

# Challenges for the Libyan Judiciary: Ensuring Independence, Accountability and Gender Equality



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Published in July 2016

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Cover Photo: Judge Kamal Bashir Dahan (C), head of Libya's Supreme Court, meets with members of the Constitutional Chamber in Tripoli November 6, 2014. REUTERS/Ismail Zitouny

Supported by the Foreign Office of the Federal Republic of Germany



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## Executive Summary

The desire for a society based on justice and the rule of law was among the factors that fuelled the 2011 February Uprising in Libya that led to the eventual fall of the regime of Colonel Muammar Gadhafi. The Constitutional Declaration of 2011, promulgated by the self proclaimed National Transitional Council, enshrined this aspiration and, at least at the outset of the transition, senior political figures expressed their commitment to delivering justice and re-establishing the rule of law. Of particular significance for the rule of law was the enshrining of the independence of the judiciary in the Constitutional Declaration, as well as various subsequent legislative reforms aimed at enhancing the independence of the judiciary. The recent drafts of the new Libyan Constitution and the Libyan Peace Agreement of December 2015 both recognise the importance of an independent judiciary.

Despite these advances, the judiciary in Libya is facing numerous challenges, not least the impact of the deterioration of the political and security situation since 2014. The judicial system is currently barely functioning and faces serious challenges from armed actors and an increasingly unclear judicial and legal framework. This uncertainty is engendered by the present governance crisis. The impact on the judiciary of the current political and security situation in Libya, however, is not the focus of this report. Rather, this report analyzes the laws in place relevant to the independence and accountability of the judiciary and, envisaging a future stable governance framework, makes recommendations for law reforms necessary for rebuilding trust in the Libyan judiciary, strengthening its independence and consolidating the rule of law.

### Background

An independent judiciary is vital for the protection and realization of human rights and for creating the necessary conditions for accountability and access to justice. International law enshrines the right to an independent and impartial judiciary. It is a fundamental aspect of the rule of law in general and the principle of separation of powers in particular. It is also indispensable to the right to a fair trial, as provided for by the International Covenant on Civil and Political rights, (ICCPR) and other treaties to which Libya is a party including the Arab Charter on Human Rights (the Arab Charter) and the African Charter on Human and Peoples' Rights (the African Charter). Other international instruments and mechanisms, including regional human rights courts and UN Special Procedures have affirmed the obligation of states to guarantee in law, and secure in practice, an independent and impartial judiciary. As explored throughout this report, the UN Basic Principles on the Independence of the Judiciary contain the universal standards setting out broadly the scope and content of this principle.

For decades, Libya failed to fully comply with its obligations under international law to respect and protect the independence of the judiciary. The judicial system was compromised by systematic executive influence, corruption, and poor education and training. The High Council of Judicial Bodies, (the predecessor to the Supreme Judicial Council (SJC)), tasked with overseeing the careers of judges including their training, appointment, transfer and discipline, was headed by the Minister of Justice. Transfers between courts were often used to reward or punish judges for actions either in line with or contrary to the interests of the regime. As a result, cases involving the government and loyalists were not always decided on their merits. Further, the selection of candidates for high judicial positions was generally influenced by connections to the regime.

In addition to asserting executive control over the regular system of courts, Colonel Gadhafi created a parallel court system, the 'People's Court', in 1971 with the express purpose to try members of the royal family, monarchists and other political opponents who were accused of rigging elections and "corrupting public opinion". These courts did not adhere to even basic due process standards and they were not independent. In addition to the 'People's Court', other courts such as military courts and so called revolutionary committees and courts were put in place by Colonel Gadhafi to try political offences against the state. These parallel judicial systems tainted the independence and affected the authority of the regular judiciary, in particular by undermining trust in the judicial system as a whole.

Some reforms to the judiciary in Libya began before the 2011 uprising, for example, in 2005, the 'People's Court' was abolished. Efforts to reform the judiciary and safeguard its independence began in earnest, however, during the first stage of the transitional period under the National Transitional Council. In particular, article 32 of the Constitutional Declaration of 2011 explicitly enshrined the independence of the judiciary, the SJC was reformed to allow for the election of its members by judges of the upper courts and the Minister of Justice was removed as member and president. Another significant advance was the abolition of the jurisdiction of military courts over civilians in April 2013.



The process of judicial reform stalled with the deterioration of the security and political situation in the country in 2014. As noted above, however, the focus of this report is not an in depth assessment of the impact of the volatile security and political situation in Libya on the judiciary but, rather, an assessment of the laws in place relevant to the independence and accountability of the judiciary. For the most part, the main body of legislation under which the judiciary was organized under Colonel Gadhafi's regime is still in place, despite the promulgation of several reforms by the National Transitional Council, the General National Congress (GNC) and the House of Representatives (HoR). This report analyzes these laws in light of international standards and makes recommendations to the Libyan authorities on how the law can be reformed to better provide for an independent and accountable judiciary.

The first chapter considers the composition and mandate of the Supreme Judicial Council. The second chapter evaluates the Statute on the Justice System, analyzing laws in place related to the selection criteria, appointment process, training, assessment, promotion, transfers, disciplining and security of tenure of judges. The third chapter addresses the accountability of judges, analysing the disciplinary procedures in place, the Code of Ethics and Conduct, attempts at vetting and provisions for criminal accountability, including for complicity in human rights violations. The fourth chapter analyzes the use of military tribunals, including its subject matter and personal jurisdiction, recommending in particular that military tribunals should never have jurisdiction over civilians and that all cases involving human rights violations should be tried by ordinary courts. The fifth chapter analyzes the laws in place governing the Office of the Prosecutor and assesses to what extent they comply with international standards.

The representation and role of women in the judiciary in Libya is also a focus of this report. Laws put in place under Colonel Gadhafi facilitated women's participation in the judiciary, including by explicitly providing for the right of women to work in the judiciary and for the right to work in general. However, societal stereotypes regarding women's role as the primary caretaker in the domestic sphere hindered women's full participation in public life, including in the judiciary, as noted by the UN Committee on the Elimination of Discrimination against Women in 2009. Worryingly, the right of women to hold judicial office has come under attack since the transition in Libya. There have been two specific constitutional challenges to the right of women to hold positions in the judiciary, (the outcomes are pending in the Supreme Court). Further, women who participate in public life, including human rights defenders, have been targeted during the ongoing conflict. This report makes recommendations on how women's representation in the judiciary can be both protected and enhanced.

### The Supreme Judicial Council

Judicial councils, or similar bodies, are designed and established to manage and regulate the careers of judges from training to appointment, promotion to discipline, and tenure to retirement. To do so properly and effectively, they must function independently and act as a crucial check against the risk of executive control over and interference in the work of the judiciary. The requirement that judicial councils be independent of the executive and legislative branches of government was addressed to a great extent in 2011 with the removal of the Minister of Justice from the SJC. The ICJ, however, is concerned about the potential influence of the executive within the SJC considering the inclusion of members of the Litigation Department, the People's Legal Defence Department, and the Law Department given that the members of these bodies are all ultimately accountable to the Ministry of Justice.

Another problem with the composition of the SJC identified in the report is the fact that the Head of the Judicial Bodies Inspection Department, (JBID) sits on the SJC. This may affect the fairness and integrity of promotion decisions and disciplinary proceedings conducted by the SJC given that the JBID conducts the initial assessments of performance and is responsible for preparing the case against a judge subject to disciplinary proceedings.

In addition, there is no representation of judges from the lower courts on the SJC, nor do judges from the lower courts have the right to participate in elections to the SJC. This is of concern to the ICJ given that judicial councils should be fully representative of the judiciary as a whole, with no exclusion as to category or level of court.

The ICJ also expresses concerns relating to the criteria for candidacy to the SJC and makes recommendations in this regard. These include the following: only a serious disciplinary infraction issued since the SJC was reformed to ensure its independence under Law No. 4 of 2011 should exclude a candidate from the SJC and the clause excluding all judges who sat on cases related to the February 2011 Uprising or on cases referred to at the discretion of the prosecutor general, among others,

should be narrowed to refer instead to those judges who have been vetted by an independent mechanism, through a fair and transparent process with clear criteria of a grave enough nature to warrant exclusion.

Women are significantly underrepresented on the SJC. In the last general elections for the SJC, no women were elected although one woman was later elected to fill a vacant seat. Under international standards, the SJC should be representative of the whole judiciary and States should take additional measures to ensure women's equal participation in the judiciary as a whole and in judicial offices. The ICJ therefore recommends that the statute governing the composition of the SJC should provide for a pluralistic and representative membership, and, in particular substantial gender representation, (and ultimately approximate gender parity).

In relation to the competencies of the SJC, the ICJ considers that the relevant legal provisions should go further in requiring that all authorities, in particular the Parliament and the executive authorities, be required proactively to consult the SJC and to consider its opinion on all matters relating to the judiciary, including judicial reforms.

A significant issue that could be improved in relation to the competence of the SJC, and of crucial importance to its independence, is the authority it has over its budget and the budget of the judiciary as a whole. The ICJ recommends that the law be amended to accord the SJC the responsibility to participate in discussions relating to the budget of the judiciary as a whole; to grant the SJC control and oversight over the budget for the judiciary; and that the law provides that the state must allocate resources adequate for the judiciary to discharge its responsibilities in respect of the fair and effective administration of justice.

### The Statute for Judges

Safeguarding judicial independence extends to the process governing all aspects of judges' careers, as affirmed by the UN Basic Principles on the Independence of the Judiciary. The requirement of independence of the judiciary refers, in addition to freedom from political interference, to "the procedure and qualifications for the appointment of judges, and guarantees relating to their security of tenure until a mandatory retirement age or the expiry of their term of office, where such exist, the conditions governing promotion, transfer, suspension and cessation of their functions".<sup>1</sup> The primary criteria to be used in the appointment process and selection criteria for judges are training, qualifications, ability and integrity, and these and any other appropriate and objective criteria should be made transparent.

Law No. 6 of 2006 on the Judicial System lays out specific criteria for the selection of judges, which in general are objective and clear but do not meet international standards on non-discrimination. In particular, article 43(7) providing that a judge must be "medically fit and must [not] suffer from any handicap that prevents him from performing his duties to the fullest extent" is overbroad and inappropriate in the absence of any legislation imposing an obligation to provide for reasonable accommodation to ameliorate any incapacitating effects from a disability, as provided under the UN Convention on the Rights of Persons with Disabilities. Article 43(9) is also of concern to the ICJ. It holds that a judge "must not be married to a non-Arab woman. This condition may be waived by a decree issued by the Council." This provision has no reasonable basis and may constitute a breach of non-discrimination based on status as well as the judge's right to privacy, protected under the ICCPR and the Arab Charter, and also impairs the right to family life.

In relation to the training of judges, the ICJ outlines a number of concerns and recommendations. For example, international standards hold that both foundational and continuing training programmes should be implemented by an independent authority and in full compliance with educational autonomy but Decree No. 208 of 1988 specifies that the Judicial Institute is subsidiary to the Ministry of Justice. Thus the ICJ recommends that the Judicial Institute be placed under the supervision and administration of the SJC.

The ICJ also recommends that the requirement to have a degree in ordinary law should be compulsory for all judges and that the SJC should introduce a requirement for continuous professional development training for all judges, and should assess the need for additional training for all judges who have not been through the professional training programme at the Judicial Institute. In addition, the ICJ recommends that in the context of the significant human rights violations perpetrated under Colonel Gadhafi's regime and during the transition in Libya, specific training for investigators, prosecutors and

<sup>1</sup> UN Human Rights Committee, General Comment No. 32, CCPR/C/GC/32, 23 August 2007, para.19.



judges on addressing cases of gross human rights violations and principles of impunity be provided.

The report examines the Libyan law on transfers of members of the judiciary. Libyan law does not provide for consultation with judges, or for their consent, other than where a judge may be transferred to a position outside of Libya. This is concerning given the history of the use of transfers during the Gadhafi period to punish and reward judges for their judgments. It is also of concern in light of the fact that some observers have noted that since the transition, transfers without consent have been used as a means of vetting and disciplining judges, without going through the ordinary and proper disciplinary procedure. Judges should be consulted and the consent of the judge should be obtained before a transfer, as long as it is not unreasonably withheld and except pursuant to a system of regular rotation provided by law or formulated after due consideration by the judiciary. The ICJ recommends that this requirement is introduced into the relevant law.

