2011, two parallel conflicts existed: a NIAC between the Libyan State then under the Gadhafi regime and armed opposition groups; and an IAC between the Libyan State and the States acting under NATO command.<sup>125</sup> In 2014, a number of NIACs took place between various actors, including the LNA led by General Haftar and aligned to the HoR; Libya Dawn supporting the GNC; and Islamist groups, most notably *Ansar al-Sharia* and later the IS.<sup>126</sup>

Due to the general instability characterizing the Libyan political context, hostilities have periodically reignited between 2014 and the present. Between 7 May and 28 June 2018, the LNA engaged in a military campaign to reconquer the city of Derna from the Derna Protection Force (previously called Shura Council). Particularly, the methods and means employed, including air strikes, and the high number of casualties are evidence of the high intensity reached by the hostilities. Both parties appear to have been sufficiently organized to consider the battle of Derna a NIAC to which IHL was applicable.<sup>127</sup>

In August and September 2018, fighting between rival militias – the Seventh Brigade and the Tripoli Revolutionaries Battalion, the former reportedly initially established by the Defense Ministry in 2017 and the latter reportedly affiliated with the GNA – broke out in and around Tripoli, resulting in the killing of at least 115 people and injury of many others. The organization of the armed groups, who were able to launch sustained and organized attacks for up to a month, and the intensity of the fighting, which involved the use of heavy weaponry including artillery, signal that the situation could be classified as a NIAC to which IHL applied.<sup>128</sup> On 4 April 2019, the LNA initiated a major military operation to conquer Tripoli. The intensity of the hostilities, sustained by the use of airstrikes and artillery, has reached the level of a NIAC between the LNA and forces loyal to the GNA, with more than 94,000 persons displaced and at least 691 persons killed, including at least 41 civilians.<sup>129</sup> At the time of writing, the conflict is still ongoing.

These are but four examples where hostilities in Libya constitute NIACs, during which IHL applied alongside international human rights law. At all other times and other situations identified in this report, international human rights law applies exclusively.

### 2.3 Libyan State and *de facto* authorities' duties to respect and protect under international law

Libya has an obligation under international law, including treaties to which it is party, to investigate and, where there is sufficient evidence, prosecute all crimes under international

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CCPR/C/GC/36, 30 October 2018, para. 64. See also European Court of Human Rights, *Isayeva v. Russia*, Application No. 57950/00, 24 February 2005.

125. Report of the International Commission of Inquiry on Libya, UN Doc. A/HRC/17/44, 12 January 2012, paras. 50-56.

126. Geneva Academy RULAC Project, *Non-international Armed Conflicts in Libya*.

127. There is little information on the organization of the LNA. However their ability to engage in sustained military operations and conduct blockades and air strikes suggest that they are likely sufficiently organized to constitute a non-state armed group for the purposes of determining whether a NIAC exists. In this respect, UNSMIL and various international NGOs called on the parties to the conflict to respect IHL. See UNSMIL, *Statement on the Situation in Derna*, 1 June 2018; Human Rights Watch, *Libya: Battle for City Endangers Civilians. Conflict Parties in Derna Should Abide by Laws of War*, 14 May 2018; Amnesty International, *Libya Protect Civilians under Siege in Derna*, 11 June 2018. UN, *Statement Attributable to the Spokesman for the Secretary-General on the Situation in Tripoli, Libya*, 1 September 2018; Human Rights Watch, *Libya: Civilians Killed in Tripoli Clashes. Residents Trapped between Armed Groups*, 1 September 2018.

128. UN, *Statement Attributable to the Spokesman for the Secretary-General on the Situation in Tripoli, Libya*, 1 September 2018; Human Rights Watch, *Libya: Civilians Killed in Tripoli Clashes. Residents Trapped between Armed Groups*, 1 September 2018.

129. UN OCHA, *Tripoli: Humanitarian key figures and response as of 10 June 2019 (since 4 April 2019)*, at <https://reliefweb.int/report/libya/tripoli-humanitarian-key-figures-and-response-10-june-2019-4-april-2019>; ICC, *Statement of ICC Prosecutor, Fatou Bensouda, in relation to the Escalation of Violence in and around Tripoli, Libya*, 16 April 2019.

law.<sup>130</sup> IHL in particular imposes an obligation to investigate war crimes committed by members of both State armed forces and organized armed groups in the context of IACs and NIACs.<sup>131</sup>

The Libyan State alone has the obligation to investigate, prosecute, criminally sanction and remedy violations of human rights and IHL that constitute crimes under international law committed by State officials or by any member of an armed group or other person acting under its direction or control. Certain armed groups are no doubt affiliated or associated with the government. To the extent that any armed group may be “acting on the instructions of, or under the direction or control of” the Libyan State, its conduct will be attributable to Libya itself and these groups would effectively be acting as State agents.<sup>132</sup> Libyan authorities also have an obligation to investigate crimes committed by members of armed groups acting nominally under State control or with its acquiescence,<sup>133</sup> and an obligation to exercise due diligence to protect any person from human rights abuses and crimes under international law committed by armed groups acting outside State control.<sup>134</sup> The obligation to investigate and prosecute crimes under international law is not subject to statutory limitations. Statutes of limitations or prescription are generally not permissible in respect of serious crimes under international law, such as crimes against humanity, war crimes and genocide, and gross human rights violations, including torture, enforced disappearance and extra-judicial executions.<sup>135</sup>

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130. CAT, art. 12; CRPD, art. 16; ICPPED, arts. 3, 10; *Declaration on the Protection of All Persons from Enforced Disappearance*, UN Doc. A/RES/47/133, 18 December 1992 (DPED), art. 13(1); *Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity*, UN Doc. E/CN.4/2005/102/Add.1, 8 February 2005, principle 19; *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, UN Doc. A/RES/60/147, 16 December 2005, principle III, para. 4; *Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions*, UN Doc. E/1989/89, January 1991, principle 9; *Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, UN Doc. A/RES/55/89, 4 December 2000, principle 2; GC IV, art. 146(1-2); ICRC Customary IHL Database, rule 158; HRC, *General Comment No. 31*, para. 18.
131. In relation to IACs, the GCs and AP I prescribe States to enact legislation that criminalizes those acts defined as grave breaches of these treaties, and to investigate and prosecute anyone accused of having committed or having ordered the commission of a grave breach; see GC IV, art. 146(1-2); AP I, art. 85(1). With regard to NIACs, a number of IHL treaties as well as the statutes of international courts and tribunals, including the ICC, provide for the criminalization of war crimes, therefore requiring their investigation and prosecution; see *Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction*, 1974 UNTS 45, 3 September 1992, art. VII(1); *Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction*, 2056 UNTS 211, 18 September 1997, art. 9; *Statute of the International Criminal Tribunal for the Former Yugoslavia*, UN Doc. S/RES/827, 25 May 1993, amended as of September 2009 (ICTY Statute), art. 3; *Statute of the International Criminal Tribunal for Rwanda*, UN Doc. S/RES/955, 8 November 1994 (ICTR Statute), art. 4; ICC Statute, arts. 8(2) (c), 8(2)(e); *Statute of the Special Court for Sierra Leone*, UN Doc. S/2002/246, 8 March 2002 (SCSL Statute), arts. 3-4. In respect of both IACs and NIACs, customary IHL requires a State to investigate and prosecute alleged war crimes committed by its nationals, or on its territory, or over which it has otherwise jurisdiction; ICRC Customary IHL Database, rule 158.
132. International Law Commission, *Articles on Responsibility of States for Internationally Wrongful Acts*, November 2001 (ARSIWA), art. 8.
133. Committee against Torture (CAT Committee), *General Comment No. 2: Implementation of Article 2 by States Parties*, UN Doc. CAT/C/GC/2, 24 January 2008, para. 18.
134. HRC, *General Comment No. 36*, para. 21; African Commission on Human and Peoples’ Rights (ACoMHPR), *General Comment No. 3: The Right to Life (Article 4)*, 57th Ordinary Session, 4-18 November 2015, para. 9.
135. ICJ, *International Law and the Fight against Impunity - Practitioners’ Guide No. 7*, 2015, pp. 363-372, 378-384. Various international instruments provide for the exclusion of limitation periods; see *Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity*, 754 UNTS 73, 26 November 1968 (Libya acceded on 16 May 1989); ICC Statute, art. 29; *Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity*, principle 23; *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, paras. 6-7. See also HRC, *Concluding Observations: Argentina*, UN Doc. CCPR/CO/70/ARG, 15 November 2000, para. 11; ICJ, *International Law and the Fight Against Impunity - Practitioners Guide No. 7*, 2015, pp. 374, 382-383.

Based on statements by the UN Security Council, General Assembly and other UN bodies, there is some authority to suggest that armed groups constituting de facto authorities exercising government-like functions and control over a territory should also bear certain international human rights responsibilities.<sup>136</sup> In any event, they are subject to the ordinary constraints imposed by domestic law, many of which contain duties that are concomitant with regulation of conduct imposed by international human rights law.

While Libya is not a party to the ICC Statute, pursuant to Security Council Resolution 1970 (2011) the ICC may investigate, prosecute and adjudicate crimes falling under its jurisdiction, including crimes against humanity and war crimes,<sup>137</sup> committed on Libyan territory since 15 February 2011.<sup>138</sup> The ICC will not exercise jurisdiction in relation to a particular crime and alleged perpetrator on a number of grounds, including if Libya is investigating or prosecuting the case, unless Libya is unwilling and unable to genuinely carry out the investigation or prosecution.<sup>139</sup>

In practice, the number of investigations conducted remains limited, notwithstanding the considerable volume of violations reported by international organizations, NGOs and the media of complaints that have been made by victims to Libyan authorities.<sup>140</sup> In April 2018, UNSMIL and OHCHR reported that no investigations had been opened into human rights violations committed by members of armed groups since 2011.<sup>141</sup> As set out in section 1.3.2, very few attempts have to been undertaken by Libyan authorities to investigate and prosecute perpetrators of violations and abuses.

In a 2013 report, UNSMIL and OHCHR documented 27 cases of deaths in custody allegedly caused by torture or ill-treatment, which had occurred in detention facilities nominally under the authority of the State but de facto controlled by armed groups. They reported that, although having provided the Ministry of Justice with the details of the cases, they were not aware of any completed investigation into the reported deaths.<sup>142</sup> UNSMIL and OHCHR also reported that there was no investigation following a torture complaint.<sup>143</sup> Some of the defendants in the *37 Gadhafi-regime members* case detained in the al-Hadhba prison also raised complaints of torture, which apparently have not been investigated.<sup>144</sup> In one instance, an investigation was opened into the complaint raised by defendant Al-Sa'di Gadhafi, who had allegedly been subjected to beatings and forced to watch other inmates being beaten. In this respect, UNSMIL and OHCHR reported that Prosecutor Al-Siddiq al-Sur had arrested Salah D'iki, the head of prisoners' affairs in Al-Hadhba prison, and detained him for six days. However, D'iki was subsequently released pending the investigation and, in September 2016, re-assigned to a leadership position in Al-Hadhba.<sup>145</sup> Based on the available information, the investigation into Al-Sa'di Gadhafi's complaint does not seem to have been effective.

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136. Committee on the Elimination of Discrimination against Women (CEDAW Committee), *General Recommendation No. 30: Women in Conflict Prevention, Conflict and Post-Conflict Situations*, UN Doc. CEDAW/C/GC/30, 18 October 2013, para. 16; Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, *Armed Non-State Actors: The Protection of the Right to Life*, UN Doc. A/HRC/38/44, 5 June 2018; Group of Eminent Experts on Yemen, *Situation of Human Rights in Yemen, including Violations and Abuses since September 2014*, UN Doc. A/HRC/39/43, 17 August 2018, para. 14; Report of the Independent International Commission of Inquiry on the Protests in the Occupied Palestinian Territory, UN Doc. A/HRC/40/74, 25 February 2019, para. 11.

137. While the ICC also has jurisdiction over genocide, to date it has charged only crimes against humanity and war crimes with respect to the situation in Libya. As of 17 July 2018, the ICC has jurisdiction over the crime of aggression with respect to States that have ratified or acceded to the relevant amendment to the ICC Statute or upon a UN Security Council referral issued after that date.

138. UN Security Council Resolution 1970, UN Doc. S/RES/1970, 26 February 2011, paras. 4-8.

139. ICC Statute, art. 17.

140. See e.g. UNSMIL & OHCHR, *Abuse Behind Bars: Arbitrary and Unlawful Detention in Libya*, April 2018, pp. 30, 36.

141. *Ibid.*, p. 37.

142. UNSMIL & OHCHR, *Torture and Deaths in Detention in Libya*, October 2013, p. 14.

143. UNSMIL & OHCHR, *Abuse Behind Bars: Arbitrary and Unlawful Detention in Libya*, April 2018, p. 29.

144. UNSMIL & OHCHR, *Report on the Trial of 37 Former Members of the Qadhafi Regime (Case 630/2012)*, February 2017, pp. 28-29.

145. *Ibid.*, p. 30.



Where the Libyan authorities have systematically failed to conduct effective investigations into credible reports indicating the commission of crimes under international law, Libya is in breach of its international obligation to investigate and prosecute serious crimes under international law and gross human rights violations.

## Chapter 3 – Accountability framework: substantive challenges

Crimes under international law committed in Libya include extrajudicial, arbitrary and summary executions, torture and other cruel, inhuman or degrading treatment or punishment (ill-treatment), rape and other forms of sexual and gender-based violence, enforced disappearance and slavery. These may also amount to war crimes under IHL if they have a nexus with an ongoing armed conflict.<sup>146</sup> Absent a conflict nexus, such crimes are governed by international human rights law and constitute gross human rights violations. When committed as part of a widespread or systematic attack against the civilian population, the above-mentioned crimes may amount to crimes against humanity.<sup>147</sup>

The present chapter analyzes whether Libya complies with its international obligations to ensure accountability for crimes under international law by adopting a legal framework to penalize and prosecute such conduct. In particular, the chapter will examine (i) whether the definitions of crimes are consistent with those under international law; (ii) whether modes of liability provided for under international law, in particular superior responsibility, are provided for under domestic law; (iii) whether the grant of amnesties and immunities is compliant with international law and standards.

### 3.1 Definition of crimes

Crimes under international law encompass torture and some ill-treatment, enforced disappearance, arbitrary deprivations of life, slavery, war crimes and crimes against humanity.<sup>148</sup> Sexual violence and human trafficking, which are widespread practices in Libya, will sometimes be part of such conduct and thereby also constitute crimes under international law. Both treaty and customary international law require States to criminalize such conduct in their domestic law.<sup>149</sup>

#### 3.1.1 Torture and other ill-treatment

##### International law

Torture is prohibited by the CAT, the ICCPR, the CRC, the Arab Charter and the ACHPR, and Libya must criminalize it accordingly.<sup>150</sup> Article 1 of the CAT defines torture as:

... any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

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146. ICTY, *Prosecutor v. Kunarac et al.*, Cases IT-96-23 and IT-96-23/1, Appeals Chamber, Judgement, 12 June 2002, paras. 57-59.

147. ICC Statute, art. 7.

148. *Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity*, Definition B. See also ICC Statute, arts. 5-8 as well as the sources cited in the following sections.

149. CAT, art. 4; *Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol)*, 11 July 2003 (Libya acceded on 23 May 2004), art. 4; ICPPED, art. 4; DPED, art. 4; ICC Statute, arts. 5-8; Inter-American Court of Human Rights (IACtHR), *Goiburú et al. v. Paraguay*, Series C No. 153, 22 September 2006, paras. 93, 128; ICRC Customary IHL Database, rule 156.

150. CAT, arts. 2, 4; ICCPR, art. 7; CRC, art. 37(a); Arab Charter, art. 8; ACHPR, art. 5; HRC, *General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment)*, UN Doc. HRI/GEN/1/Rev.9, 10 March 1992, paras. 8, 13.

The definition of torture under the CAT is reflective of customary international law insofar as it regulates the conduct of States and obliges them to prosecute torture as a standalone crime.<sup>151</sup> However, torture can be defined more broadly to exclude the objective public official requirement where the source of law arises elsewhere, including under international criminal law applicable to crimes against humanity.<sup>152</sup>

The CAT, the ICCPR, the CRC, the Arab Charter and the ACHPR also prohibit ill-treatment.<sup>153</sup> According to the Committee against Torture, “[t]he obligations to prevent torture and ... ill-treatment ... are indivisible, interdependent and interrelated. The obligation to prevent ill-treatment in practice overlaps with and is largely congruent with the obligation to prevent torture.” Article 16 of the CAT prescribes that the same measures to prevent torture must be implemented in respect of acts of ill-treatment, which may mean criminalization at domestic level.<sup>154</sup>

The obligation to bring perpetrators of certain violations of the ICCPR to justice applies “in respect of those violations recognized as criminal under either domestic or international law, such as torture and similar cruel, inhuman and degrading treatment (article 7).”<sup>155</sup>

Torture and ill-treatment can further constitute war crimes<sup>156</sup> when committed in the context of an armed conflict, or crimes against humanity when committed as part of a widespread or systematic attack against the civilian population.<sup>157</sup>

#### Libyan law in light of international law and standards

Article 2 of Law No. 10 of 2013,<sup>158</sup> which repealed provisions criminalizing torture in the Penal Code,<sup>159</sup> imposes a minimum of five years’ imprisonment on:

... anyone who inflicts or orders another person to inflict physical or mental pain on a detainee under his control in order to extract a confession for any act that such detainee has or has not committed, or because of discrimination, regardless of its type, or revenge, regardless of its motive.

The same penalty applies to persons who “cover-up[...] act[s] of torture despite [their] ability to stop it.” The penalties are increased if certain aggravating circumstances apply: “The imprisonment sentence shall be not less than eight years if the torture results in substantial harm, and not less than ten years if the torture leads to serious harm. In the event of the torture victim’s death, the penalty shall be life imprisonment.” The definition of torture in Law No. 10 of 2013 reproduces some but not all of the elements set out in

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151. ICTY, *Prosecutor v. Brđanin et al.*, Case No. IT-99-36-A, Appeals Chamber, Judgement, 3 April 2007, para. 246.

152. ICTY, *Prosecutor v. Kunarac et al.*, Case No. IT-96023 & IT-96-23/1-A, Appeals Chamber, Judgement, 12 June 2002, para. 148.

153. CAT, art. 16; ICCPR, art. 7; CRC, art. 37(a); Arab Charter, art. 8; ACHPR, art. 5.

154. CAT Committee, *General Comment No. 2*, paras. 3, 6.

155. HRC, *General Comment No. 31*, para. 18 (emphasis added).

156. GC IV, art. 3(a, c); AP II, art. 4(2)(a, e); ICRC Customary IHL Database, rules 90, 156. In particular, common article 3 of the GCs and article 4 of AP II forbid “cruel treatment” and “outrages upon personal dignity, in particular humiliating and degrading treatment.”

157. AComHPR, *General Comment No. 4: The Right to Redress for Victims of Torture and Other Cruel, Inhuman or Degrading Punishment or Treatment (Article 5)*, 21st Extra-Ordinary Session, 23 February - 4 March 2017, para. 63; ICC Statute, art. 7(1)(f). It should be noted that, differently from article 1 of the CAT, article 7(2)(e) of the ICC Statute does not require a specific purpose.

158. Law No. 10 of 2013 on the Criminalization of Torture, Forced Disappearance and Discrimination, 14 April 2013.

159. Article 435 of the Libyan Penal Code provided that “[a]ny public official who orders the torture of an accused person or tortures [them] himself shall be punished by imprisonment from three to ten years,” the scope of which is narrower than provided under article 2 of Law No. 10 of 2013.

article 1 of the CAT. While article 2 of Law No. 10 of 2013 makes reference to the purpose of extracting a “confession” from the victim, it fails to mention the other purposes envisaged in the CAT: (a) obtaining information, (b) punishing the person for an act that has been or is suspected to have been committed or (c) intimidating or coercing both or either the victim and/or a third person. More critically, the purposes listed under article 1 of CAT are illustrative and non-exhaustive – the formulation is “for such purposes as.” The open-ended formulation allows for other purposes – the conduct must be purposive, but not limited to those listed expressly under article 1.

Additionally, under article 1 of the CAT acts of severe physical or mental pain or suffering amount to torture when they are “inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.” As the Committee against Torture has pointed out in respect of this obligation, “those exercising superior authority – including public officials – cannot avoid accountability or escape criminal responsibility for torture or ill-treatment committed by subordinates where they knew or should have known that such impermissible conduct was occurring, or was likely to occur, and they failed to take reasonable and necessary preventive measures ... [It is] essential that the responsibility of any superior officials, whether for direct instigation or encouragement of torture or ill-treatment or for consent or acquiescence therein, be fully investigated through competent, independent and impartial Prosecutorial and judicial authorities.”<sup>160</sup>

While article 435 of the Penal Code criminalizes torture ordered or committed by a public official, article 2 of Law No. 10 of 2013 does not contain any such provision. The text of article 2 seems to encompass acts perpetrated by both public officials and private persons, which makes the scope of torture under Libyan law wider than under the CAT. This is consistent with article 7 of the ICCPR, article 37(a) of the CRC, article 8 of the Arab Charter and article 5 of the ACHPR, and the definition of torture as a war crime or crime against humanity, which prohibit acts of torture regardless of the involvement of a public official.<sup>161</sup> Hence, article 2 of Law No. 10 of 2013 captures acts of torture committed by private individuals, including those perpetrated by members of armed groups.

Neither the Penal Code nor Law No. 10 of 2013 criminalize other acts of ill-treatment not amounting to torture as such.<sup>162</sup> While some forms of ill-treatment may be covered by those provisions of the Penal Code penalizing injury of a slight,<sup>163</sup> gross<sup>164</sup> or serious<sup>165</sup> nature or abuse of authority,<sup>166</sup> this will not be sufficient to fulfil Libya’s relevant obligations under international

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<sup>160</sup>. CAT Committee, General Comment No. 2, para. 26.

<sup>161</sup>. HRC, General Comment No. 20, para. 13.

<sup>162</sup>. CAT, art. 16.

<sup>163</sup>. Penal Code, art. 379: “Anyone who causes injury to another person that results in sickness shall be punished by detention for a period not exceeding one year or a fine not exceeding LYD 50. If the duration of the sickness does not exceed ten days and the aggravating circumstances set forth in Article (382) of this Code are not fulfilled, the offence shall only be punishable upon complaint by the injured party.”

<sup>164</sup>. Penal Code, art. 380: “If any of the following circumstances are fulfilled, the personal injury shall be deemed gross and the penalty shall be detention not exceeding two year or a fine not exceeding LYD 100. 1. If the injury results in illness that endangers the life of the assaulted party or renders him incapable of performing his ordinary occupation for a period not exceeding forty days; 2. If the act is committed against a pregnant woman and results in a premature birth.”

<sup>165</sup>. Penal Code, art. 381: “The injury shall be deemed serious and the penalty shall be imprisonment for a period not exceeding five years if the act results in: 1. Illness from which there is no hope or possibility of recovery. 2. Loss of one sense or permanent impairment thereof. 3. Loss of a limb or organ, permanent impairment of the use of the same, loss of the benefit therefrom, loss of ability to procreate, or permanent and gross difficult in speaking. 4. Permanent facial disfigurement. 5. Abortion of the pregnant woman attacked;” art. 382: “The penalty shall be increased by no more than one half if the injuries set forth in Articles (379), (380), and (381) of this Code are accompanied by premeditation, lying in wait or by the use of arms, or if the injury is committed against ascendants.”

<sup>166</sup>. Penal Code, art. 431: “Any public official who during the exercise of his office uses force against an individual and thereby causes dishonour to the individual or causes him bodily pain shall be punished by detention and a fine not exceeding LYD 150.”

law. A domestic provision that criminalizes “acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture,” as stated by article 16 of the CAT, would better address any form of ill-treatment.

By not including some of the constitutive elements of torture under the CAT, and by failing to criminalize all forms of ill-treatment, the Libyan domestic legal framework fails fully to comply with applicable international law and standards.

### 3.1.2 Enforced disappearance

#### International law

Although Libya is not party to the ICCPED, it is party to the ICCPR and the CAT, which protect a number of rights that are constitutive of enforced disappearance.<sup>167</sup> The ICCPR and the CAT impose a duty on Libya to criminalize, investigate, prosecute, punish, and provide reparation and remedies for such violations.<sup>168</sup>

Enforced disappearance necessarily entails a violation of the prohibition against torture or ill-treatment protected under article 7 of the ICCPR; the prohibition of arbitrary detention under article 9; and the right to recognition as a person under the law under article 16. In instances where the fate of the “disappeared” person turns out to be extrajudicial, summary or arbitrary execution, it also constitutes a denial of the right to life under article 6 of the ICCPR. Accordingly, the Human Rights Committee has made clear in its General Comment No. 31, as well as in numerous cases and jurisprudence, that States parties must investigate and bring to justice perpetrators of enforced disappearance.<sup>169</sup> Enforced disappearance constitutes a continuing crime: “it begins at the time of the abduction and extends for the whole period of time that the crime is not complete, that is to say until the State acknowledges the detention or releases information pertaining to the fate or whereabouts of the individual.”<sup>170</sup>

The ICCPED contains the contemporary international definition and standards relating to enforced disappearance. Under article 2 of the ICCPED, enforced disappearance is defined as:

... the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law.<sup>171</sup>

The definition is drawn in large measure from the *UN Declaration on the Protection of All Persons from Enforced Disappearance* (DPED), adopted by the General Assembly in 1992, which enshrines the duties of States in preventing and terminating acts of enforced disappearance as well as the rights of victims and their relatives. The DPED “sets forth rules that all Member States of the United Nations, without the requirement of ratification, are called upon to apply as a minimum to prevent and suppress the practice.”<sup>172</sup>

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167. HRC, *Boucherf v. Algeria*, UN Doc. CCPR/C/86/D/1196/2003, 27 April 2006, para. 9.2; DPED, art. 1(2).

168. HRC, *General Comment No. 31*, para. 18; CAT Committee, *General Comment No. 2*, para. 6.

169. DPED, arts. 2, 17; HRC, *General Comment No. 31*, para. 18; *Bautista v. Colombia*, UN Doc. CCPR/C/55/D/563/1993, 27 October 1995; *Vincente et al. v. Colombia*, UN Doc. CCPR/C/60/D/612/19, 29 July 1997; *Boucherf v. Algeria*, UN Doc. CCPR/C/86/D/1196/2003, 27 April 2006, para. 9.2.

170. Report of the Working Group on Enforced or Involuntary Disappearances, UN Doc. A/HRC/16/48, 26 January 2001, paras. 1, 3. See also article 24(6) of the ICCPED.

171. See also ICC Statute, art. 7(2)(i); HRC, *Yurich v. Chile*, UN Doc. CCPR/C/85/D/1078/2002, 12 December 2005, para. 6.3.

172. OHCHR, *Enforced or Involuntary Disappearances*, Fact Sheet No. 6/Rev.3, at <https://www.ohchr.org/Documents/Publications/FactSheet6Rev3.pdf>, p. 6.

Article 3 of the ICPPED also requires States parties to investigate acts defined in article 2 that are “committed by persons or groups of persons acting *without the authorization, support or acquiescence of the State* and to bring those responsible to justice.”<sup>173</sup> These acts do not constitute enforced disappearance per se within the meaning of the ICPPED, but will still entail criminal conduct.

Under certain circumstances, an enforced disappearance may also constitute a war crime.<sup>174</sup> It may also constitute a crime against humanity “when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.”<sup>175</sup>

### Libyan law in light of international law and standards

Under the heading “forced disappearance,” article 1 of Law No. 10 of 2013 provides that:

Whoever kidnaps or detains a human being or deprives the same of any of his personal freedoms, whether by force, threats or deceit, shall be punished with imprisonment. The penalty incurred shall be imprisonment for a period no less than seven years if the act is committed:

- (1) Against ascendants, descendants or spouses.
- (2) Or by a civil servant who transgresses the limits of the powers associated with his position.
- (3) With the intention of realising a gain in exchange for releasing the victim; in which case, if the perpetrator achieves his goal, he shall be punished with imprisonment for a period of at least eight years.

This provision replicates almost verbatim article 428 of the Penal Code, which criminalizes kidnapping,<sup>176</sup> and which was repealed pursuant to article 6 of Law No. 10 of 2013.

Article 1 of Law No. 10 of 2013 falls foul of Libya’s international obligations. While such provision presents the element of deprivation of liberty, it fails to include the other two required components of the crime – the involvement of a public official and the refusal to disclose the fate or whereabouts of the person concerned or acknowledge the deprivation of liberty. It therefore fails to recognize the special gravity of enforced disappearance, in particular its nature as a continuing crime that infringes upon several human rights.

In light of its failure to criminalize enforced disappearance as such, Libya is not in compliance with international law.

### 3.1.3 Extrajudicial, arbitrary and summary executions

#### International law

The ICCPR, the Arab Charter, the ACHPR and other international law and standards all protect the right to life, which includes the guarantee that everyone is entitled to the right to life and that no one shall be arbitrarily deprived of her or his life.<sup>177</sup> The right to

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<sup>173</sup>. Report of the Working Group on Enforced or Involuntary Disappearances, UN Doc. A/HRC/7/2, 10 January 2008, para. 26.

<sup>174</sup>. ICRC Customary IHL Database, rule 98.

<sup>175</sup>. ICPPED, art. 5; ICC Statute, art. 7(1)(i).

<sup>176</sup>. Penal Code, art. 428: “Anyone who abducts, detains, confines, or deprives a person or his personal liberty by force, threat, or deceit shall be punished by imprisonment for a period not exceeding five years. The penalty shall be imprisonment for a period not exceeding seven years, if the offence is committed: (a) Against an ascendant, descendent or a spouse; (b) By a public official transgressing the limits of the authority pertaining to his office. (c) If the act is committed in order to obtain consideration for release, and the offender achieves his purpose, the penalty shall be imprisonment for a period not exceeding eight years.”

<sup>177</sup>. ICCPR, art. 6; CRC, art. 6; CEDAW, art. 3; Arab Charter, art. 5; ACHPR, art. 4. The right to life is recognized as part of customary international law, the general principles of law and as a *jus cogens*



life must be fully protected at all times and in all circumstances, including during public emergency.<sup>178</sup> The scope of Libya's obligations in respect of the ICCPR and the right to life is set out in the recently adopted Human Rights Committee's General Comment No. 36. Although the question of deprivation of life in the context of hostilities in armed conflict will be addressed below, it should be underscored that a killing that is unlawful under IHL will also constitute a violation of the right to life under international human rights law.<sup>179</sup>

Extrajudicial, arbitrary or summary executions are terms used to refer to forms of arbitrary deprivation of the right to life. International standards governing the use of force by public officials, in addition to the human rights treaty jurisprudence,<sup>180</sup> are set out in the *Code of Conduct for Law Enforcement Officials* (Code of Conduct)<sup>181</sup> and the *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials* (Basic Principles on the Use of Force),<sup>182</sup> which are widely accepted as reflecting legal obligations.<sup>183</sup> The governing principle is that lethal force may only be used as last resort when absolutely necessary to protect life. As stipulated in the Code of Conduct, any use of force by law enforcement officials is only permissible "when strictly necessary and to the extent required for the performance of their duty."<sup>184</sup> As stated in the Basic Principles on the Use of Force:

Whenever the lawful use of force and firearms is unavoidable, law enforcement officials shall: (a) Exercise restraint in such use and act in proportion to the seriousness of the offence and the legitimate objective to be achieved; (b) Minimize damage and injury, and respect and preserve human life; (c) Ensure that assistance and medical aid are rendered to any injured or affected persons at the earliest possible moment; (d) Ensure that relatives or close friends of the injured or affected person are notified at the earliest possible moment.<sup>185</sup>

According to the same Principles, the use of firearms against persons must be strictly limited "except in self-defence or defence of others against the imminent threat of death or serious injury, to prevent the perpetration of a particularly serious crime involving grave threat to life, to arrest a person presenting such a danger and resisting their authority, or to prevent his or her escape, and only when less extreme means are insufficient to achieve these objectives."<sup>186</sup>

Furthermore, the intentional lethal use of force by law enforcement officials is prohibited unless it is "strictly unavoidable in order to protect life."<sup>187</sup>

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norm, universally binding at all times. See HRC, *General Comment No. 29*, para. 11; AComHPR, *General Comment No. 3*, para. 5.

178. ICCPR, art. 4.

179. HRC, *General Comment No. 36*, para. 64.

180. *Ibid.*, paras. 12-13; AComHPR, *General Comment No. 3*, para. 27.

181. *Code of Conduct for Law Enforcement Officials*, UN Doc. A/RES/34/169, 17 December 1979.