The report assesses the degree to which women are represented in the judiciary and concludes that they are underrepresented. International law provides that women have a right to participate in public affairs and hold public office, including in the judiciary, in a manner equal to men. This right imposes a duty on the State to remove obstacles to women's participation in the judiciary and to take positive measures to establish gender balance within the judiciary. A gender-sensitive judiciary requires not only the appropriate training of all judges, but also adequate representation of women in the judiciary. While Law No.8 of 1989 provides for the right of women to hold judicial posts, in light of recent constitutional challenges to this law, the ICJ recommends that it is bolstered by further affirmative provisions in the law.

The ICJ recommends that the Libyan authorities take specific measures to ensure the appropriate representation of women in the judiciary, both across the entire judiciary and in specific courts where women are underrepresented, such as criminal courts and higher courts, with fixed benchmarks to demonstrate increased representation with a view to achieving approximate gender parity. The ICJ also recommends that the Libyan authorities take proactive measures such as education and training to combat societal stereotypes and discrimination that prevent women from fully participating in public life, including in the judiciary. In addition, in light of reports that women judges have received specific threats relating to their gender, proper and adequate protection must be provided for all women judges, as well as thorough investigations into such threats, and prosecutions, where appropriate.

### Vetting and Accountability

Under rule of law principles, judiciaries must not only be independent and impartial; they must also be accountable. Ensuring accountability in the judicial sector requires two key processes. The first is to set clear standards of conduct for judges and to provide a fair disciplinary procedure for those who are alleged to have breached these standards. The second is to ensure that judges who are alleged to have been complicit in human rights violations, corruption or criminal behaviour during the previous regime and period of conflict are held accountable through a fair and targeted vetting procedure and, where warranted, removed from office.

There is a comprehensive framework in place in Libya for standard setting and the disciplining of judges. A code of conduct establishes the required standards and the SJC is responsible for conducting disciplinary proceedings. The report recommends, however, that this code and these procedures, while generally providing for a fair hearing, should be brought closer in line with international standards. In particular, a key element missing from the principles outlined under the heading of 'Propriety' in the Libyan Code of Ethics and Conduct is the requirement under 4.12 of the Bangalore Principles of Judicial Conduct that a Judge shall not practice law while a holder of judicial office. In addition, two important elements outlined in international standards requiring a judge to ensure there is no discrimination or prejudice in the courtroom have been omitted from the Libyan Code. These three elements in particular should be added to the Libyan Code of Ethics and Conduct.

Article 8 on the 'Guidelines on interpretation of previous principles' of the Libyan Code of Ethics and Conduct goes far beyond the Bangalore Principles of Judicial Conduct in outlining the conduct required of judges. Certain provisions appear to be overbroad and may constitute unwarranted interference in both judicial discretion and a judge's right to privacy. Articles that go beyond what can be considered reasonable restrictions on a judge's behaviour should be removed.

Further, article 50 of Law No. 4 of 2008 appears to allow for disciplinary proceedings not based on the Code of Ethics and Conduct and the provisions are too vague to give reasonable notice of what conduct is prohibited. The ICJ recommends that disciplinary proceedings are brought on the basis of a failure to uphold the conduct outlined in the Code of Ethics and Conduct only and article 50 is amended to

reflect this. In addition, the ICJ recommends that the judiciary is responsible for redrafting the Code of Ethics and Conduct, in consultation with judges and their professional associations.

With regards to the disciplinary process, the procedure provided for in both Law No. 6 of 2006 and in Decision No. 4 of 2008 goes some way towards meeting international standards on the right of judges to be heard by an independent body in accordance with a fair procedure. However, significant deficiencies remain which undermine the fairness of the process and the law should be reformed in a number of respects. In particular, the ICJ recommends that the law be amended to include a right to a substantive appeal of the decisions of the SJC on disciplinary matters; to provide that the person accused of a disciplinary infraction has the right to equality of arms, and, specifically, to call witnesses; that transfers may not be used as punishments for disciplinary infractions; that a higher threshold for dismissal, (misconduct rendering the judge "unfit" to discharge his or her duties as a judge) is reflected in the law; and that all disciplinary penalties are required to be proportionate. In addition, all judges under inspection should be informed of a disciplinary investigation from its outset.

Further, the law should clarify that the State should guarantee compensation for any harm suffered by individuals as a result of acts or omissions by judges in the improper or unlawful exercise of their judicial functions.

Regarding criminal accountability, judges should generally enjoy immunity from criminal proceedings for acts and omissions undertaken in the course of their judicial functions. However, there must be no immunity for acts or omissions that constitute corruption, human rights violations, or crimes under international law. Judges like other individuals are also accountable in criminal law for acts they may commit in their private capacity. Libyan law provides that judges can only be arrested, detained or prosecuted once a special high ranking judicial committee is consulted, (except where they may be caught red handed). This provides a bulwark against politically motivated prosecutions and is, therefore, positive as a safeguard of the independence of the judiciary. On the other hand, the fact that the permission of a special committee must be obtained for criminal prosecutions even for acts allegedly committed outside of the course of a judge's duties may contravene standards on accountability for judges. The law should ensure that there is no immunity for any individual in cases where there is reasonable suspicion of criminal responsibility for a serious crime such as corruption, a gross human rights violation or a crime under international law.

The issue of vetting and holding judges accountable for complicity in the corrupt practices of a previous regime, as well as potential complicity in human rights violations, is of particular importance in the Libyan context. Restoring trust in judicial institutions requires some form of vetting, in particular of the judges who operated in the 'People's Court', which blatantly contravened human rights standards. Others who took bribes or worked on behalf of the regime contrary to clear ethical standards should also be held accountable. However, efforts at vetting so far have not met international standards of due process or established clear criteria.

Vetting procedures that the SJC has reportedly imposed on a large number of judges are of serious concern. In particular, the SJC reportedly imposed transfers without seeking the consent of the judges concerned and removed a large number of competent judges without outlining specific criteria for removal or applying a fair procedure. The ICJ recommends that these procedures are revisited and all judges who were transferred or removed from office without a fair procedure, should be reinstated and subjected to a fair procedure that meets international standards of due process, including being made aware of all charges against them, the right to a defence, equality of arms, adequate time to prepare a defence, and a right to appeal. All transfers made without consultation with the judge concerned should be reversed unless the explicit consent of the judge concerned was granted. The ICJ recommends that a fair and comprehensive vetting procedure that meets international standards on fair hearings and due process should be put in place to restore trust in the judiciary and ensure the accountability of the judiciary.

### Military Tribunals

The report examines the role of military tribunals in the Libyan legal system, noting in particular that the right to a fair trial, enshrined in article 14 of the ICCPR, is equally applicable to military court proceedings as it is to ordinary courts. Ensuring that any tribunal that administers justice is competent, independent and impartial is a crucial factor that safeguards this right. The composition and nature of military courts and their role within the military hierarchy is such that their use should be strictly limited in terms of both personnel and subject matter jurisdiction. The general view of most international human rights authorities is that the use of military tribunals should not be used to try civilians or for cases involving gross human rights violations or crimes under international law.

Reforms brought in by Law No. 11 of 2013, including prohibiting trials of civilians by military courts, have gone some way towards improving the military justice system and restricting its jurisdiction to appropriate cases. However, the report finds that the current status of Libyan law with regards to the subject matter and personal jurisdiction and the composition of military courts still falls short of meeting international standards.

First, crimes that could amount to violations of human rights still fall under the jurisdiction of military courts. Second, the current legislation lacks clarity on the jurisdiction of ordinary courts over crimes committed by military personnel involving civilian victims. Third, concerns arise in a number of respects with regards to the functional independence and impartiality of military courts in Libya, including in relation to the appointment procedure, the composition of the courts, and the executive role in the administration of military justice. The ICJ recommends that all decisions related to the appointment and career progression of military judges be made by an independent judicial council.

The ICJ is also concerned that the right of appeal is inadequate in military courts. Judgments issued by military courts as well as decisions on issues of legality, must be reviewed by a higher, independent, civilian court. The ICJ recommends that such a right of appeal be introduced into the relevant legislation.

#### Office of the Prosecutor

Finally, the report examines the role of prosecutors in light of international standards, noting in particular that prosecutors should be enabled to carry out their functions independently, impartially, with objectivity and in defence of and in a manner which respects human rights. Any influence or interference from any source outside the Prosecutor's Office itself as well as any attempts to undermine the independence and impartiality of prosecutors should be prohibited.

Under Libyan law, the Office of the Prosecutor General is considered to be a judicial body. It is regulated by Law No. 6 of 2006, as amended, as well as by the criminal procedural code. The public prosecution has both prosecutorial and investigatory powers. It is also the principle organ in charge of administering and supervising detention facilities. International standards have emphasized the importance of ensuring the functional independence and autonomy of prosecutorial authorities. The ICJ therefore recommends that the Libyan authorities undertake an independent review with a view to adopting statutory reform that reflects the distinct and independent functions of a prosecutor from the rest of the judiciary.

Pursuant to article 224 of the Libyan Penal Code, there are many crimes that require either the initiative or the authorization of the Minister of Justice in order to be prosecuted. This provision lacks a requirement for a justified decision by the Minister of Justice for his decision whether or not to prosecute and does not provide for the instructions of the Minister of Justice to be challenged. This is contrary to international standards and, among others, the ICJ recommends that the law be revised to eliminate or significantly limit the use of case-specific instructions to prosecutors from the Ministry of Justice.

Of particular importance in the Libyan context is the requirement that prosecutors are obliged to ensure the protection of human rights and the right to fair trial during detention, investigation and trial proceedings. This includes ensuring no evidence is used that has been obtained through illegal methods; defendants have legal representation; safeguards are in place against arbitrary and *incommunicado* detention; and detainees are protected from torture and other forms of ill-treatment. According to numerous reports, arbitrary detention, torture and other ill-treatment, including prolonged *incommunicado* detention and detention in illegal detention facilities are widespread and systemic in Libya.

While acknowledging the challenges inherent in the current security situation, the ICJ urges the Libyan authorities and the Prosecutor's Office to take immediate measures to end arbitrary detention across Libya and to uphold conditions for detention that meet international standards. The ICJ recommends that the Libyan authorities and in particular high ranking prosecutors ensure that all those responsible for human rights violations amounting to crimes under international law, including unlawful killings, torture and other ill treatment are held accountable, including by conducting independent, impartial and thorough investigations and, where the evidence warrants, criminal prosecutions.

**The full list of recommendations made by the ICJ can be found on p.86. Among them are the following:**

**The Libyan authorities should ensure that the law on the Supreme Judicial Council:**

1. Provides for an SJC that is composed of a majority of judges and excludes representatives from the executive, the office of the prosecutor and of the public defence department, unless their independence from the executive is ensured;
2. Removes the Head of the JBID as a member of the SJC;
3. Provides that judges from all courts are entitled to participate in the election of members to the SJC and that there is some representation on the SJC of judges of the lower courts;
4. Provides, in relation to the composition of the SJC, for a pluralistic and representative membership, and, in particular, substantial gender representation with a view ultimately to achieving approximate gender parity;
5. Provides that all authorities, in particular the Parliament and the Government, are required to consult the SJC and to consider its opinion on all matters relating to the judiciary, including judicial reforms; and
6. Provides for a separate budget for the SJC and empowers the SJC to consult directly with the legislative branch in setting the budget for the judiciary.

**The ICJ urges the authorities in Libya to ensure that the Statute on the Judiciary:**

1. Sets out fair and transparent procedures for the selection of trainee judges and the appointment of all judges and expressly prohibits discrimination on any status grounds in this process;
2. Sets forth objective and appropriate criteria for all judicial appointments, which include training and qualifications in ordinary law, integrity, high competency and experience;
3. Ensures that Decree 208 of 1988 is revised so as to place the Judicial Institute under the supervision and administration of the SJC and not the Ministry of Justice;
4. Provides for the assessment of the need for additional training for all judges who have not been through the professional training programme at the Judicial Institute;
5. Ensures specific training for investigators, prosecutors and judges on addressing cases of gross human rights violations and combating impunity;
6. Provides for education and training to combat gender stereotypes that prevent women from fully participating in public life, including in the judiciary;
7. Requires consultation with and consent of a judge before any transfer is effected, as long as such consent is not unreasonably withheld and except pursuant to a system of regular rotation provided by law or formulated after due consideration by the judiciary; and
8. Provides that specific and proactive measures are taken to ensure the increased appropriate representation of women in the judiciary with a view to achieving approximate gender parity, both across the entire judiciary and in specific courts where women are underrepresented.

**In order to ensure the accountability of the Libyan judiciary in a manner that is consistent with its independence and impartiality, the SJC and the Libyan authorities should ensure that:**

1. The disciplinary procedure for addressing complaints against judges for alleged breaches of the Code of Ethics and Conduct is set out in law and affords judges the right to a fair hearing before an independent and impartial body;
2. The Code of Ethics and Conduct is reviewed by the judiciary, in consultation with judges and their professional associations, to bring it fully in line with the Bangalore Principles on Judicial Conduct;
3. A judge may only be disciplined on the basis of breaching established conduct as outlined in the Code of Ethics and Conduct and article 50 of Law No. 4 of 2011 is revised accordingly;
4. The law is amended to ensure that no immunity is provided for in cases in which there is reasonable suspicion on the basis of *prima facie* evidence of criminal

**responsibility for a gross human rights violation, a crime under international law or other serious crime;**

- 5. A fair and comprehensive vetting procedure that meets international standards on fair hearings and due process should be introduced to restore trust in and ensure the accountability of the Libyan judiciary; and**
- 6. All judges who were transferred or dismissed previously, pursuant to an unfair vetting procedure, be reinstated and, if further action is considered warranted, subjected to fair processes that meet due process standards.**

**In order to enhance the independence and impartiality of the judiciary and ensure fair trials in military courts, the ICJ urges the Libyan authorities to reform the military justice system so as to:**

- 1. Guarantee the functional independence and impartiality of military tribunals;**
- 2. Retain the limited personal jurisdiction of military tribunals over military personnel and ensure that military courts do not have jurisdiction over cases concerning civilians, whether as alleged perpetrator or victim;**
- 3. Explicitly restrict the jurisdiction of military tribunals to cases involving members of the military for alleged breaches of military discipline;**
- 4. Ensure that allegations of violations of human rights committed by the military or armed forces are investigated by civilian authorities;**
- 5. Ensure that proceedings before military tribunals are carried out in a manner that is consistent with requirements of fair trial guaranteed in international standards; and**
- 6. Ensure everyone before a military tribunal has the right to appeal and there is the possibility of judicial review of all judgments issued by military courts, and that such review is conducted before a higher, independent and civilian court.**

**With the aim of enhancing the independence of prosecutors and tackling impunity, the ICJ recommends that Libyan authorities undertake reforms to:**

- 1. Affirm and guarantee a clear separation between the role and functions of judges and prosecutors and to this end the Libyan authorities should undertake and adopt statutory reforms that reflect the distinct and independent functions of the prosecutor from the rest of the judiciary;**
- 2. Remove the hierarchical authority of the Minister of Justice over the Prosecutor's Office, including the ability to control and direct prosecutors over specific cases;**
- 3. Revoke the power of the Minister of Justice to authorize or initiate prosecutions in specific crimes (article 244 of the Penal Code);**
- 4. Ensure that prosecutors guarantee the protection of human rights and the right to fair trial in all proceedings within their mandate;**
- 5. Take immediate measures to end arbitrary detention across Libya, as well as ensuring to all detainees the right to a fair trial;**
- 6. Ensure that all alleged human rights violations amounting to crimes, including unlawful killings, torture and other ill treatment are impartially and thoroughly investigated and prosecuted and the perpetrators held accountable.**



## Introduction

After decades of authoritarian rule under Colonel Muammar Gadhafi, the violent suppression of protests in February 2011 led to an uprising against his regime, months of conflict between various armed rebel factions (backed by NATO air strikes) and Gadhafi's forces, and the eventual fall of the regime in October 2011. A self-proclaimed National Transitional Council took power, declaring a new era of democracy in Libya and promulgating a Constitutional Declaration that provided for free and fair elections for a new transitional government in 2012. The transfer of power to the provisional parliament, the General National Congress (GNC) following elections in 2012 took place relatively peacefully. The next step in the process was to be a transfer of authority from the GNC, to a new permanent Parliament, the House of Representatives (HoR). Libya seemed, at this juncture, to be undergoing a reasonably successful transition, despite sporadic violence and the ongoing influence of militias. However, in 2014, the transition in the country was marred by the escalation of violence as simmering disputes over the nature of the new Libya, the expiry date of the Parliament and handover procedures led to the splintering of the government into two.

In elections for the HoR held in June 2014, (and provided for by the Constitutional Declaration) many parliamentarians who had held seats in the GNC were not reelected. Thereafter, a coalition of militias, known as *Libya Dawn*, took over Tripoli and declared their allegiance to the GNC, which refused to recognise the legitimacy of the HoR and continued to function as a de facto legislative authority over certain areas of Libya. The HoR, backed by former General Khalifa Haftar, who had played a key role in military operations against Colonel Gadhafi, convened in Tobruq because of heavy fighting in Benghazi. The UN and most other states recognized the HoR as the legitimate Parliament. The Libyan Supreme Court subsequently declared that the HoR had not been created in accordance with the procedures outlined in the Constitutional Declaration of 2011, but HoR supporters argue that the Court was heavily influenced by surrounding militias at the time.

At present, there exist two Parliaments, each with a distinct Prime Minister and functioning Ministries, and both of which have continued to legislate for the whole of Libya. As a result, there is general confusion as to which laws are in fact applicable across Libya. Both governments have attempted to interfere with the structure of the judiciary, impacting its independence, as explored below.

In December 2015, following a series of UN brokered peace talks, the competing factions signed an accord which envisaged the creation of a National Unity Government. However, senior leaders in the GNC refused to sign the accord and the HoR has yet to vote to approve the new government. At the time of writing, the National Unity Government has established itself in Tripoli but both the HoR and the GNC appear to remain operational.

### *The Legal and Justice System of Libya*

Following Libya's independence from Italian colonial rule, a new constitution was promulgated in 1951 establishing Libya as a constitutional monarchy. New laws were drafted that were heavily influenced by French and Italian civil law traditions,<sup>2</sup> as well as by regional developments, in particular in Egypt. Sharia Courts, which had been in place since Ottoman rule, remained operational in parallel to ordinary courts with jurisdiction over the personal status and family law questions in relation to Muslims, including marriage, divorce and inheritance.

Following a military coup by Colonel Gadhafi's forces in September 1969, and until the overthrow of his regime in 2011, there was no clear constitutional framework in Libya. Libya's 1951 Constitution was annulled by Colonel Gadhafi and replaced with a Constitutional Proclamation. This was to be a temporary document until a formal Constitution was established.<sup>3</sup> In 1977 the country was renamed

<sup>2</sup> The monarchy adopted new codes based on French and Italian law. Libya's 1953 Code of Criminal Procedure was a hybrid of the Italian and Napoleonic systems, while the Penal Code of that same year was heavily influenced by Italy's version. Libya's 1954 Civil Code was written by Egypt's Abd al-Razzak al-Sanhuri, a contributor to the 1949 Egyptian Civil Code, itself based on both French civil law and Islamic law. The English version of Libya's civil code is available in M. O. Ansel and I. M. Al-Arif, *The Libyan Civil Code: an English translation and a comparison with the Egyptian Civil Code* (Cambridge, 1972). Most Libyan laws referenced in this report are available at DCAF's website on Libyan Security Sector Legislation, <http://www.security-legislation.ly/home>. Other laws referenced can be made available by the ICJ on request. Where the English translation is not available on DCAF's website, the ICJ has used internal unofficial translations, which may also be made available on request.

<sup>3</sup> The Preamble of the Constitutional Proclamation 1969 states: "The present Constitutional Proclamation is made to provide a basis for the organisation of the State during the phase of completion of the national and democratic revolution, until a permanent constitution is prepared, defining the objectives of the Revolution and outlining the



as the Libyan Arab Jamahiriya and the Declaration on the Establishment of the Authority of the People was adopted. It consisted of 10 articles and declared the Koran to be the Constitution of Libya.<sup>4</sup> These instruments were later supplemented by Colonel Gadhafi in a series of essays known as 'The Green Book'.<sup>5</sup> In terms of the status of law and the Constitution, 'the Green Book' specifically provided: "The natural law of any society is either tradition (custom) or religion...Constitutions are not the law of the society."<sup>6</sup> This provision both undermined the existing constitutional framework in Libya, and clearly was at odds with fundamental rule of law tenets.

In 2011, following the uprising against the Gadhafi regime, the NTC drew up and promulgated a Constitutional Declaration, to govern the transitional period "until a permanent Constitution is ratified in a plebiscite."<sup>7</sup> This document repealed 'the Green Book', the Constitutional Proclamation of 1969 and the Constitution of 1951.

The Constitutional Drafting Assembly (CDA) was elected in 2014 tasked with drafting the new Constitution of Libya, as provided for by the Constitutional Declaration. This body has seen its share of controversy, with a divide emerging between conservative and more liberal minded members who have clashed over key articles, such as the role of Sharia in the legal framework and the rights of women. These rifts in part reflect the current political divisions in the country. In addition, the CDA has been boycotted by the Amazigh community since the beginning of its work and has seen boycotts by the Tuareg and Tebu communities at different periods because of their belief that the process was not adequately representing their communities. In December 2014, the CDA published proposals for different chapters of the Constitution, drafted by separate Committees. These drafts were discussed, to some extent, with civil society and other stakeholders during 2015 and a Drafting Committee of 12 members of the CDA released a comprehensive draft Constitution in October 2015. This draft was analyzed in light of international law and standards by the ICJ in a report published in December 2015.<sup>8</sup> The drafting Committee released a second draft for consideration by the CDA in February 2016 with minor changes to the October draft.

The latest draft of the Constitution was published by the secretariat of the CDA in April 2016.<sup>9</sup> This draft is considered by some members of the CDA as its final draft, which should be put to referendum to be approved by the Libyan people, (as required by the Constitutional Declaration of 2011). However, the draft was not approved by a full quorum of CDA members as outlined in the Constitutional Declaration of 2011, which requires a 2/3 majority plus one of the entire CDA. Rather, in order to address the persistent absence of and continuing boycott by a number of members of the CDA, which prevented the possibility of obtaining a constitutionally mandated quorum, those present at a meeting in April 2016 decided to amend the procedural rules to change a quorum to a 2/3 majority plus one of CDA members *present* rather than of the entire CDA. This amendment is currently being challenged in the courts as unconstitutional; the outcome is pending at time of writing and its impact on what draft will be used going forward is not yet clear.<sup>10</sup> This report analyses relevant articles of the April 2016 draft Constitution as it is the latest published draft and makes recommendations on how to bring it closer in line with international law and standards. In general, the recommendations made by the ICJ in its 2015 report are still pertinent. .

For the time being, the Constitutional Declaration of 2011 remains in force as the effective Libyan

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future course."

<sup>4</sup> Declaration on the Establishment of the Authority of the People (1977), Article 2.

<sup>5</sup> Officially the 'Great Green Charter of Human Rights of the Jamahiriyan Era', (the Green Book), available at: <http://www.security-legislation.ly/node/31865> (last accessed 13 May 2016).

<sup>6</sup> The Green Book, Part I, The Law of Society.

<sup>7</sup> 2011 Constitutional Declaration, Preamble.

<sup>8</sup> This report is entitled: 'The Draft Libyan Constitution: Procedural Deficiencies, Substantive Flaws' and is available at: <http://www.icj.org/libya-revise-draft-constitution-to-ensure-compliance-with-international-standards/> (last accessed 13 May 2016).

<sup>9</sup> This Draft Constitution is available here: <http://www.constitutionnet.org/vl/item/Libya-draft-constitution-19-april-2016-ar> (last accessed 13 May 2016). The translations used in this report are from an unofficial UNSMIL translation.

<sup>10</sup> The Al-Beida Court of Appeal decision of 9 May 2016 suspended the effect of the "Amendment to the CDA's decision 'Number 1 of 2014 issuing the Internal Rules' on [...] 16 April 2016 in the fourth part of the evening session, Number 67, Part 4, taking a decision providing for the amendment of Article 60 of the Internal Rules", pending the outcome of the constitutional challenge.