182. *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials*, Eighth UN Congress on the Prevention of Crime and the Treatment of Offenders, 27 August-7 September 1990.

183. The Human Rights Committee uses these instruments in interpreting state obligations under the ICCPR, as does the African Commission in interpreting state obligations under the ACHPR.

184. *Code of Conduct for Law Enforcement Officials*, principle 3. The Basic Principles on the Use of Force include a similar provision in principle 4.

185. *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials*, principle 5.

186. *Ibid.*, principle 9. See also *Code of Conduct for Law Enforcement Officials*, para. (c) of the Commentary to principle 3.

187. *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials*, principle 9. See also Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Study on Police Oversight Mechanisms, UN Doc. A/HRC/14/24/Add.8, 28 May 2010, para. 8. In a similar vein, international law regulates the use of force in the context of protests and demonstrations. According to the Basic Principles on the Use of Force, "in the dispersal of assemblies that are unlawful but non-violent, law enforcement officials shall avoid the use of force or, where that is not practicable, shall restrict such force to the minimum extent necessary;" see *ibid.*, principle 13. Likewise, the Principles establish that, in the dispersal of violent gatherings, law enforcement officials may use firearms "only when less dangerous means are not practicable and only to the minimum extent necessary;" *ibid.*, principle 14.

Any use of force against persons held in custody or detention is subject to the same international standards,<sup>188</sup> along with all the other international law principles applicable in case of detention.<sup>189</sup>

Protection against the right to life also covers the death penalty.<sup>190</sup> There is an emerging norm that the death penalty is per se incompatible with guarantees protecting the right to life. This is evidenced not only by the growing number of States that have assumed legal obligations to abolish the death penalty,<sup>191</sup> but also the repeated resolutions adopted by an overwhelming majority votes in the UN General Assembly calling on all states that have not yet abolished the death penalty to declare an immediate moratorium with a view to abolition.<sup>192</sup> In addition, State practice now reflects the shrinking minority of States that continue to apply the death penalty.

For States that have still retained the death penalty, it can be imposed only under very stringent conditions. The death penalty cannot be imposed as the result of a "trial" that does not comply with the standards prescribed under international law for a fair trial (due process) and/or which present a lack of judicial guarantees; or for crimes that are not considered as "the most serious" offenses; or political or related crimes; or with regard to people who should not be subject to the death penalty.<sup>193</sup>

When the death penalty is retained, article 6 of the ICCPR requires States to respect certain substantive and procedural requirements:

2. In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgement rendered by a competent court ... 4. Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases. 5. Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women.<sup>194</sup>

According to the Human Rights Committee, "mandatory death sentences that leave domestic courts with no discretion on whether or not to designate the offence as a crime entailing the death penalty, and on whether or not to issue the death sentence in the particular circumstances of the offender, are arbitrary in nature."<sup>195</sup> Death penalty also amounts to arbitrary deprivation of life when it is applied for an offence that did not envisage it at the time of its commission or that is vaguely defined under domestic law, when international fair trial standards are not complied with, and when the conditions of detention in the death row or the methods of execution amount to ill-treatment.<sup>196</sup>

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**188.** *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials*, principles 15-16.

**189.** *Ibid.*, principle 17. See also *United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules)*, UN Doc. A/RES/70/175, 17 December 2015, rules 27-34; *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*, UN Doc. A/RES/43/173, 9 December 1988, principles 6, 7, 21, 30; *United Nations Rules for the Protection of Juveniles Deprived of their Liberty*, UN Doc. A/RES/45/113, 14 December 1990, rules 63-71; *United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules)*, UN Doc. A/C.3/65/L.5, 6 October 2010, rules 7, 19, 20, 22, 24-25.

**190.** The ICJ considers that the death penalty per se violates both the right to life and the right to be free from cruel, inhuman or degrading punishment.

**191.** ICCPR, art. 6(6); *Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the Abolition of the Death Penalty*, 999 UNTS 414, 15 December 1989; AComHPR, *General Comment No. 3*, para. 22; HRC, *General Comment No. 36*, paras. 50-51.

**192.** UN General Assembly Resolution 73/175, UN Doc. A/RES/73/175, 17 December 2018.

**193.** ICJ, *Enforced Disappearance and Extrajudicial Execution: Investigation and Sanction - Practitioners' Guide No. 9*, 2015, p. 79.

**194.** ICCPR, art. 6. See also AComHPR, *General Comment No. 3*, paras. 24-26.

**195.** HRC, *General Comment No. 36*, para. 37. See also AComHPR, *General Comment No. 3*, para. 24.

**196.** HRC, *General Comment No. 36*, paras. 38-42.

The prohibition of arbitrary deprivation of life applies even when hostilities reach the level of an armed conflict.<sup>197</sup> However, in armed conflict combatants and civilians taking direct part in hostilities may, subject to certain other limitations, be lawfully targeted,<sup>198</sup> unless they are *hors de combat*.<sup>199</sup>

When part of a systematic or widespread attack against the civilian population, violations of the right to life may constitute crimes against humanity.<sup>200</sup>

States have an obligation to enact appropriate domestic legislation and other measures to protect the right to life and provide for appropriate penalties that reflect the gravity of such crimes.<sup>201</sup> All forms of arbitrary deprivation of life must be criminalized accordingly.<sup>202</sup>

According to the Human rights Committee, “[g]iven the importance of the right to life, States parties must generally refrain from addressing violations of article 6 merely through administrative or disciplinary measures, and a criminal investigation is normally required, which should lead, if enough incriminating evidence is gathered, to a criminal prosecution.”<sup>203</sup> Furthermore, it stated that:

States Parties must ensure that those responsible are brought to justice. As with failure to investigate, failure to bring to justice perpetrators of such violations could in and of itself give rise to a separate breach of the Covenant. These obligations arise notably in respect of those violations recognized as criminal under either domestic or international law, such as torture and similar cruel, inhuman and degrading treatment (article 7), summary and arbitrary killing (article 6) and enforced disappearance (articles 7 and 9 and, frequently, 6).<sup>204</sup>

States are under a further obligation to protect all persons within their jurisdiction from arbitrary deprivations of life committed by non-State actors, including private parties. In this respect, they must act with due diligence to prevent, investigate, prosecute and redress such acts.<sup>205</sup> The African Commission on Human and Peoples Rights and the Human Rights Committee have clarified that the obligation to protect the right to life covers acts of and threats by armed groups.<sup>206</sup>

### Libyan law in light of international law and standards

The Libyan domestic legal framework does not provide for criminal liability for all forms of arbitrary deprivation of life. Article 296 of the Penal Code criminalizes murder,<sup>207</sup> which in

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**197.** *Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions*, principle 1: “[Extrajudicial] executions shall not be carried out under any circumstances including, but not limited to, situations of internal armed conflict.” The African Commission has made clear that during armed conflicts States continue to bear the duty to protect the life, safety and security of people; AComHPR, *Commission Nationale des Droits de l’Homme et des Libertés v. Chad*, Report No. 74/92, 11 October 1995, paras. 21-22.

**198.** AP I, arts. 48, 51(2), 52(2); AP II, art. 13(2).

**199.** The phrase “*hors de combat*” indicates persons who have ceased taking direct part in hostilities due to sickness, wounds or detention.

**200.** HRC, *General Comment No. 31*, para. 18; ICC Statute, art. 7(1)(a).

**201.** HRC, *General Comment No. 36*, paras. 18-20; AComHPR, *General Comment No. 3*, paras. 7, 10.

**202.** *Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions*, principle 1; HRC, *General Comment No. 31*, para. 18.

**203.** HRC, *General Comment No. 36*, para. 27.

**204.** HRC, *General Comment No. 31*, para. 18; *Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity*, definition B; *Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions*, principle 1.

**205.** HRC, *General Comment No. 31*, para. 8.

**206.** AComHPR, *General Comment No. 3*, para. 9; HRC, *General Comment No. 36*, para. 21.

**207.** Penal Code, art. 296: “Anyone who, with the intention to kill, commits acts that do not undermine the safety of the State but endanger public safety, shall be punished by imprisonment for a period of no less than ten years. If the act results in the death of one or more persons, the penalty shall

principle covers arbitrary deprivations of life committed by any person. When death results as consequence of conduct constituting torture or ill-treatment, States authorities must prosecute both offences. No specific provision exists in the Libyan Penal Code regarding State officials who carry out unlawful homicides in the course of their duties.

As indicated, international law prohibits any arbitrary deprivation of life.<sup>208</sup> Libyan law, however, could serve to excuse the use of excessive force by public officials resulting in death, and thereby arbitrary executions. Article 71 of the Penal Code provides that “a public official shall not be subject to punishment if he uses or orders [or assists in the fulfilment of an order for] the use of arms or other means of physical coercion when compelled by the necessity to repel force or to overcome resistance to public authorities.” It further provides that “[t]he same provisions shall apply to anyone who assists a public official in fulfilment of a lawful request.” Article 71 therefore provides that public officials and other parties assisting them, who use force in the performance of their duties, are not punishable. This provision applies “notwithstanding” limits on the use of self-defence contained in article 70,<sup>209</sup> and consequently appears to apply to the use of lethal force with limited restrictions. Coupled with the broad scope of situations in which the use of force may be used – to repel force or overcome resistance to public authorities – article 71 is contrary to the limits on the use of force under international law, which require law enforcement officers to use lethal force only as a measure of last resort in response to an imminent threat to life.<sup>210</sup>

The law accordingly excuses rather than criminalizes what would constitute an arbitrary execution.

Libyan law also does not criminalize applications of the death penalty amounting to summary executions of accused persons carried out without full compliance with all fair trial rights. The Libyan Penal Code envisages the death penalty for felonies. For certain felonies,<sup>211</sup> e.g. murder, the Penal Code prescribes death as the only possible sentence,<sup>212</sup> which is not in accord with article 6 of the ICCPR. When mitigating circumstances exist, however, the judge may substitute a death sentence with life imprisonment.<sup>213</sup> The death penalty does not apply to persons below eighteen years of age or who are in a state of partial or total mental incapacity.<sup>214</sup> When a pregnant woman is sentenced to death, the execution is to be delayed until two months after the delivery of the baby.<sup>215</sup> Death sentences may be appealed before the Court of Cassation in cases of “a violation of law, an error in its execution or interpretation,” or if “the verdict is null or the procedures involve a nullity that affected the verdict.”<sup>216</sup> A death sentence can be subject to a special pardon,

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be death ...” The reference to the “safety of the state” seems to relate to crimes penalized under articles 165 ff. of the Penal Code.

**208.** ICCPR, art. 6; Arab Charter, art. 5; ACHPR, art. 4.

**209.** Penal Code, art. 70: “There is no punishment if the act is committed during exercise of the right to lawful defence. This right exculpates a person for commission of any act that is necessary in order to avert a crime that would cause damage to himself or others. This right does not exist when it would have been possible to seek the protection of the public authorities in a timely manner.”

**210.** In particular, the use of lethal force may only be used “in self-defence or defence of others against the imminent threat of death or serious injury, to prevent the perpetration of a particularly serious crime involving grave threat to life, to arrest a person presenting such a danger and resisting their authority, or to prevent his or her escape, and only when less extreme means are insufficient to achieve these objectives. In any event, intentional lethal use of firearms may only be made when strictly unavoidable in order to protect life;” *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials*, principle 9.

**211.** Penal Code, arts. 17, 53.

**212.** Penal Code, art. 296.

**213.** Penal Code, art. 29.

**214.** Penal Code, arts. 81(2), 84.

**215.** Code of Criminal procedure (CCP), art. 436.

**216.** CCP, arts. 381(1), 385 *bis*.

the effect of which is to substitute it with life imprisonment or another sentence.<sup>217</sup> Death sentences are carried out by firing squad.<sup>218</sup> The execution of a death sentence must occur inside a prison or other concealed location. Only the public prosecution, the prison warden, a doctor and the defence may attend. Other persons may attend only by means of a special authorization issued by the public prosecution.<sup>219</sup> The convicted person may be visited by her or his family on the day of the execution.<sup>220</sup>

As a whole, and in many of its parts, the legal regulation of the death penalty is non-compliant with Libya's international legal obligations, particularly under article 6 of the ICCPR. The prescription of the death penalty as the only sentence for certain offences, e.g. murder, unless mitigating circumstances apply, is at odds with the prohibition on mandatory death sentence. The possibility of sentencing to death a pregnant woman, even though the execution is postponed after the delivery of the baby, plainly contradicts article 6(5) of the ICCPR. The fact that a death sentence may only be reviewed by the Court of Cassation for errors of procedure or interpretation and not on substantive or factual bases, in violation of article 14(5)<sup>221</sup> of the ICCPR,<sup>222</sup> also breaches article 6(2). As discussed in Chapter 4 below, the overall widespread deficiencies regarding fair trial guarantees and the administration of justice may render the application of the death penalty in Libya per se unlawful. Finally, the provision in article 432 of the Penal Code, according to which the family of the convicted may visit her or him on the day of the execution, without further specification, may lead authorities to adopt a restrictive interpretation and allow visits only on that day. In this case, denial of family visits for the whole period that a person awaits the execution of the death sentence would amount to a prohibited form of ill-treatment, and therefore violate the right to life.

In light of the foregoing, Libya fails to respect international law with regard to the protection of the right to life from all forms of arbitrary deprivation of life.

### 3.1.4 Rape and other forms of sexual and gender-based violence<sup>223</sup>

#### International law

Libya has an obligation under international law to prevent and prosecute rape and other forms of sexual and gender-based violence,<sup>224</sup> including by providing for criminal sanction for such conduct, whether by State or non-State actors. The CRC requires States to

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<sup>217</sup>. Penal Code, arts. 124-125.

<sup>218</sup>. Penal Code, art. 19.

<sup>219</sup>. CCP, art. 433: "The death penalty may be executed inside the prison, or any other concealed location ...;" 434(1): "The death penalty shall be executed in the presence of a member of the Public Prosecution, the prison warden, the prison doctor or any other doctor designated by the Public Prosecution. No other person or individual may attend without a special authorization by the Public Prosecution. The defence shall always be authorized to attend."

<sup>220</sup>. CCP, art. 432(1): "The relatives of the person sentenced to death may visit him on the execution day, and such reunion shall be in a place away from the execution area."

<sup>221</sup>. "Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law."

<sup>222</sup>. HRC, *General Comment No. 32: Right to Equality before Courts and Tribunals and to a Fair Trial (Article 14)*, UN Doc. CCPR/C/GC/32, 23 August 2007, para. 48: "A review that is limited to the formal or legal aspects of the conviction without any consideration whatsoever of the facts is not sufficient under the Covenant."

<sup>223</sup>. For further reference, see ICJ, *Women's Access to Justice for Gender-Based Violence – Practitioners' Guide No. 12*, 2016, pp. 195 ff.

<sup>224</sup>. According to article 7(3) of the ICC statute, "the term 'gender' refers to the two sexes, male and female, within the context of society." With regard to the crime of rape, the ICC Elements of Crimes specify that "[t]he concept of 'invasion' [of the victim's body by the perpetrator] is intended to be broad enough to be gender-neutral"; see *ibid.*, notes 15, 50, 63. In relation to women in particular, the Committee on the Elimination of Discrimination against Women understands gender-based violence as "violence that is directed against a woman because she is a woman or that affects women disproportionately. It includes acts that inflict physical, mental or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty;" *General Recommendation No. 19: Violence against Women*, UN Doc. A/47/38, 29 January 1992, para. 6.

protect children from sexual exploitation and abuse.<sup>225</sup> All forms of gender-based violence, including rape and sexual violence, must be criminalized under domestic law.<sup>226</sup>

As article 3(4) of the *Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol)* provides, "States Parties shall adopt and implement appropriate measures to ensure the protection of every woman's right to respect for her dignity and protection of women from all forms of violence, particularly sexual and verbal violence." Under article 4(2)(a), States are also obliged to "enact and enforce laws to prohibit all forms of violence against women including unwanted or forced sex whether the violence takes place in private or public." With specific regard to the context of armed conflict, article 11(3) provides, "States Parties undertake to protect asylum seeking women, refugees, returnees and internally displaced persons, against all forms of violence, rape and other forms of sexual exploitation, and to ensure that such acts are considered war crimes, genocide and/or crimes against humanity and that their perpetrators are brought to justice before a competent criminal jurisdiction."

Rape is a form of torture under the ICCPR and the CAT<sup>227</sup> and under international criminal law, as affirmed by international criminal tribunals.<sup>228</sup>

Other forms of sexual violence will constitute a form of torture or ill-treatment depending on the nature of the violence. Other acts of sexual violence may also constitute crimes such as slavery or human trafficking.<sup>229</sup>

Article 36(1) of the Istanbul Convention<sup>230</sup> defines rape and sexual violence as "(a) engaging in non-consensual vaginal, anal or oral penetration of a sexual nature of the body of another person with any bodily part or object; (b) engaging in other non-consensual acts of a sexual nature with a person; or (c) causing another person to engage in non-consensual acts of a sexual nature with a third person." The *UN Handbook for Legislation on Violence against Women* recommends States to define sexual assault as a violation of bodily integrity and sexual autonomy; replace existing offences of rape and "indecent" assault with a broad offence of sexual assault graded based on harm; and provide for aggravating circumstances including, but not limited to, the age of the survivor, the relationship of the perpetrator and survivor, the use or threat of violence, the presence of multiple perpetrators, and grave physical or mental consequences of the attack on the victim.<sup>231</sup>

Article 36(2) of the Istanbul Convention also requires that "[c]onsent be given voluntarily as the result of the person's free will assessed in the context of the surrounding circumstances." The CEDAW Committee affirmed that legislation defining sexual assault must require either "the existence of 'unequivocal and voluntary agreement' and requiring proof by the accused of steps taken to ascertain whether the complainant/survivor was

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225. CRC, arts. 19(1), 34.

226. *Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol)*, art. 2(a); CEDAW Committee, *General Recommendation No. 30: Women in Conflict Prevention, Conflict and Post-Conflict Situations*, UN Doc. CEDAW/C/GC/30, 18 October 2013, para. 38(a).

227. Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, UN Doc. A/HRC/7/3, 15 January 2008, para. 3; CAT Committee, *V.L. v. Switzerland*, UN Doc. CAT/C/37/D/262/2005, 22 January 2007, para. 8.10: "The acts concerned, constituting among others multiple rapes, surely constitute infliction of severe pain and suffering perpetrated for a number of impermissible purposes, including interrogation, intimidation, punishment, retaliation, humiliation and discrimination based on gender. Therefore, the Committee believes that the sexual abuse by the police in this case constitutes torture."

228. International Criminal Tribunal for Rwanda (ICTR), *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Trial Chamber, Judgement, 2 September 1998, para. 597; ICTY, *Prosecutor v. Kunarac and Others*, Case No. IT-96-23 & IT-96-23/1-A, Appeals Chamber, Judgement, 12 June 2002, para. 150.

229. See below section 3.1.5

230. *Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence*, CETS No. 210, 11 May 2011 (Istanbul Convention).

231. *UN Handbook for Legislation on Violence against Women*, Doc. ST/ESA/329, 2010, p. 26.



consenting; or ... that the act take place in 'coercive circumstances' and includes a broad range of coercive circumstances."<sup>232</sup> These requirements are reflected in the *UN Handbook for Legislation on Violence against Women*, which also recommends specifically criminalizing sexual assault within a relationship (i.e., "marital rape") either by providing "that sexual assault provisions apply 'irrespective of the nature of the relationship' between the perpetrator and complainant; or stating that 'no marriage or other relationship shall constitute a defence to a charge of sexual assault under the legislation.'"<sup>233</sup>

Rape and other forms of sexual and gender-based violence as war crimes will be dealt with below.<sup>234</sup>

### Libyan law in light of international law and standards

Article 407 of the Libyan Penal Code criminalizes "... sexual intercourse with another by force, threat, or deceit ..."<sup>235</sup> and article 408 punishes "[a]nyone who, by any of the means mentioned in the previous article, commits indecent assault on another ..."<sup>236</sup> It is worth noting that the two provisions also penalize consensual sexual intercourse and indecent assault.<sup>237</sup> However, article 424 provides that the offence and its penal effects are extinguished "[i]f the offender marries the woman against whom the offense is committed ..."<sup>238</sup>

By criminalizing "sexual intercourse ... by force, threat or deceit" article 407 seems to encompass acts usually associated with the crime of rape. By mentioning only "force, threat, or deceit," on the other hand, the provision does not seem broad enough to capture all situations in which non-consent can be inferred from coercive environment in which it is committed.

Similar observations can be made with regard to article 408 as the concept of "indecent assault" is not wide enough to cover all forms of sexual and gender-based violence other than rape.

Article 424, in turn, is contrary to international law in many respects. First, marrying a woman victim of rape or sexual violence cannot under any circumstances be a mitigating factor that extinguishes the crime and bars prosecution because it would in effect amount to a legitimization ex post of the crime.<sup>239</sup>

This provision indeed is non-compliant with Libya's obligation to investigate and prosecute the crimes under international law of rape and sexual violence. Second, in comparison to male victim of rape and sexual violence, article 424 constitutes a gender-based discrimination against women for the following reasons: (1) it excludes women victims of rape, who are later married by the perpetrator, from obtaining redress for the harm suffered; (2) it breaches their right to justice and to have the perpetrator prosecuted and punished; (3) it subjects women to further psychological, and possibly physical, violence by obliging them to live together with the perpetrator of the crime they have been victims

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<sup>232</sup>. CEDAW Committee, *Vertido v. The Philippines*, UN Doc. CEDAW/C/46/D/18/2008, 22 September 2010, para. 8.9(b)(ii).

<sup>233</sup>. *UN Handbook for Legislation on Violence against Women*, Doc. ST/ESA/329, 2010, p. 26.

<sup>234</sup>. See below section 3.1.6.

<sup>235</sup>. Penal Code, art. 407.

<sup>236</sup>. Penal Code, art. 408.

<sup>237</sup>. Penal Code, art. 407(4).

<sup>238</sup>. Penal Code, art. 424.

<sup>239</sup>. In its report entitled *Obstacles to Women's and Girls' Access to Justice for Gender-based Violence in Morocco*, the ICJ recommended that "[i]mpunity, including the suspension of penalties by way of mitigating circumstances, is never granted to perpetrators in cases of forced or early marriage after rape;" see p. 37.

of. Under certain circumstances, the latter condition may amount to the crime of sexual slavery.<sup>240</sup> Accordingly, Libya must repeal article 424 of the Penal Code.

In relation to the criminalization of rape and other forms of sexual and gender-based violence, Libya is not in compliance with its obligations under international law, particularly insofar as they do not comport with the Istanbul Protocol and international criminal law.<sup>241</sup>

### 3.1.5 Slavery

#### International law

Libya must prohibit all forms of slavery and slavery-like conditions. Under Article 8 of the ICCPR:

1. No one shall be held in slavery; slavery and the slave-trade in all their forms shall be prohibited.
2. No one shall be held in servitude.
3. (a) No one shall be required to perform forced or compulsory labour.<sup>242</sup>

Article 10 of the Arab Charter<sup>243</sup> further states:

1. All forms of slavery and trafficking in human beings are prohibited and are punishable by law. No one shall be held in slavery and servitude under any circumstances.
2. Forced labor, trafficking in human beings for the purposes of prostitution or sexual exploitation, the exploitation of the prostitution of others or any other form of exploitation or the exploitation of children in armed conflict are prohibited.

Human trafficking amounts to slavery, especially when it takes the form of sexual slavery, forced prostitution or forced labour.<sup>244</sup>

Libya is also party to the *Slavery Convention*, which requires States to prevent and suppress slavery and slave trade, including through their criminalization at domestic level,<sup>245</sup> as well as the 1956 *Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery*, which requires States to eliminate debt bondage, serfdom and slave-like institutions and practices affecting women and children.<sup>246</sup>

Enslavement and sexual slavery constitute crimes against humanity and/or war crimes under the statutes of international criminal tribunals and courts.<sup>247</sup> According to the

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**240.** ICC, *Prosecutor v. Katanga*, Case No. ICC-01/04-01/07, Trial Chamber II, Judgement, 7 March 2014, para. 978: "... the notion of sexual slavery may also encompass situations where women and girls are forced to share the existence of a person with whom they have to engage in acts of a sexual nature."

**241.** For the definitions of rape and sexual violence under international criminal law, see below section 3.1.6.

**242.** See also UDHR, art. 4; CMW, art. 11; ACHPR, art. 6; *Convention concerning Forced or Compulsory Labour* (No. 29), 39 UNTS 55, 10 June 1930; *Convention concerning the Abolition of Forced Labour* (No. 105), 25 June 1957; *Protocol to the Forced Labour Convention*, 11 June 2014.

**243.** See also ACHPR, art. 6.

**244.** Committee on the Rights of the Child (CRC Committee), *Concluding Observations: Brazil*, UN Doc. CRC/C/BRA/CO/2-4, 30 October 2015, para. 85. See also ICC, *Elements of Crimes*, art. 7(1)(c), footnote 11.

**245.** *Slavery Convention*, 60 UNTS 254, 25 September 1926, arts. 2, 6-7 (Libya acceded on 14 February 1957).

**246.** *Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery*, 266 UNTS 3, 7 September 1956, art. 1 (Libya acceded on 16 May 1989).

**247.** *Charter of the Nuremberg International Military Tribunal - Annex to the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis (London Agreement)*, 8 August 1945 (Nuremberg IMT Statute), art. 6(c); ICTY Statute, art. 5(c); ICTR Statute, art. 3(c); SCSL Statute, art. 2(c, g); ICC Statute, arts. 7(1)(c, g), 8(2)(b)(xxii), 8(2)(e)(vi); ICRC Customary IHL Database, rules 94, 156.

ICTY, indicia of enslavement include "control of someone's movement, control of physical environment, psychological control, measures taken to prevent or deter escape, force, threat of force or coercion, duration, assertion of exclusivity, subjection to cruel treatment and abuse, control of sexuality and forced labour ... enslavement flows from claimed rights of ownership; accordingly, lack of consent does not have to be proved by the Prosecutor as an element of the crime."<sup>248</sup>

Under the ICC Statute, a person commits the crime against humanity of enslavement when she or he exercises "... any or all of the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty."<sup>249</sup> The same definition is provided in relation to the crime against humanity and war crime of sexual slavery, the commission of which further requires that the victim be obliged to engage in acts of a sexual nature.<sup>250</sup>

### Libyan law in light of international law and standards

Article 425 of the Penal Code provides sanctions for "[a]nyone who enslaves another or places him under conditions that resemble slavery ..." Article 426 further penalizes "[a]nyone who deals in or traffics in slaves or in any manner disposes of a slave or a person in a condition resembling slavery ... [and] anyone who disposes of an enslaved person or a person in a condition resembling slavery, or who delivers him, has him in his possession, acquires him, or retains him in his said condition." Additionally, the Penal Code criminalizes forced prostitution of women or children<sup>251</sup> and the international trafficking of women and children for the purposes of prostitution.<sup>252</sup> Law No. 12 of 2010 on Labour Relations also prohibits forced labour, defining it as "[a]ny work or service that any person is obliged to carry out under threat and without volunteering to perform it by his own choice," but does not provide for its criminalization.<sup>253</sup>

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**248.** *Prosecutor v. Kunarac and Others, Cases Nos. IT-96-23 and IT-96-23/1-A, Appeals Chamber, Judgement, 12 June 2002, paras. 119-120.*

**249.** ICC, *Elements of Crimes*, art. 7(1)(c).

**250.** *Ibid.*, arts. 7(1)(g)-2, 8(2)(b)(xxii)-2, 8(2)(e)(vi)-2. See also ICC, *Prosecutor v. Katanga, Case No. ICC-01/04-01/07, Trial Chamber II, Judgement, 7 March 2014, paras. 975-977*. Factors that prove the existence of a condition of enslavement include "detention or captivity and their respective duration; restrictions on freedom to come and go or on any freedom of choice or movement; and, more generally, any measure taken to prevent or deter any attempt at escape. The use of threats, force or other forms of physical or mental coercion, the exaction of forced labour, the exertion of psychological pressure, the victim's vulnerability and the socioeconomic conditions in which the power is exerted may also be taken into account;" see *ibid.*, para. 976.

**251.** Penal Code, art. 416: "Anyone who, to satisfy the lust of another, uses force or violence to compel a juvenile or an adult woman to prostitution shall be punished by imprisonment for a period from three to six years and a fine between LYD 100 and LYD 550."

**252.** Penal Code, art. 418: "1. Anyone who compels a woman by force or threat to emigrate to a location abroad with the knowledge that she will practice prostitution there shall be punished by imprisonment for a period not exceeding ten years and a fine LYD 100 and LYD 500. 2. The same penalty shall apply to anyone who induces a juvenile or mentally-defective adult woman by any means to emigrate to a location abroad with the knowledge that she will practice prostitution there. 3. If the act is accompanied by force or threat, the penalty shall be increased by one half. 4. The penalty shall be doubled in the circumstances set forth in the last paragraph of Article (415) of this Code [if the offender is entrusted with the discipline, education, supervision, care, employment, or training of the victim], and if the act is committed against two or more persons, even if their destinations are different."

**253.** Law No. 12 of 2010 on Labour Relations and its Bylaw, 28 January 2010, arts. 2, 5.

Finally, it prohibits the smuggling of migrants,<sup>254</sup> as well as the international trafficking of women.<sup>255</sup>

While article 425 of the Penal Code criminalizes slavery, it does not provide a definition of the crime and is therefore deficient. Furthermore, the Penal Code does not envisage sexual slavery as a distinct crime. Libyan law is thus only partially in line with international law and standards. The definitions of forced prostitution of women and children and international trafficking of women are deficient insofar as they exclude men from their protection. The definition of forced labour, requiring the issuance of a threat, does not meet the standard for slavery under international law; furthermore, it does not appear to be penalized as a criminal offence. Libyan law penalizes the international trafficking of women and children for the purposes of prostitution, but does not penalize other forms of human trafficking, contrary to Libya's international legal obligations.

### 3.1.6 War crimes and crimes against humanity

#### International law

International law provides for individual criminal liability for certain violations of treaty or customary rules of IHL amounting to war crimes.<sup>256</sup> The GCs and AP I impose an obligation to criminalize those serious violations identified as grave breaches of the Conventions, which apply in IACs.<sup>257</sup> Many violations also constitute war crimes under customary international law applicable in IACs and/or NIACs, and are reflected in the statutes of international criminal tribunals<sup>258</sup> and the ICC.<sup>259</sup>

Examples of such offences include murder, torture and ill-treatment, rape and other forms of sexual violence, enslavement, the taking of hostages, directing attacks against civilians and civilian objects, conscripting or enlisting children or using them to participate in hostilities, and employing poison or poisoned weapons. States are obligated to criminalize, investigate and, if the case demands, prosecute war crimes.<sup>260</sup>

Human rights violations committed as part of a widespread or systematic attack against the civilian population constitute crimes against humanity.<sup>261</sup> Among others, these encompass many forms of arbitrary deprivation of life (extrajudicial killings), torture, other inhuman acts intentionally causing great suffering or serious injury to body or to mental or physical health, enforced disappearance, rape and other forms of sexual violence, slavery and arbitrary detention.<sup>262</sup> Crimes against humanity do not require a conflict nexus; they can

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**254.** Law No. 19 of 2010 on Combatting Illegal Immigration, 28 January 2010, art. 2: "The following shall be deemed acts of illegal immigration: 1. Admission of illegal immigrants into the country or removal therefrom by any means. 2. Transportation of or facilitating the transportation of illegal immigrants inside the country with knowledge of their illegality. 3. Harboring illegal immigrants or concealing them in any way from the competent authorities or concealing information about them in order to enable them to reside in the country or depart therefrom. 4. Preparing, providing, or acquiring counterfeit travel documents or IDs for them. 5. Organising, assisting, or instructing other persons to perform any of the acts stipulated in the foregoing paragraphs."

**255.** Penal Code, art. 418(1): "Anyone who compels a woman by force or threat to emigrate to a location abroad with the knowledge that she will practice prostitution there shall be punished by imprisonment for a period not exceeding ten years and a fine LYD 100 and LYD 500." Article 419 criminalizes the facilitation of trafficking of women.

**256.** ICTY, *Prosecutor v. Tadić*, Case No. IT-94-1, Appeals Chamber, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 94.

**257.** GC IV, art. 147; AP I, arts. 11, 85.

**258.** ICRC Customary IHL Database, rule 156; ICTY Statute, art. 3; ICTR Statute, art. 4; SCSL Statute, arts. 3-4.

**259.** ICC Statute, art. 8(2)(c) and (e), which includes a non-exhaustive list of war crimes that can be committed in NIACs.

**260.** GC IV, arts. 146-147; AP I, art. 85; ICRC Customary IHL Database, rule 158.

**261.** HRC, *General Comment No. 31*, para. 18.

**262.** ICC Statute, art. 7(1); HRC, *General Comment No. 31*, para. 18.

be committed during or outside an armed conflict.<sup>263</sup> While efforts to codify crimes against humanity in a stand-alone treaty remain ongoing,<sup>264</sup> crimes against humanity are already included in the statutes of international criminal tribunals and the ICC,<sup>265</sup> as well as in certain human rights instruments,<sup>266</sup> and form part of customary international law.<sup>267</sup> The obligation to criminalize, investigate and prosecute crimes against humanity arises from the general obligation to protect human rights embodied in human rights treaties.<sup>268</sup>

Rape and other forms of sexual violence constitute violations of IHL in both IACs and NIACs<sup>269</sup> under GC IV, AP I<sup>270</sup> and AP II,<sup>271</sup> including when they constitute torture, inhuman treatment and outrages upon personal dignity. The IHL prohibition on rape and other forms of sexual violence is part of customary international law; these acts may amount to war crimes in both types of conflicts.<sup>272</sup> They also constitute crimes against humanity when committed as part of a widespread or systematic attack on a civilian population.<sup>273</sup>

The statutes of international courts and tribunals, including the ICC Statute, prohibit rape and other forms of sexual and gender-based violence as crimes against humanity and or/ war crimes.<sup>274</sup> The ICC Statute provides a non-exhaustive list of sexual violence crimes over which the Court has jurisdiction as both crimes against humanity and war crimes, including rape, sexual slavery, enforced prostitution, forced pregnancy and enforced sterilization.<sup>275</sup>

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**263.** While the Statutes of the Nuremberg IMT and the ICTY require that crimes against humanity have a nexus with an armed conflict, the Statutes of the ICTR, ICC and the SCSL do not. The ICTY has recognized that customary international law does not require such a nexus to exist; see ICTY, *Prosecutor v. Tadić*, Case IT-94-1, Appeals Chamber, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 110.

**264.** In 2014, the International Law Commission included the topic of crimes against humanity in its programme of work, appointing a Special Rapporteur. In 2017, a draft convention on crimes against humanity has been adopted on first reading; see UN Doc. A/CN.4/L.892, 26 May 2017.

**265.** Nuremberg IMT Statute, art. 6(c); ICTY Statute, art. 5; ICTR Statute, art. 3; ICC Statute, art. 7; SCSL Statute, art. 2.

**266.** DPED, preamble para. 4; *Inter-American Convention on Forced Disappearance of Persons*, Adopted at the Twenty Fourth Regular Session of the General Assembly of the Organization of American States, 9 June 1994, preamble para. 6; ICPPED, art. 5.

**267.** ICTY, *Prosecutor v. Kupreškić et al* ("*Lašva Valley*" Case), Case No. IT-95-16, Trial Chamber, Judgement, 14 January 2000, para. 520; IACtHR, *Goiburú et al. v. Paraguay*, Series C No. 153, 22 September 2006, para. 128.

**268.** HRC, *General Comment No. 31*, paras. 15, 18.

**269.** Customary IHL Database, rule 93.

**270.** Article 27(2) of GC IV and article 76(1) of AP I provide for the protection of women against "rape, enforced prostitution and any form of indecent assault" during IACs; article 147 of GC IV criminalizes torture and inhuman treatment as grave breaches, which may be committed through rape or sexual violence; article 75(2)(b) of AP I protects against "torture ... outrages upon personal dignity, in particular humiliating and degrading treatment, enforced prostitution and any form of indecent assault ... and threats to commit any of the foregoing acts;" such acts constitute grave breaches of the Protocol under article 85(2) of AP I.

**271.** Article 4(2)(e) of AP II prohibits "outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault" in respect of all civilians and persons *hors de combat* during NIACs.

**272.** Customary IHL Database, rules 93, 156.

**273.** ICC Statute, art. 7(1)(g).

**274.** ICTY Statute, art. 5(g); ICTR Statute, arts. 3(g), 4(e); SCSL Statute, art. 2(g), 3(e). For a definition of the crimes of rape and sexual violence, see ICTY, *Prosecutor v. Kunarac and Others*, Case No. IT-96-23 & IT-96-23/1-A, Appeals Chamber, Judgement, 12 June 2002, paras. 127-128; *Prosecutor v. Furundžija*, Case No. IT-95-17-1, Trial Chamber, Judgement, 10 December 1998, para. 186.

**275.** For the definition of these crimes under the ICC Statute, see ICC, *Elements of Crimes*, arts. 7(1)(g)-6, 8(2)(b)(xxii)-1, 8(2)(e)(vi)-1.

## Libyan law in light of international law and standards

Libyan law does not contain any legislation addressing war crimes and crimes against humanity. However, article 37 of the 2017 Consolidated Draft Constitution, provides: “[a]ll forms of behavior that constitute crimes against humanity, war crimes, genocide, and terrorism shall be prohibited, shall not be subject to the statute of limitations, and shall not be pardoned, in so far as this does not contradict the provisions of the Constitution. The international jurisdiction of the Libyan judiciary shall apply thereto.” As this provision has not been approved by way of referendum and thus has not been adopted, the Libyan legal framework is wholly deficient with respect to Libya’s obligations to criminalize war crimes and crimes against humanity.<sup>276</sup>

### 3.2 Modes of liability and superior responsibility

While the above sections have dealt with the substantive criminal offences, the question of who may be held criminally liable based on their contribution to the offence is a distinct question. Persons may be held liable for crimes under international law pursuant to multiple modes of liability. Under international law, these include direct perpetration, superior responsibility, aiding and abetting, ordering, planning, instigation, incitement, conspiracy and attempt.<sup>277</sup> The mode of superior responsibility and defence of superior orders have particular relevance in the context of crimes under international law, which are often committed by persons acting under the authority of military or civilian leaders.

#### 3.2.1 Superior responsibility

##### International law

Generally, military and civilian superiors bear responsibility for failure to take the necessary and reasonable measures to prevent or punish crimes committed by their subordinates when under a duty to do so.<sup>278</sup> Superior responsibility is expressly provided for in international human rights law, IHL and international criminal law instruments.

Under international human rights law, superiors must be held responsible for torture and ill-treatment, enforced disappearance and arbitrary deprivations of life committed by their subordinates,<sup>279</sup> for example where torture is “inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity ... [or when an act] constitutes complicity or participation in torture.”<sup>280</sup> For example, Libya must hold liable “those exercising superior authority – including public officials ... for torture or ill-treatment committed by subordinates where they knew or should have known that such impermissible conduct was occurring, or was likely to occur, and they failed to take reasonable and necessary preventive measures.”<sup>281</sup> Libya must also hold superiors liable for an enforced disappearance where they exercised “effective responsibility for and control

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**276.** Should the Constitution pass, the non-admissibility of amnesties for crimes under international law should also be included in article 37. See below section 3.4.

**277.** See e.g. ICTY Statute, art. 7(1); ICTR Statute, art. 6(1); ICC Statute, art. 25; SCSL Statute, art. 6(1); ICTR, *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Trial Chamber, Judgment, 2 September 1998, paras. 480-485. See also CAT, arts. 1, 4; ICPPED, art. 6(1)(a); HRC, *General Comment No. 20*, para. 13; CAT Committee, *General Comment No. 2*, para. 26.

**278.** ICTY, *Prosecutor v. Hadzihasanovic*, Case No. IT-01-47-AR72, Appeals Chamber, Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, 16 July 2003, para. 31; ICTR, *Prosecutor v. Muvunyi*, Case No. ICTR-2000-55A-T, Appeals Chamber, Judgment and Sentence, 12 September 2006, para. 473.

**279.** ICPPED, art. 6(1)(b); *Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity*, principle 27(b); *Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions*, principle 19; *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials*, principle 24.

**280.** CAT, arts. 1, 4.

**281.** CAT Committee, *General Comment No. 2*, para. 26.



over [relevant] activities,” had the requisite knowledge that an enforced disappearance was being or was about to be committed, and “[f]ailed to take all necessary and reasonable measures within his or her power to prevent or repress [its] commission” or refer it “to the competent authorities for investigation and prosecution.”<sup>282</sup>

Military and civilian superiors are also liable under IHL and customary international law for war crimes,<sup>283</sup> crimes against humanity and genocide<sup>284</sup> committed by their subordinates if the following three components are met:

- (a) The existence of a superior-subordinate (*de facto* or *de jure*) relationship;<sup>285</sup>
- (b) The superiors had the requisite knowledge that a subordinate is about to commit, is committing or has committed a crime.<sup>286</sup>
- (c) The superior’s failure to take the necessary and reasonable measures to prevent the commission of a crime or to punish the alleged perpetrator.<sup>287</sup>

### Libyan law in light of international law and standards

Article 5 of Law No. 10 of 2013 concerning the Criminalization of Torture, Forced Disappearance and Discrimination provides for superior responsibility in respect of:

... any political, executive or administrative official, and any military leader or acting military leader when any employee or forces under the control and command thereof commit the crimes stipulated in the previous articles, if such official or leader does not take the necessary measures to prevent or uncover such crimes while being capable thereof, or prevents in any way the referral of such crimes to the authorities in charge of discipline, investigation or prosecution.

While article 5 of Law No. 10 of 2013 includes the first element of superior responsibility, namely the superior-subordinate relationship, it does not prescribe a knowledge requirement (the second element), and only imposes duties on a superior to “uncover” the crime and refrain from preventing the referral of the crime for investigation and punishment without requiring them to punish the subordinate.

According to article 5 of Law No. 10 of 2013, a civilian or military superior is held responsible when she or he fails to “prevent or uncover [torture and enforced disappearance]<sup>288</sup> while being capable thereof.” This provision links individual responsibility not to the actual or constructive knowledge of the superior but to her or his capability to prevent or uncover the crimes committed by a subordinate. The reference to “uncover” is unclear: it could refer to an obligation on the superior to determine whether a subordinate will commit, is committing or has committed crimes (and thereby a knowledge requirement), or an

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**282.** ICPPED, art. 6. States must also penalize any person who “commits, orders, solicits or induces the commission of, attempts to commit, is an accomplice to or participates in an enforced disappearance.”

**283.** AP I, art. 86; ICRC Customary IHL Database, rule 153.

**284.** ICTY Statute, art. 7(3); ICTR Statute, art. 6(3); ICC Statute, art. 28; SCSL Statute, art. 6(3)..

**285.** ICC Statute, art. 28; ICC, *Prosecutor v. Bemba Gombo*, Case no. ICC-01/05-01/08, Pre-Trial Chamber II, Decision pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor against Jean-Pierre Bemba Gombo, 15 June 2009, paras. 414-416. See also ICTY, *Prosecutor v. Delalić*, Case No. IT-96-21-A, Appeals Chamber, Judgment, 20 February 2001, paras. 188-198.

**286.** Under article 28(a) of the ICC Statute, military superiors are held liable when they “knew or should have known” that subordinates were committing or about to commit a crime; under article 28(b), civilian superiors are liable when they “knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes.” See also ICTY Statute, art. 7(3); ICTR Statute, art. 6(3).

**287.** ICC Statute, art. 28. See also ICTY Statute, art. 7(3); ICTR Statute, art. 6(3); ICTR, *Prosecutor v. Gacumbitsi*, Case No. ICTR-2001-64-A, Appeals Chamber, Judgment, 7 July 2006, para. 143.

**288.** As set out in sections 3.1.1-3.1.2 above, the crimes of “torture” and “enforced disappearance” under Libyan law do not meet the international law definitions.

obligation to expose the commission of crimes to others for the purposes of disciplinary action or investigation and prosecution. If the former, such that the superior must actively seek information to “uncover” crimes, this might be akin to negligence standard or the standard imposed by the ICC for military superiors (“should have known”). If the latter, such standard may determine a superior’s responsibility on the basis of strict liability, a standard of conduct that does not require proof of whether a superior actually knew, or had reason to know or should have known, about a subordinate’s crimes and that is more stringent than that applied under international law.

With regard to the third component, article 5 of Law No. 10 of 2013 holds a superior responsible when they do not “prevent or uncover” a subordinate’s crimes. While the element of prevention reflects the international law definition of superior responsibility, the other element included in the latter – i.e. punishment of a subordinate’s crimes – is excluded. As mentioned above, the term “uncover” is unclear: it does not refer to knowledge, it might refer to actions such as inquiry or investigation, but does not necessarily encompass punishment. Article 5 of Law No. 10 of 2013 further adds the element of preventing the referral of a crime to the competent authorities. This amounts to obstruction of justice, which does not fall within the international law definition of superior responsibility.

It is also worth noting that article 5 of Law No. 10 of 2013 concerns torture and those acts that this Law criminalizes as “enforced disappearance.” There is no equivalent provision in Libyan domestic law establishing superior responsibility for either extrajudicial and arbitrary executions, or war crimes and crimes against humanity,<sup>289</sup> notwithstanding the requirement under international law to hold superior’s responsible for failure to prevent or punish such crimes when committed by their subordinates.<sup>290</sup>

While constituting an attempt to codify superior responsibility at the domestic level, article 5 of Law No. 10 of 2013 does not reflect all the elements in the international definition nor does it apply to all crimes under international law, in particular extrajudicial and arbitrary executions, war crimes and crimes against humanity, and is therefore non-compliant with international law and standards.

### 3.2.2 Superior Orders

#### International law

Under international law, the fact that a person acted pursuant to the order of a superior does not free her or him from criminal liability.<sup>291</sup> In certain circumstances, the fact that a subordinate acted pursuant to superior orders may count as a mitigating factor in the determination of their sentence.<sup>292</sup>

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**289.** It should be recalled that Libyan domestic law fails to criminalize arbitrary executions, war crimes and crimes against humanity; see above sections 3.1.3 and 3.1.6.

**290.** *Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity*, principle 27(b); *Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions*, principle 19; *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials*, *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials*, principle 24; HRC, *General Comment No. 36*, para. 27.

**291.** *Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity*, principle 27(a); *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials*, principle 26; *Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions*, principles 3, 19.

**292.** See e.g. ICTY, *Prosecutor v. Erdemović*, Case No. IT-96-22-T, Trial Chamber, Judgement, 29 November 1996, paras. 19, 53; *Prosecutor v. Erdemović*, Case No. IT-96-22-Tbis, Trial Chamber, Sentencing Judgement, 5 March 1998.

Human rights instruments and jurisprudence explicitly exclude the defence of superior orders for gross human rights violations. Under the CAT, “[a]n order from a superior officer or a public authority may not be invoked as a justification of torture.”<sup>293</sup> Under the ICPPED, “[n]o order or instruction from any public authority, civilian, military or other, may be invoked to justify an offence of enforced disappearance.”<sup>294</sup>

Under the statutes of the international criminal tribunals and courts, superior orders do not constitute a defence to war crimes, crimes against humanity and genocide.<sup>295</sup> Under the ICC Statute, superior orders may only constitute a defence if “[t]he person was under a legal obligation to obey orders of the Government or the superior in question; the person did not know that the order was unlawful; and the order was not manifestly unlawful.”<sup>296</sup> It provides, however, that “orders to commit genocide or crimes against humanity are manifestly unlawful.”<sup>297</sup>

### Libyan law in light of international law and standards

The Libyan Penal Code provides that a “person who carries out [an unlawful] order is likewise liable unless due to a mistake of fact, he believed that he was obeying a lawful order” but that “[t]he person who carries out an unlawful order shall not be subject to punishment when the law definitively forbids discussion on the lawfulness thereof.”<sup>298</sup> This provision encapsulates the requirements of the defence of superior orders relating to the existence of a person’s legal duty to obey an order and the lack of knowledge that the order was unlawful insofar as it is based on a mistake of fact.<sup>299</sup>

However, article 69 is broader in scope than the exception to the prohibition on the defence of superior orders in several respects. First, it does not exclude the defence for manifestly unlawful orders, such those to commit war crimes and crimes against humanity. Second, it excuses the person carrying out the order where the law forbids “discussion of” of whether the order was unlawful, effectively preventing a determination by a court regarding whether the persons giving and carrying out the order were liable.

In light of these shortcomings, and notwithstanding the fact that the superior that gives an unlawful order remains punishable under Libyan law,<sup>300</sup> article 69 of the Penal Code cannot be deemed in compliance with Libya’s obligations under international law.

### 3.3 The obligation to investigate crimes under international law

#### International law

State authorities must initiate an investigation *ex officio* as soon as they become aware of a relevant allegation of a crime under international law; there is no need for the victims or their next of kin to file a formal complaint.<sup>301</sup> The next of kin of the direct victim should have standing in an investigation; they should accordingly being informed of its details and have the ability to present new evidence.<sup>302</sup> Investigations must be effective, namely conducted in accordance with the

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**293.** CAT, art. 2(3). See also CAT Committee, *General Comment No. 2*, para. 26; *Code of Conduct for Law Enforcement Officials*, art. 5.

**294.** ICPPED, art. 6(2). See also DPED, art. 6(1).

**295.** ICC Statute, art. 33; ICTY Statute, art. 7(4); ICTR Statute, art. 6(4); SCSL Statute, art. 6(4).

**296.** ICC Statute, art. 33(1).

**297.** ICC Statute, art. 33(2).

**298.** Penal Code, art. 69(1) and (2) respectively.

**299.** With respect to the defence of mistake of fact, article 32 of the ICC Statute provides, “[a] mistake of fact shall be a ground for excluding criminal responsibility only if it negates the mental element required by the crime.” A similar principle was upheld in earlier case law. See *United States v. List and Others (The Hostage Trial)*, Law Reports of Trials of War Criminals, Volume VIII, 1949, p. 69.

**300.** Penal Code, art. 69(1).

**301.** HRC, *Concluding Observations: Dominican Republic*, UN Doc. CCPR/C/DOM/CO/5, 19 April 2014, para. 14.

**302.** *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross*

standards of promptness, thoroughness, independence, impartiality and transparency.<sup>303</sup> Failure to conduct effective investigations amounts to a breach of international law, including the ICCPR, the Arab Charter and the ACHPR.<sup>304</sup>

### Libyan law in light of international law and standards

The Libyan criminal procedures applying to the commencement of an investigation are non-compliant with international standards in a number of ways.

First, although the Libyan CCP entrusts the public prosecution with conducting investigations,<sup>305</sup> it limits the scope for victims to file complaints about crimes. The complaint must be filed within three months of when the victim “learns of the offense and the perpetrator” unless the law provides otherwise; if the victim dies, the right to file a complaint expires.<sup>306</sup> The cessation of a cause of action after the victim’s death fails to accord sufficient rights to the victim’s next of kin, who should be considered victims entitled to the right to an investigation and reparation.<sup>307</sup> Further, the three-month restriction on filing a complaint serves as a significant barrier to ensuring crimes are investigated or prosecuted, which could lead to the violation of a State’s obligation to investigate and prosecute crimes, particularly for crimes under international law to which statutory limitations should not apply.

Second, the Prosecutor has the sole power to initiate investigations with respect to certain crimes largely considered “crimes against the State.”<sup>308</sup> This provision was applied, for instance, in the *37 Gadhafi-regime members* case.<sup>309</sup> Following the adoption of Law No. 3 of 2013, the Public Prosecutor’s powers in this respect were expanded to include those ordinarily accorded to an investigating judge, such as the power to order search and seizure and with respect to interrogations and pre-trial detention.<sup>310</sup> In particular, the Prosecutor is accorded the power to question the accused within three days of referral from the judicial police and order their detention for two weeks before bringing them before a judicial authority.<sup>311</sup>

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*Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, para. 8; CAT Committee, *General Comment No. 3: Implementation of Article 14 by States Parties*, UN Doc. CAT/C/GC/3, 13 December 2012, para. 3; HRC, *General Comment No. 36*, para. 28.

**303.** *The Minnesota Protocol on the Investigation of Potentially Unlawful Death (2016)*, Office of the High Commissioner for Human Rights, New York/Geneva, 2017, paras. 22-33; AComHPR, *General Comment No. 3*, paras. 7, 15; HRC, *General Comment No. 36*, para. 28.

**304.** HRC, *General Comment No. 31*, para. 15; AComHPR, *General Comment No. 3*, para. 15.

**305.** CCP, arts. 1, 2, 172. The function and powers of the investigating judge are detailed below.

**306.** CCP, arts. 3, 7.

**307.** *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, para. 8.

**308.** CCP, art. 187 bis A. Crimes that require authorization from the Minister of Justice for prosecution are in articles 165-223 of the Penal Code and include plotting with Foreigners to the detriment of Libya’s military or political status (art. 167); recruitment against a foreign State (art. 168); inciting political defeatism (art. 175); inciting economic defeatism (art. 177); activity of Libyans abroad against the interests of the State (art. 178); acts prejudicing the 17 February revolution, or insulting public authorities (art. 195); and formation of or joining non-political international associations without permission (art. 208). Crimes that require the initiative of the Minister of Justice for prosecution include attacks on the liberty of heads of foreign States (art. 219); offences to the dignity of the heads of foreign States (art. 220); attacks on representatives of foreign States (art. 221); and attacks against the flag of a foreign State or international body (art. 222).

**309.** UNSMIL & OHCHR, *Report on the Trial of 37 Former Members of the Qadhafi Regime (Case 630/2012)*, February 2017, p. 14.

**310.** Law No. 3 of 2013 on Amending Certain Provisions of the Code of Criminal Procedure, 21 March 2013, art. 1, amending articles 187 bis (A) and (B) of the CCP.

**311.** Law No. 3 of 2013, art. 1, amending article 187 bis B to the Penal Code.

Furthermore, some of these crimes may only be investigated upon authorization or request of the Ministry of Justice.<sup>312</sup> The right to an independent and impartial court or tribunal requires the Prosecutor to exercise sufficient independence from the executive, such that instructions issued to Prosecutors not to prosecute must be prohibited or otherwise exceptional, subject to specific controls and subject to a right to challenge executive or other decisions not to investigate or prosecute.<sup>313</sup>

Third, evidence gathered by persons other than ordinary law enforcement or judicial authorities may be used during investigations and prosecutions. Under the CCP, investigations are ordinarily carried out by judicial investigation officers, including police and military personnel and prison guards, which are subordinated to the public prosecution and act under its supervision.<sup>314</sup> The public prosecution or the accused may request the appointment of an investigating judge,<sup>315</sup> who otherwise plays no role in investigations conducted by Prosecutors.<sup>316</sup> When appointed, the investigating judge becomes the only person responsible for conducting the investigation.<sup>317</sup> The President of the Court has the task of monitoring that the investigating judge carries out their functions in an “appropriately timely manner and abiding by the deadlines set out by the law.”<sup>318</sup> When a case is referred to the Indictment Chamber<sup>319</sup> for prosecution, the latter may conduct supplementary investigations.<sup>320</sup> If further investigations are needed after the Indictment Chamber refers the case to the Criminal Court, the public prosecution will conduct them.<sup>321</sup> The public prosecution may also request resumption of the investigation if,

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**312.** CCP, arts. 8-9. See also Penal Code, art. 224: “1. Proceedings may not be instituted without the permission of the Minister of Justice in the case of the offences set forth in Articles (191), (192), (193) and (194) of this Code. 2. In the case of the offences set forth in Articles (219) and (220) and in Article (221) with regard to aforementioned articles, and also in the case of the offence set forth in Article (222), no proceedings may be instituted except at the request of the Minister of Justice.”

**313.** ICJ, *International Principles on the Independence and Accountability of Judges, Lawyers and Prosecutors - Practitioners’ Guide No. 1*, 2007, p. 71; Report of the Special Rapporteur on the Independence of Judges and Lawyers, UN Doc. A/HRC/20/19, 7 June 2012, paras. 27, 116.

**314.** CCP, arts. 11-12, 13(1), 174. Those conducting investigations may adopt all necessary “precautionary means” to preserve evidence (art. 14(2)). While collecting evidence, they may take statements from any relevant persons, including the accused, and in so doing they may seek the assistance of doctors or other experts (art. 19). In cases of *flagrante delicto*, the judicial officers have the power to summon whoever may provide information and to forbid people to leave or move from the crime scene (art. 22)

**315.** According to the information available to the ICJ, in practice, Prosecutors do not refer cases to investigating judges for investigation despite provision for it in the CCP.

**316.** CCP, arts. 51-52.

**317.** CCP, art. 53. The investigating judge may delegate some investigative tasks in accordance with articles 54-55 of the CCP. The investigating judge may hear witnesses, either on other parties request or on their own initiative; she or he may summon witnesses coercively (art. 93). Unless urgency requires otherwise, the public prosecution, the accused, the victim, the civil plaintiff, the civil defendant, and their representatives have a right to attend the investigation (art. 62), and submit pleas, motions, and memoranda to the investigating judge, about which they have to rule within 24 hours (arts. 65-66). Under the CCP, the “civil defendant” may participate in criminal proceedings related to the claim against them. See art. 226: “1. The civil action to claim damages shall be instituted against a person accused of a crime if he is an adult, and his representative if he is incompetent. In the event he does not have a representative, the court shall appoint him one pursuant to the foregoing article. 2. A civil action may also be instituted against the civil defendants for the action of the accused. 3. The Public Prosecution shall include the civil defendants, even in the absence of a civil plaintiff in the action, to be charged with fees due to the government;” art. 227: “1. The civil defendant shall be entitled to be participate in the criminal action of his own accord at any stage. 2. The Public Prosecution and the civil plaintiff shall be entitled to oppose his intervention.”

**318.** CCP, art. 58.

**319.** CCP, art. 145.

**320.** CCP, art. 148. The Indictment Chamber has the same powers as an investigating judge; it may also delegate the investigation to the public prosecution or to an investigating judge; see art. 151.

**321.** CCP, art. 166.

after dismissal by the Indictment Chamber, new evidence emerges.<sup>322</sup> The court responsible for hearing a case may also “delegate one of its judges or a different judge” as an investigating judge in situations where “it is impossible to investigate evidence before the court.”<sup>323</sup>

When an investigation is conducted by Prosecutors, they are subject to the same provisions as the investigating judge.<sup>324</sup>

Decree 388 of 2011 extended investigatory powers to the “Supreme Security Committee,” the members of which are appointed by the Ministry of Interior.<sup>325</sup> The Committee is entrusted with various tasks, among which the investigation and collection of evidence on issues limited to the 17 February Revolution, including in relation to the agents of the former regime.<sup>326</sup> The Supreme Security Committee also has broader powers to “[c]onduct [...] investigations and arrests and collect evidence.”<sup>327</sup> The Supreme Security Committee is reportedly composed mainly of armed brigades acting under the authority of the Ministry of Interior.<sup>328</sup>

Article 2 of Law No. 38 of 2012 additionally provides that “[r]eports by revolutionaries [*thuwaar*] documenting incidents and statements of witnesses and detainees from senior officials of the former regime shall have the status of information-gathering reports conducted by judicial police officers in accordance with the Code of Criminal Procedure, when they display reliability according to the discretionary authority of the trial judge.” Accordingly, the evidence collected by members of armed groups in relation to alleged crimes committed by former Gadhafi-era officials are to be handled in accordance with articles 11 ff. of the CCP which, as explained above, concern the role and powers of judicial investigation officers. Such reports can therefore be used by the public prosecution in its investigations and potentially as evidence at trial, subject to the approval of the trial judge.

Both Decree 388 of 2011 and Law No. 38 of 2012 are problematic insofar as they entrust investigative powers on persons that do not have the necessary degree of competence, independence and impartiality required under international law.<sup>329</sup>

Members of armed groups, who fought against the Gadhafi regime during the 2011 uprising and who themselves may be involved in the commission of human rights violations and abuses and, given they would effectively be investigating their enemies, do not have the necessary degree of impartiality required of judicial investigation officers to collect evidence and testimonies to be used in investigations and trials of former regime officials.<sup>330</sup> Furthermore, given they have not been subject to the training accorded to

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<sup>322</sup>. CCP, art. 171.

<sup>323</sup>. CCP, art. 267.

<sup>324</sup>. CCP, art. 172. The public prosecution is further subject to what is prescribed in articles 173-187 *bis* (C).

<sup>325</sup>. Decree No. 388 of 2011 on the Establishment of the Interim Supreme Security Committee and the Determination of its Competence and Organizational Structure, 28 February 2011, art. 1: “An interim Supreme Security Committee shall be established and a chairman and deputy chairman shall be assigned to head it. They shall be appointed by virtue of a decision from the Minister of Interior. The spatial jurisdiction of the Committee’s branches shall comprise all territories of the Libyan State.”

<sup>326</sup>. *Ibid.*, art. 2.

<sup>327</sup>. *Ibid.*, art. 3.

<sup>328</sup>. UNSMIL & OHCHR, *Torture and Deaths in Detention in Libya*, October 2013, pp. 6, 12.

<sup>329</sup>. CAT, arts. 12-13; DPED, art. 13; *Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions*, principle 9; *The Minnesota Protocol on the Investigation of Potentially Unlawful Death*, para. 31; *Guidelines on the Role of Prosecutors*, Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, 27 August-7 September 1990, guideline 13(a).

<sup>330</sup>. UNSMIL and OHCHR have also raised concerns that article 2 of Law No. 38 of 2012 might allow the prosecution and courts to rely on evidence obtained while an accused was subject to arbitrary detention or unlawful interrogation methods, e.g. torture or other ill-treatment; see *Abuse Behind Bars: Arbitrary and Unlawful Detention in Libya*, April 2018, p. 15. Article 2 should be read in conjunction with article 4 of the same Law, which provides a blanket amnesty for acts committed to “save and protect” the 17 February Revolution; for analysis, see section 3.4 below.

judicial police officers or other investigating authorities, they are not competent to conduct criminal investigations.

### 3.4 Amnesty laws

#### International law

The international standard regarding amnesties is set out in principle 24 of the UN Impunity Principles, which provides that “amnesties and other measures of clemencies” may not even be contemplated until after the basic elements of criminal accountability have already been met, as established in principle 19:

States shall undertake prompt, thorough, independent and impartial investigations of violations of human rights and international humanitarian law and take appropriate measures in respect of the perpetrators, particularly in the area of criminal justice, by ensuring that those responsible for serious crimes under international law are prosecuted, tried and duly punished.

Amnesties typically serve to bar or terminate criminal prosecution and civil, administrative or other proceedings in respect of certain criminal conduct within a specified period of time or situation.

They have sometimes been employed as a tool in countries in transition for the purposes of promoting “reconciliation” and with a view to facilitating the stabilization of a country that is recovering from a situation of armed conflict, instability or other oppressive governances (e.g. the apartheid regime in South Africa).<sup>331</sup> However, as principle 24 of the UN Impunity Principles makes clear, such measures are incompatible with international human rights obligations around accountability. Measures that serve to mitigate punishment or are considered in post-accountability situations are a separate matter.

The Human Rights Committee has made clear that amnesties for serious human rights violations are in breach of the ICCPR.<sup>332</sup> Numerous special procedures of the UN Human Rights Council have emphasized that amnesties are incompatible with international human rights obligations.<sup>333</sup> The UN Security Council has clarified that, even when amnesties are enacted, crimes under international law must be investigated and prosecuted.<sup>334</sup> In relation to NIACs, article 6(5) of AP II envisages that “[a]t the end of hostilities, the authorities in power shall endeavour to grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained.”<sup>335</sup> This provision is interpreted as not allowing for amnesties for war crimes and crimes against humanity.<sup>336</sup> Moreover, human rights authorities and international courts and tribunals, such as the ICC, have held that crimes under international law cannot be subject to amnesties.<sup>337</sup>

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<sup>331</sup>. OHCHR, *Rule-of-Law Tools for Post-Conflict States: Amnesties*, 2009, p. 5; A. Seibert-Fohr, *Amnesties*, Max Planck Encyclopedia of Public International Law, November 2010, paras. 2-3.

<sup>332</sup>. HRC, *General Comment No.31*, para. 18.

<sup>333</sup>. Joint Communication from Special Procedures, Doc. OL NPL 1/2019, 12 April 2019, at [https://www.ohchr.org/Documents/Issues/Truth/OL\\_NPL\\_1\\_2019.pdf](https://www.ohchr.org/Documents/Issues/Truth/OL_NPL_1_2019.pdf).

<sup>334</sup>. UN Security Council Resolution 1120, UN Doc. S/RES/1120, 14 July 1997, para. 7 (Croatia); Resolution 1315, UN Doc. S/RES/1315 (2000), 14 August 2000, preamble para. 5 (Sierra Leone).

<sup>335</sup>. Y. Sandoz, C. Swinarski and B. Zimmermann (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, Geneva 1987, para. 4618: “[t]he object of this sub-paragraph is to encourage gestures of reconciliation which can contribute to reestablishing normal relations in the life of a nation which has been divided.”