Constitution. Most of the legislation adopted during Colonel Gadhafi's regime remains in force in Libya.<sup>11</sup> Article 35 of the 2011 Constitutional Declaration states that all existing legislation shall remain valid until amended or abolished, as long as it does not contradict the Constitutional Declaration.

### *Libya's International Human Rights Obligations*

Libya is a State party to the International Covenant on Civil and Political Rights (ICCPR),<sup>12</sup> the International Covenant on Economic, Social and Cultural Rights (ICESCR),<sup>13</sup> the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT),<sup>14</sup> the Convention on the Elimination of Discrimination against Women (CEDAW),<sup>15</sup> the Convention on the Elimination of Racial Discrimination (CERD),<sup>16</sup> the Convention on the Rights of the Child (CRC)<sup>17</sup> and the International Convention on the Protection of the Rights of all Migrant Workers and Members of their Families.<sup>18</sup> It acceded to the First Optional Protocol to the ICCPR (Communication procedure) and the First Optional Protocol to the CRC on the sale of children, child prostitution and child pornography and the Second Optional Protocol to the CRC on the involvement of children in armed conflict. Libya is also a State party to the African Charter on Human and Peoples' Rights (African Charter), as well as to the Maputo Protocol on the African Charter on Human and Peoples' Rights on the Rights of Women in Africa.<sup>19</sup> It has ratified the Arab Charter on Human Rights (the Arab Charter) which came into effect in 2008. In 2008, Libya signed the Convention on the Rights of Persons with Disabilities, but has not yet deposited its instrument of ratification.<sup>20</sup>

The position of international treaties in Libyan law was unclear during the period of Colonel Gadhafi's rule. Both the CEDAW Committee and the UN Human Rights Committee highlighted this lack of clarity in their Concluding Observations of 2009 and 2007, respectively.<sup>21</sup> The Constitutional Declaration is silent as to whether Libya is a monist or dualist state. Current practice holds that once the Legislative Body has approved a treaty it is directly applicable in Libyan courts.<sup>22</sup> The April 2016 draft of the Constitution declares that, "[t]he international treaties and conventions that the State ratifies shall be superior to the law and inferior to the Constitution,"<sup>23</sup> implying that treaties can be used in domestic courts as long as they are in conformity with the provisions of the new Constitution.

The 2011 Constitutional Declaration problematically aims to circumscribe the Libyan legal framework by providing in article 1 that "Islam is the religion of the State and the principal source of legislation is the Islamic Sharia." This is echoed in the April 2016 draft of the Constitution, which provides in article 8 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

<sup>11</sup> For the purpose of consistency with post-Gadhafi laws terminology, the Socialist People's Libyan Arab Jamahiriya, or Libyan Jamahiriya, is referred to as Libya. The Armed People is referred to as the Army or the Armed Forces. The People's Committee is referred to as Ministry, and the Secretary for the People's Committee as Minister. The People's Defence is referred to as Public Defence.

<sup>12</sup> Acceded to on 15 May 1970.

<sup>13</sup> Acceded to on 15 May 1970.

<sup>14</sup> Acceded to on 16 May 1989.

<sup>15</sup> Acceded to on 16 May 1989.

<sup>16</sup> Acceded to on 3 July 1968.

<sup>17</sup> Acceded to on 14 April 1993.

<sup>18</sup> Acceded to on 18 June 2004.

<sup>19</sup> Adopted by the 2nd Ordinary Session of the Assembly of the Union, Maputo, September 13, 2000, CAB/LEG/66.6, entered into force November 25, 2005, ratified by Libya May 23 2004.

<sup>20</sup> See [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=iv-15&chapter=4&lang=en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=iv-15&chapter=4&lang=en) (last accessed 13 May 2016). It has not yet become a party to, inter alia, the International Convention for the Protection of All Persons from Enforced Disappearance, the Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, the Second Optional protocol to the ICCPR, the third Optional Protocol to the CRC, the Optional Protocol to the Convention on the Rights of Persons with Disabilities, the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, or the 1951 Convention relating to the Status of Refugees and its Optional Protocol.

<sup>21</sup> See CEDAW Committee, Concluding Observations on Libya, UN Doc. CEDAW/C/LBY/CO/5, February 2009 para.9 and Human Rights Committee, Concluding Observations on Libya, UN Doc. CCPR/C/LBY/CO/4, para.8.

<sup>22</sup> According to one senior judge, interviewed by the ICJ in May 2016, (name on file with the ICJ).

<sup>23</sup> CDA Draft Constitution, April 2016, article 17.

shall be interpreted in accordance with this."<sup>24</sup>

These provisions, by purporting to give *Sharia* effective precedence above the Constitution, raise concerns as to the ability of Libya to give effect to its international legal obligations, including those arising under international human rights law. Human rights treaties to which Libya is a party may not be rendered subordinate to domestic law, including to any potentially conflicting interpretations of *Sharia* or other laws incompatible with the object and purpose of such treaties."<sup>25</sup> A general rule of international law, codified by the Vienna Convention on the Law of Treaties, is that "[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty."<sup>26</sup> The UN Human Rights Committee has affirmed that under the ICCPR states are prevented from "invoking provisions of the constitutional law or other aspects of domestic law to justify a failure to perform or give effect to obligations under the treaty."<sup>27</sup> The UN Human Rights Committee has also expressed concern when there is "lack of clarity on the primacy of the Covenant over conflicting or contradictory national legislation, including both *Sharia* law and matters not based in *Sharia* law";<sup>28</sup> or "reference is made in the State party's system to certain religious tenets as primary norms"; or *Sharia* is used by the judiciary to come to conclusions that are incompatible with the ICCPR.<sup>29</sup>

### *The Court Structure in Libya*

In 1973, Colonel Gadhafi reorganized the court system in Libya, primarily by merging the *Sharia* court system with the regular civil and criminal courts, purportedly to bring civil law in line with *Sharia* principles. The Judicial Organisation Law of 1973 created a four tier system, still in use today, which consists of: the Supreme Court, Court of Appeal, Courts of First Instance and Summary Courts.

The **Supreme Court** is based in Tripoli and has appellate jurisdiction over all lower courts. It is also responsible for cases involving constitutional interpretation, challenges to the constitutionality of legislation and conflicts of jurisdiction. It sits as a five-judge panel with a majority required for a ruling. The **Court of Appeal** is the second highest court with appellate jurisdiction over the courts of first instance and original jurisdiction for felonies and serious crimes. It sits as a three judge panel requiring a majority for a ruling. The **Courts of First Instance** are found in each district in Libya. They have appellate jurisdiction over the summary courts and primary jurisdiction for civil disputes in excess of 1,000 Libyan Dinar, (around 650 euro), criminal and commercial cases, and personal and religious matters, where *Sharia* is applied. It sits as a three judge panel for its appellate jurisdiction and one judge sits for cases of first instance. **Summary Courts**, comprised of one judge, are found across Libya and their jurisdiction is limited to small civil, commercial and administrative disputes.<sup>30</sup>

<sup>24</sup> CDA Draft Constitution, April 2016, article 8.

<sup>25</sup> See, for example, Pakistan's withdrawal of certain reservations it purported to make on its ratification of the ICCPR, "that the provisions of Articles 3, 6, 7, 18 and 19 shall be so applied to the extent that they are not repugnant to the Provisions of the Constitution of Pakistan and the *Sharia* laws", after objections by other states that such a reservation was invalid. And see similar reaction to reservations by several states under the CEDAW and CRC. See also HRC General Comment, 24, UN Doc. CCPR/C/21/Rev.1/Add.6 (1994) for a discussion on when reservations are incompatible with the Covenant.

<sup>26</sup> Article 27, Vienna Convention on the Law of Treaties, 1969, acceded to by Libya 22 December 2008; International Court of Justice, *Belgium v Senegal*, 2012, para.113.

<sup>27</sup> Human Rights Committee, General Comment No. 31, UN Doc. CCPR/C/21/Rev.1/Add.13 (2004), para.4.

<sup>28</sup> Human Rights Committee, Concluding Observations on Kuwait, UN Doc. CCPR/C/KWT/CO/2 (18 November 2011), para.6.

<sup>29</sup> Human Rights Committee, Concluding Observations on Iran, UN Doc. CCPR/C/IRN/CO/3 (29 November 2011), at para.5 stating that "The Committee notes with concern that reference is made in the State party's system to certain religious tenets as primary norms. The State party should ensure that all the obligations of the Covenant are fully respected and that the provisions of its internal norms are not invoked as justification for its failure to fulfil its obligations under the Covenant;" at para.22 stating that "The Committee is also concerned that judges have used *Sharia* law and fatwas to reach a verdict that was in contravention to the rights and principles as laid down in the Covenant (art. 14).[...] The State party should also ensure that judges, in interpreting legislation as well as in relying on religious principles, do not reach verdicts that are in contravention to the rights and principles as laid down in the Covenant;" and at para.26 stating that "The Committee is concerned that the right to freedom of assembly and association is severely limited, and notes that the holding of public gatherings and marches as well as the establishment of associations are conditional upon compliance with 'principles of Islam', which are not defined under national legislation."

<sup>30</sup> For further detail on the functioning of these courts see 'Security and Justice in post revolution Libya', Fiona Mangan, Christina Murtaugh, Ferdaouis Bagga, *United States Institute of Peace*, 2014, (Peaceworks 2014), p.10 and Alghaitta, N. & Ibrahim, S., *Additional Report: Libya's Court Structure*, in Otto, J.M., Carlisle, J. & Ibrahim, S. (Eds.), *Searching for Justice in Post-Gaddafi Libya*, Leiden: Van Vollenhoven Institute, Leiden University, 2013.

It should be noted that many courts are not currently operational due to the security situation across Libya and that in lieu of ordinary courts individuals are resorting to other forms of dispute resolution, including tribal mechanisms and local religious councils.<sup>31</sup>

### *The Libyan Judiciary*

The structure of the Libyan Judiciary is somewhat unusual as it encompasses a range of bodies with different functions, including the Prosecutor's Office and public defence lawyers. Law No. 6 of 2006 on the Justice System, as amended by Law No. 4 of 2011 and Law No. 14 of 2013, among others, provides for the organization of the judiciary in Libya. This law defines the Judicial Body as "[t]he Judicial Body Inspection Department, the Courts, the Public Prosecution, the Litigation Department, the Public Legal Defence Department, [and] the Law Department."<sup>32</sup>

The **Judicial Body Inspection Department** is the agency responsible for the inspection, assessment and initiation of disciplinary proceedings and is examined in detail in Chapter III on judicial accountability and vetting. The **Courts** encompass all judges working at all levels in the Ordinary Courts, (the court structure is outlined above). Judges working in the Court of Appeal or above are referred to as Counsellors and all judges below that level are referred to as judges. The **Public Prosecution** is considered part of the judiciary in Libya and is examined in detail in Chapter V on the independence of the Prosecutor's Office. The **Litigation Department** is tasked with representing governmental institutions and bodies in judicial proceedings. The law creating this department makes clear that members are answerable to their superiors and ultimately to the Minister of Justice.<sup>33</sup>

The **Public Legal Defence Department** has a somewhat controversial history. It was created by statute in 1981 with the express aim of providing free legal advice to all those taking cases in the courts. The regime initially aimed to squeeze all private lawyers out of practice by providing that lawyers within this department were the only lawyers authorized to practice before the Libyan Courts. This served to sideline lawyers who were willing to act independently. However, private lawyers were authorized to practice again in the early 1990s. Despite the initial controversy over its creation, and its reputation for lacking the independence of private lawyers, the Legal Defence Department is now, in fact, championed by many in the justice sector as playing a positive role in the delivery of justice by providing free legal advice to all those who want to avail of it.<sup>34</sup> Those who have particularly benefited from the provision of free legal advice have been women. In addition, there is evidence that many lawyers working within the public defence department are women, who, in a society still significantly influenced by stereotypical gender roles, have apparently benefitted from the structured conditions, including regular hours and regular salaries.<sup>35</sup>

The **Law Department** was created by Decree in 1993 by the Minister of Justice, charged with, among other functions, analysing draft laws, providing legal opinions to government and public authorities and reviewing international agreements.<sup>36</sup> The law provides that its members must be existing members of another judicial body. However, they are appointed by the Minister of Justice and its members are ultimately subordinate to the Ministry of Justice. Some commentators have observed however that this body was mainly ignored under the Gadhafi regime, a result perhaps of the fact that its decisions were advisory only.<sup>37</sup>

Judicial training is organized by the Judicial Institute.<sup>38</sup> The Judicial Institute has its own legal personality and is an independent financial entity but it is subsidiary to the Ministry of Justice. The Director of the Institute is appointed by the Government, on recommendation by the Minister of Justice, and must hold the grade of at least President of a First Instance Court or hold high qualifications in Islamic jurisprudence and law.<sup>39</sup>

<sup>31</sup> Peaceworks 2014, p.87.