<sup>336</sup>. ICRC Customary IHL Database, rule 159; IACtHR, *Massacres of El Mozote and Nearby Places v. El Salvador*, Series C No. 252, 25 October 2012, paras. 285-286; European Court of Human Rights, *Marguš v. Croatia*, Application No. 4455/10, 27 May 2014, paras. 131, 139.

<sup>337</sup>. ICC, *Prosecutor v. Saif al-Islam Gaddafi*, Case No. ICC-01/11-01/11, Pre-Trial Chamber I, Decision on the ‘Admissibility Challenge by Dr. Saif Al-Islam Gaddafi pursuant to Articles 17(1)(c), 19 and



## Libyan law in light of international law and standards

Law No. 35 of 2012 amnesties crimes committed between 15 February 2011 and 2 May 2012, the date of its promulgation,<sup>338</sup> except those listed in article 1:

- (1) Crimes committed by the next of kin and assistants of Ghaddafi;
- (2) So-called *hudud* crimes – specific acts criminalized under Islamic law – when referred to the judiciary;
- (3) Kidnapping, torture and forced intercourse crimes; and
- (4) Drug trafficking.

Article 4 of Law No. 38 of 2012, promulgated on the same day as Law No. 35, provides that “[t]here is no penalty for necessities of the 17 February Revolution in terms of military, security or civil acts carried out by revolutionaries to save or protect the revolution.”<sup>339</sup>

Under article 2 of Law No. 35 of 2012, the effect of the amnesty is to pardon crimes, to suspend ongoing criminal proceedings and to cancel related penalties, criminal effects and records for all the persons benefitting from the amnesty. Potential beneficiaries must meet the following conditions:

- (1) Return any embezzled public fund;
- (2) Reconcile with the victim, his or her legal guardian or the so-called guardian of the blood;
- (3) Hand over the objects, weapons and tools employed to perpetrate the crime;
- (4) Make a declaration of repentance before the competent criminal division.

Article 3 provides that the amnesty is revoked, and its legal effects expire, if the beneficiary commits “an intentional offence” within five years from the date of entry into force of the Law.

The objective of Law No. 35 and Law No. 38 is to avoid the prosecution of individuals that participated in the 17 February Revolution and in the subsequent NIAC against the Gadhafi regime.<sup>340</sup> As noted above, while amnesties covering the act of participation in armed conflict do not per se contravene international law, the scope of application of both laws is problematic. Law No. 35 has the potential of amnestying certain crimes under international law, especially enforced disappearance, arbitrary deprivations of life, war crimes and crimes against humanity, which Libya is under an obligation to investigate and prosecute. Law No. 38 provides for a blanket immunity in respect of conduct connected to the “necessities of the 17 February Revolution;” in the absence of any further specification, this provision may include any crime under international law. Given the numerous allegations concerning war crimes and crimes against humanity perpetrated by revolutionaries and militias during and after the 2011 conflict,<sup>341</sup> both laws raise concerns in terms of accountability of the

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20(3) of the Rome Statute’, 5 April 2019, paras. 61, 77; HRC, *Hugo Rodríguez v. Uruguay*, UN Doc. CCPR/C/51/D/322/1988, 9 August 1994, para. 12.4; IACtHR, *Barrios Altos v. Peru (Merits)*, Series C No. 75, 14 March 2001, para. 41. For further reference on amnesties, see ICJ, *The Right to a Remedy and to Reparation for Gross Human Rights Violations - Practitioners’ Guide No. 2*, Geneva 2018, pp. 250 ff.

**338.** Law No. 35 of 2012 on the Amnesty of Particular Crimes, 2 May 2012.

**339.** Law No. 38 of 2012 on some Procedures concerning the Transitional Phase, 2 May 2012.

**340.** M. Kersten, *Impunity Rules: Libya Passes Controversial Amnesty Law*, Justice in Conflict, 8 May 2012.

**341.** Report of the International Commission of Inquiry on Libya, UN Doc. A/HRC/17/44, 12 January 2012, para. 251; Report of the International Commission of Inquiry on Libya, UN Doc. A/HRC/19/68, 28 January 2014, para. 120; Human Rights Watch, *Libya: Letter to Misrata Councils*, 8 April 2012. See also Report of the Secretary-General on the United Nations Support Mission in Libya, UN Doc. S/2012/675, 30 August 2012, para. 35.

perpetrators. In this respect, UNSMIL has urged Libyan authorities to avoid interpreting or implementing these laws in a way that grants amnesty for crimes under international law.<sup>342</sup>

As mentioned, article 1 of Law No. 35 of 2012 excludes kidnapping, torture and forced intercourse crimes from its scope of application. This provision is in line with international law only as far as it excludes torture and rape.<sup>343</sup> The same provision, however, is not in compliance with international law insofar as it does not exclude enforced disappearance,<sup>344</sup> arbitrary deprivations of life, serious ill-treatment constituting crimes, war crimes and crimes against humanity, which as mentioned cannot be the object of an amnesty. This is all the more significant in light of the findings by the UN Commission of Inquiry on Libya that Libyan revolutionaries allegedly perpetrated war crimes and crimes against humanity during the 2011 conflict.<sup>345</sup>

Additionally, article 4 of Law No. 38 of 2012, which precludes prosecution for “military, security or civil acts carried out by revolutionaries to save or protect the revolution,” is directly in contravention of Libya’s international obligations. The establishment of a total bar to prosecution for arbitrary deprivations of life, torture and serious ill-treatment constituting crimes, enforced disappearance, war crimes and crimes against humanity possibly committed by armed groups that were in opposition to the Gadhafi regime also contravenes international law.

In September 2015, the House of Representatives sitting in Tobruk issued a third amnesty law.<sup>346</sup> Article 1 of Law No. 6 of 2015 provides:

... a general amnesty shall be granted to all Libyans who have committed crimes during the period from February 15th 2011 until the promulgation of this Law [7 September 2015]. The criminal proceedings related to such crimes shall be terminated, the penalties imposed and the criminal consequences thereof shall be waived and removed from the criminal record of the persons concerned by this amnesty when the conditions provided for herein are met.

To benefit from the amnesty, a person must fulfil the conditions set in article 2:

- (1) A written pledge of repentance and not re-offending. This pledge is not needed for contraventions or offences punishable only by a fine;
- (2) To return the money back for financial crimes;
- (3) To reconcile with the victim or his heir or the pardon granted by the victim’s heir, as the case may be;
- (4) To surrender weapons and equipment used to commit the crime;
- (5) To return things to their original status for crimes against property and movables.

Article 6 further provides that, if the above conditions are met, the decision whether or

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<sup>342</sup>. Report of the Secretary-General on the United Nations Support Mission in Libya, UN Doc. S/2012/675, 30 August 2012, para. 35.

<sup>343</sup>. CAT Committee, *General Comment No. 2*, para. 5; *General Comment No. 3*, para. 41.

<sup>344</sup>. As explained in section 3.1.2, under the heading “forced disappearance” Law No. 10 of 2013 criminalizes acts such as kidnapping and hostage taking rather than enforced disappearance.

<sup>345</sup>. Report of the International Commission of Inquiry on Libya, UN Doc. A/HRC/17/44, 12 January 2012, para. 251; Report of the International Commission of Inquiry on Libya, UN Doc. A/HRC/19/68, 28 January 2014, para. 120.

<sup>346</sup>. Law No. 6 of 2015 on General Amnesty, 7 September 2015. According to its article 11, this Law repeals Law No. 35 of 2012. However, the Government of National Accord based in Tripoli considers Law No. 6 of 2015 as invalid; see ICC, *The Prosecutor v. Saif al-Islam Gaddafi*, Prosecution Response to ‘Admissibility Challenge by Dr. Saif Al-Islam Gaddafi’, ICC-01/11-01/11, 11 October 2018, para. 146.

not a person may benefit from the amnesty rests with the judge competent to adjudicate the case,<sup>347</sup> a requirement not present in Law No. 35 of 2012.

Article 3 excludes from the scope of the amnesty a higher number of crimes than Law No. 35 of 2012,<sup>348</sup> namely: (1) terrorism; (2) drug trafficking; (3) sexual crimes; (4) murder, abduction, forced disappearance and torture; (5) *hudud* crimes,<sup>349</sup> when reported; and (6) corruption and corruption-related crimes.

In principle, this provision does not affect performance of Libya's obligation to investigate and prosecute enforced disappearance, torture, sexual violence and some forms of arbitrary deprivation of life. As discussed above, however, Libyan law fails to criminalize enforced disappearance in line with international law and standards, which in turn entails that this crime may be covered by the amnesty. Moreover, article 3 of Law No. 6 of 2015 contravenes international law insofar as it does not exclude other forms of arbitrary deprivation of life, ill-treatment constituting crimes, war crimes and crimes against humanity from the scope of the amnesty. In this sense, the observations made above with regard to Law No. 35 of 2012 apply equally here.

Law No. 6 of 2015 also envisages a broader category of beneficiaries than Law No. 35 of 2012. The latter was designed to amnesty only crimes committed by so-called revolutionaries – those that fought against the Ghaddafi regime in the 2011 conflict – specifically excluding any crimes committed by the next of kin and assistants of Muammar Ghaddafi.<sup>350</sup> Law No. 6 of 2015, instead, encompasses crimes committed by all Libyans. This includes Saif al Islam Ghaddafi,<sup>351</sup> Muammar's son, who was convicted *in absentia* by the Tripoli Court of Assize<sup>352</sup> and remains subject to an ICC arrest warrant for crimes against humanity.<sup>353</sup>

In June 2018, Saif al-Islam Gadhafi filed an admissibility challenge arguing, amongst other things, that Law No. 6 of 2015 provides a legal basis to terminate the ICC proceedings against him.<sup>354</sup> The ICC Prosecutor opposed the application in significant part on the basis that there was no final decision regarding whether the amnesty law would apply to him and that, if it did, (i) it would not cover the crime of murder for which he was charged and (ii) would shield him from prosecution and thereby demonstrate that Libya is unwilling genuinely to prosecute him.<sup>355</sup>

In its decision, the ICC Pre-Trial Chamber agreed with the Prosecution, finding that Law No. 6 of 2015 would not apply to the crime of murder with which Saif al-Islam is charged,<sup>356</sup>

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347. "A reasoned decision shall be taken by the judicial entity that has jurisdiction to stop further measures in the criminal case if the conditions of amnesty are met. Those eligible for amnesty are then released unless they are imprisoned for another reason."

348. Article 1 of Law No. 35 of 2012 did not exclude murder and enforced disappearance from the scope of the amnesty.

349. These are specific acts criminalized under Islamic law.

350. Law No. 35 of 2012, art. 1(1).

351. Two attempts have been made, in April 2016 and June 2017, to release Saif al Islam on the basis of Law No. 6 of 2015; accounts regarding such a release are conflicting, though, and his whereabouts remain unknown.

352. UNSMIL and OHCHR, *Report on the Trial of 37 Former Members of the Qadhafi Regime (Case 630/2012)*, 21 February 2017.

353. ICC, *Warrant of Arrest for Saif al-Islam Gaddafi*, Case No. ICC-01/11-14, 27 June 2011.

354. ICC, *The Prosecutor v. Saif al-Islam Gaddafi*, Case No. ICC-01/11-01/11-640, Admissibility Challenge by Dr. Saif Al-Islam Gadhafi pursuant to Articles 17(1)(c), 19 and 20(3) of the Rome Statute, 5 June 2018.

355. ICC, *The Prosecutor v. Saif al-Islam Gaddafi*, Case No. ICC-01/11-01/11, Prosecution Response to 'Admissibility Challenge by Dr. Saif Al-Islam Gadhafi', ICC-01/11-01/11, 11 October 2018, paras. 164-174.

356. ICC, *Prosecutor v. Saif al-Islam Gaddafi*, Case No. ICC-01/11-01/11, Pre-Trial Chamber I, Decision on the 'Admissibility Challenge by Dr. Saif Al-Islam Gadhafi pursuant to Articles 17(1)(c), 19 and 20(3) of the Rome Statute', 5 April 2019, para. 58.

and that the Law would be incompatible with international law because it would bar the prosecution of crimes against humanity which cannot be the object of amnesties.<sup>357</sup>

### 3.5 Immunities under domestic law

#### International law

The prosecution of crimes under international law must not be frustrated by the granting of immunities deriving from a perpetrator's function or status. Immunities are exemptions from penalties, prosecution or lawsuit, which may derive from the official capacity of an individual when acting in the exercise of her or his duties or from her or his status as a State official. Functional immunities cover conduct performed by a State official in the performance of her or his official duties. Personal immunities accrue to incumbent heads of State and heads of government and Ministries of Foreign Affairs, and bar foreign domestic prosecutions of such individuals for the duration of their tenure unless the sending State opts for a waiver. Under international law, immunities are no longer recognized as legitimate barriers to the prosecution of crimes under international law.

International bodies, including the Human Rights Committee and African Commission, have all affirmed that immunities are incompatible with obligations under their respective treaties.<sup>358</sup> Principle 22 of the UN Impunity Principles provides that "States should adopt and enforce safeguards against any abuse of rules such as those pertaining to ... immunities ... that fosters or contributes to impunity;" principle 27(c) affirms that "[t]he official status of the perpetrator of a crime under international law - even if acting as head of State or Government - does not exempt him or her from criminal or other responsibility and is not grounds for a reduction of sentence."<sup>359</sup>

With regard to torture and enforced disappearance specifically, the involvement of a State official in the crime is a constitutive element under the definition provided by the CAT and the ICPPED.<sup>360</sup> By implication, immunity deriving from official capacity or status must not be available for such crimes. The DPED and the *Inter-American Convention on Forced Disappearance of Persons* expressly exclude the possibility of invoking immunities in trials against suspected perpetrators of enforced disappearance.<sup>361</sup>

With regard to arbitrary deprivations of life, the *Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions* provide that "[i]n no circumstances, including a state of war, siege or other public emergency, shall blanket immunity from prosecution be granted to any person allegedly involved in extra-legal, arbitrary or summary executions;"<sup>362</sup> the *Minnesota Protocol on the Investigation of Potentially Unlawful Death* further affirms that "[i]mpunity stemming from ... blanket amnesties is incompatible with [the duty to investigate and prosecute]."<sup>363</sup>

International and domestic courts have concluded that functional immunities<sup>364</sup> and

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357. Ibid., paras. 77-78.

358. See e.g. HRC, *General Comment No. 31*, para. 18; HRC, *General Comment No. 36*, para. 27; CAT Committee, *General Comment No. 3*, para. 42; AComHPR, *General Comment No. 4*, para. 28.

359. *Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity*, principles 22, 27(c).

360. CAT, art. 1; ICPPED, art. 2.

361. DPED, arts. 16(3), 18; *Inter-American Convention on Forced Disappearance of Persons*, art. IX.

362. *Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions*, principle 19. See also UN General Assembly, *Vienna Declaration and Programme of Action*, UN Doc. A/CONF.157/23, 12 July 1993, art. 60.

363. *The Minnesota Protocol on the Investigation of Potentially Unlawful Death*, para. 8(c).

364. *Nazi Conspiracy and Aggression: Opinion and Judgment*, US Government Printing Office 1947, p. 53; ICTY, *Prosecutor v. Blaškić*, Case No. IT-95-14, 29 October 1997, Appeals Chamber, Judgment on the Request of The Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, para. 41; *R v Bow Street Metropolitan Stipendiary Magistrate, Ex Parte Pinochet Ugarte*, No 3 [1999] UKHL 17, 24 March 1999.

personal immunities<sup>365</sup> may not be invoked to impede the prosecution of crimes under international law. Immunities may not be invoked before international courts and tribunals prosecuting crimes against humanity, war crimes and genocide, including the ICC.<sup>366</sup>

#### Libyan law in light of international law and standards

Article 69 of the Libyan Penal Code provides that:

1. An act committed through the exercise of a right or the performance of a duty imposed by law or by a lawful order of a public authority shall not be subject to punishment. If an act which constitutes an offence has been carried out by order of authority, the public official who gave the order is responsible for that offence. The person who carries out the order is likewise liable unless due to a mistake of fact, he believed that he was obeying a lawful order.
2. The person who carries out an unlawful order shall not be subject to punishment when the law definitively forbids discussion on the lawfulness thereof.

Article 69 grants immunity to persons committing crimes pursuant to a legal duty and is therefore not in accord with international law. With regard to immunities, the second sentence of paragraph 1 is compliant to the extent that it does not shield from punishment public officials that have ordered or materially committed a crime. However, the first sentence of paragraph 1 is clearly not in line with Libya's international legal obligations because it generally excludes criminal liability of public officials without envisaging an exception with respect to crimes under international law.

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**365.** International Court of Justice, *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgement, 14 February 2002, paras. 58-61, 70-71.

**366.** Nuremberg IMT Statute, art. 7; ICTY Statute, art. 7(2); ICTR Statute, art. 6(2); ICC Statute, art. 27(2); SCSL Statute, art. 6(2); SCSL, *Prosecutor v. Taylor*, Case No. SCSL-2003-01-1, Appeals Chamber, Decision on Immunity from Jurisdiction, 31 May 2004, para. 52; ICC, *Prosecutor v. Al-Bashir*, Case No. ICC-02/05-01/09 OA2, Appeals Chamber, Judgment in the Jordan Referral re Al-Bashir Appeal, 6 May 2019, paras. 95 ff.

## Chapter 4 – Libya’s criminal justice system: fair trial rights

### 4.1 Introduction

Libya is obligated to respect and protect the right to liberty and the right to a fair trial under the ICCPR, the Arab Charter and the ACHPR. Other applicable standards, including the Guidelines on the Conditions of Arrest, Police Custody and Pre-Trial Detention in Africa of the African Commission on Human and Peoples’ Rights, the African Commission’s *Principles and Guidelines on the Right to Fair Trial and Legal Assistance in Africa* and the Human Rights Committee’s General Comments Nos. 32 and 35, clarify the scope of States’ obligations under the ICCPR, ACHPR, and Arab Charter.

The rights to liberty and to a fair trial, like most human rights, extend to foreign nationals and stateless persons to ensure they are treated on an equal footing with nationals in the administration of justice.<sup>367</sup>

The 2011 Constitutional Declaration protects the right to a fair trial, providing that:

There shall be no crime or penalty except by virtue of the text of the law. Any defendant shall be innocent until he is proved guilty by a fair trial wherein he shall be granted the guarantees necessary to defend himself. Each and every citizen shall have the right to recourse to the judiciary in accordance with the law.<sup>368</sup>

However, the legal framework giving effect to the 2011 Constitutional Declaration, and governing the investigation and prosecution of crimes in Libya, suffers from several substantive and procedural deficiencies that impact the rights of accused persons to liberty and a fair trial. This chapter provides an in-depth analysis of that framework by examining some of the concomitant rights, and the ways in which it is non-compliant with international law and standards.

The chapter also briefly examines the extent to which the application of the legal framework has resulted in the violation of the accused’s rights. As mentioned above, there is little information about practice in relation to crimes under international law or other domestic crimes from which to draw conclusions. However, the extensive reporting on the *37 Gadhafi regime-members* case between March 2014 and July 2015, coupled with the trial judgment the ICJ was able to obtain, has provided a basis to conduct a limited analysis. The 37 alleged members of the Gadhafi regime, including Gadhafi’s son Saif al-Islam and the former chief of intelligence Abdullah al-Senussi, were tried on charges of war crimes and other offences before the Tripoli Court of Assize,<sup>369</sup> which sentenced nine defendants to death; eight defendants to life in prison; and the rest to prison sentences ranging from 12 to 15 years. While the trial of these former officials was a positive step in the way of accountability, international and civil society organizations including UNSMIL and OHCHR documented multiple breaches of the defendants’ fair trial rights guaranteed under international law, violations which are evidenced in part by the trial judgment.

### 4.2 Pre-trial rights

The right to liberty, including freedom from arbitrary detention, guaranteed under article 9 of the ICCPR, article 14 of the Arab Charter and article 6 of the ACHPR, imposes a number of obligations on Libya. These include obligations to ensure the accused is informed of the reasons for arrest or detention, is brought promptly before an independent and impartial judicial authority and can challenge their detention, has access to legal counsel of their choice, can access family and medical care, has adequate time and facilities to prepare a defence, and is not compelled to incriminate oneself. These obligations will be dealt with in turn.

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**367.** HRC, *General Comment No. 15: The Position of Aliens under the Covenant*, UN Doc. CCPR/C/GC/15, 11 April 1986, paras. 1, 7; *General Comment No. 32*, para. 9.

**368.** 2011 Constitutional Declaration, art. 31.

**369.** Or *Mahkamah al-Jinayat*, which is a section of the Court of Appeal. The Court, which is composed of three judges, hears felony cases.

## 4.2.1 Lawful arrest and detention

### International law

Pursuant to the right to liberty, Libya must ensure that arrests and detention are only “carried out strictly in accordance with the provisions of the law and by competent officials or persons authorized for that purpose, pursuant to a warrant, on reasonable suspicion or for probable cause.”<sup>370</sup> While arrest refers to the commencement of a deprivation of liberty, detention relates to its continuation until release; pre-trial detention is the time span between arrest and the judgment of first instance.<sup>371</sup>

Any detention must meet the necessary standards of last resort, reasonableness, necessity and proportionality.<sup>372</sup> Detention should not be the rule for persons awaiting trial,<sup>373</sup> but should be a means of last resort to be employed only when sufficient evidence confirms a risk of flight, the possibility of interference with the investigation or the existence of a danger to others.<sup>374</sup>

Domestic law must prescribe in sufficiently precise terms the grounds and procedure for any deprivation of liberty, including the officials responsible for ordering and effectuating an arrest, the authorized detention facilities and all relevant procedural safeguards.<sup>375</sup> Persons held in pre-trial detention must be tried as expeditiously as possible without unjustified delays. Release may be subject to certain conditions and guarantees, including bail.<sup>376</sup>

Security detention, internment, or other forms of administrative detention are generally arbitrary, unless undertaken pursuant to a lawful derogation under a declared state of emergency.<sup>377</sup> Any such measures must not be “inconsistent with their other obligations under international law,” including IHL.<sup>378</sup> In other words, security detention under a derogation regime is admissible only when necessary and proportionate according to the concrete circumstances and non-discriminatory; all procedural guarantees, including the right to *habeas corpus*, must be available.<sup>379</sup> Persons deprived of their liberty must be detained in centres that are officially recognized, not secret or unacknowledged facilities.<sup>380</sup> Authorities must keep an accurate record of all arrested or detained persons, which is made

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**370.** AComHPR, *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*, Doc. OS(XXX)247, 2003, principle M(1)(b). The concept of arbitrariness is to be interpreted broadly: it encompasses “elements of inappropriateness, injustice, lack of predictability and due process of law, as well as elements of reasonableness, necessity and proportionality;” HRC, *General Comment No. 35*, para. 12.

**371.** HRC, *General Comment No. 35*, paras. 13, 37.

**372.** *Ibid.*, para. 12.

**373.** ICCPR, art. 9(3).

**374.** AComHPR, *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*, principle M(1)(e).

**375.** ICCPR, art. 9(1); HRC, *General Comment No. 35*, paras. 22-23.

**376.** ICCPR, art. 9(3). Persons lawfully detained while awaiting trial must have the possibility to have their detention periodically reviewed; see *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*, principle 39.

**377.** Security detention may be employed only when “under the most exceptional circumstances, a present, direct and imperative threat” exists and the State proves that an “individual poses such a threat and that it cannot be addressed by alternative measures.” Such detention should not last longer than absolutely necessary; its duration must be limited in time and procedural safeguards, such as judicial review and access to legal counsel, be guaranteed. See HRC, *General Comment No. 35*, para. 15.

**378.** ICCPR, art. 4(1). In IACs, POWs may be detained without review until the cessation of hostilities but civilians can be interned only if a competent judicial or administrative body determines that “the security of the Detaining Power makes it absolutely necessary” and their detention is reviewed at least every six months; GC IV, arts. 42(1), 43(1), 46(1), 78(2), 132(1), 133(1).

**379.** HRC, *General Comment No. 35*, paras. 65-67.

**380.** DPED, art. 10(1); AComHPR, *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*, principle M(6)(a).



available to the person's lawyer and family, as well as to judicial authorities and national and international human rights mechanisms.<sup>381</sup>

A State is directly responsible for acts of armed groups officially entrusted with detention powers or acting under its direction and control or with its acquiescence.<sup>382</sup>

In this respect, it must strictly oversee the conduct of such groups and ensure that they do not engage in unlawful and/or arbitrary detention.<sup>383</sup> States also bear a due diligence obligation to protect individuals from any deprivation of liberty carried out by private parties, including armed groups.<sup>384</sup> This translates into a duty to endeavour at their best to prevent such detention from occurring or to put an end to it when taking place. Under IHL, armed groups bear an obligation not to detain individuals arbitrarily and to treat detainees humanely; they must refrain from acts that may imperil their bodily or mental integrity.<sup>385</sup>

### Libyan law in light of international law and standards

Under the CCP, a person may be arrested or detained only on the basis of an order issued by a legally competent authority or when caught *in flagrante delicto* (in the act).<sup>386</sup> Multiple authorities have the power to detain persons.

Judicial officers may arrest a "present" accused or issue an order to arrest an accused when not present in certain circumstances when there is sufficient evidence to charge them with an offence as prescribed by law.<sup>387</sup>

Following the commencement of an investigation, an investigating judge can order the attendance or arrest of an accused<sup>388</sup> and, if the accused fails to appear on a summons without reasonable excuse, may abscond, does not have a known place of residence or it is a *flagrante delicto* offence, the investigating judge may issue an order for the accused's arrest and surrender.<sup>389</sup> After the accused is questioned, or if they escape, the investigating judge may provisionally detain them for 15 days if there is sufficient evidence they committed a felony or misdemeanour punishable by more than three months' imprisonment. The investigating just must provisionally detain them if they do "not have a known, fixed placed of residence in Libya and the offence is a misdemeanour punishable by imprisonment."<sup>390</sup>

The investigating judge may extend the 15-day detention for additional periods not exceeding 30 days in total.<sup>391</sup> Any further extensions – for consecutive periods of 45 days each until the end of the investigation – must be determined by the court of first instance.<sup>392</sup> Unless release is "obligatory", the investigating judge may release an accused upon the payment of bail<sup>393</sup> but may not release an accused if they are not a resident in

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**381.** *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*, principle 12.

**382.** ARSIWA, arts. 4-5, 8.

**383.** HRC, *General Comment No. 35*, para. 8.

**384.** *Ibid.*, para. 7.

**385.** GC IV, art. 3; AP II, art. 4; ICRC Customary IHL Database, rules 87, 99.

**386.** CCP, arts. 27, 30.

**387.** CCP, arts. 24-25. This includes where the accused has committed a felony, or misdemeanour punishable by at least three months imprisonment.

**388.** CCP, art. 107; see also art. 116.

**389.** CCP, art. 111.

**390.** CCP, art. 115. The Prosecutor may request the provisional detention of an accused at any time; art. 111.

**391.** CCP, art. 122.

**392.** CCP, art. 123.

**393.** CCP, art. 126.

the area where the court is located "before electing a domicile for them in the area."<sup>394</sup>

The public prosecution also has the power to detain a person for up to six days,<sup>395</sup> which is extendable by the competent summary judge<sup>396</sup> and the appellate panel of the circuit court of first instance for further consecutive 30-day periods up to a maximum of 90 days.<sup>397</sup> If the investigation is then still not concluded, the Prosecutor General "[must] require" the appellate panel to extend detention for an undefined period "if the circumstances of the investigation or action so require."<sup>398</sup> The public prosecution "may release the accused at any time, with or without bail."<sup>399</sup> Where a person is accused of crimes against the State, they may be detained by judicial investigation officers for seven days, then up to two weeks by the Prosecutor, and then for consecutive 45-day periods by the competent judge until the end of the investigation.<sup>400</sup>

The provisions of the CCP governing arrest and detention are not compliant with international law and standards. Under articles 111, 115 and 125, accused persons may be detained, or their release may be denied, if they do not have a known place of residence. This constitutes an arbitrary ground for detention in violation of international law to the extent it is applied without an assessment of the necessary standards of last resort, reasonableness, necessity and proportionality in the circumstances of the individual case. Articles 123, 177 and 187 *bis* B are also problematic insofar as they do not set a maximum duration of pre-trial detention, much less one that is permissible; such provisions may violate the right to be tried without undue delay under article 14(3) (c) of the ICCPR.<sup>401</sup>

A significant issue surrounding pre-trial detention in Libya concerns persons detained since the 2011 conflict. According to OHCHR and UNSMIL, "the vast majority are yet to be referred to trial and have had no opportunity to challenge the legality of their detention,"<sup>402</sup> which implies that the detainees had not been, at the time of reporting, brought before a judicial authority. The Libyan legislature has made several unsuccessful attempts to solve this issue: article 1 of Law No. 38 of 2012 set a two-month deadline from the date of its promulgation (May 2nd) to either refer for prosecution or release all 2011 conflict-related detainees; article 26 of Law No. 29 of 2013 provided for a new three-month deadline starting from December 2013; article 1 of Law No. 9 of 2014, enacted in March 2014, set another fourth-month deadline to either prosecute or release the said detainees. None of these laws have been implemented.<sup>403</sup> On the other hand, in September 2018 the Libyan Presidency Council and the SJC issued Decrees Nos. 1301, 1304 and 1307 setting up two committees tasked with the screening of the detainees held at the Mitiga prison in Tripoli, including cases of arbitrary detention. As of January 2019, UNSMIL reported that 800 detainees, out of an estimated total of 3,600, have been screened, 300 of whom have been released.<sup>404</sup> These decrees are not publicly available and, as of the time of writing, were not accessible to the ICJ.

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394. CCP, art. 125.

395. CCP, art. 175.

396. CCP, art. 176.

397. CCP, art. 177.

398. CCP, art. 177.

399. CCP, arts. 178-179.

400. CCP, arts. 26(2), 187 *bis* B. Upon referral of a case to the Summary Court or Indictment Chamber, the investigating judge determines whether the accused should be detained or released, but the court or chamber can override the decision from that point; CCP, art. 137. Where cases are referred to the competent court for prosecution, expedited hearings must be held where the accused is provisionally detained and before the end of the period of provisional detention "when possible;" CCP, art. 153 *bis*.

401. *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*, principle 38; HRC, *General Comment No. 32*, para. 35.

402. UNSMIL & OHCHR, *Report on the Trial of 37 Former Members of the Qadhafi Regime (Case 630/2012)*, February 2017, p. 8.

403. UNSMIL & OHCHR, *Abuse Behind Bars: Arbitrary and Unlawful Detention in Libya*, April 2018, pp. 15-16.

404. Report of the Secretary-General on the United Nations Support Mission in Libya, UN Doc. S/2019/19, 7 January 2019, paras. 33-35.

UNSMIL and OHCHR have documented multiple cases of unlawful and arbitrary arrests and detention across Libya undertaken by armed groups, including those affiliated with the State. Despite that under the CCP “[n]o person may be held in detention except in such prisons as are intended for that purpose,”<sup>405</sup> it reported episodes occurring both in western and eastern Libya between early 2016 and March 2017, concerning the arrest without a warrant and detention in unofficial localities of several individuals.<sup>406</sup> The UN Panel of Experts on Libya has also recounted of cases of unlawful and arbitrary detention by armed groups in both the east and west of Libya.<sup>407</sup> The WGAD has documented instances of arbitrary detention carried out by LNA-aligned armed groups in eastern Libya, which arrested multiple persons without a warrant.<sup>408</sup> In one instance, the WGAD found that, in the context of one of the NIACs in 2014, two individuals were detained for the sole reason that some of their family members were allegedly involved with armed groups opposed to the LNA. The WGAD determined that Libya failed to demonstrate that such persons posed the necessary degree of threat that could have justified their internment on security grounds, and concluded that this amounted to arbitrary detention.<sup>409</sup> The WGAD, UNSMIL and OHCHR have documented other cases of arbitrary detention, including on the basis of their perceived affiliation with anti-LNA armed groups.<sup>410</sup>

Arbitrary detention occurs even when individuals are nominally detained by the State. In the *37 Gadhafi-regime members* case, UNSMIL documented that many of the defendants had been arbitrarily detained for prolonged periods of time, some of them up to two years.<sup>411</sup> Similar cases have been reported by the WGAD.<sup>412</sup>

Arbitrary arrests and detention effectuated without a warrant, detention in facilities disconnected from State institutions, as well as administrative detention not justified by security reasons, or conducted outside the legal framework applicable to armed conflict and states of emergency, violate articles 30 and 31 of the CCP as well as international law and standards.

#### 4.2.2 Right to be promptly informed of the charges

##### International law

Libyan authorities must ensure that arrested persons are “informed, at the time of arrest, of the reasons for [their] arrest and ... promptly informed of any charges against [them],”<sup>413</sup> to enable them to challenge the detention. The information on the arrest must be specific, include both the underlying legal and factual bases, and be communicated in a language

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405. CCP, art. 31. See also 2017 Consolidated Draft Constitution, art. 63: “[t]he competent authorities shall justify their orders that affect rights and freedoms. Detention may only be in places designated therefor and for a period determined by law ... The location of the detainee shall be indicated ...;” art. 64: “[e]very person shall have the right to personal freedom. Freedom shall only be deprived if alternative measures, procedures, or penalties are insufficient.”

406. UNSMIL & OHCHR, *Abuse Behind Bars: Arbitrary and Unlawful Detention in Libya*, April 2018, pp. 20-21.

407. Final Report of the Panel of Experts on Libya established pursuant to Resolution 1973 (2011), UN Doc. S/2018/812, 5 September 2018, paras. 34-44.

408. Working Group on Arbitrary Detention (WGAD), *Opinion No. 3/2016 concerning Farida Ali Abdul Hamid and Salim Mohamed Musa (Libya)*, UN Doc. A/HRC/WGAD/2016/3, 15 June 2016, paras. 5-6; *Opinion No. 6/2017 concerning Yousif Abdul Salam Faraj Ahbara and Others (Libya)*, UN Doc. A/HRC/WGAD/2017/6, 9 June 2017, paras. 4-28.

409. WGAD, *Opinion No. 3/2016*, paras. 14-21.

410. WGAD, *Opinion No. 6/2017*, paras. 14, 17; UNSMIL & OHCHR, *Abuse Behind Bars: Arbitrary and Unlawful Detention in Libya*, April 2018, p. 21.

411. UNSMIL & OHCHR, *Report on the Trial of 37 Former Members of the Qadhafi Regime (Case 630/2012)*, February 2017, pp. 24-25.

412. WGAD, *Opinion No. 4/2016 concerning Abdul Majed al-Gaoud and Others (Libya)*, UN Doc. A/HRC/WGAD/2016/4, 15 June 2016, paras. 4-34.

413. ICCPR, art. 9(2). See also Arab Charter, art. 14(3).

the person understands.<sup>414</sup> The existence of any charges must be communicated promptly, although not necessarily at the time of arrest, and in as much detail as is necessary “to facilitate the determination of whether the provisional detention is appropriate or not.”<sup>415</sup>

#### Libyan law in light of international law and standards

The CCP requires an investigator to inform accused persons of the charges against them and record any relevant statement the first time they appear in the investigation.<sup>416</sup> Information regarding the charges and identity of the accused must be included in the investigating judge’s order to arrest an accused,<sup>417</sup> and in the dismissal or referral orders the investigating judge issues at the end of an investigation.<sup>418</sup> The same provisions apply to investigations conducted by the Public Prosecutor.<sup>419</sup>

The CCP fails to require arresting officers to inform the accused of the charges when arrested pursuant to an arrest order or when caught *in flagrante delicto*, and to require the authorities to inform the accused of the reasons for arrest. This is non-compliant with Libya’s corresponding obligations under international law.

In practice, according to the OHCHR, detained persons rarely are apprised of the reasons for their arrest and the nature or existence of the charges against them.<sup>420</sup> In the *37 Gadhafi-regime members* case, UNSMIL and OHCHR recounted that a number of defendants had to wait until being brought before the prosecution in order to know the charges against them, which largely occurred between one and two years after their arrest.<sup>421</sup> The WGAD further documented several cases of persons who were arrested and detained without knowing the charges against them or where the charges were communicated in an insufficiently precise manner.<sup>422</sup> The practice of detaining persons without notifying them of the reasons or charges is in breach of articles 105 and 108 of the CCP as well as Libya’s international legal obligations, including under the ICCPR and the Arab Charter.

#### 4.2.3 Right to be brought promptly before a judge

##### International law

Judicial control must be asserted over a detained person automatically upon arrest and detention. Libyan authorities must ensure that “[a]nyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release.”<sup>423</sup>

The purpose of bringing persons deprived of their liberty promptly before a judge is to review the lawfulness of arrest or detention, establish conditions for continued detention or trial, such as bail, and prevent violations of the detainee’s rights, including torture and

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414. HRC, *General Comment No. 35*, paras. 24-28.

415. *Ibid.*, paras. 29-30.

416. CCP, art. 105. If enacted, article 63 of the 2017 Consolidated Draft Constitution would constitutionalize a requirement for a detained person to be notified of the reasons for their detention.

417. CCP, art. 107.

418. CCP, art. 138.

419. CCP, art. 172.

420. UNSMIL & OHCHR, *Abuse Behind Bars: Arbitrary and Unlawful Detention in Libya*, April 2018, pp. 21-22.

421. UNSMIL & OHCHR, *Report on the Trial of 37 Former Members of the Qadhafi Regime (Case 630/2012)*, February 2017, pp. 33-34.

422. WGAD, *Opinion No. 3/2016*, para. 10; *Opinion No. 4/2016*, paras. 16, 17, 26; *Opinion No. 6/2017*, paras. 16, 18-19, 24-25, 28.

423. ICCPR, art. 9(3). See also Arab Charter, art. 14(5); DPED, art. 10(1); *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*, principles 4, 11; AComHPR, *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*, principle M(3).

other ill-treatment, and enforced disappearance.<sup>424</sup> No person may be detained for longer than 48 hours before being brought before a judicial authority. Delays longer than 48 hours from arrest or detention should remain absolutely exceptional and be justified under the specific circumstances.<sup>425</sup>

Judicial control must “be exercised by an authority which is independent, objective and impartial in relation to the issues dealt with.” The Prosecutor can never constitute an objective, independent and impartial judge (discussed in more detail in section 4.3.1 below) for purposes of overseeing detention orders.<sup>426</sup> Impartiality standards require that the authority ordering the detention be separate from the one carrying out the prosecution. Consequently, judges and Prosecutors should have distinctly separate roles and be independent, not only from the executive and legislative branches, but from each other as well. For these reasons, an investigating judge may also not meet such requirements where they conduct the investigation and order pre-trial detention of the accused.

#### Libyan law in light of international law and standards

Judicial officers arresting and/or detaining accused persons must promptly question and refer them to the public prosecution within 48 hours if they suspect such persons are involved in a crime. This time frame may be extended up to seven days in cases involving crimes against the State.<sup>427</sup> The public prosecution has 24 hours to question an accused, after which she or he must decide whether to release or detain the accused.<sup>428</sup>

As discussed in section 4.2.1 above, an accused may be detained by the public prosecution for up to six days<sup>429</sup> before being brought in front of a judicial authority<sup>430</sup> or, in cases involving crimes against the State, by the police for seven days and then the public prosecution for up to two weeks before bringing them in front of a judicial authority.<sup>431</sup> They may also be detained by an investigating judge after interrogation or in the case of escape for 15 days or, in some circumstances, up to 30 days, before bringing them before a court of first instance to determine whether detention should continue.<sup>432</sup>

The provisions of the CCP governing arrest and detention are not compliant with international law and standards. By not subjecting the detention powers of police and public prosecution to prompt judicial review, articles 107, 115, 117, 122, 175 and 187 *bis* B of the CCP fail to ensure detention is subject to independent and impartial judicial control as required under international law.<sup>433</sup> As set out above, a Prosecutor cannot constitute a judicial authority within the meaning of article 9(3) of the ICCPR. The investigating judge, who has the authority to detain a person for up to 30 days before bringing them before the court of first instance, may also not constitute an impartial authority where they discharge functions of an investigating authority and an authority ordering the detention of the accused, in particular where they have been involved in interrogating the accused and determining whether the person should be indicted, roles which require them to take a position regarding whether the accused may be guilty.

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<sup>424</sup>. AComHPR, *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*, principle M(3)(b).

<sup>425</sup>. HRC, *General Comment No. 35*, para. 33.

<sup>426</sup>. *Ibid.*, para. 32.

<sup>427</sup>. These are set out in articles 165 ff. of the Penal Code, and include: bearing of arms by Libyans against the State (art. 165); plotting with a foreign State to make war on Libya (art. 166); plotting with foreigners to the detriment of Libya’s military or political status (art. 167).

<sup>428</sup>. CCP, art. 26.

<sup>429</sup>. CCP, art. 175.

<sup>430</sup>. CCP, art. 176.

<sup>431</sup>. CCP, arts. 26(2), 187 *bis* B; see also art. 137.

<sup>432</sup>. CCP, arts. 115, 122-123.

<sup>433</sup>. ICCPR, art. 9(3); *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*, principle 4.

Judicial control is indeed foreseen under articles 123 and 176, but only for extending detention, and under article 131 only once a case is referred to the Indictment Chamber or the criminal court.

UNSMIL and OHCHR reported that most of the 2011 conflict-related detainees have not appeared at all before judicial authorities and their detention has not been reviewed. It also documented the failure promptly to bring detainees before judicial authorities in a number of cases.<sup>434</sup>

The WGAD has also reported multiple cases of failure to bring arrested or detained persons promptly before a judge.<sup>435</sup> In the *37 Gadhafi-regime members* case, UNSMIL and OHCHR found that some of the detainees were held for prolonged periods of time, sometimes up to two years, before meeting judicial authorities.<sup>436</sup> The African Court on Human and Peoples' Rights also determined that Saif al-Islam Gadhafi, while in custody of an armed group in Zintan, had not been brought promptly before a proper judicial authority when taken before an extraordinary court later declared unconstitutional by the Libyan Supreme Court.<sup>437</sup>

The foregoing practice constitutes a failure to allow arrested or detained persons to appear promptly before judicial authorities in violation of articles 123, 177 and 187 *bis* B of the CCP as well as Libya's international legal obligations.

#### 4.2.4 Right to *habeas corpus*

##### International law

In addition to the right to be brought before a judicial authority, persons deprived of their liberty have the right to access a court at any time (*habeas corpus*), particularly in order to challenge the lawfulness of their or detention and related issues such as allegations of torture or ill-treatment, which must decide on their case without delay and release them if their detention is not justified.<sup>438</sup> The court reviewing the detention must be independent and impartial, and must have the power to order release.<sup>439</sup> The review must consider whether or not an arrest or detention was arbitrary or unlawful under both domestic law and international law and standards.<sup>440</sup> Persons unlawfully deprived of their liberty have an enforceable right to reparation, including compensation.<sup>441</sup>

##### Libyan law in light of international law and standards

The CCP does not provide for the right to access a court to challenge the lawfulness of detention or raise any related issues. The CCP provides the prisoners with the right to "submit a written or verbal complaint to the prison warden at any time and ask him to notify it to the Public Prosecution or to the competent judge. The warden shall accept it and notify it immediately after documenting it in a specific record at the prison." The public prosecution or competent judge is then obliged to "immediately proceed to the location of the detainee in question, conduct an investigation, order the release of the inmate detained illegally, and draw up a detailed report on all such facts."<sup>442</sup> Libya is not

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434. UNSMIL & OHCHR, *Abuse Behind Bars: Arbitrary and Unlawful Detention in Libya*, April 2018, pp. 21-22.

435. WGAD, *Opinion No. 3/2016*, para. 10; *Opinion No. 4/2016*, paras. 16, 18-19, 21, 24, 27; *Opinion No. 6/2017*, paras. 16, 19, 24-25, 28.

436. UNSMIL & OHCHR, *Report on the Trial of 37 Former Members of the Qadhafi Regime (Case 630/2012)*, February 2017, pp. 24-25.

437. African Court on Human and Peoples' Rights, *African Commission on Human and Peoples' Rights v. Libya*, Application No. 002/2013, Judgment, 3 June 2016, paras. 90-91.

438. ICCPR, art. 9(4); Arab Charter, art. 14(6).

439. HRC, *General Comment No. 35*, paras. 41-42, 45.

440. HRC, *A v. Australia*, UN Doc. CCPR/C/59/D/560/1993, 30 April 1997, para. 9.5.

441. ICCPR, art. 9(5); Arab Charter, art. 14(7).

442. CCP, art. 33.



compliant with international law as the provision does not grant the detained person direct access to a judge; access is dependent on the prison warden complying with their duty to submit the complaint or restricted to the public prosecution.

The CCP also does not provide a right to compensation or other reparation for persons who are unlawfully detained, except for political prisoners detained by the Gadhafi regime. Law No. 50 of 2012 on compensation of political prisoners provides for the payment of 8,000 Libyan Dinar's per month as compensation and indemnification to "any civilian or military person detained in prison or special detention camps from 01/09/1969 to 15/02/2011 due to opposition to the former regime."<sup>443</sup> Compensation is determined by a body established pursuant to Decree No. 1 of 2012, which is based on the duration of time the prisoner spent in detention.<sup>444</sup> The limited scope of compensation and reparations (discussed in Chapter 5) is not compliant with Libya's obligations under international law. If passed, article 64 of the 2017 Consolidated Draft Constitution would entitle a person who was unlawfully detained "to proper compensation upon an order to dismiss or upon the issuance of a judgment of acquittal due to the lack of a crime or evidence."

The WGAD recounted only one case in which a detainee has received compensation for his unlawful detention.<sup>445</sup> In all other cases documented by the WGAD following the 2011 uprising, detained persons have not had the opportunity to challenge their detention or obtain just compensation,<sup>446</sup> in violation of international law and standards.

#### 4.2.5 Right to legal counsel

##### International law

Any arrested person must have the right to the assistance of a lawyer of their own choice or an assigned lawyer during pre-trial proceedings, including during detention, questioning and preliminary investigations.<sup>447</sup> The right imposes a duty on Libyan authorities to inform the arrested person of their right<sup>448</sup> so they have adequate time and facilities for the preparation of their defence,<sup>449</sup> and to ensure they have adequate time to consult the lawyer in confidence and to have the lawyer present during questioning.<sup>450</sup> Access to legal counsel must be available immediately upon arrest and detainees should be afforded prompt and regular access to counsel throughout their detention.<sup>451</sup>

The burden is on the State, as represented by justice sector actors, and not on the accused, to ensure adequate and effective appointed legal counsel for those charged with criminal offences.<sup>452</sup> If the accused does not have the means to appoint counsel, they

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<sup>443</sup>. Law No. 50 of 2012 on Compensation of Political Prisoners, 11 June 2012, arts. 1-2. Under article 2, any amounts already awarded to the victim are deducted from this amount. Article 3 provides that any conviction of the political prisoner is revoked.

<sup>444</sup>. Decree No. 513 of 2013, issuing Executive Regulation of Law No. 50 of 2012, art. 7.

<sup>445</sup>. WGAD, *Opinion No. 4/2016*, para. 19.

<sup>446</sup>. WGAD, *Opinion No. 3/2016*; *Opinion No. 4/2016*; *Opinion No. 6/2017*.

<sup>447</sup>. ICCPR, art. 14(3)(d); Arab Charter, art. 16(4); ACHPR, arts. 3, 7; ICPED, art. 17(2)(d). The ICCPR and the ACHPR expressly provide for the right to legal counsel during the trial phase, however, human rights bodies have considered that such provisions apply to the pre-trial phase as well; see HRC, *Concluding Observations: Netherlands*, UN Doc. CCPR/C/NLD/CO/4, 25 August 2009, para. 11; AComHPR, *Liesbeth Zegveld and Mussie Ephrem v. Eritrea*, Communication No. 250/02, 20 November 2003, para. 55.

<sup>448</sup>. ICCPR, art. 14(3)(d); *Basic Principles on the Role of Lawyers*, Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, 27 August–7 September 1990, principles 1, 5.

<sup>449</sup>. HRC, *General Comment No. 32*, paras. 32 ff.

<sup>450</sup>. Arab Charter, art. 16(3); *Basic Principles on the Role of Lawyers*, principles 8, 22. Likewise, lawyers' case files should be protected from seizure and inspection, and phone calls from interception; Report of the Special Rapporteur on the Independence of Judges of Lawyers, UN Doc. A/64/181, 28 July 2009, para. 110.

<sup>451</sup>. HRC, *General Comment No. 35*, paras. 35, 46.

<sup>452</sup>. *Basic Principles on the Role of Lawyers*, principle 3.



have the right to have a lawyer assigned to them free of charge whenever the interests of justice require.<sup>453</sup>

### Libyan law in light of international law and standards

The investigating judge or the public prosecution may question an accused, as well as confront him or her with other accused or witnesses, only in the presence of a lawyer, except in cases of *flagrante delicto* or when there is a risk that evidence will be lost.<sup>454</sup> The lawyer, however, may only speak when authorized by the judge.<sup>455</sup> Accused persons have the right to choose their own lawyer<sup>456</sup> and, in felony cases, the State may appoint a lawyer if the accused has not chosen one.<sup>457</sup> A detained accused must always be guaranteed the right to contact his or her lawyer in private.<sup>458</sup> Investigators are forbidden from seizing documents from the accused's lawyer.<sup>459</sup>

The CCP is not in accordance with international law and standards insofar as (i) it does not guarantee the right to legal counsel upon arrest or shortly thereafter, (ii) allows an accused to be questioned upon arrest and confronted with other accused or witnesses without the presence of her or his lawyer of choice in cases of *flagrante delicto* or where there is a risk that the evidence will be lost; and (iii) only permits the lawyer the right to speak upon the authorization of the judge. The fact that the CCP does not ensure the accused's lawyer can actively and effectively participate in an interrogation and subjects counsel's questions to prior authorization by the investigative judge is contrary to the accused's rights to an effective legal counsel.

Libyan citizens may obtain free legal representation in "different types and degrees of cases" filed against or by them by submitting an application to the Department of People's Legal Defence, which is located in the Courts of the Appeal and Courts of First Instance.<sup>460</sup> All citizens are entitled to such legal representation, without restriction.

Such legal assistance is only provided to foreign nationals subject to the payment of a fee determined by the executive regulation of the law establishing the Department of People's Legal Defence.<sup>461</sup> Requests may also be submitted by the court or public prosecution to delegate a lawyer to defend a person whenever the law requires.<sup>462</sup> An individual may also request a waiver of court fees – judicial assistance – from the trial court where they do not have the financial means to pay them; an application cannot be filed in the meantime.<sup>463</sup> The criteria upon which legal aid may be provided is not set out in the law. The imposition of a fee on foreign nationals applying for legal aid violates the requirement that legal aid be provided on a non-discriminatory basis.

UNSMIL and OHCHR have reported that detainees are not informed of their right to legal counsel and do not have the possibility to meet in private with their lawyer; many are also

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<sup>453</sup>. ICCPR, art. 14(3)(d); Arab Charter, art. 16(4).

<sup>454</sup>. CCP, art. 106.

<sup>455</sup>. CCP, art. 106.

<sup>456</sup>. CCP, art. 106.

<sup>457</sup>. CCP, arts. 162(1), 187 *bis* (C), 321. If adopted, article 63 of the 2017 Consolidated Draft Constitution would constitutionalize an accused's right to be notified of their right "to choose and contact a lawyer."

<sup>458</sup>. CCP, art. 121.

<sup>459</sup>. CCP, art. 80.

<sup>460</sup>. Law No. 4 of 1981 establishing the Department of People's Legal Defence, 27 January 1981, arts. 3, 6-7.

<sup>461</sup>. *Ibid.*, art. 10.

<sup>462</sup>. *Ibid.*, art. 7.

<sup>463</sup>. According to an interview with a member of the Department of People's Legal Defence, court fees are relatively minor, normally amounting to 14 Libyan Dinars.

questioned without a lawyer being present at the interrogation.<sup>464</sup> The WGAD reported cases involving a number of individuals who were arrested and detained without access to a lawyer.<sup>465</sup> Serious delays in access to a lawyer were documented in the *37 Gadhafi-regime members* case.<sup>466</sup> During the trial, the Court rejected Mohammed Al-Sherif's argument that the absence of legal representation during the interrogation of his client rendered any evidence derived therefrom inadmissible,<sup>467</sup> finding there had been no violation of article 106 of the CCP.<sup>468</sup> Once they were brought before judicial authorities, and even where the Court appointed counsel to defendants, access to counsel by many of the defendants was restricted because of the security and political environment, with some counsel withdrawing from the case because of threats to their physical security.<sup>469</sup> Baghdadi Al-Mahmoudi complained that he had only met his lawyer on the day of the hearing, which he submitted was an inadequate amount of time to prepare a meaningful defence.<sup>470</sup>

Failure to provide an arrested or detained person with prompt access to a lawyer violates articles 106 and 121 of the CCP as well as international law and standards.

#### 4.2.6 Right to family visit and medical assistance

##### International law

Persons deprived of their liberty have the right to communicate with and be visited by their family or any other person of their choice,<sup>471</sup> including medical personnel.<sup>472</sup> They should be provided with adequate facilities to receive family visits, "subject to restriction and supervision only as are necessary in the interests of the administration of justice and of security of the institution."<sup>473</sup> Any refusal of or restriction on family visits to persons deprived of their liberty must not be unreasonable.<sup>474</sup> The deprivation of the right to family visit may even constitute cruel, inhuman or degrading treatment.<sup>475</sup> Prompt medical care should be provided free of charge to detained persons, who should be informed of this right.<sup>476</sup> Doctors should be independent of the detaining authorities or of the detained person's choice.<sup>477</sup> Women should have the right to access female practitioners.<sup>478</sup> Law enforcement officials must ensure that detainees health is protected and that medical assistance is provided when necessary.<sup>479</sup>

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464. UNSMIL & OHCHR, *Abuse Behind Bars: Arbitrary and Unlawful Detention in Libya*, April 2018, pp. 21-22.

465. WGAD, *Opinion No. 6/2017*, paras. 4-28; *Opinion No. 4/2016*, paras. 4-34.

466. UNSMIL & OHCHR, *Report on the Trial of 37 Former Members of the Qadhafi Regime (Case 630/2012)*, February 2017, pp. 37-38.

467. *Ibid.*, p. 37.

468. *Ibid.*

469. *Ibid.*, pp. 36-39.

470. *The State of Libya v. Saif al-Gadhafi, Abdullah al-Senussi & Others*, Case No. 630/2012, July 2015, p. 14.

471. ICPPED, art. 17(2)(d); *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*, principle 19; *United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules)*, UN Doc. A/RES/70/175, 17 December 2015, rule 58.

472. Arab Charter, art. 14(4); *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*, principle 24.

473. AComHPR, *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*, principle M(2)(g).

474. *Ibid.*, para. M(2)(g).

475. AComHPR, *Civil Liberties Organisation v. Nigeria*, Communication No. 151/96, 15 November 1999, para. 27.

476. AComHPR, *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*, para. M(2)(b).

477. CAT Committee, *General Comment No. 2*, para. 13.

478. *United Nations Rules for the Treatment of Women Prisoners and Non-Custodial Measures for Women (Bangkok Rules)*, UN Doc. A/C.3/65/L.5, 6 October 2010, rule 10(2).

479. *Code of Conduct for Law Enforcement Officials*, art. 6.

## Libyan law in light of international law and standards

Under the CCP, the Public Prosecution and the investigating judge may order that no one visit the accused, without prejudice to the right of the accused to always contact her or his attorney in private.<sup>480</sup> A person who is sentenced to death is only guaranteed the right to a family visit on the day of the execution.<sup>481</sup>

The unfettered authority of the Prosecutor or the investigating judge to limit or even deny an accused's right to be visited by her or his family does not comply with international law. Particularly remarkable is the absence of prescriptions on the need to provide specific reasons to restrict this right and on temporal limitations to such restrictions. The limitation of family visits for persons awaiting the execution of the death penalty is also unfounded and contrary to Libya's obligations under international law.

UNSMIL and OHCHR as well as the WGAD have documented cases in which individuals have been held without the visits by their family,<sup>482</sup> a practice which is in violation of international law and standards.

### 4.2.7 Right to adequate time and facilities to prepare a defence

#### International law

Libya must ensure accused persons have "adequate time and facilities for the preparation of [their] defence," including during the investigative phase.<sup>483</sup> This ensures the right to equality before the law and courts, which entails equal treatment by the courts.<sup>484</sup> "Adequate time" means that a lawyer must have sufficient time to prepare the accused's defence; the adequacy of such time will vary in light of the concrete circumstances.<sup>485</sup>

An accused has a right to have their case adjourned accordingly, particularly when they are charged with a serious criminal offence.<sup>486</sup> "Adequate facilities" requires that the accused and the lawyer have timely access to the relevant information on which the prosecution intends to rely (i.e., disclosure) including exculpatory material and information about the circumstances in which evidence allegedly obtained through torture or ill-treatment was acquired; the accused has "the right to [retain] materials necessary to the preparation of a defence," including copies of the case file.<sup>487</sup>

## Libyan law in light of international law and standards

The 2011 Constitutional Declaration states that "[a]ny defendant ... shall be granted the guarantees necessary to defend himself."<sup>488</sup> The CCP allows interested parties to request copies of any files during the investigation at their own expenses, "unless the investigation was conducted in their absence pursuant to a decision in this regard."<sup>489</sup> The accused's

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<sup>480</sup>. CCP, art. 121.

<sup>481</sup>. CCP, art. 432.

<sup>482</sup>. UNSMIL & OHCHR, *Abuse Behind Bars: Arbitrary and Unlawful Detention in Libya*, April 2018, pp. 22, 28-29, 32; WGAD, *Opinion No. 3/2016*, paras. 6, 8; *Opinion No. 6/2017*, paras. 14-15, 17-18, 20, 26.

<sup>483</sup>. ICCPR, art. 14; Arab Charter, art. 16(2); AComHPR, *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*, principle N(3).

<sup>484</sup>. ICCPR, arts. 14(1), 26; Arab Charter, art. 12; CEDAW, arts. 2(c), 15(1); CERD, arts. 2, 5(a); CRPD, arts. 12-13.

<sup>485</sup>. AComHPR, *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*, principle N(3)(c).

<sup>486</sup>. HRC, *General Comment No. 32*, para. 32.

<sup>487</sup>. *Basic Principles on the Role of Lawyers*, principle 21; HRC, *General Comment No. 32*, para. 33.

<sup>488</sup>. 2011 Constitutional Declaration, art. 31. If adopted, article 63 of the 2017 Consolidated Draft Constitution would constitutionalize a detainee's right to "be given sufficient time and the necessary facilities to prepare his defense."

<sup>489</sup>. CCP, art. 68.

lawyer can review the case file upon which a referral order was based once a case has been referred for prosecution to the competent court.<sup>490</sup> There is, however, no provision for making copies of the file. According to the information available to the ICJ, in practice, some Prosecutors occasionally allow counsel to make copies of the file; such practice differs from region to region. Litigants may also "review the case documents as soon as they are summoned to appear before the court."<sup>491</sup>

The CCP also restricts an accused's (and Prosecutor's) right to challenge evidence gathering or investigation procedures if they took place before the accused's lawyer and the lawyer did not object at the time; in such cases the accused's (and Prosecutor's) right to challenge such procedures subsequently is extinguished.<sup>492</sup> Furthermore, the CCP is silent regarding the accused's right to adequate time and facilities to prepare a defence during questioning.<sup>493</sup>

In light of the foregoing, Libyan law fails fully to guarantee an accused's right to adequate time and facilities to prepare a defence because: (i) it does not impose an obligation to disclose all evidence to the accused before a case is referred to court for prosecution; (ii) the accused's lawyer has no right to make copies of the case file; (iii) the accused is not provided with adequate time to challenge evidence gathering or investigation procedures if her or his lawyer did not object at the first available occasion; and (iv) the CCP is silent on the right to adequate time and facilities to prepare a defence during the interrogation phase.

In practice, accused are not afforded sufficient time and facilities to prepare a defence. The WGAD reported that, in one case, Abdul Majed al-Gaoud was not provided with the necessary documentation to prepare his defence adequately.<sup>494</sup> UNSMIL and OHCHR documented the difficulties faced by several defendants in the *37 Gadhafi-regime members* case in accessing relevant documentation and, more generally, in preparing their defence adequately.<sup>495</sup> At several hearings, defence lawyers petitioned the court for access to key information, including a copy of the accusation file and list of witness and their affidavits. While the court appears to have approved the petition, the fact that defence lawyers made similar requests at subsequent hearings would suggest that access to key information and evidence remained an issue throughout the trial.<sup>496</sup> Even when lawyers obtained copies of the accusation file, some maintained that they did not have sufficient time to examine and assess all the evidence contained therein and that some documents were missing from the case file.<sup>497</sup> UNSMIL reported that, in some instances, the Court granted lawyers additional time to prepare their defence.<sup>498</sup> Such practices are in breach of Libyan domestic law as well as international law and standards.

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490. CCP, art. 163.

491. CCP, art. 209.

492. CCP, art. 306: "[i]n cases other than those mentioned in the foregoing article, the right to request invalidation of evidence gathering, initial investigation, or in-session investigation procedures in felonies and misdemeanours shall be extinguished if the accused has a lawyer, and the procedure has taken place before the attorney and the latter failed to make an objection. ... The Public Prosecution shall lose the right to request invalidation when the Public Prosecution does not make an objection at the time."

493. CCP, arts. 26, 105-106, 112.

494. WGAD, *Opinion No. 4/2016*, para. 16.

495. UNSMIL & OHCHR, *Report on the Trial of 37 Former Members of the Qadhafi Regime (Case 630/2012)*, February 2017, pp. 40-41.

496. *The State of Libya v. Saif al-Gadhafi, Abdullah al-Senussi & Others*, Case No. 630/2012, July 2015, pp. 1-65.

497. UNSMIL & OHCHR, *Report on the Trial of 37 Former Members of the Qadhafi Regime (Case 630/2012)*, February 2017, pp. 41-42.

498. *Ibid.*

#### 4.2.8 Right not to be compelled to incriminate oneself

##### International law

Article 14(3)(g) of the ICCPR and article 16(6) of the Arab Charter protect the right “[n]ot to be compelled to testify against oneself or to confess guilt” at any time, including before trial and during police questioning.<sup>499</sup> The right to remain silent is part of this right as well as part of the right to be presumed innocent.<sup>500</sup> Anyone suspected of a crime should be informed of their right to remain silent and their right not to incriminate themselves when they are arrested and before they are questioned.<sup>501</sup> The right prohibits any form of coercion, whether direct or indirect, physical or psychological including, but not limited to, torture and ill-treatment.<sup>502</sup> It also prohibits the introduction of a “confession” obtained through coercion.<sup>503</sup> Upon any allegation that a “confession” or other statement was obtained through coercion, the judge should have the authority to consider the allegation and the burden is on the Prosecution to show that the statement was given voluntarily.<sup>504</sup>

The prohibition against self-incrimination also requires the court to establish before a guilty plea that the plea is voluntary and that the accused understands the nature of the charges and consequences of the plea, and that the accused is competent.<sup>505</sup>

##### Libyan law in light of international law and standards

The 2011 Constitutional Declaration provides that “[a]ny defendant shall be innocent until he is proved guilty by a fair trial ...”<sup>506</sup> The only reference to this right in the CCP states that “[t]he accused shall not be questioned without his consent.”<sup>507</sup>

The CCP is not in compliance with international law because it does not explicitly guarantee the right to remain silent during the investigation phase of the case. Article 247 is also not in line with international law insofar as it fails to ensure that the defendant be informed of their right not to testify against themselves or confess guilt.

UNSMIL and OHCHR reported that many defendants in the *37 Gadhafi-regime members* case were not informed of their right to remain silent,<sup>508</sup> which violates international law and standards.

#### 4.3 Trial rights

The right to a fair trial under article 14 of the ICCPR, articles 12 to 13 and 15 to 17 of the Arab Charter, and article 7 of the ACHPR functions “as a procedural means to safeguard

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499. AComHPR, *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*, principles M(2)(f), N(6)(d); HRC, *Concluding Observations: France*, UN Doc. CCPR/C/FRA/CO/4, 22 July 2008, para. 14.

500. AComHPR, *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*, principle N(6)(d)(ii).

501. HRC, *Concluding Observations: France*, UN Doc. CCPR/C/FRA/CO/4, 22 July 2008, para. 14.

502. HRC, *General Comment No. 32*, para. 41. See also AComHPR, *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*, principle N(6)(d)(i) (a confession obtained during incommunicado detention is considered as obtained by coercion).

503. ICCPR, art. 7; CAT, art. 15. See also HRC, *General Comment No. 32*, para. 41.

504. HRC, *General Comment No. 32*, para. 41.

505. ICTR, *The Prosecutor v. Jean Kambanda*, Case No. ICTR-97-23-A, Appeal Chamber, Judgment, 19 October 2000, para. 61

506. See also 2017 Consolidated Draft Constitution, art. 62: “People shall be initially assumed innocent and a person charged shall be presumed innocent until proven guilty;” art. 63: a detainee must “be notified of ... his right to not be forced to submit any evidence against himself and his responsibility for the statements he makes.”