<sup>32</sup> Law No. 6 of 2006 on the Justice System, article 1.

<sup>33</sup> Law No. 87 of 1971, (available in Arabic only).

<sup>34</sup> Including judicial actors interviewed by the ICJ in March 2016 (names on file with the ICJ).

<sup>35</sup> 'Searching for Justice in Post-Gaddafi Libya', Jan Michael Otto, Jessica Carlisle, Suliman Ibrahim, AJIDIL Research Project, 2013 (ADIJIL Report 2013), p.84.

<sup>36</sup> Decree No. 356 of 1993, (available in Arabic only).

<sup>37</sup> 'The State of Law Making in post Gadhafi Libya' by Suliman Ibrahim, *Legal Agenda*, 13 November 2015, available at, <http://english.legal-agenda.com/article.php?id=733&folder=articles&lang=en> (last accessed 13 May 2016).

<sup>38</sup> Decree No. 208 of 1988 outlines the rules and regulations of the Judicial Institute.

<sup>39</sup> Decree No. 208 of 1988, article 8.



### *The Independence of the Judiciary*

The desire for a society based on justice and the rule of law was among the factors that fuelled the 2011 February Uprising in Libya that led to the eventual fall of the regime of Colonel Muammar Gadhafi. The Constitutional Declaration enshrined this aspiration<sup>40</sup> and, at least at the outset of the transition, senior political figures expressed their commitment to delivering justice and re-establishing the rule of law.<sup>41</sup> Significantly, the independence of the judiciary was established in the Constitutional Declaration<sup>42</sup> and has been provided for in the most recent draft of the new Libyan Constitution.<sup>43</sup>

An independent judiciary is vital for the protection and realization of human rights and for creating conditions for accountability and access to justice. International law enshrines the right to an independent and impartial judiciary. It is a fundamental aspect of the rule of law in general and the principle of separation of powers in particular. It is also indispensable to the right to a fair trial, as provided for by the ICCPR and other treaties to which Libya is a party.<sup>44</sup> The Arab Charter, in addition to guaranteeing the right to an independent, impartial and competent tribunal in relation to fair trial, separately provides that, “[t]he States parties shall guarantee the independence of the judiciary and protect magistrates against any interference, pressure or threats.”<sup>45</sup> The African Charter provides for the right to be tried by an “impartial” tribunal.<sup>46</sup> Other international instruments and mechanisms, including regional human rights courts<sup>47</sup> and UN Special Procedures<sup>48</sup> have affirmed the obligation of states to guarantee in law, and secure in practice, an independent and impartial judiciary. As explored throughout this report, the UN Basic Principles on the Independence of the Judiciary contain the universal standards setting out broadly the scope and content of this principle.<sup>49</sup>

Of particular importance in securing an independent judiciary is ensuring the separation of the executive and the judicial branches of government.<sup>50</sup> The UN Human Rights Committee has underlined the importance of this, as follows, “[a] situation where the functions and competencies of

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<sup>40</sup> Libyan Constitutional Declaration of 2011, article 31 states: “there shall be no crime or penalty except by virtue of the text of the law,” and article 32 states: “judges shall be independent, subject to no other authority but the law and conscience.”

<sup>41</sup> The then Prime Minister Al-Keab said in July 2012, “proper justice is one of the reasons why this revolution started”, See, “Libya justice system stagnant despite funding”, Al-Jazeera, 1 July 2012, as quoted in International Crisis Group, *Trial by Error: Justice in Post-Qadhafi Libya Middle East/North Africa Report No. 140*, 17 April 2013, (hereinafter ICG Report).

<sup>42</sup> As noted at supra 1, the Libyan Constitutional Declaration of 2011, article 32 states “judges shall be independent, subject to no other authority but the law and conscience.”

<sup>43</sup> For an in depth analysis of the October 2015 version of the Draft Constitution see ICJ Report, *The Libyan Draft Constitution: Procedural Deficiencies, Substantive Flaws*, available at <http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2015/12/Libya-Draft-Constitution-Flaws-Deficiencies-Publications-Reports-2015-ENG.pdf> (last accessed 13 May 2016).

<sup>44</sup> See article 14 of the ICCPR.

<sup>45</sup> Article 12 of the Arab Charter on Human Rights. Article 13(1) reads, in part 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.” Libya has been a Party to the Arab Charter since 2006.

<sup>46</sup> See article 7 of the African Charter. Libya ratified the African Charter on 19 July 1986.

<sup>47</sup> For a comprehensive overview of international standards see the International Commission of Jurists, Practitioners’ Guide No. 1 on ‘International Principles on the Independence and Accountability of Judges, Lawyers and Prosecutors’, Geneva 2007, (ICJ Practitioner’s Guide No. 1).

<sup>48</sup> See in particular the Special Rapporteur’s report to the Human Rights Council in 2009, where the then Rapporteur focused on measures to ensure the independence of the judiciary, UN Doc. A/HRC/11/41, (2009).

<sup>49</sup> UN Basic Principles on the Independence of the Judiciary, Adopted by the 7<sup>th</sup> UN Congress on the Prevention of Crime and the Treatment of Offenders, 1985, endorsed by UN General Assembly Resolutions 40/32, November 1985 and 40/146, December 1985, (UN Basic Principles on the Independence of the Judiciary).

<sup>50</sup> Report of the Special Rapporteur on the independence of judges and lawyers, UN Doc. A/HRC/11/41 (2009), para.18, stating that: “It is the principle of the separation of powers, together with the rule of law, that opens the way to an administration of justice that provides guarantees of independence, impartiality and transparency”; Report of the Special Rapporteur on the situation of human rights in Nigeria, UN Doc. E/CN.4/1997/62/add.1 (1997), para.71, noting that “the separation of powers and executive respect for such separation is a sine qua non for an independent and impartial judiciary to function effectively”; Report of the Special Rapporteur on the independence of judges and lawyers, UN Doc. E/CN.4/1995/39 (1995), para.55; *Judgment of 31 January 2001*, Inter-American Court of Human Rights, Constitutional Court Case (Aguirre Roca, Rey Terry and Revoredo Marsano v. Peru), para.73.

the judiciary and the executive are not clearly distinguishable or where the latter is able to control or direct the former is incompatible with the notion of an independent tribunal.”<sup>51</sup> The Committee has explained that States must take measures guaranteeing the independence of the judiciary “through the constitution or adoption of laws establishing clear procedures and objective criteria for the appointment, remuneration, tenure, promotion, suspension and dismissal of the members of the judiciary and disciplinary sanctions taken against them.”<sup>52</sup>

### *The Gadhafi Era*

For decades, Libya failed to fully comply with its obligations under international law to respect and protect the independence of the judiciary.<sup>53</sup> The judicial system was compromised by systematic executive influence, corruption, and poor education and training.<sup>54</sup> The High Council of Judicial Bodies (the predecessor to the Supreme Judicial Council), tasked with overseeing the careers of judges including their training, appointment, transfer and discipline, was headed by the Minister of Justice.<sup>55</sup> Transfers between courts were often used to reward or punish judges for actions either in line with or contrary to the interests of the regime.<sup>56</sup> As a result, cases involving the government and loyalists were not always decided on their merits. In addition, the selection of candidates for high judicial positions was generally influenced by connections to the regime.<sup>57</sup> Colonel Gadhafi effectively made the judiciary a tool in the consolidation of his power.

In addition to asserting executive control over the regular system of courts, Colonel Gadhafi created a parallel court system, the ‘People’s Court’, in 1971 with the express purpose to try members of the royal family, monarchists and other political opponents who were accused of rigging elections and “corrupting public opinion.”<sup>58</sup> These courts did not adhere to even basic due process standards<sup>59</sup> and they were not independent. They were largely staffed with judges loyal to Colonel Gadhafi, who often lacked formal legal training,<sup>60</sup> and were primarily used as a tool to quell political opposition. This parallel system of courts was formalized by Law No. 5 of 1988 with jurisdiction over political and security offenses against the State.<sup>61</sup> The new structure contained an appeals court and a Prosecution Service, the People’s Prosecution Office. This office was of particular concern in relation to the independence of the judiciary as it was entitled to pierce the immunity enjoyed by judges in the ordinary courts.<sup>62</sup> These courts routinely violated the right to a fair trial, including by refusing the defendants’ right to access both counsel and evidence against them. According to some reports, these abuses happened in the regular criminal courts as well but were much less widespread.<sup>63</sup>

In addition to the ‘People’s Court’, other courts such as military courts and so called revolutionary committees and courts were put in place by Colonel Gadhafi to try political offences against the state. These parallel judicial systems were used as a mechanism of control rather than of justice. They tainted the independence and affected the authority of the regular judiciary, in particular by undermining trust in the judicial system as a whole.<sup>64</sup>

### *The beginning of judicial reform*

Some reforms to the judiciary in Libya began before the 2011 uprising. In 2006, under international

<sup>51</sup> UN Human Rights Committee, General Comment No. 32, CCPR/C/GC/32, 23 August 2007, para.19.

<sup>52</sup> HRC GC No.32, para.19.

<sup>53</sup> Including under Article 14 of the ICCPR.

<sup>54</sup> See further Peaceworks 2014, p.5.

<sup>55</sup> Law No. 6 of 2006.

<sup>56</sup> Peaceworks 2014, p.10 and 11. See also *The Reform of Judiciaries in the Wake of Arab Spring*, Proceedings of the Seminar 11-12 February 2012, Rabat, Euro-Mediterranean Human Rights Network (EMHRN Report).

<sup>57</sup> Peaceworks 2014, p.11.

<sup>58</sup> See ICG Report p.12.

<sup>59</sup> International Legal Assistance Consortium, *Rule of Law Assessment Report of Libya*, 2013 (ILAC) p.22.

<sup>60</sup> ILAC p.22.

<sup>61</sup> Law No. 5 of 1988.

<sup>62</sup> EMHRN Report.

<sup>63</sup> Human Rights Watch (HRW), “Libya: Words to Deeds: The Urgent Need for Human Rights Reform”, (January 25, 2006).

<sup>64</sup> Peaceworks 2014, p.11.



pressure, the 'People's Court' was abolished<sup>65</sup>, (although a State Security Court, created in 2007, mirrored some practices of the 'People's Court' including prolonged pre-trial detention until it was abolished in 2011).<sup>66</sup> Many judges and prosecutors previously assigned to the 'People's Court' were integrated into the regular system. Not all of these judges and prosecutors had formal legal training and some of the procedures and practices, lifted from the 'People's Court', including prolonged pre-trial detention, were transferred to the General Prosecutor<sup>67</sup> until they were found to be unconstitutional by the Supreme Court in 2012.<sup>68</sup>

Important steps to reform the judiciary and safeguard its independence were taken during the first stage of the transitional period under the National Transitional Council. In particular, article 32 of the Constitutional Declaration of 2011 explicitly enshrined the independence of the judiciary,<sup>69</sup> the Supreme Judicial Council (SJC) was reformed to allow for the election of its members by judges of the upper courts and the Minister of Justice was removed as member and president. Reflecting a new era of independence, the Supreme Court demonstrated its ability and willingness to act independently of government on several occasions in 2012, including by declaring laws that targeted former regime officials unconstitutional.<sup>70</sup> A significant advance in April 2013 was the abolition of the jurisdiction of military courts over civilians by the GNC.<sup>71</sup> In June 2012, a National Committee for the Development of the Judiciary was formed including judges, prosecutors, lawyers and academics. It was commissioned by the President of the SJC to make recommendations on restructuring the judiciary, its administration and the relevant legislative framework.<sup>72</sup> In January 2013, the Committee presented its report, which acknowledged the need to rebuild trust in the judiciary and to reform the judicial system to guarantee its "independence, integrity and impartiality."<sup>73</sup>

Attempts were also made by the GNC to include the judiciary in laws providing for the vetting of previous Gadhafi era officials from public positions. A vetting law passed in 2013, known as the 'Political Isolation law', excluded all public servants who had served under the Gadhafi regime from public positions for ten years, including members of the judiciary. This law overtook and undermined efforts within the judiciary at vetting, and because of its unclear and extensive criteria and unfair procedures caused immense controversy.<sup>74</sup> According to one public prosecutor, up to 180 judges and prosecutors were removed from their posts, or transferred without proper charge or procedure, as a result of this process.<sup>75</sup> Numerous judges went on strike to protest against the application of the law to the judiciary.<sup>76</sup> The status of the law is currently unclear. It has been reportedly overturned by the HoR and challenged in the Supreme Court, which has not yet ruled on its constitutionality.

### *Security and political challenges*

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<sup>65</sup> The 'People's Court' was formally abolished by Law No.7 of 2006 though the government announced that the Court would be abolished in January 2006. See further Human Rights Watch Report, 2006, 'Libya: Words to Deeds, The urgent need for human rights reform', available here: <https://www.hrw.org/reports/2006/libya0106/index.htm>, (last accessed 16 June 2016).

<sup>66</sup> Created by Decision No. 7 of 2007 and abolished by the Constitutional Declaration of 2011.

<sup>67</sup> By article 2 of Law No. 7 of 2005.

<sup>68</sup> Peaceworks 2014, p.11.

<sup>69</sup> Article 32 of the Constitutional Declaration of 2011.

<sup>70</sup> In June 2012, the Court ruled that Law No. 37 of 2012 on the 'Criminalisation of the Glorification of the Tyrant' was unconstitutional because it violated the right to freedom of thought and expression, as protected by the Constitutional Declaration. A November 2012 ruling declared Law No. 52 of 2012 as unconstitutional because it violated the constitutionally protected principle of equality by setting forth strict criteria for certain posts that excluded those that had served under the Gadhafi regime. December 2012 saw the striking down of article 2 of Law No. 7 of 2004 that had abolished the 'People's Court' because rather than abolishing the 'People's Court' completely it had transferred the exceptional powers and procedures of the court to specialised courts and public prosecutions. These procedures had allowed prosecutors to adjudicate criminal offences, including political crimes, suspects could be detained for longer periods and did not have a right to a lawyer during interrogations.

<sup>71</sup> United Nations Support Mission in Libya (UNSMIL) Report, (2013) UN Doc. S/2013/516, p.8 (hereinafter UNSMIL Report 2013).

<sup>72</sup> Report of the Secretary-General on the United Nations Support Mission in Libya, UNSMIL, 30/8/12.

<sup>73</sup> Report of the National Committee for the Development of the Judiciary, January 2013, as quoted in ICG Report, p.16 and footnote 68.

<sup>74</sup> ICJ Report, p.3.

<sup>75</sup> According to a Member of the Libyan Public Prosecution in an interview with the ICJ, March 2016 (name on file with the ICJ).

<sup>76</sup> Peaceworks 2014, p.30.

The process of judicial reform stalled with the deterioration of the security and political situation in the country in 2014. The judicial system is currently barely functioning and faces serious challenges from armed actors and an increasingly unclear judicial and legal framework. This uncertainty is engendered by the present governance crisis.

In interviews conducted in early 2016 by the ICJ, judicial actors stressed the key current obstacle to the efficient and independent functioning of the judiciary in Libya as the negative influence of armed actors. While courts continue to operate in some areas of Libya, in particular civil, administrative and family courts,<sup>77</sup> judges trying criminal cases in particular face intimidation and threats by militias. One ICJ interviewee stated that the court in the jurisdiction where she works had not functioned in five years, leading to the ongoing detention of detainees who cannot be tried. Courts are unable to notify parties of court proceedings and court orders are not executed.<sup>78</sup> The United Nations Support Mission in Libya (UNSMIL) and the Office of the UN High Commissioner for Human Rights (OHCHR) have documented ongoing and severe violent attacks against the judiciary during the transition period<sup>79</sup> as well as the negative effect of the security situation on its ability to function. In February 2016, the OHCHR noted that, “[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>80</sup> Judicial police are incapable of providing protection for court staff.<sup>81</sup>

Beyond the influence of the militias on the ordinary judicial system, the International Crisis Group has described “a parallel judicial system in which independent armed groups assumed state functions, arresting, detaining and kidnapping individuals without judicial oversight or accountability.”<sup>82</sup> The use of detention centres outside the legal framework by armed actors not accountable to the state is a particular challenge for the Libyan justice system. In November 2015, Human Rights Watch identified 4,000 of 6,000 prisoners in one region alone that had not been charged and were arbitrarily detained.<sup>83</sup> The use of torture and ill-treatment in these detention systems has also been widely documented.<sup>84</sup>

In addition to the security challenges, the judiciary has become embroiled in the political contest between the two competing parliaments since 2014, the GNC in Tripoli and the HoR in Tobruk, (both still in existence at time of writing). Both Parliaments have attempted to use the courts and the judiciary to assert their respective legitimacy, thus forcing the judiciary to take sides in the political stand-off and undermining its independence. As noted above, the establishment of the HoR in 2014, envisaged by the Constitutional Declaration, was challenged in the Supreme Court. The finding by the Tripoli based court that the HoR was illegitimate was viewed by many actors as resulting from the influence of militias who were ‘protecting’ the court at the time and who supported the actors within the GNC.<sup>85</sup> The GNC has attempted to influence the make-up of the Supreme Court, including by appointing the President, bypassing the SJC, and requiring the swearing of an oath before the GNC, rather than before the SJC. The HoR, in turn, has attempted to reassert executive control over the SJC, including by drafting a law that would reinstate the Minister of Justice as a member. The law,

<sup>77</sup> “Except for senior members of the Qadhafi regime, the resumption of criminal trials remains slow, owing to security problems, while civil, commercial and administrative courts appear to be resuming operations at a faster pace.” UNSMIL Report, UN Doc. S/2013/516, p.8.

<sup>78</sup> ICJ interview with a Libyan judge, March 2016 (name on file with the ICJ).

<sup>79</sup> “The safety of judicial personnel remained a serious concern, with several attacks on prosecutors and judges recorded, including the assassination of a high-level judge outside the courthouse in Derna on 16 June and bomb attacks on courthouses in Sirte and Benghazi on 24 and 28 July, respectively.” UNSMIL Report, UN Doc. S/2013/516, p.7; In February 2014, UNSMIL noted a “series of targeted assassinations in Benghazi, primarily against serving and former security and judicial personnel”, UNSMIL Report, February 2014, UN Doc. S/2014/131, p.4 In September 2014, it noted, “[a]ssaults and threats of violence against judges and prosecutors continued to impede judicial work”... “Courts in Derna, Benghazi and Sirte stopped working in March”. UNSMIL September 2014 p.9.

<sup>80</sup> OHCHR Report, February 2016, UN Doc. A/HRC/31/CRP.3, p.55.

<sup>81</sup> ICJ interviewee, March 2016 (name on file with the ICJ).

<sup>82</sup> ICG Report, p.18.

<sup>83</sup> Human Rights Watch, *The Endless Wait, Long-term Arbitrary Detentions and Torture in Western Libya*, December 2015, available at: <https://www.hrw.org/node/283978>, (last accessed 13 May 2016).

<sup>84</sup> Including by Human Rights Watch in ‘*The Endless Wait, Long-term Arbitrary Detentions and Torture in Western Libya*’, December 2015.

<sup>85</sup> ICJ interviewee, March 2016 (name on file with the ICJ).

however, failed to pass at the legislative committee stage.<sup>86</sup>

### *This report*

An in depth assessment of the impact of the volatile security and political situation in Libya on the judiciary is not the focus of this report. Rather, while the obvious impact of the security situation is acknowledged, this report analyzes the laws in place relevant to the independence and accountability of the judiciary and, envisaging a future stable governance framework, makes recommendations for law reforms necessary for rebuilding trust in the Libyan judiciary, establishing and strengthening its independence and consolidating the rule of law.

For the most part, the main body of legislation under which the judiciary was organized under Colonel Gadhafi's regime is still in place, despite the promulgation of several reforms by the National Transitional Council, the GNC and the HoR.<sup>87</sup> The report analyzes these laws in light of international standards and makes recommendations to the Libyan authorities on how the law in place can be reformed to better provide for an independent and accountable judiciary.

In particular, Chapter I considers the composition and mandate of the SJC. Chapter II evaluates the Statute on the Justice System, analysing laws in place related to the selection criteria, appointment process, training, assessment, promotion, transfers, disciplining and security of tenure of judges. Chapter III addresses the accountability of judges, analysing the disciplinary procedures in place, the Code of Ethics and Conduct, attempts at vetting and provisions for criminal accountability, including for complicity in human rights violations. Chapter V analyzes the laws in place governing the Office of the Prosecutor and assesses to what extent they comply with international standards, in particular in relation to safeguarding the independence of the Prosecution.

The representation and role of women in the judiciary in Libya is also a focus of this report.<sup>88</sup> Laws put in place under Colonel Gadhafi facilitated women's participation in the judiciary, including by explicitly providing for the right of women to work in the judiciary and for the right to work. However, societal stereotypes regarding women's role as the primary caretaker in the domestic sphere hindered women's full participation in public life, including in the judiciary, as noted by the UN Committee on the Elimination of Discrimination against Women in 2009.<sup>89</sup> Worryingly, the right of women to hold judicial office has come under attack since the transition in Libya. There have been two specific constitutional challenges to the right of women to hold positions in the judiciary<sup>90</sup> (the outcomes are pending in the Supreme Court). These cases have been taken in the context of other concerning legislation passed during the transition period, which also weaken women's rights.<sup>91</sup> Further, women who participate in public life, including human rights defenders, have been targeted during the ongoing conflict.<sup>92</sup> This report makes recommendations on how women's representation in the judiciary can be both protected and enhanced.

This report bases its analysis on international law standards. The sources include principle human rights treaties to which Libya is a party, as outlined above, and their interpreting authorities, including the ICCPR, the Arab Charter and the African Charter. Sources also include the principal declarative instruments concerning the independence of the judiciary and the legal profession, including the UN

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<sup>86</sup> According to a Libyan law lecturer interviewed in March 2016.

<sup>87</sup> AJIDIL Report (2013) p.27.

<sup>88</sup> The ICJ notes that the adequate representation of other groups, such as minorities, is also an issue in the Libyan context but this is beyond the scope of this report.

<sup>89</sup> CEDAW Concluding Observations, UN Doc. CEDAW/C/LBY/CO/5, February 2009.

<sup>90</sup> Constitutional Challenge No. 10/60(judicial year) of 2012 and Constitutional Challenge No.14/60 (judicial year) of 2013.

<sup>91</sup> For example, the GNC has passed legislation ruling that women cannot act as witnesses to marriage contracts, GNC Law No.14 of 2015.

<sup>92</sup> See Amnesty International, Human Rights Abuses Continue as Country Descends into Chaos, Submission for Libya's Universal Periodic Review, May 2015, p.6 available at: <https://www.amnesty.org/download/Documents/MDE1900032015ENGLISH.pdf> (last accessed 13 May 2016), (AI May 2015), and see Human Rights Watch, 'A Revolution for All: Women's Rights in the New Libya', 2013, available at: [http://www.hrw.org/sites/default/files/reports/libya0513\\_brochure\\_LOWRES.pdf](http://www.hrw.org/sites/default/files/reports/libya0513_brochure_LOWRES.pdf) (last accessed 13 May 2016)

Basic Principles on the Independence of the Judiciary,<sup>93</sup> the UN Basic Principles on the Role of Lawyers,<sup>94</sup> the UN Guidelines on the Role of Prosecutors<sup>95</sup> and the African Union's Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa. A comprehensive survey of many of these instruments can be found in the ICJ's Practitioners' Guide on the Independence and Accountability of Judges, Lawyers and Prosecutors.<sup>96</sup>

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<sup>93</sup> Adopted by the 7<sup>th</sup> UN Congress on the Prevention of Crime and the Treatment of Offenders, 1985, endorsed by UN General Assembly Resolutions 40/32, November 1985 and 40/146, December 1985, (UN Basic Principles on the Independence of the Judiciary).