507. CCP, art. 247. Articles 26, 105-106 and 112 of the CCP, which regulate the investigators’ authorities to question an accused during the investigation, do not make any reference to the right to remain silent.

508. UNSMIL & OHCHR, *Report on the Trial of 37 Former Members of the Qadhafi Regime (Case 630/2012)*, February 2017, pp. 31-32.

the rule of law.”<sup>509</sup> The right imposes a number of obligations binding on Libya, including the rights to be tried by a competent, independent and impartial tribunal established by law, to a public hearing, to be represented by counsel, to call and examine witnesses, to be tried in one’s presence, to the exclusion of evidence obtained in violation of international standards, and to appeal. These obligations will be dealt with in turn.

#### 4.3.1 Right to trial before a competent, independent and impartial tribunal

##### International law

Everyone charged with a criminal offence is entitled to a trial by a competent, independent and impartial court or tribunal established by law.<sup>510</sup> Article 13(1) of the Arab Charter provides that “[e]veryone has the right to a fair trial that affords adequate guarantees before a competent, independent and impartial court that has been constituted by law to hear any criminal charge against him or to decide on his rights or his obligations.” Article 14(1) of the ICCPR provides for the same right. The requirement of an independent and impartial judiciary is affirmed in numerous international instruments, including the UN Basic Principles on the Independence of Judiciary. The right to an independent and impartial hearing is “an absolute right that may suffer no exception.”<sup>511</sup> It is a general principle of customary international law, binding on all States including during situations of emergency and armed conflict.<sup>512</sup>

##### *Established by law*

The requirement for courts and tribunals to be established by law requires them to be established by a constitution, by legislation passed by a competent legislative authority, or those to whom such authority delegates for the purposes of administrative law, or by common law. The requirement ensures that Libyan courts and tribunals that do not use established legal procedures are not created to displace the jurisdiction belonging to ordinary courts.<sup>513</sup>

##### *Competent*

In order for a Libyan court or tribunal to make a determination on a particular matter, the matter must fall within its competence.<sup>514</sup> The court or tribunal must have the necessary jurisdictional authority over the subject matter and the person on trial,<sup>515</sup> and may only decide on jurisdictional matters in accordance with the law.<sup>516</sup>

##### *Independent*

Among the most important components of article 14 of the ICCPR is the requirement for trials to be conducted by independent tribunals.<sup>517</sup> The notion of “independence” pertains to both the judiciary as a whole, and to individual judges.

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<sup>509</sup> HRC, *General Comment No. 32*, para. 2.

<sup>510</sup> ICCPR, art. 14(1); Arab Charter, arts. 12-13; ACHPR, arts. 7(1), 26; AComHPR, *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*, principles A(1), (4)(b).

<sup>511</sup> HRC, *Miguel González del Río v. Peru*, UN Doc. CCPR/C/46/D/263/1987, 2 November 1992, para. 5.2.

<sup>512</sup> HRC, *General Comment No. 32*, para. 19; HRC, *General Comment No. 29*, para. 16; ICCPR, art. 4; Arab Charter, art. 4.

<sup>513</sup> *Basic Principles on the Independence of the Judiciary*, Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, 26 August-6 September 1985, principle 5.

<sup>514</sup> AComHPR, *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*, principle A(4)(b).

<sup>515</sup> *Ibid.*, principle A(4)(c).

<sup>516</sup> *Ibid.*, principle A(4)(b)-(d).

<sup>517</sup> See also Arab Charter, arts. 12-13; ACHPR, art. 26.

The former, also referred to as institutional independence, is delineated in principle 1 of the Basic Principles on the Independence of Judiciary, which requires “all governmental and other institutions to respect and observe the independence of the judiciary.”<sup>518</sup> This imposes an obligation on Libya to ensure that the judiciary is free from improper external influences, and that any decisions deriving from judicial bodies are respected by other State institutions. The notion of institutional independence is therefore premised, and reliant on, the separation of powers.<sup>519</sup>

Institutional independence must operate in tandem with individual independence, such that individual judges can discharge their functions free from unwarranted influences and interferences from within and outside the judiciary.<sup>520</sup> Libya must ensure that judges and adjudicators are empowered to objectively decide on the set of facts before them in accordance with the law, without fear of reprisal.<sup>521</sup> To preserve judicial independence, the judicial selection process must be transparent, accountable, and ideally made by an independent body,<sup>522</sup> and safeguarded against judicial appointments for improper motives or on the basis of any particular attribute.<sup>523</sup> Judges must be selected, appointed and promoted primarily by virtue of their legal expertise, experience and integrity.<sup>524</sup> Particular steps should be taken to appoint women and members of minorities to the judiciary.<sup>525</sup> Libya must ensure that judges’ term of office and security, remuneration, conditions of service, pensions and the age of retirement are adequately secured by law,<sup>526</sup> and that their tenure is guaranteed until the mandatory retirement age or expiration of their term, unless they are incapable of carrying out their duties or their conduct is incompatible with their office.<sup>527</sup>

Where gross misconduct or incompetence incompatible with judicial office occurs, judges may be subjected to expeditious and fair disciplinary procedures or sanctions such as suspension or dismissal by an independent and impartial body in accordance with established standards of judicial conduct.<sup>528</sup>

In order for judges to render justice promptly and impartially, Libya must allocate sufficient human and financial resources to judicial training throughout a judge’s career.<sup>529</sup>

### *Impartiality*

Article 14(1) of the ICCPR, article 13 of the Arab Charter and article 7(1) of the ACHPR require tribunals to be impartial. This means judges must not allow personal bias or prejudice to enter into their deliberations, be predisposed to rule in a certain direction on the issues

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**518.** *Basic Principles on the Independence of the Judiciary*, principle 1.

**519.** Report of the Special Rapporteur on the Independence of Judges and Lawyers, UN Doc. E/CN.4/1995/39, 6 February 1995, para. 55. See also *Basic Principles on the Independence of the Judiciary*, principle 1.

**520.** See further ICJ, *International Principles on the Independence and Accountability of Judges, Lawyers and Prosecutors - Practitioner’s Guide No. 1*, 2004, p. 25.

**521.** *Basic Principles on the Independence of the Judiciary*, principle 2; AComHPR, *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*, principle A(4)(c), (f).

**522.** AComHPR, *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*, principle A(4)(h).

**523.** *Basic Principles on the Independence of the Judiciary*, principle 10: “in the selection of judges, there shall be no discrimination against a person on the grounds of race, colour, sex, religion, political or other opinion, national or social origin, property, birth or status.” Any domestic legal provision that requires a candidate for judicial office to be a national of the country concerned is not considered to be discriminatory; *ibid.*, principle 10.

**524.** *Basic Principles on the Independence of the Judiciary*, principles 10, 13; AComHPR, *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*, principles A(4)(i), 4(o).

**525.** *Protocol to the African Charter on the Rights of Women (Maputo Protocol)*, art. 8; HRC, *Concluding Observations: United Kingdom*, UN Doc. CCPR/CO/73/UK, 6 December 2001, para. 15.

**526.** Arab Charter, art. 12; *Basic Principles on the Independence of the Judiciary*, principles 7, 11.

**527.** *Basic Principles on the Independence of the Judiciary*, principles 11-12, 18.

**528.** HRC, *General Comment No. 32*, para. 20.

**529.** HRC, *Concluding Observations: Republic of the Congo*, UN Doc. CCPR/C/79/Add.118, 25 April 2000, para. 14.



before them, or act in a manner that furthers the interests of one party over the other.<sup>530</sup> Judges must “also appear to a reasonable observer to be impartial,”<sup>531</sup> meaning they must be perceived by a reasonable observer to dispense justice with fairness. The Libyan judiciary therefore has an obligation to ensure that matters before them are decided impartially, on the basis of facts and in accordance with law and without restrictions, improper influences, inducements, pressures and/or threats from any quarter for any reason.<sup>532</sup>

Judges are entitled to freedom of expression, belief, association and assembly like any other individual. In exercising such rights, they must “always conduct themselves in such a manner as to preserve the dignity of their office and the impartiality and independence of the judiciary,”<sup>533</sup> and refrain from making comments that may affect the result of proceedings.

### Libyan law in light of international law and standards

Efforts to reform the Libyan judiciary and safeguard its independence began during the transitional period in 2011 under the auspices of the NTC. Article 32 of the 2011 Constitutional Declaration enshrined the independence of the judiciary, stating that:

The judicial authority shall be independent. It shall be exercised by courts of justice of different sorts and competences. They shall issue their judgments in accordance with the law. Judges shall be independent, subject to no other authority but the law and conscience. Establishing exceptional courts shall be prohibited.<sup>534</sup>

In its report on *Challenges for the Libyan Judiciary: Ensuring Independence, Accountability and Gender Equality*, published in 2016, the ICJ examined shortcomings in the legal framework governing the selection, appointment, promotion, tenure and training of the judiciary in Libya and found that it falls short of international law and standards.

In terms of judicial selection and appointment,<sup>535</sup> the criteria which continue to apply for judicial appointments<sup>536</sup> fall short of international standards in two respects. First, the

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<sup>530</sup>. HRC, *General Comment No. 32*, para. 21.

<sup>531</sup>. *Ibid.*

<sup>532</sup>. *Basic Principles on the Independence of the Judiciary*, principle 2; AComHPR, *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*, principles A(2)(h), (5)(a), (5)(e).

<sup>533</sup>. *Basic Principles on the Independence of the Judiciary*, principle 8.

<sup>534</sup>. 2011 Constitutional Declaration, art. 32. In article 118, the 2017 Consolidated Draft Constitution also makes explicit reference to the independence of the judiciary, stating that “its function shall be to establish justice, guarantee the rule of law, and protect rights and liberties.” It also provides that judges must commit to the principles of integrity, independence and impartiality in performing their functions, and that interference with the work of the judiciary is a crime for which there is no statute of limitations.

<sup>535</sup>. In 2011, the Minister of Justice was removed as a member of the Supreme Judicial Council (SJC) – the body responsible for overseeing the careers of judges, regulating issues relating to their selection, appointment, promotion, tenure, retirement and discipline – and its composition was restricted to the President of the Supreme Court, the Prosecutor General and the Presidents of the seven courts of appeal. See Law No. 4 of 2011 amending Law No. 6 of 2006 on the Judicial System, 16 November 2011. See also Law No. 14 of 2013 amending some Provisions of the Judicial System Law, 27 May 2013. For an overview of the SJC see ICJ, *Challenges for the Libyan Judiciary: Ensuring Independence, Accountability and Gender Equality*, 2016, pp. 23-30.

<sup>536</sup>. The criteria specify that anyone appointed to a judicial body must enjoy full capacity; hold Libyan nationality; have obtained a university degree in Islamic Sharia or law from a college of the Great Jamahiriya (the former name of Libya), or an equivalent foreign diploma (in these circumstances, the candidate must pass an examination as per a decision issued by the Minister of Justice); have successfully completed the relevant qualification programme at the Higher Judicial Institute (in these circumstances, the candidate must pass an examination as per a decision issued by the Minister of Justice); be commendable and of good reputation; not have been found guilty of a felony or misdemeanour involving moral turpitude or dishonesty; not have been dismissed or transferred to a non-judicial position by a disciplinary board; be medically fit; not suffer from any handicap that prevents him from discharging his duties; be over 40 years of age to fill the position of counsellor; be over 30 years of age to fill the position of judge; be over 21 years of age to fill other positions within judicial bodies; not be married to a non-Arab woman (this requirement may be waived by way of decree issued by the SJC).

requirement that judges must be “medically fit and must [not] suffer from any handicap that prevents him from performing his duties to the fullest extent.”<sup>537</sup> is discriminatory in the absence of legislation that provides for the “reasonable accommodation” of persons with a disability to ensure their rights on an equal basis with others, as stipulated in article 5(3) of the CRPD, which Libya has ratified. Second, the requirement that judges not be married to a non-Arab woman<sup>538</sup> is discriminatory and impairs a judge’s right to privacy and family life under the ICCPR, the Arab Charter and the ACHPR.<sup>539</sup>

The criteria for promotion to the grade of counsellor, its equivalent, or lower are limited to “seniority and with consideration given to competence”<sup>540</sup> and do not require objective factors such as “ability, integrity and experience,” as required by international standards. There also seems to be no requirement for judges to undertake continuous professional development training, bar a reference in Decree No. 4 of 2008, which stipulates that the Judicial Body Inspection Department can recommend judges undertake additional training and grant leave to those who wish to pursue full-time study.<sup>541</sup> According to the International Crisis Group in 2013, there is need for a greater focus on the training of judges in Libya because of the legacy of the Gadhafi regime’s “People’s Court” in which less qualified and more politicized judges worked, and who were later reappointed to work in ordinary courts when the People’s Court was disbanded.<sup>542</sup> The International Crisis Group also indicated that around 40 per cent of judges in Libya had not been adequately trained.<sup>543</sup> Furthermore, the Judicial Institute, responsible for the training of judges, is subsidiary to the Ministry of Justice.<sup>544</sup> The Director is appointed by the government following recommendation from the Minister of Justice,<sup>545</sup> two members of the administration committee are selected by the Minister of Justice, all administrative and other decisions are subject to the approval of the Minister of Justice, and the Minister of Justice<sup>546</sup> has the discretion to call a meeting of the Administrative Committee at any time and may attend and chair the meeting.<sup>547</sup> The significant involvement of the Minister of Justice in the administration of judicial training poses a threat to the independence of the judiciary.

The requirements for a judge to recuse themselves because of actual or perceived bias are insufficient to ensure their impartiality. The CCP provides that “[t]he judge shall abstain from participating in considering the action if it was committed against him personally, if he acted as the judicial officer, official of the Public Prosecution, or lawyer of one of the litigants, if he testified, or if he acted as an expert;” in the verdict “if he conducted any of the investigation or referral procedures in the action; or in the appeal “if he rendered the appealed verdict.”<sup>548</sup> It does not require a judge to recuse themselves if they have a personal interest other than because the crime was committed against them.

Challenges relating to the right to a fair trial before a competent tribunal have been raised in practice. In the *37 Gadhafi-regime members* case, Muhammed Ahmed Mansur al-Sherif argued that the court should declare a mistrial because the verdict had been issued by an “exceptional court” in contravention of the prohibition contained in the Constitutional

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537. Law No. 6 of 2006 on the Judicial System, 5 March 2006, art. 43(7).

538. Ibid., art. 43(9). The requirement may be waived by a decree issued by the SJC.

539. ICCPR, art. 17; Arab Charter, art. 21; ACHPR, art. 28.

540. Law No. 6 of 2006, art. 47. As with cases of appointment, promotions are granted by the SJC upon recommendations made by the Judicial Bodies Inspection Department (JBID); *ibid.*, arts. 28-29.

541. Decree No. 4 of 2008 on the Judicial Inspection Regulation, 13 January 2008, arts. 4(3-4).

542. International Crisis Group, *Trial by Error: Justice in Post Qadhafi Libya*, 2013, p. 12.

543. *Ibid.*, p. 12.

544. Decree No. 208 of 1988.

545. *Ibid.*, art. 8.

546. *Ibid.*, arts. 6-7.

547. *Ibid.*, art. 5.

548. CCP, art. 220. The CCP also provides that “neither members of Public Prosecution nor judicial officers shall be subject to recusal;” art. 221.

Declaration. The accused disputed the transfer of Justice Abdulqader Gadur from the Court of Appeal of the Green Mountains and Justice al-Saddiq Badi from the Court of Appeal of Misrata to the Court of Appeal of Tripoli. In his view, this resulted in an exceptional court with “unnatural judges” hearing the case, as opposed to an active circuit of the Court of Appeal in Tripoli.<sup>549</sup> The prosecution responded that the court had relevant jurisdiction over the case and that “it applied the regular procedure of a natural judge.”<sup>550</sup> The verdict is currently being challenged before the Court of Cassation.<sup>551</sup>

Reports from late 2018 indicate that the LNA announced it would commence military trials for “terrorist groups” in eastern Libya.<sup>552</sup> Although there is little information about whether such trials are underway, these reports raise concerns about whether such trials would be conducted by competent and independent bodies established by law if carried out by bodies established by the LNA rather than the military tribunals established under the current legal framework.

#### 4.3.2 Right to a public hearing

##### International law

Libya has an obligation under Article 14(1) of the ICCPR, article 7 of the ACHPR<sup>553</sup> and article 13(2) of the Arab Charter to conduct trials publicly. Article 13(2) of the Arab Charter states that “[t]rials shall be public, except in exceptional cases that may be warranted by the interests of justice in a society that respects human freedoms and rights.”<sup>554</sup> Under the Arab Charter, the right is not subject to any derogation in times of public emergency pursuant to article 4.

The right to a public trial requires Libya to ensure that all court hearings are open to the public and that court judgments are published.<sup>555</sup> Libya must ensure that both domestic legislation and judicial practice grant entrance to members of the public, including the media, to hearings,<sup>556</sup> which entails making information such as the time and venue of oral hearings available and the provision of adequate facilities to facilitate attendance.<sup>557</sup>

Under article 14(1) of the ICCPR and the Principles and Guidelines on the Right to Fair trial in Africa, Libyan courts can only restrict the media and public’s access to trial proceedings in exceptional circumstances, where it is: (i) in the interests of justice for the protection of children, witnesses or the identity of victims of sexual violence;<sup>558</sup> or (ii) for reasons of public order or national security in an open and democratic society that respects human

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549. UNSMIL & OHCHR, *Report on the Trial of 37 Former Members of the Qadhafi Regime (Case 630/2012)*, February 2017, p. 21.

550. *Ibid.*, p. 21.

551. The appeal is being heard by the Criminal Chamber of the Supreme Court, which in this context functions as a Court of Cassation.

552. Middle East Eye, *Libyan National Army Announces Start of Military Trials for Terrorist Groups*, 7 November 2018.

553. Although there is no explicit reference to a public hearing in article 7, the African Commission has held that a failure to hold a public hearing violates the right to a fair trial under article 7 of the ACHPR; AComHPR, *Media Rights Agenda v. Nigeria*, Communication No. 224/98, 6 November 2000, paras. 51-54; *Civil Liberties Organisation, Legal Defence Centre, Legal Defence and Assistance Project v. Nigeria*, Communication No. 218/98, 7 May 2001, paras 35-39.

554. See also AComHPR, *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*, principles A(1), (3), (D).

555. HRC, *General Comment No. 32*, para. 28; *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*, principle 36(1). The right to a public hearing is not necessarily applicable to all pre-trial or appeal proceedings, however the parties submission and judicial orders and decisions should be published; HRC, *General Comment No. 32*, paras. 28-29.

556. HRC, *G.A. Van Meurs v. Netherlands*, UN Doc. CCPR/C/39/D/215/1986, 13 July 1990, para. 6.1.

557. HRC, *General Comment No. 32*, para. 28.

558. AComHPR, *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*, principle A(3)(g)-(i).

rights and the rule of law.<sup>559</sup> Such restrictions are subject to the principles of necessity and proportionality, which can mean that the public could be excluded from portions of the proceedings but not from the entirety of the trial,<sup>560</sup> or that witnesses are subject to protective measures.<sup>561</sup> Where the court deems it necessary to exclude the media and public from trial proceedings, the judgment rendered, including the essential findings, evidence and legal reasoning must be pronounced in public,<sup>562</sup> except where the interest of minors otherwise requires or in matrimonial dispute or guardianship cases.<sup>563</sup> This could entail the redaction, rather than the wholesale confidentiality of the judgment.

### Libyan law in light of international law and standards

While the CCP requires hearings to be public, it provides that “the court shall be entitled to order the action to be heard, whether wholly or partially in a closed hearing or to ban certain classes from attending, in accordance with public order or to maintain public morality.”<sup>564</sup> Trials may be broadcast on television and transmitted on, for example, public screens.<sup>565</sup> There is no explicit right to a public hearing on appeal.

The court must also publish a written verdict within eight days of its oral issuance, “as much as possible,”<sup>566</sup> and deliver the sentence in a public hearing even if the “case was deliberated in a closed hearing.”<sup>567</sup>

According to the information provided to the ICJ, written judgments are rarely published with the 8-day timeframe, but are published within 30-days whether or not there are compelling reasons for such delay. The verdict in trials *in absentia* for “absconding accused” must be posted on the Court’s notice board and, at the request of the Prosecutor, a description of the charge(s) and dispositive portion of the verdict in the Official Gazette and two local newspapers.<sup>568</sup>

The domestic framework is not compatible with international law and standards insofar as it permits a court to close hearings either wholly or partially to “certain classes” for reasons not permitted, namely to maintain “public morality.”<sup>569</sup> The provision also appears, on its face, to be discriminatory to the extent it is applied only to “certain classes” rather than the media and public generally, contrary to the prohibition on discrimination in the ICCPR, the Arab Charter and the ACHPR.<sup>570</sup>

Violations of the right surfaced in the *37 Gadhafi-regime members* case. UNSMIL reported that the Public Relations Department of the al-Hadhba Prison in Tripoli, where the trial was held and the defendants were detained, made the hearings accessible to the public but that guards at the facility, who “appeared to exercise a degree of discretion in permitted entry,” limited access by members of the international community, international NGO personnel, relatives of the defendants and the general public.<sup>571</sup> On one occasion, representatives of the NGO No Peace Without Justice were asked to leave a hearing by a guard in military

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<sup>559</sup>. ICCPR, art. 14(1); Arab Charter, art. 13(2).

<sup>560</sup>. Amnesty International, *Fair Trial Manual*, 2014, p. 123.

<sup>561</sup>. AComHPR, *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*, principle A(3)(g)-(i).

<sup>562</sup>. HRC, *General Comment No. 32*, para. 29.

<sup>563</sup>. Ibid.

<sup>564</sup>. CCP, art. 241.

<sup>565</sup>. Law No. 7 of 2014 on amending Certain Provisions on the Code of Criminal Procedure, 24 March 2014, art.1; CCP, art. 241.

<sup>566</sup>. CCP, art. 285.

<sup>567</sup>. CCP, art. 276.

<sup>568</sup>. CCP, art. 352.

<sup>569</sup>. “Morals” is a basis for the exception to a public hearing under article 14 of the ICCPR, however this notion is contested.

<sup>570</sup>. ICCPR, art. 16; Arab Charter, art. 3; ACHPR, art. 2.

<sup>571</sup>. UNSMIL & OHCHR, *Report on the Trial of 37 Former Members of the Qadhafi Regime (Case 630/2012)*, February 2017, pp. 34-36.

fatigues, taken to another building and questioned for several hours until their release later that day. UNSMIL staff and journalists encountered similar treatment. The 14 April 2014 hearing was closed to all except UNSMIL staff and certain journalists.<sup>572</sup> While some local television stations broadcast the trial, sessions were repeatedly interrupted by breaking news or technical interference.<sup>573</sup> According to UNSMIL, some sessions were not broadcast at all, including, crucially, those dedicated to the prosecution's case.<sup>574</sup>

The prosecution's case and supporting evidence was never made known to the public<sup>575</sup> and the trial judgment was never published. A judicial record establishing the historical facts relating to the events of 2011 would have assisted the Libyan public to understand what happened during the conflict and the complicity of the defendants on trial therein.

### 4.3.3 Right to be represented by counsel

#### International law

As set out in section 4.2.5 above, pursuant to articles 9 and 14 of the ICCPR, the article 16 of the Arab Charter and article 7 of the ACHPR, any arrested person has the right to the assistance of a lawyer of their own choice or an assigned lawyer during pre-trial proceedings. The right to be represented by counsel continues into the trial phase, in which all persons charged with a criminal offence have the right to defend themselves in person or through legal counsel of their choosing.<sup>576</sup> The rights to defend oneself in person and through legal counsel are not mutually exclusive. Accused persons retain the right to instruct their legal counsel on the conduct of their case and testify on their own behalf.<sup>577</sup>

The burden is on justice sector actors, and not on the accused, to ensure adequate and effective appointed legal counsel for those charged with criminal offences.<sup>578</sup> This is fundamental to ensuring the right to a fair trial without discrimination; the right to equality before the courts; and the principle of equality of arms. If the accused does not have the means to appoint counsel, they have the right to "the free assistance of a lawyer who will defend [them] if [they] cannot defend [themselves] or if the interests of justice so require."<sup>579</sup> Under the *UN Principles and Guidelines on Access to Legal Aid in the Criminal Justice System*, legal aid should be provided from the moment a person requires legal assistance and to all persons without discrimination.<sup>580</sup>

Counsel for an accused should be able to advise their client "without restrictions, influence, pressure or undue interference from any quarter."<sup>581</sup> It is incumbent on States to protect lawyers threatened as a result of carrying out their duties.<sup>582</sup> It is further incumbent on States to ensure that lawyers are not identified with their clients or their clients' causes as a result of defending them,<sup>583</sup> as doing so may amount to intimidation and harassment of the lawyers involved.<sup>584</sup>

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572. Ibid., p. 35.

573. Ibid., p. 36.

574. Ibid.

575. Ibid., p. 35.

576. ICCPR, art. 14(3)(d); Arab Charter, art. 16(3); ACHPR, art. 7(1)(c).

577. Where the interests of justice so require, legal counsel may be assigned to the accused against her or his wishes, including where the accused substantially and persistently obstructed the trial, faces serious charges and is unable to act in their own interests or faces the possibility of the death penalty, or it is necessary to protect vulnerable witnesses from further distress or intimidation if they were to be questioned by the accused; HRC, *General Comment No. 32*, paras. 37-38.

578. *Basic Principles on the Role of Lawyers*, principle 3.

579. Arab Charter, art. 16(4). See also AComHPR, *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*, principle H(a).

580. *United Nations Principles and Guidelines on Access to Legal Aid in the Criminal Justice System*, UN Doc. A/RES/67/187, 28 March 2013, principles 3, 6, 10.

581. *Basic Principles on the Role of Lawyers*, principle 16; HRC, *General Comment No. 32*, para. 34.

582. *Basic Principles on the Role of Lawyers*, principle 17.

583. Ibid., principle 18.

584. Report of the Special Rapporteur on the Independence of Judges and Lawyers, UN Doc. E/CN.4/1998/39, 12 February 1998, para. 179.

## Libyan law in light of international law and standards

The 2011 Constitutional Declaration states that an accused person must be afforded “guarantees necessary to defend [one]self.”<sup>585</sup> As set out in section 4.2.5 above, an accused can only be interrogated or confronted with another accused or witness after their lawyer is summoned, “if [they] have a lawyer,” with the exception of cases where they are “caught *in flagrante delicto* or in case of urgency due to fear of loss of evidence.”

If the accused has not appointed a lawyer, the Accusation Chamber<sup>586</sup> must appoint counsel to defend persons accused of felonies<sup>587</sup> for whom an order of referral to the Criminal Court has been made, unless the accused has not already appointed such counsel.<sup>588</sup> The President of the competent Court of Appeal must also appoint counsel to defend a person accused of crimes which the Public Prosecutor has exclusive jurisdiction to investigate (discussed in section 3.3 above). However, there is no obligation on the court to appoint counsel to persons accused of misdemeanors or infractions punishable by imprisonment,<sup>589</sup> contrary to international law and standards.

In the *37 Gadhafi-regime members* case, UNSMIL reported that many of the defendants had not been represented by counsel during hearings before the Accusation Chamber and that, for some defendants, this lack of representation continued for several hearings at trial.<sup>590</sup> The judgment, which has yet to be made public, corroborates these reports.<sup>591</sup> For example, during the first trial hearing on 24 March 2014, Abdullah Al-Senussi stated that he had been deprived of access to legal counsel during interrogations.<sup>592</sup> The court assured the defendant that it would appoint counsel from the public bar association for those defendants who were still unrepresented, but the extent to which defendants were permitted to choose their own counsel, as is their right under international law, remains unclear. Some defendants remained represented by counsel on a consistent basis for the duration of the trial.<sup>593</sup> For example, at the 14 April 2014 hearing, seven defendants, including Abdullah Al-Senussi, had no legal representation.<sup>594</sup> Likewise, at the 27 April 2014 hearing, at least five defendants, including Saif Al-Islam Gadhafi, were not represented by counsel.<sup>595</sup> Some defendants experienced difficulty in retaining lawyers. Taking into consideration the political sensitivity of the case, finding Libyan lawyers willing to represent the defendants was challenging.<sup>596</sup> At the 27 April 2014 hearing, one lawyer recused himself after he had allegedly been physically attacked in the streets approximately two days before.<sup>597</sup> The ICJ is not unaware of any appropriate measures taken by the authorities to ensure the safety of lawyers, nor of any investigation by

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**585.** 2011 Constitutional Declaration, art. 31. Article 65 of the 2017 Consolidated Draft Constitution makes provision for certain procedural guarantees in criminal proceedings, including the accused’s right to choose and contact a lawyer. It also guarantees “judicial assistance,” without specifying the terms on which it might be provided.

**586.** Or *ghurfat al-ittiham*. Once the public prosecution has completed its investigation it refers the case file to the Accusation Chamber requesting a referral to court; CCP, art. 136.

**587.** The Penal Code distinguishes between felonies, misdemeanors and infractions. Felonies are punishable by death, life imprisonment and imprisonment; misdemeanors are punishable by detention for more than one month and a fine of more than 10,000 Libyan dinars; and infractions are punishable by detention not exceeding one month and a fine not exceeding 10,000 Libyan Dinars; Penal Code, arts. 52-55.

**588.** CCP, art. 162.

**589.** CCP, art. 210.

**590.** UNSMIL & OHCHR, *Report on the Trial of 37 Former Members of the Qadhafi Regime (Case 630/2012)*, February 2017, p. 37.

**591.** *The State of Libya v. Saif al-Gadhafi, Abdullah al-Senussi & Others*, Case No. 630/2012, July 2015, pp. 1-21.

**592.** *Ibid.*, p. 14.

**593.** *Ibid.*, pp. 1-65.

**594.** *Ibid.*, p. 13.

**595.** *Ibid.*, p. 15.

**596.** UNSMIL & OHCHR, *Report on the Trial of 37 Former Members of the Qadhafi Regime (Case 630/2012)*, February 2017, p. 38.

**597.** *Ibid.*, pp. 37-38.



the authorities into the attack. UNSMIL also expressed concern over the fact that some defense lawyers represented defendants at trial simultaneously.<sup>598</sup>

The regular absence of lawyers from trial proceedings raises serious questions *apropos* the quality and effectiveness of the representation afforded to the defendants. The representation of multiple accused by the same counsel may also raise concerns about their capacity to provide effective assistance, particularly given the gravity of the crimes charged and the possibility that the accused had competing interests and conflicting defenses. As noted above, the State is obligated not only to ensure that accused persons are assisted by counsel, but also to ensure that legal assistance offered to them is commensurate with the gravity of the offences for which they are being accused. There is no evidence in the judgment to suggest that the court took measures to ensure that defendants' legal representation was effective and consistent with international standards.

#### 4.3.4 Right to call and examine witnesses

##### International law

Both a right of defence and a fundamental component of the equality of arms<sup>599</sup> is equal opportunity to present the case during trial and to challenge and contest the arguments and evidence presented by the opposing party.<sup>600</sup> Article 14(3)(e) of the ICCPR provides that an accused person must be able "[t]o examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him." The same standard applies under the Arab Charter and the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa.<sup>601</sup> This right ensures that the accused has an opportunity to effectively challenge any evidence that is produced by the prosecution against her or him, and that the accused is guaranteed "the same legal powers of compelling the attendance of witnesses and of examining or cross-examining any witnesses as are available to the prosecution."<sup>602</sup>

The prosecution should provide the defence with a list of names of witnesses that it intends to call at trial within a reasonable time in advance, so that defence counsel has sufficient time to prepare their case.<sup>603</sup> The accused must also have the right to be present when witnesses are giving testimony, which may only be restricted in exceptional circumstances, "such as when a witness reasonably fears reprisal by the defendant, when the accused engages in a course of conduct seriously disruptive to the proceedings, or when the accused repeatedly fails to appear for trivial reasons and after having been duly notified."<sup>604</sup> The accused must be able to cross-examine witnesses testifying against them.

The right may be limited in cases involving victims of sexual violence or minors,<sup>605</sup> who courts should enable to be heard without having to be physically present in the courtroom,

<sup>598</sup>. Ibid., p. 43.

<sup>599</sup>. Arab Charter, art. 16(5); AComHPR, *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*, principle N(6)(f).