<sup>94</sup> Adopted by the 8<sup>th</sup> UN Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990.

<sup>95</sup> Adopted by the 8<sup>th</sup> UN Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990.

<sup>96</sup> ICJ Practitioner's Guide No. 1; see also the ICJ Geneva Declaration on Upholding the Rule of Law and the Role of Lawyers and Judges in Times of Crisis and its legal commentary, available at: <http://www.icj.org/legal-commentary-to-the-icj-geneva-declaration-upholding-the-rule-of-law-and-the-role-of-judges-lawyers-in-times-of-crisis/> (last accessed 13 May 2016).

## I. The Supreme Judicial Council

### A. Introduction

Judicial Councils, or similar bodies, are designed and established to manage and regulate the careers of judges from training to appointment, promotion to discipline, and tenure to retirement. To do so properly and effectively, they must function independently and as a crucial check against the risk of executive control over and interference in the work of the judiciary. Judicial councils should be independent bodies, consisting of a majority of judges, who are elected by their peers. Judicial councils can play an important role in reinforcing the separation of powers and safeguarding the institutional and individual independence of the judiciary, as well as promoting the efficient functioning of the judiciary.<sup>97</sup> In order to be effective in this role, they must be truly independent from the executive and, importantly, they must be given sufficient authority.

### B. Libyan Legal Framework

Libyan legislation provides for a judicial council, the SJC, to organize the affairs of the judiciary. The SJC is provided for in Law No. 4 of 2011, (amending Law No. 6 of 2006) and replaces the body which formerly had authority over judges' careers, known as the High Council of Judicial Bodies.<sup>98</sup> The membership of the former body had included the Minister of Justice and all of the heads of departments within the Ministry of Justice. This arrangement obviously vested significant power in the executive over the affairs of judges and was not consistent with the separation of powers.

In a relatively swift development following the uprising in 2011 demonstrating the desire to enhance the rule of law as a key aim of the movement, Law No. 4 of 2011 was passed by the National Transitional Council, the first post-Gadhafi government in Libya, which significantly enhanced the independence of the judiciary, in particular by removing the Minister of Justice as president and member of the Council.

#### i. Mandate of the Supreme Judicial Council

Article 5 of the main law on the organization of the judiciary, Law No. 6 of 2006, as amended, defines the SJC's competences as follows: "[t]he Council shall be responsible for overseeing judicial affairs and for exercising all competences related to the professional affairs of the members of judicial bodies, in the manner set out in this law."

Article 5 goes on to detail the SJC's responsibilities as follows:

"The Council shall also be responsible for the following matters:

1. Providing opinions in all matters related to judicial bodies, and studying and proposing legislat[ion] on [matters] related to judicial systems.
2. Ratifying the provisions which are legally subject to ratification.
3. Issuing full or partial pardons for penalties.
4. Other competences as stipulated in this law or other laws."

Article 6 of Law No. 6 of 2006, as amended by Law No. 4 of 2011, provides that the SJC will be the sole body responsible for adjudicating requests by members of judicial bodies on, "1. [t]he cancellation of final administrative decisions related to any professional matters of members of judicial bodies, which originally fall under the jurisdiction of the administrative judiciary, as well as requests for any resulting compensation. 2. Disputes regarding the salaries, pensions, and bonuses due to members of judicial bodies or to their heirs." Article 6, as amended, provides

<sup>97</sup> European Charter on the Statute for Judges, adopted by the participants at a multilateral meeting of the Council of Europe, Strasbourg, 8-10 July 1998, DAJ/DOC (98) 23, para.1.3.

<sup>98</sup> Provided for by Law No. 6 of 2006.



that decisions taken by the SJC on these matters will be final.

As to its financial independence, article 1 of Law No. 14 of 2013 provides as follows:

To conduct its business, the SJC shall have a budget separate from the state budget. The President of the SJC shall have the same powers of a department head with respect to the disbursement of such budget.

ii. Composition of the Supreme Judicial Council

As noted above, Law No. 4 of 2011, amending Law No. 6 of 2006, enhanced the independence of the judiciary by removing the Minister of Justice as a member of the SJC. It also restricted the members of the Council to the President of the Supreme Court, the Prosecutor General and the Presidents of the "seven courts of appeal," thus insulating the Council from the executive. Law No. 14 of 2013, however, added to the composition of the SJC by reintroducing the participation of members representing different bodies within the judiciary. These include representatives from the Litigation Department, the Public Legal Defence Department, and the Law Department, as well as the head of the Judicial Body Inspection Department.

Article 1 of Law No. 14 of 2013 provides:

Judicial affairs shall be handled by a supreme council called the 'Supreme Judicial Council', (SJC). The SJC shall assume the powers of the Supreme Council of Judicial Bodies stipulated by the aforementioned Justice System Law and by any other law. It shall be composed of the following:

1. A counsellor from the Supreme Court elected by the general assembly of the Supreme Court by secret ballot.
2. Head of the Judicial Body Inspection Department.
3. A counsellor from every court of appeal elected by the general assembly of each such court by secret ballot.
4. The Prosecutor General.
5. A member on behalf of the Litigation Department, the Public Legal Defence Department, [and] the Law Department. The member's grade shall be no less than that of a counsellor in a court of appeal. He shall be elected by the Department's members who are in the same grade by secret ballot.

Article 1 of Law No. 14 of 2013 sets out criteria for candidacy to the SJC. In particular, members must not have been a member or secretary of the "People's Congress" nor of a "People's Committee" at any level, they must not have worked in the court or prosecution of cases concerning the "17 February Revolution," or in a State Security Court or Prosecution or in a Specialized court or prosecution in cases referred to at the discretion of the "Prosecutor General, the People's Court, the People's Prosecution Office, the Permanent Revolutionary Court, or the Revolution Security Prosecution." They must not have been the "the head of a cleansing committee; or a collaborator with one of the security agencies of the former regime." Further, no disciplinary ruling must have been issued against candidates and they must not have received a "final assessment with a below average grade."

The duration of membership of the SJC is three years, full time with the exception of the Head of the Judicial Body Inspection Department (JBID) and the Prosecutor General. The ICJ understands that terms on the SJC are renewable. At the time of writing, two members of the outgoing SJC are standing for reelection.<sup>99</sup> The length of the membership of the Head of the JBID and the Prosecutor General appears not to be specified. The SJC is given the authority to "develop the candidature mechanism and verify that the candidates for the membership of the Council meet the conditions," as well as to supervise election procedures.

Article 1 also provides that the "mandate of the existing SJC at the issuance of this law shall end from the date of the announcement of the results."

Article 1 further provides that "[t]he SJC shall select from among its members a president and a vice-president by secret ballot. Membership in the SJC shall end by death, resignation, inability to exercise the duties of membership, the loss of one of the conditions for membership, or breach of the professional duties."

<sup>99</sup> Phone interview by the ICJ with a Libyan judge, June 2016.



Law No. 6 of 2015, issued by the GNC, provided that rather than a Counsellor from the Supreme Court to be elected as representative of that Court, the President of the Supreme Court would be automatically appointed as President of the SJC. In addition, the Head of the Judicial Body Inspection Department would automatically be the Vice President. This law had not been implemented at the time of writing and the composition of the current SJC complies with Law No. 14 of 2013.

iii. Women's Representation on the Supreme Judicial Council

While Libyan law provides explicitly that women may be members of the judiciary,<sup>100</sup> there are no provisions providing for additional measures to ensure or at least facilitate women's adequate representation either in the SJC or in judicial offices. There are no women sitting on the current, (outgoing), SJC.<sup>101</sup> However, elections for a new SJC are currently under way. One woman has already been elected to represent the Benghazi Court of Appeal. 50% of candidates for certain other positions, including other Courts of Appeal, the Public Defence Department and the Litigation authority are women.

**C. International Standards on Judicial Councils**

i. Mandate of judicial councils

Tasking an independent body such as a judicial council with responsibility over all aspects of judges' careers is vital for ensuring the independence of the judiciary from the executive. The UN Human Rights Committee has held that article 14 of the ICCPR imposes the obligation on States to "take specific measures guaranteeing the independence of the judiciary, protecting judges from any form of political influence in their decision-making through the constitution or adoption of laws establishing clear procedures and objective criteria for the appointment, remuneration, tenure, promotion, suspension and dismissal of the members of the judiciary and disciplinary sanctions taken against them."<sup>102</sup> Similarly, the European Charter on the Statute for Judges recommends "the intervention of an authority independent of the executive and legislative powers" in respect of "every decision affecting the selection, recruitment, appointment, career progress or termination of office of a judge."<sup>103</sup> Thus, the competence of a judicial council should extend to the management of all aspects of the careers of judges from the beginning of their career as a judge until its end.

The State must ensure that the judiciary is provided with adequate resources in order to discharge its functions effectively. This requirement is necessary to ensure the protection of the rule of law, the right of access to courts, the independence of the judiciary and the right to a fair trial.<sup>104</sup> In addition to the provision of adequate resources, the judiciary should be involved in the drafting of its own budget.<sup>105</sup> A number of regional standards also provide that the judiciary should be consulted regarding the preparation of its budget and its implementation.<sup>106</sup> Consultation with and the involvement of the judiciary in budgetary matters can play a role in safeguarding against inappropriate influence by the executive in judicial affairs, particularly where the outcome of sensitive cases may be concerned.<sup>107</sup> The UN Special Rapporteur on the independence of judges and lawyers has recommended that a fixed percentage of GDP should be established in favour of the judiciary and that this budget be progressively increased.<sup>108</sup>

<sup>100</sup> Law No. 8 of 1989.

<sup>101</sup> At the time of writing, elections are underway for a new SJC. The term of the last SJC officially ended in May 2016 but it is unclear when the new SJC will take up its mandate. See further: 'The Elections of the Supreme Judicial Council in Libya: A message of unity amidst a major division' Marwan Tashani, Legal Agenda, 5 June 2016, p.19.

<sup>102</sup> HRC General Comment No. 32, para.19.

<sup>103</sup> European Charter on the Statute for Judges, adopted by the participants at a multilateral meeting of the Council of Europe, Strasbourg, 8-10 July 1998, DAJ/DOC (98) 23, para.1.3.

<sup>104</sup> UN Basic Principles on the Independence of the Judiciary, Principle 7; see also Concluding Observations of the Human Rights Committee on the Central African Republic, UN Doc. CCPR/C/CAF/CO/2, para.16.

<sup>105</sup> Report of the Special Rapporteur on the independence of judges and lawyers, UN Doc. A/HRC/11/41 (2009), para.39.

<sup>106</sup> ACHPR Principles and Guidelines, Section A, Principle 4(v); Committee of Ministers (CoM) Recommendation (2010)12, para.40.

<sup>107</sup> ICJ Practitioners' Guide No. 1, p. 33.

<sup>108</sup> Report of the Special Rapporteur on the independence of judges and lawyers, Addendum, Mission to Maldives, UN Doc. A/HRC/4/25/Add.2 (2007), para.77. The Special Rapporteur also underlined that the reduction of the

Based on its global experience and expertise, the ICJ has likewise identified the lack of participation by the judiciary in the drafting of its budget as a factor that can undermine judicial independence and impartiality. The ICJ Practitioners' Guide on independence and accountability of judges, lawyers and prosecutors states, "[i]nasmuch as other branches of power or State institutions wield an important influence in the allocation and administration of those resources given to the judiciary, there is a real possibility of influencing the outcomes of particularly sensitive cases, which would entail an attack on the independence of the judiciary".<sup>109</sup>

ii. Composition of judicial councils

While not necessarily the only instrument by which to ensure the competent and independent administration of the judiciary, judicial councils or similar bodies are among the most effective means to do so and their establishment constitutes a best practice in this regard.