<sup>600</sup>. AComHPR, *Avocats Sans Frontières (on behalf of Gaëtan Bwampamye) v. Burundi*, Communication No. 231/99, 6 November 2000, para. 29 According to the Human Rights Committee, any distinction must be based on law and justified on objective and reasonable grounds without entailing actual disadvantage or unfairness to the defendant; HRC, *General Comment No. 32*, para. 13.

<sup>601</sup>. AComHPR, *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*, principle N(6)(f); Arab Charter, art. 16(5). The wording under the Arab Charter differs slightly: "To examine, or have examined, the witnesses against him, to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him."

<sup>602</sup>. HRC, *General Comment No. 32*, para. 39.

<sup>603</sup>. AComHPR, *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*, principle N(6)(f)(i); ICJ, *The Observation Manual for Criminal Proceedings - Practitioner's Guide No. 5*, 2009, p. 97.

<sup>604</sup>. AComHPR, *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*, principle N (6)(f)(iii).

<sup>605</sup>. Ibid., principles A(3)(f)(i), N(6)(f)(iii).



or at least without having to see the accused.<sup>606</sup> Courts must treat evidence obtained from a witness with particular care where the rights of the accused cannot be secured.<sup>607</sup>

If for any reason the attendance of the defendant cannot be guaranteed, her or his counsel shall always have the right to be present in order to ensure the defendant's right to examine and cross-examine witnesses.<sup>608</sup>

### Libyan law in light of international law and standards

The prosecution and accused have the right to call witnesses at trial.<sup>609</sup> The prosecution and accused must provide their witness list to the Indictment Chamber when the case is referred to the Criminal Court,<sup>610</sup> which they can amend at a later date; additional witnesses must be notified to the other party at least three days prior to their testimony.<sup>611</sup>

The CCP provides that "witnesses may not be rejected for any reason,"<sup>612</sup> but goes on to state that "[r]ules stipulated in the [CCP] shall apply before the criminal court to prevent the witness or exempt [them] from testifying."<sup>613</sup> There are no further rules setting out the basis upon which a witness may be rejected. The accused has an explicit right to question witnesses at the investigation stage<sup>614</sup> and an implicit right at the trial stage.<sup>615</sup>

The court must travel to hear a witness unable to travel with reasonable excuse; the parties have the right to attend in person or through their representatives.<sup>616</sup> If it is "impossible to hear the witness for any reason," the court can "recite the[ir] testimony" from an earlier stage in the proceedings.<sup>617</sup> Although the accused has the right to question witnesses at the investigation stage,<sup>618</sup> their right to challenge the evidence by an absent witness at the trial stage when they have had the opportunity to prepare their defence may be limited by the absence of any explicit guarantees to protect the right, contrary to the accused's rights under international law and standards.<sup>619</sup>

In practice, in the *37 Gadhafi-regime members* case, the accused's right to call and examine witnesses was severely restricted. The prosecution did not call any witnesses to testify during the hearings but relied upon written statements only,<sup>620</sup> raising serious concerns regarding the credibility of the written testimonies, which could not be tested through cross-examination. According to observers, some defence lawyers challenged the prosecution's reliance on written testimony, submitting that the witnesses, many of whom were detained at the time, were subject to coercion or even torture or ill-treatment to extract testimony, and calling for the witnesses to testify; their requests were refused.<sup>621</sup>

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<sup>606</sup>. Ibid., principle O(p).

<sup>607</sup>. European Court of Human Rights, *S.N. v. Sweden*, Application No. 34209/96, 2 July 2002, paras. 47-53.

<sup>608</sup>. ICJ, *The Observation Manual for Criminal Proceedings - Practitioner's Guide No. 5*, 2009, p. 98.

<sup>609</sup>. CCP, arts. 244-245.

<sup>610</sup>. CCP, art. 159.

<sup>611</sup>. CCP, arts. 160-161. Witnesses may be recalled where necessary to clarify prior testimony; art. 244.

<sup>612</sup>. CCP, art. 258.

<sup>613</sup>. CCP, art. 260.

<sup>614</sup>. CCP, arts. 244-245.

<sup>615</sup>. In particular, the right of the accused to travel to question witnesses who are unable to attend the trial hearing; CCP, art. 254.

<sup>616</sup>. CCP, art. 254.

<sup>617</sup>. CCP, art. 262.

<sup>618</sup>. CCP, arts. 244-245.

<sup>619</sup>. Such guarantees may include preventing the evidence from going to the acts and conduct of the accused, or according the evidence less weight.

<sup>620</sup>. UNSMIL & OHCHR, *Report on the Trial of 37 Former Members of the Qadhafi Regime (Case 630/2012)*, February 2017, p. 43.

<sup>621</sup>. Ibid.

On 8 February 2015, for example, counsel for Al-Senussi argued that “listening to live testimony in the courtroom setting is of the utmost importance.”<sup>622</sup> Al-Senussi himself stated that the prosecution “had deceived the court” by selecting witnesses beneficial to their case and refusing to listen to “the true witnesses” connected to the case.<sup>623</sup> The Court rejected these submissions and took the view it was exercising its right to rule on the admissibility of evidence in proceedings.<sup>624</sup>

One of the accused, Awaydat Ghandur, contested that fact the prosecution had failed to present mercenaries he allegedly mobilized from Chad and Niger to Libya on behalf of the Gadhafi regime as witnesses or obtain live testimony from witnesses<sup>625</sup> and relied solely on the written testimony provided by two witnesses who the accused did not have the opportunity to cross-examine.<sup>626</sup> The prosecution argued that the accusations against the defendants had been adequately verified by Hmaid Abdallah Al-Azoumi, who was a member of Gadhafi’s Revolutionary Committee<sup>627</sup> and who the prosecution stated had voluntarily submitted his testimony to the prosecution, and by Bahsir Mohammed Al-Tawaerghi, who served as a liaison officer to the Revolutionary Committee.<sup>628</sup> The Court indicated that it was satisfied with the testimony of both witnesses, because Ghandur did not provide evidence to the contrary.<sup>629</sup> Ghandur was subsequently convicted on all charges<sup>630</sup> and sentenced to death by firing squad.<sup>631</sup>

Another accused, Husni al-Wahayshi al-Sadiq al-Kabir, contested the Public Prosecutor’s reliance on written testimony from two witnesses, Milad Deman and Colonel Al-Hadi Imberish.<sup>632</sup>

Al-Kabir’s counsel petitioned the Court to disregard testimony provided by Colonel al-Hadi Imberish on the grounds that the testimony had been obtained from him “forcefully” and that the accused was not afforded the opportunity to cross-examine him. The prosecution argued that the witness was questioned voluntarily by several investigative bodies and that his testimony remained consistent throughout several sessions of questioning.<sup>633</sup> Convinced by the testimony of Al-Hadi Imberish, the Court convicted the accused on all counts, sentencing him to life imprisonment.<sup>634</sup>

Additionally, the court set an arbitrary limit of two witnesses per defendant to testify during proceedings. This decision, for which justification was never provided, put the defence at a considerable disadvantage compared with the prosecution, which relied upon the written testimony of an unlimited number of witnesses. This decision contravened both the rights of defence and the principle of equality of arms and negatively impacted the fairness of the trial.

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<sup>622</sup>. Ibid.

<sup>623</sup>. *The State of Libya v. Saif al-Gadhafi, Abdullah al-Senussi & Others*, Case No. 630/2012, July 2015, p. 39.

<sup>624</sup>. Ibid.

<sup>625</sup>. Ibid.; UNSMIL & OHCHR, *Report on the Trial of 37 Former Members of the Qadhafi Regime (Case 630/2012)*, February 2017, p. 43

<sup>626</sup>. *The State of Libya v. Saif al-Gadhafi, Abdullah al-Senussi & Others*, Case No. 630/2012, July 2015, p. 51. Offences he was charged with included but were not limited to (i) destruction; (ii) random killing of people; (iii) mobilizing foreign mercenaries; (iv) transferring weapon supplies to mercenaries; (v) arranging financial support for Gadhafi’s Revolutionary Committees; and (vi) mobilizing tribal militias to protect the regime; *ibid.*, pp. 319-321.

<sup>627</sup>. Ibid., p. 51.

<sup>628</sup>. Ibid., pp. 49-51.

<sup>629</sup>. Ibid., pp. 50-51.

<sup>630</sup>. Ibid., p. 322.

<sup>631</sup>. Ibid., pp. 321-326.

<sup>632</sup>. Ibid., p. 350.

<sup>633</sup>. Ibid., p. 51.

<sup>634</sup>. Ibid., p. 351.

### 4.3.5 Right to be tried in one's presence

#### International law

According to article 14(3)(d) of the ICCPR and article 16(3) of the Arab Charter, everyone has the right "to be tried in [their] presence, and to defend [themselves] in person or through [a lawyer of their] choosing." It is incumbent on Libyan justice sector actors to take all necessary steps to notify the accused and their defence counsel in sufficient time of the date and location of trial, request their presence and not wrongfully exclude them from participating.<sup>635</sup> The accused may waive their right to be present provided it is unequivocal, accompanied by sufficient safeguards and commensurate with the public interest.<sup>636</sup> In such cases, the right to be represented by counsel persists (see section 4.4.3 above).

The right can only be limited in exceptional circumstances where the accused repeatedly disrupts the proceedings such that it is impractical to continue, provided the rights of the accused are preserved through the use of video-link so they can observe the trial and provide instructions to counsel, and provided the restriction is only imposed as long as necessary and is proportional.<sup>637</sup>

Under the ICCPR and the *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*, Libya may not conduct trials *in absentia*.<sup>638</sup> However, exceptionally, they may be permissible "when accused persons, although informed of the proceedings sufficiently in advance, decline to exercise their right to be present."<sup>639</sup> Before a trial *in absentia* can take place, the court must verify whether the accused has been duly notified of the case, time and place of proceedings.<sup>640</sup> When permitted, the court must be extra vigilant in ensuring the defence rights of the accused are respected,<sup>641</sup> in particular the right to counsel, even if the accused has chosen not to attend proceedings and have a counsel conduct their defence.<sup>642</sup> If tried *in absentia*, the accused has the right to a re-trial "upon showing that inadequate notice was given, that the notice was not personally served on the accused, or that [their] failure to appear was for exigent reasons beyond [their] control."<sup>643</sup>

#### Libyan law in light of international law and standards

The accused's right to be present at trial proceedings may only be suspended in exceptional circumstances, including for example if the accused displays "any disruptive behaviour."<sup>644</sup> If excluded, the defendant's counsel should be present<sup>645</sup> and the court must keep the accused apprised of the trial's progress.<sup>646</sup> Where the defendant's safety is at risk, the court permits "modern methods of communication" to connect the defendant during trial proceedings.<sup>647</sup>

<sup>635</sup> HRC, *General Comment No. 32*, para. 36.

<sup>636</sup> AComHPR, *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*, principle N(6)(c)(iii).

<sup>637</sup> See e.g. ICC Statute, art. 63(2).

<sup>638</sup> AcomHPR, *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*, principle N(6)(c)(ii).

<sup>639</sup> HRC, *General Comment No. 32*, para. 36.

<sup>640</sup> HRC, *Maleki v. Italy*, UN Doc. CCPR/C/66/D/699/1996, 13 September 1999, para. 9.4.

<sup>641</sup> HRC, *Concluding Observations: Tajikistan*, UN Doc. CCPR/CO/84/TJK, 18 July 2005, para. 19.

<sup>642</sup> AComHPR, *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*, principle N(6)(f)(iv).

<sup>643</sup> *Ibid.*, principle N(6)(c)(ii).

<sup>644</sup> CCP, art. 243.

<sup>645</sup> CCP, art. 162.

<sup>646</sup> CCP, art. 243.

<sup>647</sup> CCP, art. 243, as amended by art. 2 of Law No. 7 of 2014 on amending Certain Provisions of the Code of Criminal Procedure, 24 March 2014.

The accused may be tried *in absentia* if they do not appear upon a summons or subpoena.<sup>648</sup> The accused is not guaranteed the right to be represented by counsel in such cases, except where the accused is charged with an infraction (i.e., for an offence attracting less than one month imprisonment), in which case the CCP permits the accused not to appear and instead be represented by counsel.<sup>649</sup>

In misdemeanor and infraction cases, a verdict may be considered *in presentia* if the subpoena was delivered to the litigant in person and they did not submit an excuse justifying their absence, and must be considered *in presentia* if they initially appeared upon summons and subsequently failed to appear "without an acceptable excuse" or appeared before the end of the hearing in which the verdict was issued.<sup>650</sup>

In felony cases, the verdict *in absentia* becomes final when the penalty period expires.<sup>651</sup> Before that time, if the accused appears or is arrested, the verdict may be annulled and the accused subject to a re-trial.<sup>652</sup> The accused may otherwise appeal the verdict if they were not duly notified of the charges within 10 days the verdict *in absentia* was communicated to the accused (or of the *in presentia* verdict) or the date upon which the deadline for a re-trial of *in absentia* cases expires.<sup>653</sup> An appeal may also be heard and rendered *in absentia*, for which the same 10-day challenge period applies.<sup>654</sup> There is no right to a re-trial where a misdemeanour or infraction has been tried *in absentia*.

The rules governing the right to be present and trials *in absentia* are not fully compliant with Libya's international legal obligations. The CCP does not explicitly preserve the accused's right to be represented by counsel during such trials. In felony cases, the CCP seems to restrict the right to a re-trial if the penalty period has expired, and otherwise imposes an unreasonably short 10-day time period within learning of a verdict to appeal, and in misdemeanor and infraction cases there is no right to re-trial at all, which is incompatible with the standards applied under international law.

In the *37 Gadhafi-regime members* case, defendants and their lawyers were absent from several hearings.<sup>655</sup> In total, six defendants were tried *in absentia*, including Saif al-Islam Gadhafi. Other defendants attended trial proceedings on an intermittent basis and were therefore not present at the entire trial.<sup>656</sup> Defendants who were being detained in remote locations for a period of time tuned into proceedings via video link, however technical complications reportedly interfered with the transmission and obstructed their ability to satisfactorily follow proceedings.<sup>657</sup> UNSMIL concluded that the absence of some defendants "... cannot be reasonably attributed to their free choice."<sup>658</sup> It appears that the court did not take all necessary measures to ensure the full participation of at least nine defendants at trial,<sup>659</sup> which constitutes a violation of their right to participate in proceedings (and by extension their right to prepare an adequate defence).

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648. CCP, arts. 211, 348, 350.

649. CCP, arts. 55, 211, 351.

650. CCP, arts. 211-212, 215.

651. CCP, art. 357.

652. CCP, art. 358. In felony cases, following a conviction in absentia, the convicted person loses their right to "dispose of and manage money and ... to file any action in [their] name, and any act or engagements undertaken by the convicted party shall be void." A guardian may be appointed to manage the convicted person's money; art. 353.

653. CCP, arts. 369-370.

654. CCP, arts. 384, 391, 428.

655. *The State of Libya v. Saif al-Gadhafi, Abdullah al-Senussi & Others*, Case No. 630/2012, July 2015, pp. 1-65.

656. UNSMIL & OHCHR, *Report on the Trial of 37 Former Members of the Qadhafi Regime (Case 630/2012)*, February 2017, p. 46.

657. *Ibid.*, pp. 46-47.

658. *Ibid.*, p. 47.

659. *Ibid.*

#### 4.3.6 The prohibition on reliance on information gained through torture or ill-treatment at trial

##### International law

As described in section 3.1.1 above, torture and ill-treatment are prohibited under international law, without exception.<sup>660</sup> The use of evidence obtained through torture or ill-treatment, or other forms of coercion, is absolutely prohibited under article 15 of the CAT, which states that “[e]ach State Party shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made.” When Prosecutors come into possession of evidence that they know or believe on reasonable grounds has been obtained through torture or ill-treatment, they must refuse to use such evidence against anyone other than those who used the methods.<sup>661</sup> Once allegations of torture have been made by a defendant, the burden of proof lies with the State to substantiate whether or not evidence was obtained through the use of torture.<sup>662</sup>

##### Libyan law in light of international law and standards

Libyan law does not expressly exclude the use of information obtained or extracted through torture or ill-treatment as evidence at trial, as required by the CAT, the ICCPR, the Arab Charter and the ACHPR; information so obtained can only be used as proof that an act of torture or ill-treatment has occurred.<sup>663</sup>

Practice shows that torture and other ill-treatment are used in a widespread manner during interrogations. The WGAD recounted at least 10 such cases.<sup>664</sup> In the *37 Gadhafi-regime members* case, UNSMIL reported that at least four defendants affirmed that they were tortured while being questioned during their detention.<sup>665</sup> UNSMIL further documented the extensive use of solitary confinement in the al-Hadhba prison, where most defendants were held, with the likely purpose of intimidating the defendants.<sup>666</sup> During the 28 December 2014 hearing, Al-Mabrouk Mohammed Al-Mabrouk argued that his statement should be dismissed as it was obtained through torture, alleging that he had been coerced by the armed group detaining him to sign a blank paper, who threatened that they would harm his family if he changed his statements when interrogated by the Prosecutor.<sup>667</sup>

The Court dismissed Al-Mabrouk’s arguments on the basis that there was insufficient proof to substantiate the allegations and because “the public prosecution does not commit coercion,” without conducting an investigation.<sup>668</sup> At the 17 April 2014 hearing, Bagdadi Al-Mahmudi petitioned the Court to acquit him on the basis that the “depression and other unspecified illnesses from which he was suffering was a result of the treatment he was subjected to by the prosecution during interrogations.”<sup>669</sup> Similarly, Abuzeid Dorda argued that evidence obtained during interrogations should be disregarded because no interrogation order was issued by the responsible legal authorities and that he gave

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<sup>660</sup> ICCPR, art. 7; CAT, art. 2. See also HRC, *General Comment No. 32*, paras. 6, 41, 60.

<sup>661</sup> AComHPR, *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*, principle F(I).

<sup>662</sup> CAT Committee, *G.K. v. Switzerland*, UN Doc. CAT/C/30/D/219/2002, 12 May 2003, para. 6.10; HRC, *Nallaratnam v. Sri Lanka*, UN Doc. CCPR/C/81/D/1033/2001, 23 August 2004, para. 7.4.

<sup>663</sup> CAT, art. 15; HRC, *General Comment No. 20*, para. 12.

<sup>664</sup> WGAD, *Opinion No. 4/2016*, paras. 16, 18-19, 2-22, 24; *Opinion No. 6/2017*, paras. 14-28.

<sup>665</sup> UNSMIL & OHCHR, *Report on the Trial of 37 Former Members of the Qadhafi Regime (Case 630/2012)*, February 2017, pp. 27-31.

<sup>666</sup> Ibid.

<sup>667</sup> Ibid.

<sup>668</sup> Ibid..

<sup>669</sup> *The State of Libya v. Saif al-Gadhafi, Abdullah al-Senussi & Others*, Case No. 630/2012, July 2015, p. 45.

statements and information during interrogations under duress and through the use of force.<sup>670</sup> The Court dismissed the allegations, ruling that Abuzeid Dorda had failed to establish that statements he gave during interrogations were elicited through coercion. The Court took no further action to investigate the allegations of torture during questioning that were also made by Abdallah Al-Senussi.<sup>671</sup>

Defendants' accusations that statements extracted through torture or ill-treatment were used as evidence during the *37 Gadhafi-regime members* case were not effectively, promptly and thoroughly investigated. The Court's repeated dismissals of the accused's allegations without conducting an investigation violates Libya's international legal obligations. Furthermore, the Court's tendency to place the burden of proof on the defence to establish whether statements were obtained through torture or coercion is similarly in contravention of Libya's obligations, as indicated above. In light of the well-documented widespread and systematic practices of torture<sup>672</sup> and culture of impunity that has gripped Libya since the 2011 uprising, the Court had even more reason to lend credibility to the accusations of torture that arose at trial and not to shift the burden of proof on the accused to verify the allegations; rather, it was obliged to instigate an investigation into whether the accused was subjected to torture or ill-treatment and, upon a finding that evidence was obtained through coercion, exclude such evidence at trial.

#### 4.3.7 Right to appeal

##### International law

Article 14(5) of the ICCPR, article 16(7) of the Arab Charter and article 7(1) of the ACHPR require Libya to ensure an accused has the right to have their conviction and sentence reviewed by a higher tribunal according to law.<sup>673</sup> This right is particularly important in death penalty cases.<sup>674</sup> The right to appeal requires timely, thorough and substantial review of both errors of law and of fact, in relation to both the conviction and sentence; reviews restricted to the formal or legal aspects of a conviction and that fail to give any consideration to the facts of the case do not meet international law.<sup>675</sup> Tribunals conducting reviews are not expected to carry out a full retrial, but rather are required to study the "factual dimensions of the case."<sup>676</sup> States' obligations in relation to the right to appeal go beyond the mere establishment of an appeals framework, and require positive measures in order to ensure that appeals are effectively submitted and processed, including for example ensuring that appellants have adequate access to case materials, such as transcripts and judicial rulings.<sup>677</sup>

Under the *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*, an accused must also have the right to appeal or review of a decision to correct a verdict "[i]f exculpatory evidence is discovered after a person is tried and convicted [... and] if the new evidence would have been likely to change the verdict, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to the accused."<sup>678</sup>

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<sup>670</sup>. Ibid., p. 74.

<sup>671</sup>. Ibid., p. 340; UNSMIL & OHCHR, *Report on the Trial of 37 Former Members of the Qadhafi Regime (Case 630/2012)*, February 2017, pp. 27-31.

<sup>672</sup>. WGAD, *Opinion No. 4/2016*, paras. 16, 18-19, 2-22, 24; *Opinion No. 6/2017*, paras. 14-28; UNSMIL & OHCHR, *Abuse Behind Bars: Arbitrary and Unlawful Detention in Libya*, April 2018, pp 44-45, 49-50; *Torture and Deaths in Detention in Libya*, October 2013.

<sup>673</sup>. See also AComHPR, *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*, principles A(2)(j), N(10).

<sup>674</sup>. Ibid., principle N(10)(b); HRC, *General Comment No. 32*, para. 51.

<sup>675</sup>. AComHPR, *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*, principle N(10)(a)(i); HRC, *General Comment No. 32*, para. 48.

<sup>676</sup>. HRC, *General Comment No. 32*, para. 48.

<sup>677</sup>. Ibid., para. 49.

<sup>678</sup>. AComHPR, *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*, principle N(10)(a)(i).

## Libyan law in light of international law and standards

Article 33 of the 2011 Constitutional Declaration provides that “legal decisions exempting any administrative decision from review by the courts shall be prohibited.” According to the CCP, criminal court verdicts can be reviewed through cassation or reconsideration<sup>679</sup> within 60 days of the verdict (or 30 days where the accused has been sentenced to death) where (i) the verdict is based on a violation of law or an error in its execution or interpretation; or (ii) if the verdict is null or the procedures involve a nullity that affected the verdict.<sup>680</sup> Interlocutory appeals on jurisdiction prior to the issuance of a verdict may be filed before the Court of Cassation.<sup>681</sup>

The public prosecution, victim and civil defendant have the right to file an appeal on the above grounds in the absence of the accused.<sup>682</sup> The Court of Cassation also has the right to “challenge the verdict on its own accord” in death penalty cases<sup>683</sup> or otherwise “if it discovers from the records that there was violation of law or an error in its execution or interpretation, that the court which issued it was not formed according to law or did not have jurisdiction to decide on the case, or if the challenged verdict is subject to a law applicable to the incident subject of the case.”<sup>684</sup> If the grounds on which an appeal is filed by an accused are related to other accused in the case, any ruling on them shall apply to the other accused as well, even if they do not file an appeal.<sup>685</sup> Where the accused is sentenced to death, the lawyer for the accused, whether assigned by the accused or the court, has the right to file an appeal without prejudice to the right of the accused to file their own appeal in person or through another lawyer.<sup>686</sup>

The Court of Cassation has the power to replace the verdict where it was based on a violation of law or an error in its execution or interpretation; no further appeal from the Court of Cassation’s verdict is permitted.<sup>687</sup> If the Court of Cassation determines that the “verdict is null or the procedures involve a nullity that affected the verdict,” it must return the matter to the first instance court or another criminal court composed of new judges.<sup>688</sup> A further appeal on the above grounds may be filed against the new verdict in such cases.<sup>689</sup>

If the accused who has filed an appeal was sentenced to a term of imprisonment at the first instance trial, their appeal is extinguished if they do not appear for execution of the sentence before the appeal hearing.<sup>690</sup>

In addition to the right to appeal, the Public Prosecutor has the right to request the Court of Cassation to overturn “any verdict, decision, order, or procedure issued by any judicial authority in penal matters where its authority was abused” within 30 days, which must be ruled on without pleadings.<sup>691</sup>

The right to request reconsideration of a verdict upon the emergence of a new fact only applies to penalties for misdemeanours and petty offences, not for felonies.<sup>692</sup>

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<sup>679</sup> CCP, art. 345.

<sup>680</sup> CCP, art. 381.

<sup>681</sup> CCP, arts. 382, 385, 385 *bis*.

<sup>682</sup> CCP, art. 384.

<sup>683</sup> CCP, art. 385 *bis*.

<sup>684</sup> CCP, art. 386.

<sup>685</sup> CCP, art. 396.

<sup>686</sup> CCP, art. 400.

<sup>687</sup> CCP, art. 393.

<sup>688</sup> CCP, art. 393.

<sup>689</sup> CCP, art. 399.

<sup>690</sup> CCP, art. 395.

<sup>691</sup> CCP, art. 401.

<sup>692</sup> CCP, art. 402. Requests for reconsideration are barred after a final verdict has been issued on appeal; CCP, art. 416.



The framework governing appeals in criminal court cases is non-compliant with international law for several reasons: (i) there is no right to appeal an error of fact; (ii) appeals by one accused may result in rulings which impact upon the conviction or acquittal of another accused, irrespective of whether the latter has had an opportunity to make any representations on the issue, potentially violating their right to defend themselves and participate in the proceedings; (iii) if an accused is convicted on appeal, they have no right to appeal the conviction, effectively preventing them from appealing any errors of law or fact that impact their conviction; (iv) the accused waives their right to appeal if they do not appear for execution of their sentence even where they have filed an appeal, without provision for a reasonable excuse or determination of whether enforcement of the sentence is appropriate in the circumstances; (v) only the Public Prosecution has the right to overturn any "verdict, decision, order, or procedure issued by any judicial authority in penal matters where its authority was abused," not the accused; and (vi) an accused does not have the right to reconsideration of a verdict upon the emergence of a new fact in felony cases.

With respect to military tribunals, there is no right to appeal summary trial judgements, which are handed down by the responsible commanding officer, who also conducts the investigation and prosecution of the case at hand.<sup>693</sup> The only avenue for review is through a higher ranking officer, who has discretion to proprio motu amend or annul a penalty.<sup>694</sup> Additionally, judgments issued by military circuit courts and military field courts cannot be appealed.<sup>695</sup> In this respect, Libyan law is non-compliant with international law and standards, which clearly stipulate that judgements by military tribunals must be reviewed by a higher, independent, civilian court.<sup>696</sup>

#### 4.3.8 Trial by military tribunals

##### International law

Military tribunals must afford all the guarantees of fair trial as prescribed by article 14 of the ICCPR, articles 12 to 13 and 15 to 17 of the Arab Charter and article 7 of the ACHPR, including the requirements of independence and impartiality.<sup>697</sup> Military judges may lack such characteristics because they are subject to the military hierarchy.<sup>698</sup>

Under international law, military tribunals should not have jurisdiction to try civilians, who should only be subject to ordinary courts,<sup>699</sup> or "military personnel if the victims include civilians."<sup>700</sup> Gross human rights violations and crimes under international law should also always be excluded from the jurisdiction of military tribunals.<sup>701</sup> The latter tribunals should adjudicate only "offences of a purely military nature committed by military personnel;"<sup>702</sup> the

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<sup>693</sup>. Military CCP, art. 28.

<sup>694</sup>. Military CCP, art. 33.

<sup>695</sup>. ICJ, *Challenges for the Libyan Judiciary: Ensuring Independence, Accountability and Gender Equality*, 2016, p. 75.

<sup>696</sup>. *Draft Principles Governing the Administration of Justice through Military Tribunals*, UN Doc. E/CN.4/2006/58, 13 January 2006 (Decaux Principles), principle 17; Report of the Special Rapporteur of the Sub-Commission on the Promotion and Protection of Human Rights, UN Doc. E/CN.4/2006/58, 13 January 2006, para. 57.

<sup>697</sup>. HRC, *General Comment No. 32*, para. 22; AComHPR, *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*, principle L(b).

<sup>698</sup>. European Court of Human Rights, *Incal v. Turkey*, Application No. 41/1997/825/1031, 9 June 1998, paras. 67-68.

<sup>699</sup>. AComHPR, *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*, principle L(c); *Draft Principles Governing the Administration of Justice through Military Tribunals (Decaux Principles)*, principle 5.

<sup>700</sup>. Report of the Working Group on Arbitrary Detention, UN Doc. E/CN.4/1999/63, 18 December 1998, para. 80(b).

<sup>701</sup>. *Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity*, principle 29; *Draft Principles Governing the Administration of Justice through Military Tribunals (Decaux Principles)*, principle 9.

<sup>702</sup>. AComHPR, *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*,

notion of military crimes should be interpreted narrowly and be restricted to “disciplinary” offences.<sup>703</sup>

Decisions of military tribunals must be subject to appeal to a higher judicial court, which should be of a civilian and not military nature.<sup>704</sup> Furthermore, ordinary higher judicial bodies, such as a supreme or constitutional court, should be competent to solve any conflict of authority or jurisdiction that may arise between military and civilian tribunals.<sup>705</sup>

### Libyan law in light of international law and standards

As discussed in the ICJ’s 2016 *report, Challenges for the Libyan Judiciary*, military tribunals in Libya have jurisdiction over civilians,<sup>706</sup> as well as ordinary crimes and crimes under international law.<sup>707</sup>

Subsequent to the publication of the report, the HoR enacted Law No. 4 of 2017 on amending some provisions of the Military Penal Code and Military CCP,<sup>708</sup> which expands both the personal and subject-matter jurisdiction of military tribunals. According to article 1(5-6) of the Law, amending article 2 of the Military Penal Code, military tribunals have jurisdiction over “armed groups” and “individuals [who have committed] acts of terrorism” respectively. Article 2(1)(b) and (2) of the Law further extends military tribunals’ jurisdiction to include crimes committed against the State,<sup>709</sup> as well as crimes committed against the military,<sup>710</sup> irrespective of who commits them. Such provisions are not compliant with international law and standards, which require that civilians, gross human rights violations and crimes under international law are only prosecuted in independent civilian courts. The jurisdiction of military courts should be strictly limited to military offences, i.e. breaches of military discipline.

The executive retains some control over military tribunals in Libya. For example, the Minister of Defence may appoint and regulate the judiciary in military tribunals and issue decrees relating to the appointment and promotion of the Military Prosecutor General and military tribunal members.<sup>711</sup> Members of the military judiciary are also not subject to oversight by an

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principle L(a). ICJ, *Challenges for the Libyan Judiciary: Ensuring Independence, Accountability and Gender Equality*, 2016, p. 72.

**703.** *Draft Principles Governing the Administration of Justice through Military Tribunals (Decaux Principles)*, principle 17; HRC, *General Comment No. 32*, para. 22.

**704.** *Draft Principles Governing the Administration of Justice through Military Tribunals (Decaux Principles)*, principle 17; Report of the Special Rapporteur of the Sub-Commission on the Promotion and Protection of Human Rights, UN Doc. E/CN.4/2006/58, 13 January 2006, paras. 56-57.

**705.** The personal jurisdiction of military tribunals over “regular prisoners of war,” which is undefined in the Military Penal Code, is problematic insofar as it might apply to civilian detainees, and over civilians who are charged jointly with military personnel; ICJ, *Challenges for the Libyan Judiciary: Ensuring Independence, Accountability and Gender Equality*, 2016, pp. 66, 70, 73. See also Law No. 11 of 2013 amending the Military Penal Code and the Code of Military Procedure, 2 April 2013, arts. 1, 4; Military Penal Code (Law No. 37 of 1974) and the Military CCP (Law No. 1 of 1999), as amended by Law No. 11 of 2013.

**706.** Military tribunals’ have subject-matter jurisdiction over some ordinary crimes or war crimes, for example over pillaging (Military Penal Code, art. 107), “killing or harming wounded persons” (Military Penal Code, art. 55), and “abandoning wounded persons” (Military Penal Code, art. 107). For more information see ICJ, *Challenges for the Libyan Judiciary: Ensuring Independence, Accountability and Gender Equality*, 2016, pp. 66-67, 71, 73-74.

**707.** Military tribunals’ have subject-matter jurisdiction over some ordinary crimes or war crimes, for example over pillaging (Military Penal Code, art. 107), “killing or harming wounded persons” (Military Penal Code, art. 55), and “abandoning wounded persons” (Military Penal Code, art. 107). For more information see ICJ, *Challenges for the Libyan Judiciary: Ensuring Independence, Accountability and Gender Equality*, 2016, pp. 66-67, 71, 73-74.

**708.** Law No. 4 of 2017 on amending some Provisions of the Military Penal Code and Military Code of Criminal Procedure, art. 5.

**709.** *Ibid.*, art. 2(1)(b).

**710.** *Ibid.*, art. 2(2)(a-b).

**711.** ICJ, *Challenges for the Libyan Judiciary: Ensuring Independence, Accountability and Gender Equality*, 2016, pp. 67-68, 74-75.

independent authority such as the SJC.<sup>712</sup> The criteria for the appointment of military judges is also insufficient to ensure their competence; such criteria only prescribe one in five judges to have a legal background, which only requires possession of a law degree.<sup>713</sup> The legal framework governing military tribunals in Libya fails to meet international law and standards governing the right to trial by a competent and independent tribunal.

There is no appeal process for summary trial judgments conducted by a responsible commanding officer instead of a judge, for which the only form of review is where a high ranking commanding officer amends or annuls the decision *proprio motu*, and circuit courts established within military units do not require prosecution or defence, and judgements are not subject to appeal,<sup>714</sup> in contravention to the requirement that decisions of military tribunals must be subject to appeal to a higher judicial civilian court.

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**712.** Article 19 of Decree No. 15 of 2000 by the Minister of Defence regulates inspectorates and disciplinary procedures concerning members of the military judiciary.

**713.** ICJ, *Challenges for the Libyan Judiciary: Ensuring Independence, Accountability and Gender Equality*, 2016, p. 75.

**714.** ICJ, *Challenges for the Libyan Judiciary: Ensuring Independence, Accountability and Gender Equality*, 2016, p. 68. See also *ibid.*, p. 69, regarding the lack of clarity concerning whether Permanent Military Court decisions asserting competence are subject to appeal.

## International law

The right to an effective remedy and reparation is a general principle of law, and has been affirmed by a consensus of all States in the *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law* (UN Basic Principles and Guidelines on the Right to a Remedy and Reparation), adopted by the UN General Assembly.<sup>716</sup> The obligation applies to all human rights treaties.<sup>717</sup> The right to a remedy and reparation is established under article 2(3) of the ICCPR, article 14 of the CAT, articles 12 and 23 of the Arab Charter and article 7(1)(a) of the ACHPR.

This right obliges the responsible State to provide an effective remedy by ensuring that victims or their next of kin have access to a competent body to file a claim and to adequate reparation for the harm suffered.<sup>718</sup> The distinctive requirement of remedies is effectiveness: a remedy must be accessible, enforceable and capable of stopping an ongoing violation.<sup>719</sup>

Redress is required for all human rights violations,<sup>720</sup> including crimes under international law, which constitute gross human rights violations. Specific forms of redress must be provided for the harm caused by arbitrary deprivation of life,<sup>721</sup> torture and ill-treatment,<sup>722</sup> enforced disappearance,<sup>723</sup> rape and other forms of sexual and gender-based violence,<sup>724</sup> and slavery.<sup>725</sup>

Reparation is an integral component of the right to an effective remedy.<sup>726</sup> The forms of

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715. For further reference, see ICJ, *The Right to a Remedy and Reparation for Gross Human Rights Violations – Practitioners’ Guide No. 2*, 2018, at <https://www.icj.org/wp-content/uploads/2018/11/Universal-Right-to-a-Remedy-Publications-Reports-Practitioners-Guides-2018-ENG.pdf>.

716. *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, principle 11; *Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions*, principles 4, 16, 20; *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*, principles 7, 33.

717. UDHR, art. 8; CAT, arts. 13-14; ICCPR, arts. 8(2), 20(2), 24(4-5); Arab Charter, art. 23; Committee on Economic, Social and Cultural Rights, *General Comment No. 3: The Nature of States Parties’ Obligations (art. 2, para. 1, of the Covenant)*, UN Doc. E/1991/23, 14 December 1990, para. 5; CRC Committee, *General Comment No. 5: General Measures of Implementation of the Convention on the Rights of the Child (arts. 4, 42 and 44, para. 6)*, UN Doc. CRC/GC/2003/5, 27 November 2003, para. 24; CEDAW Committee, *General Recommendation No. 28: The Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women*, UN Doc. CEDAW/C/GC/28, 16 December 2010, paras. 32, 34.

718. *Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity*, principle 31; *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, principle 11.

719. HRC, *General Comment No. 31*, para. 15.

720. *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, principles 2(c), 3(c-d).

721. ICCPR, arts. 2(3), 6; HRC, *General Comment No. 36*, paras. 4, 27; *Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions*, principle 20.

722. CAT, arts. 13-14; *Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, UN Doc. A/RES/55/89, 4 December 2000, principles 1(c); CAT Committee, *General Comment No. 3*; AComHPR, *General Comment No. 4*.

723. ICCPR, arts. 8(2), 20(2), 24(4-5).

724. ICCPR, arts. 2(3), 7; CAT, arts. 13-14; *Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa (Maputo Protocol)*, art. 25.

725. CCPR, arts. 2(3), 8.

726. HRC, *General Comment No. 31*, para. 16. See also Permanent Court of International Justice, *Case Concerning the Factory at Chorzów (Jurisdiction)*, PCIJ Series A, No. 9, 26 July 1927, p. 21; ARSIWA, arts. 1, 28, 31.

reparation that must be provided include compensation, rehabilitation, restitution, satisfaction and guarantees of non-repetition.<sup>727</sup> These forms of reparation are not alternative options; they must all be available in principle, although not all will be relevant in each and every case. Reparation should be proportional to the gravity of the violation and the harm suffered by the victim,<sup>728</sup> and tailored to the needs of the victim, as appropriate.<sup>729</sup> This means that compensation, for example, must reflect the material (e.g. loss of earnings) and moral damages (e.g. psychological harm) actually incurred by the victim or their family.<sup>730</sup>

Under IHL, States have an obligation to provide full reparation for breaches thereof committed by their armed forces and by persons or groups acting on their instructions or under their direction or control, whether in IACs or NIACs.<sup>731</sup> The UN Basic Principles and Guidelines on the Right to a Remedy and Reparation require States to provide “[e]qual and effective access to justice [and] [a]dequate, effective and prompt reparation” for serious violations of IHL.<sup>732</sup> Victims of crimes against humanity are also entitled to obtain reparations.<sup>733</sup>

Under international law, amnesties must not prejudice the right of victims of crimes under international law to remedy and reparation.<sup>734</sup>

### Libyan law in light of international law and standards

The Penal Code states that “[t]he infliction of the penalties set forth by this Code shall not affect a party’s obligation to provide restitution or compensation.”<sup>735</sup> Under the CCP, any persons who claims damage from a crime can file a complaint with the public Prosecutor or other judicial officer and present themselves as civil plaintiffs seeking damages against the accused or a civil defendant.<sup>736</sup> Civil claims may be filed with the prosecution or the investigating judge also during the investigation phase. If the prosecution refuses to accept the claim, the claimant may appeal the decision before the Indictment Chamber.<sup>737</sup> A claim filed with the investigating magistrate is not subject to appeal; however, a refusal by either the prosecution or the investigating judge to accept the civil claim does not prejudice the claimant’s ability to file a claim at a later stage before the criminal court or before a civil court.<sup>738</sup>

Civil claims may be filed until the closure of the pleadings at the trial stage, but not before the Court of Appeals.<sup>739</sup> Civil claims are to be settled in the final verdict unless the criminal

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<sup>727</sup>. *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, principles 15-23; HRC, *General Comment No. 31*, para. 16; CAT Committee, *General Comment No. 3*, para. 2.

<sup>728</sup>. *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, principle 18.

<sup>729</sup>. CAT Committee, *General Comment No. 3*, para. 6.

<sup>730</sup>. *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, principle 20(b).

<sup>731</sup>. *Hague Convention IV respecting the Laws and Customs of War on Land and Annexed Regulations*, 18 October 1907, art. 3; AP I, art. 91; ICRC Customary IHL Database, rule 150.

<sup>732</sup>. *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, principle 11.

<sup>733</sup>. ICC Statute, art. 75; *The Prosecutor v. Germain Katanga*, Case No. ICC-01/04-01/07, Trial Chamber II, Order for Reparations pursuant to Article 75 of the Statute, 24 March 2017.

<sup>734</sup>. *Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity*, principle 24(b): “[a]mnesties and other measures of clemency shall be without effect with respect to the victims’ right to reparation ... and shall not prejudice the right to know.” See also HRC, *General Comment No. 36*, para. 27.

<sup>735</sup>. Penal Code, art. 15.

<sup>736</sup>. CCP, arts. 17, 226.

<sup>737</sup>. CCP, arts. 60, 173.

<sup>738</sup>. CCP, art. 231.

<sup>739</sup>. CCP, art. 224.

court decides to transfer the civil aspect of the case to a civil court for adjudication.<sup>740</sup> If related criminal and civil proceedings occur, civil proceedings for reparations must be suspended until the conclusion of the criminal proceedings.<sup>741</sup> A claimant in a civil case may also abandon his civil claim if a criminal case is subsequently commenced and file her or his claim in the criminal court.<sup>742</sup> The outcome in the criminal case – whether a conviction or acquittal – constitutes a determinative finding (*res judicata*) for the purpose of the civil court case if the civil court has “not reached a final settlement on the actual occurrence of the crime, on the legal description of the crime, and on the perpetrator of the crime.”<sup>743</sup> The possible expiration of the criminal proceedings does not affect the civil action;<sup>744</sup> the abandonment of the civil action by the plaintiff does not affect the criminal proceedings, and she or he retains the right to bring the claim before civil courts.<sup>745</sup>

While the Penal Code provides that the prosecution of a perpetrator does not discharge her or his duty to redress the harm caused to the victim, Libyan law does not envisage a duty of the State to provide redress for crimes under international law for which it is responsible, and therefore does not comply with international law.<sup>746</sup> Under the ICCPR, a State must establish “appropriate judicial and administrative mechanisms for addressing claims of rights violations under domestic law.”<sup>747</sup> According to the UN Basic Principles and Guidelines on the Right to a Remedy and Reparation, “... a State shall provide reparation to victims for acts or omissions which can be attributed to the State ... States should endeavour to establish national programmes for reparation and other assistance to victims in the event that the parties liable for the harm suffered are unable or unwilling to meet their obligations.”<sup>748</sup>

As set out above, Libya has enacted a number of laws effectively granting amnesty for crimes under international law. Law No. 35 of 2012 states that the amnesty therein envisaged does not prejudice the “right of the victim to restitution and compensation,”<sup>749</sup> and Law No. 6 of 2015 provides almost identical text.<sup>750</sup> Such provisions terminate criminal prosecutions, remove penalties and delete any criminal consequences from a convicted persons record<sup>751</sup> (constituting a violation of the obligation to prosecute, as discussed above).<sup>752</sup> To the extent the scope of the amnesties remains confined to the criminal domain and leaves untouched existing civil proceedings against perpetrators or the possibility of instituting new ones in the future, these provisions would appear to preclude an amnesty from negatively affecting certain but not all forms of reparation. Such amnesties impede the fulfilment of the right to an investigation and accountability as a form of satisfaction.<sup>753</sup>

Furthermore, Law No. 35 of 2012 and Law No. 6 of 2015 envisage only restitution and compensation, and fail to provide for satisfaction, rehabilitation and guarantees of non-

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740. CCP, art. 282.

741. CCP, art. 236.

742. CCP, art. 237.

743. CCP, art. 417.

744. CCP, art. 232.

745. CCP, arts. 233, 235.

746. *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, principle 3.

747. HRC, *General Comment No. 31*, para. 15.

748. *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, principles 15-16.

749. Law No. 35 of 2012, art. 5.

750. Law No. 6 of 2015, art. 10.

751. Law No. 35 of 2012, art. 2; Law No. 6 of 2015, art. 1.

752. See above section 3.3.

753. HRC, *General Comment No. 36*, para. 27.

repetition. While under the law of international responsibility and international human rights law Libya is bound to provide victims of crimes under international law with the full range of reparation forms, domestic law should be amended accordingly in order to include them.<sup>754</sup>

In turn, Law No. 38 of 2012, which provides a blanket immunity for all acts furthering the 17 February Revolution,<sup>755</sup> makes no reference to remedies and reparation for victims. This law prescribes that "... if an order of dismissal or an acquittal is issued for [a former Gadhafi-era official] for any objective or legal reason, he shall not be entitled to seek criminal or civil recourse against the State or the persons who arrested or detained him unless it is established in the prosecution's decision or the grounds of the judgment that the incident attributed to him is fabricated or malicious."<sup>756</sup>

Such a provision in effect amounts to a bar against instituting civil proceedings against persons who have unlawfully and arbitrarily deprived former Gadhafi-era officials of their liberty. Law No. 38 of 2012 is therefore not compliant with Libya's international legal obligations.

Law No. 50 of 2012, discussed in section 4.2.4 above, provides for the compensation of political prisoners detained under the Gadhafi regime, and indemnifies the authorities from any further legal action by the victims, limiting the scope of reparations that may be awarded, contrary to international law. To the extent that compensation is determined by reference to the duration of time the prisoner spent in detention, it does not comply with the requirement that compensation be proportionate to the harm suffered and commensurate with the material and moral damages incurred. The Law also fails to provide for other elements of reparations, including restitution, satisfaction, rehabilitation and guarantees of non-repetition.

Law No. 29 of 2013,<sup>757</sup> concerning the transitional justice process in Libya,<sup>758</sup> further provides for certain reparation measures. Article 1 clarifies that the Law addresses "grave and systematic violations of fundamental rights and freedoms" perpetrated during the Gadhafi regime with a view to providing, among other things, redress to the victims thereof. Importantly, the same provision includes among the acts falling within the scope of the law, and for which redress may be sought, "[a]cts which were necessary to protect the revolution and which were marred by some behaviours that did not adhere to its principles." Such a formulation may encompass crimes under international law committed by so-called revolutionaries. One question is how to reconcile this norm with Laws Nos. 35 and 38 of 2012 and Law No. 6 of 2015, which amnesty most crimes under international law committed during the 2011 conflict.<sup>759</sup>

Law No. 29 of 2013 further contemplates various forms of reparation that may be granted to victims: (1) compensation; (2) memorialization; (3) treatment, rehabilitation, and provision of social services; and (4) other forms determined by the Fact-Finding and Reconciliation Commission (FFRC), the dedicated body tasked with the implementation

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**754.** For instance, article 23 of Law No. 29 of 2013, analyzed below, provides for further forms of reparation such as memorialization (a form of satisfaction) and rehabilitation.

**755.** Law No. 38 of 2012, art. 4.

**756.** *Ibid.*, art. 5.

**757.** Law No. 29 of 2013 on Transitional Justice, 2 December 2013. At the time of writing, no additional measures or regulations have been adopted to implement this Law.

**758.** According to article 1, Law No. 29 of 2013 intends to address "grave and systematic violations of fundamental rights and freedoms ... in order to reveal the truth, hold perpetrators to account, reform institutions, preserve the national memory, and provide reparations and compensation for the misdeeds for which the state is responsible for providing compensation. ... The objective of this shall be to reach national reconciliation, to overcome enmities, to secure social peace, and to establish a state that upholds rights and is governed by rule of law."

**759.** See above section 3.4.



of the Law.<sup>760</sup> While this provision partially reflects the content of reparations under international law, it fails to include other forms of satisfaction as well as restitution, guarantees of non-repetition and the right to truth.<sup>761</sup> Compensation is to be determined by a decision of a committee appointed by the FFRC's Administrative Board – which the FFRC must approve the decision<sup>762</sup> – and paid by an ad hoc "Victims' Compensation Fund."<sup>763</sup> The procedure to obtain reparation under Law No. 29 of 2013, therefore, is independent of any civil or criminal proceedings instituted against alleged perpetrators of crimes under international law.

A subsequent law, Law No. 31 of 2013, provides benefits to families of persons killed in the Abu Salim prison "massacre or who died due to disease, torture, or other causes, whether their death has been officially proved or not" ("martyrs"),<sup>764</sup> which it characterizes as "a crime against humanity."<sup>765</sup> The Law provides that the State and public administrations such persons used to work for shall disburse all the due salaries and pensions to their families and heirs; persons not falling in such category are entitled to a forfeit pension of 1,000 Libyan dinars.<sup>766</sup> The Law also establishes a Committee to investigate the massacre, for the purposes inter alia of establishing the cause of death of the deceased;<sup>767</sup> presenting proposals and recommendations on how to address the impact of the massacre; and settling the status of the families of all the victims of the massacre.<sup>768</sup> The law states that none of its provisions "shall constitute a violation of the right to compensation of the families of the Abu Salim prison massacre martyrs that is stipulated by the general rules of the law or that is prescribed for them in the future."<sup>769</sup> Under the Gadhafi regime, families of victims were offered compensation of 200,000 Libyan Dinars in extinguishment of any further legal claims, which was accepted by around 50% of the families.<sup>770</sup> Law No. 31 of 2013, however, implies that any extinguishment of rights to reparation are not now valid, and that the next of kin of the victims are still entitled to reparation under Libyan law in addition to the compensatory schemes provided for by Law No. 31 of 2013.

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**760.** Law No. 29 of 2013, art. 23.

**761.** UN Human Rights Council Resolution 18/7, UN Doc. A/HRC/RES/18/7, 13 October 2011; Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence, UN Doc A/HRC/21/46, 9 August 2012.

**762.** Law No. 29 of 2013, art. 24. The committee must be composed of five members and headed by a judge.

**763.** Ibid., art. 25(1).

**764.** Law No. 31 of 2013 adopting Provisions pertaining to the Abu Salim Prison Massacre, 18 December 2012, art. 2.

**765.** Ibid., art. 1.

**766.** Ibid., arts. 2-4.

**767.** The Law makes clear that the Committee's investigative tasks are without prejudice of the investigating judges or public prosecution's prerogative in conducting criminal investigations and pursuing prosecutions.

**768.** Ibid., art. 6. See also arts. 1, 5.

**769.** Ibid., art. 10.

**770.** Human Rights Watch, *Truth and Justice Can't Wait: Human Rights Developments in Libya Amid Institutional Obstacles*, 2009, p. 55.

## Chapter 6 - Recommendations

Despite the widespread instances of gross human rights violations and serious violations of IHL constituting crimes under international law, committed both during and after the fall of the Gadhafi regime, very few individuals have been brought to justice in courts or otherwise held accountable. Justice system actors, including Prosecutorial and judicial authorities, presently are competent and have the legal framework at their disposal to conduct effective investigations and prosecutions to achieve accountability and facilitate redress for the victims of these violations and abuses. They should discharge their responsibilities to do so. However, considerable progress needs to be made to stabilize the political and security situation in Libya to optimize the capacity for justice system actors to deliver accountability and redress and, critically, to do so in accordance with international law and standards. Reform of the legislative framework governing criminal justice is necessary to facilitate the effective, impartial and human rights compliant administration of justice in practice.

The ICJ calls on the responsible Libyan authorities, in accordance with their functions and responsibilities, to undertake a number of measures:

*With regard to the substantive framework governing accountability:*

- To amend article 2 of Law No. 10 of 2013 to bring the definition of torture in line with international legal obligations, including under the CAT, and criminalize other serious acts of cruel, inhuman or degrading treatment or punishment;
- To amend article 1 of Law No. 10 of 2013 so as to criminalize enforced disappearance consistent with international law;
- To enact laws that fully criminalize arbitrary deprivations of the right to life, including arbitrary and summary executions, to the extent required pursuant to Libya's obligations under article 6 of the ICCPR, article 5 of the Arab Charter and article 4 of the ACHPR, as well as IHL;
- To amend article 71 of the Penal Code so as to exclude the possibility that public officials and other parties assisting them, who in the performance of their duties use excessive force resulting in death, are not subject to criminal sanction;
- To amend articles 407 and 408 of the Penal Code to reflect the definitions contained in the Istanbul Protocol, including by criminalizing acts of rape where the lack of consent owes to the existence of a coercive environment (i.e., not only when they are committed by direct "force, threat, or deceit"); and amending article 408 to include not only "indecent assault," but also all forms of sexual and gender-based violence other than rape;
- To repeal article 424 of the Penal Code, which provides for the extinction of the offence of rape or indecent assault and its penal effects if the perpetrator marries the victim;
- To amend article 425 of the Penal Code to provide a definition of the crime of slavery in line with international law and standards;
- To enact laws that criminalize war crimes and crimes against humanity, as defined under IHL and international criminal law;
- To amend article 5 of Law No. 10 of 2013 to bring the definition of superior responsibility for torture in line with international law and standards; and to enact laws that codify superior responsibility in respect of all other crimes under international law;
- To amend (or repeal) Law No. 35 of 2012 and Law No. 6 of 2015 to exclude enforced disappearance, ill-treatment constituting crimes, arbitrary deprivation of life, war crimes and crimes against humanity from the scope of amnesties; and amend (or repeal) article 4 of Law No. 38 of 2012 to exclude crimes under international law committed during the 2011 conflict from the scope of the amnesty;
- To amend article 69(1) of the Penal Code to provide for the criminal liability of public officials responsible for a crime under international law in the performance of their duties;

- To amend article 69(2) of the Penal Code to exclude the defence of superior orders for manifestly unlawful orders, such as those to commit crimes under international law; and to establish responsibility of a court to adjudicate on the lawfulness of an order when such a defence is raised; and
- To accede to the ICPPED, the Optional Protocol to the CAT, the Second Optional Protocol to the ICCPR, the Optional Protocol to the ICESCR, the Optional Protocol to the CRC on communications procedure and the Optional Protocol to the CRPD.

*With respect to the legal framework governing criminal procedures:*

- To amend article 3 of the CCP to extend the three-month deadline that bars victims from filing a complaint;
- To amend article 7 of the CCP, which establishes the cessation of a cause of action after the victim's death, to fully provide the victim's family members with the right to initiate an investigation;
- To remove the effective authority of the Minister of Justice over the Prosecutor's Office, particularly the authority to control and direct investigations and prosecutions of specific crimes set out in article 224 of the Penal Code;
- To repeal article 2 of Law No. 38 of 2012, which allows the use of information collected by armed groups in proceedings against former Gadhafi-era officials as evidence in investigations and trials; and repeal Decree 388 of 2011, which entrusts the Supreme Security Committee, whose members are appointed by the Ministry of Interior, with investigatory powers regarding issues limited to the 17 February Revolution;
- To amend articles 107, 115, 117, 122, 175 and 187 *bis* B of the CCP to ensure that detainees are brought before an independent and impartial judicial authority promptly following arrest, and no later than 48 hours in any event;
- To repeal articles 111, 115 and 125 of the CCP allowing the detention of an accused on the sole ground that she or he does not have a fixed place of residence;
- To amend articles 123, 177 and 187 *bis* B to set a maximum duration of pre-trial detention in line with international law and standards, and specify that any such detention should be employed as last resort only when necessary, proportionate and reasonable according to the circumstances of the case;
- To amend the CCP to include a provision recognizing the right to access a court to challenge the lawfulness of detention or raise any related issues, and the right to compensation and other reparation for persons who have been unlawfully detained;
- To amend the CCP to include a provision that requires arresting officers to inform the accused of (a) the reasons for their arrest and (b) the charges against them, when caught *in flagrante delicto*;
- To amend the CCP to provide for the right to legal counsel from the moment of arrest;
- To amend article 106 of the CCP to exclude the possibility for an accused to be questioned upon arrest and confronted with other accused or witnesses without the presence of her or his lawyer of choice in cases of *flagrante delicto* or where there is a risk that the evidence will be lost, and to repeal the provision requiring a lawyer to seek authorization from the judge to speak during the interrogation of the accused;
- To amend article 121 of the CCP to ensure that detainees have the right to be visited by and communicate with their family at all times, and to be visited by a doctor; and to amend article 432 to guarantee persons sentenced to capital punishment to be visited by their family while awaiting the execution of the sentence;
- To amend article 163 of the CCP to envisage the disclosure of all evidence to the accused before a case is referred to court for prosecution, and to allow the accused to make copies of the case file;
- To amend article 306 of the CCP to provide the accused with adequate time to challenge evidence gathering or investigation procedures if her or his lawyer did not object at the first available occasion;

- To amend article 26, 105, 106 and 112 of the the CCP so as to provide, during the interrogation phase, for the right to adequate time and facilities to prepare a defence and the right to remain silent;
- To amend article 247 of the the CCP to ensure that the defendant be informed of their right not to testify against themselves or admit guilt;
- To amend the CCP to include a provision that preserves the accused's right to be represented by counsel during trials *in absentia*;
- To amend the CCP to ensure a person convicted of a misdemeanour or infraction *in absentia* has the right to a re-trial;
- To amend the CCP to ensure that, where a trial has been determined to be held *in presentia* despite the absence of the accused, the accused person has the right to a re-trial if they were not notified of the proceedings sufficiently in advance and did not decline to exercise their right to be present;
- To amend articles 357 and 358 of the CCP to remove the requirement that an accused person convicted *in absentia* must seek a re-trial before the expiration of the penalty period imposed at trial and replace it with a reasonable time period following which the verdict was communicated to them;
- To amend articles 369 and 370 of the CCP to replace the 10-day time period within which an accused person convicted *in absentia* must file an appeal with a reasonable time period following which the verdict was communicated to them;
- To amend the CCP to include a provision that expressly prohibits the use of statements or other information as evidence in legal proceedings that have been extracted through torture or ill-treatment;
- To amend the CCP to require the Public Prosecutor, investigating judge and/or court to commence a prompt, impartial and thorough investigation when an accused person alleges statements or other information or evidence were obtained through torture or ill-treatment;
- To amend the framework governing appeals by:
  - Amending article 345 of the CCP to permit accused to appeal questions of fact as well as questions of law;
  - Amending article 396 to ensure that any ruling on grounds of appeal, which are favourable to an accused that is not a party to such appeal, are applied to their benefit and that any rulings which are adverse to an accused in such instances are not applied to their detriment;
  - Amending the CCP to ensure that, where an accused is convicted at the appeal stage following an acquittal at the trial stage, the accused can appeal the conviction to a competent appeals chamber composed of different judges;
  - Amending article 395 of the CCP so that an accused person's right to appeal is not extinguished if they do not appear for execution of the sentence before the appeal hearing, if they have legitimate reasons for not doing so;
  - Amending article 401 of the CCP to afford all parties to a case the opportunity to challenge any verdict, decision, order or procedure issued by any judicial authority which abused its authority;
  - Amending article 402 to provide the accused with the right to reconsideration of a verdict upon the discovery of new facts in felony cases;
- To amend the Military Penal Code and Law No. 4 Of 2017 to ensure that civilians, and military members committing gross human rights violations and crimes under international law, are prosecuted in independent civilian courts and the subject matter of military courts is strictly limited to breaches of military discipline;
- To amend the Military CCP and Decree No. 15 of 2000 to:
  - Ensure the functional independence and impartiality of military courts;
  - Provide safeguards for their independence and impartiality, in particular by ensuring that: (i) the selection of judges is based on clear criteria, including adequate legal qualifications, experience and integrity; (ii) the civilian SJC plays a role in the

selection of judges for military courts through an impartial and independent selection process; (iii) judges on military courts remain outside the military chain of command and military authority in respect of matters concerning the exercise of any judicial function; and

- To amend the Military CCP to ensure accused persons have the right to appeal decisions of military tribunals on the merits and on errors of law to a higher judicial civilian court.

*With regard to the right to an effective remedy and reparation:*

- To amend article 417 of the CCP to allow the institution of civil proceedings even when an accused is found not guilty of a crime in related proceedings, if it constitutes a bar to such proceedings;
- To amend (or repeal) Law No. 35 of 2012, Law No. 50 of 2012 and Law No. 6 of 2015 to provide for satisfaction, restitution, rehabilitation and guarantees of non-repetition as forms of reparation, and to repeal article 5 of Law No. 38 of 2012, which bars the institution of civil proceedings against persons who have unlawfully and arbitrarily deprived former Gadhafi-era officials of their liberty; and
- To amend Law No. 50 and related regulations to ensure compensation is proportionate to the harm suffered.

*With respect to the judiciary, the SJC, HoR and Constitutional Drafting Assembly should implement the recommendations set out in the ICJ's 2016 report, including but not limited to:*

- To adopt objective criteria and transparent procedures for the management of the career of judges, including selection, appointment, promotion, transfer and disciplinary procedures, including by:
  - Replacing the requirement in article 43(7) of Law No. 6 of 2006 that judges must be medically fit and not suffer from any handicap with an obligation to provide for the "reasonable accommodation" of persons with a disability;
  - Removing the requirement in article 43(9) of Law No. 6 of 2006 that judges not be married to a non-Arab woman is discriminatory and impairs a judge's right to privacy and family life under the ICCPR, the Arab Charter and the ACHPR;
  - Replacing the "seniority" criteria for promotion with objective factors such as "ability, integrity and experience;"
- To make provision, including funds, for judges to receive continuing judicial training, and removing the authority of the Minister of Justice over the Judicial Institute; and
- To amend the CCP to ensure judges must recuse themselves on any grounds which they cannot meet in respect of the requirements of actual or perceived impartiality under international law and standards.

*The ICJ calls on Libyan police, Prosecutors and judges, in the conduct of investigations, trials and appeals:*

- To ensure that all allegations of crimes under international law are impartially and thoroughly investigated and prosecuted and the perpetrators are brought to justice in fair trials;
- To ensure international standards governing the rights to liberty and to a fair trial are met in practice, including the right to be informed of the charges, to immediately access a lawyer, to be brought promptly before an independent judicial authority, to have access at all time to a judicial authority for the purposes of *habeas corpus* or similar procedures, to access family and medical services, to adequate time and facilities to prepare a defence, to defend oneself in person or through counsel, to be present at trial and appeal, to call and examine witnesses and to appeal errors of law; and

- To commence a prompt, impartial and thorough investigation when an accused person alleges statements or other information were obtained through torture or ill-treatment.

*The ICJ calls on the GNA and HoR to facilitate investigations and trials in line with international law, in particular:*

- To establish a robust system of victim and witness protection that conducts effective risk assessment for victims and witnesses and ensures that necessary and appropriate security measures are taken to protect them; and
- To establish an immediate moratorium on the death penalty, with a view to abolition, and act expeditiously towards full abolition of article 17 of the Penal Code.

*Given the significant political, security and human rights challenges faced by Libya, international actors must take further steps to ensure Libyan authorities meet their international human rights obligations. The ICJ therefore calls on:*

- States to act collectively and individually to ensure accountability for crimes under international law committed by State and non-State actors in Libya and call for reform in both law and practice, including through the UN Human Rights Council, other UN bodies, the African Commission on Human and Peoples' Rights, the Arab Human Rights Committee and State bodies;
- The UN Human Rights Council to establish a Commission of Inquiry or similar mechanism on the situation of human rights in Libya, with a mandate to monitor, document, establish the facts and report on gross human rights violations including with a view to collecting and preserving evidence of crimes under international law for future criminal proceedings before national or international courts;
- States to exercise expanded jurisdiction, including universal jurisdiction, to investigate and prosecute crimes under international law committed in Libya, including when the perpetrator is within their territory or otherwise under their jurisdiction;
- States to facilitate international cooperation in the investigation and prosecution of crimes under international law, including through mutual legal assistance, joint investigations and extradition, to exchange information, evidence, witnesses and accused persons, in line with international law and standards, including the rights to liberty and a fair trial under the ICCPR, the Arab Charter and the ACHPR, and pursuant to international conventions such as the UN Convention on Transnational Organized Crime or bilateral treaties or on a reciprocity basis;
- States to adequately fund and resource the ICC, to ensure full cooperation with it to guarantee it has adequate capacity to conduct its investigations into the situation in Libya, and to enforce arrest warrants to bring alleged perpetrators of crimes before the court for trial;
- States and UN actors to ensure human rights-compliant terms in its engagement with Libya, including in relation to arrangements made to deal with migration and trafficking from and through Libya to EU countries, as well as in relation to the supply of arms; and
- States and UN actors to refrain from entering into or implementing agreements with Libyan authorities, including in relation to the detention of migrants, refugees and asylum seekers and provision of arms, in situations where it is reasonably foreseeable that violations international human rights law, IHL and/or international refugee law might occur.

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**International  
Commission  
of Jurists**

P.O. Box 91  
Rue des Bains 33  
CH 1211 Geneva 8  
Switzerland

**t** +41 22 979 38 00

**f** +41 22 979 38 01

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