International standards hold that a judicial council should be independent of the executive and legislative branches of government in order to safeguard its own independence and the independence of the judiciary as a whole. In practice, this means that the executive, whether represented by a Minister of Justice or any other figure within the Ministry or other executive bodies, and whether or not they are political appointees or civil servants, should not have significant control over the judicial council nor have an overriding role in its functioning. Judicial councils should consist of a majority of judges. The UN Special Rapporteur on the independence of judges and lawyers has stated that the composition of a judicial council "matters greatly to judicial independence as it is required to act in an objective, fair and independent manner when selecting judges." Therefore, "[n]o political representation should be permitted" on a judicial council, but rather it "should preferably be composed entirely of judges, retired or sitting, although some representation of the legal profession or academia could be advisable."<sup>110</sup>

Independence is best protected where a significant proportion of the judicial council are judges who are chosen by their peers. The Council of Europe's Committee of Ministers (CoM) have recommended that "at least half" of the members should be judges.<sup>111</sup> The Council of Europe has recommended that: "[t]he authority taking the decision on the selection and career of judges should be independent of the government and the administration. In order to safeguard its independence, rules should ensure that, for instance, its members are selected by the judiciary and that the authority decides itself on its procedural rules."<sup>112</sup>

The Explanatory Memorandum to the European Charter on the Statute for Judges states that in order to avoid the "risk of party-political bias," the judges who are "members of the independent body should be elected by their peers, on the grounds that the requisite independence of this body precludes the election or appointment of its members by a political authority belonging to the executive or the legislature."<sup>113</sup>

iii. Women's representation on judicial councils

International law and standards require that States take positive measure to ensure women have equal opportunities to participate in public life. The Committee for the Elimination of Discrimination against Women has emphasized that article 7 of the Convention requires States to remove legal barriers and to take additional measures to ensure that women enjoy equal opportunities to participate in the judiciary. These may include temporary special measures such as "recruiting, financially assisting and training women candidates, amending electoral procedures, developing campaigns directed at equal participation, setting numerical goals and quotas and targeting women for appointment to public positions such as the judiciary."<sup>114</sup> Additionally, the UN Special Rapporteur on the independence of judges and lawyers has stated, "since a primary function of the judiciary is to promote equality and

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judiciary's budget significantly hampers the administration of justice: Report of the Special Rapporteur on the independence of judges and lawyers, UN Doc. A/HRC/11/41 (2009), para.41.

<sup>109</sup> ICJ Practitioners' Guide No. 1, p. 33.

<sup>110</sup> Report of the Special Rapporteur on the Independence of Judges and Lawyers, UN Doc. A/HRC/26/32, 28 April 2014, para.126.

<sup>111</sup> See CoM Recommendation (2010)12, para.27.

<sup>112</sup> The Council of Europe, Recommendation No. R (94) 12, Principle I.2.c.

<sup>113</sup> Explanatory Memorandum to the European Charter on the Statute for Judges, Principle 1.3.

<sup>114</sup> Committee on the Elimination of Discrimination against Women, General Recommendation No. 23: Political and public life, UN Doc. HRI/GEN/1/Rev.9 (Vol. II)(1997), para.15.

fairness, the composition of courts and other judicial offices should reflect the State's commitment to equality."<sup>115</sup>

#### ***D. Assessment in light of international law and standards***

##### ***i. Composition of the Supreme Judicial Council***

The requirement that judicial councils be independent of the executive and legislative branches of government was addressed to a great extent in 2011 with the removal of the Minister of Justice from the SJC.<sup>116</sup> The ICJ, however, is concerned about the potential influence of the executive within the SJC considering the inclusion of members of the Litigation Department, the People's Legal Defence Department, and the Law Department. As explained above, these three bodies were created during the Gadhafi era and mandated with particular functions within the judiciary. They are considered part of the judiciary by law (Law No. 6 of 2006), but the statute creating each department places it within the remit of the Ministry of Justice and holds that all members of each department are accountable to the Ministry of Justice. Given that the members of these bodies are all ultimately accountable to the Ministry of Justice, their presence on the SJC, at least as the bodies are presently constituted, is problematic from the perspective of safeguarding judicial independence. On the other hand, the members of these departments are drawn from the judiciary, and given the nature of the transfer rules between the rest of the judiciary and these departments,<sup>117</sup> it would appear that to have an SJC that is properly representative of the judiciary a member from each department in principle is not inappropriate. The dilemma could be remedied by placing these departments either firmly within the ambit of the judiciary by severing the link with the Ministry of Justice or by establishing these entities as independent bodies outside of the judiciary. (If they were established as independent bodies, their representation on the SJC would be less compelling).

The ICJ understands that this is a sensitive issue for the judiciary in Libya, given that judges who have been transferred temporarily to the prosecution or public defence could now face an obstacle transferring back to the judiciary where it is appropriate or may face the loss of certain privileges. Nonetheless, the presence of prosecutors and defence lawyers on a judicial council does raise the possibility of, or at least the appearance of, a conflict of interest where lawyers have, or may be due, to appear in Court before judges, whose careers are under consideration by the SJC (for example for promotion or disciplinary action). This could be remedied by providing in law that prosecutors and defence lawyers may never sit on a board considering a judge's promotion or disciplinary action against a judge.

A second problem with the composition of the SJC is the fact that the Head of the JBID sits on the SJC. This may affect the fairness and integrity of promotion decisions and disciplinary proceedings in particular given that the JBID conducts assessments and is responsible for preparing the case against a judge subject to disciplinary proceedings. This has been described by one Libyan judge as 'the same person acting as prosecutor and judge in the same case'. The ICJ therefore recommends that the Head of the JBID be removed from the SJC.

The ICJ welcomes the fact that the composition of the SJC consists of a majority of judges, which positively reflects international standards. The relevant Libyan law provides that: the SJC shall be made up of a counsellor from the Supreme Court elected by the general assembly of the Supreme Court by secret ballot; the Head of the JBID; a counsellor from every court of appeal elected by the general assembly of each such court by secret ballot; the Prosecutor General; a member on behalf of the State Lawsuits Authority, the Department of People's Legal Defence, and the Law Department.<sup>118</sup> While the introduction of the election of members by other members of the judicial department they are nominated by is a step in the right direction, the composition and election process of the SJC could be improved in another key respect. Currently, there is no representation of judges from the lower courts, nor do judges from the lower courts have the right to participate in elections to the SJC.

Judicial councils should be fully representative of the judiciary as a whole, with no exclusion as to category or level of court. The European Charter on the Statute for Judges, for example, provides that "[i]n respect of every decision affecting the selection, recruitment, appointment, career progress or termination of office of a judge, the statute envisages the intervention of an authority independent of

<sup>115</sup> Interim Report of the Special Rapporteur on the independence of judges and lawyers, UN Doc. A/66/289 (2011), para.26.

<sup>116</sup> Law No. 4 of 2011.

<sup>117</sup> Transfer rules in the Libyan judiciary are generally open and flexible, as explored in chapter II of this report.

<sup>118</sup> Article 1 of Law No. 14 of 2013 (replacing article 3 of the 2006 law).

the executive and legislative powers within which at least one half of those who sit are judges elected by their peers *following methods guaranteeing the widest representation of the judiciary*,” (emphasis added). Regional examples of such practice can be found in Morocco and Tunisia, where judges from the lower courts are mandated to sit on the each country’s respective judicial council.<sup>119</sup>

The ICJ therefore recommends that there is some representation on the SJC of judges from the lower courts and that all judges have the right to participate in elections to the SJC.

The fact that the SJC, under Law No. 14 of 2013, (amending Law No. 6 of 2006), elects its own president and vice-president from among its members is a positive contribution to ensuring independence, as is the clear statement of the length of membership (three years with the exception of the Head of the Judicial Body Inspection Department and the Prosecutor General) and the inclusion of clear conditions whereby membership of the SJC shall end.<sup>120</sup> It is also positive that the SJC is given the authority to “develop the candidature mechanism and verify that the candidates for the membership of the Council meet the conditions”, as well as to supervise selection procedures. This meets international standards to the extent that they provide that a judicial council should decide on its own procedural rules.<sup>121</sup> The ICJ recommends, however, that the law should explicitly provide for a procedure for the election of members that is fair, inclusive, transparent and independently administered.

As noted above, article 1 of Law No. 14 of 2013 lays down certain criteria for candidacy to the SJC. No disciplinary ruling must have been issued against the candidates and they must not have received a “final assessment with a below average grade.” The requirement of having obtained a certain grade in assessments is salutary, as it requires that merit is taken into account. Taking some account of prior disciplinary rulings is certainly appropriate as it goes directly to standards of integrity. On the other hand, making a single disciplinary infraction an absolute bar is not sound. Particularly problematic are instances where a disciplinary ruling may have been issued a long time in the past, or may have been for a minor infraction, or where the disciplinary procedure itself was unfair or inappropriate, as was the case with many past infractions. The ICJ therefore recommends that only a serious disciplinary infraction issued since the SJC was reformed to ensure its independence under Law No. 4 of 2011 should exclude a candidate from the HJC and therefore that ‘serious’ is introduced before ‘disciplinary ruling’ in article 1.

The same article provides that members must not have been a member or secretary of the “People’s Congress” nor of a “People’s Committee” at any level; must not have worked in the court or prosecution of cases concerning the “17 February Revolution” or in a court or prosecution in cases referred to at the discretion of, among others, the Prosecutor General or the People’s Court; [t]he candidate must not have been the “the head of a cleansing committee; or a collaborator with one of the security agencies of the former regime.”

The ICJ is concerned that excluding all judges who sat on cases related to the February 2011 Uprising or referred to at the discretion of the prosecutor general, among others, appears to be an overly broad exclusionary measure. The ICJ therefore recommends that this exclusionary clause be narrowed to refer instead to those judges who have been vetted by an independent mechanism, through a fair and transparent process and that this vetting procedure contains clear criteria of a grave enough nature to warrant exclusion, such as complicity in gross human rights violations, serious crimes or corruption. The vetting procedure should be decided on a case by case basis and should not exclude entire categories of people. It should also be made clear that individuals must not be excluded from the SJC on the basis of their political opinion. Neither should they be excluded as result of mere association with those with whom they may have served in a professional legal capacity, provided that their representation or other association did not constitute a serious breach of professional ethics.

## ii. Women’s representation on the Supreme Judicial Council

There appears to be no provision in Libyan law to ensure that women are adequately represented on the SJC. As noted above, there are no women sitting on the current, (outgoing), SJC.<sup>122</sup> However,

<sup>119</sup> See article 115 of the Moroccan Constitution and article 10 of Draft Law No 16 of 2015, (recently signed into law by the President), entitled ‘La loi organique sur le conseil supérieur de la magistrature’.

<sup>120</sup> Article 1 of Law No. 14 of 2013 states “[t]he SJC shall select from among its members a president and a vice-president by secret ballot. Membership in the SJC shall end by death, resignation, inability to exercise the duties of membership, the loss of one of the conditions for membership, or breach of the professional duties.”

<sup>121</sup> The Council of Europe, Recommendation No. R(94)12, Principle I.2.c. Explanatory Memorandum to the European Charter on the Statute for Judges, Principle 1.3.

<sup>122</sup> See further: ‘The Elections of the Supreme Judicial Council in Libya: A message of unity amidst a major divi-

in the ongoing elections for the new SJC, one woman has been elected and 50% of candidates for certain other positions, including other Courts of Appeal, the Public Defence Department and the Litigation authority are women. While the outcome of these elections are not yet known, the fact that at least one woman will be represented on the SJC can be viewed as a positive development. Under international standards, the SJC should be representative of the whole judiciary and States should take additional measures to ensure women's equal participation in the judiciary as a whole and in judicial offices. In the context of some concerning cases taken in Libya over the last few years involving restrictions on the rights of women, and, in particular, challenging the right of women to work as judges (as discussed in Chapter II), ensuring that women are substantially represented on the SJC should be made a high priority. The ICJ therefore recommends that the statute governing the composition of the SJC should provide for a pluralistic and representative membership, and, in particular, substantial gender representation, (and ultimately approximate gender parity).<sup>123</sup>

### iii. Mandate of the Supreme Judicial Council

Article 5 of Law No. 6 of 2006 provides, in part, that "[t]he Council shall be responsible for overseeing judicial affairs and for exercising all competences related to the professional affairs of the members of judicial bodies, in the manner set out in this law." The competence of the SJC, both over the key aspects of the careers of judges and over procedures and the development of laws that are relevant to judicial bodies, meets international standards requiring an independent council to be in charge of every aspect of judge's careers. Article 5 goes on to provide that the Council shall also be responsible for "[p]roviding opinions in all matters related to judicial bodies, and studying and proposing legislat[ion] on [matters] related to judicial systems." This appropriately establishes the SJC's competency in an important area but the ICJ considers that this provision should go further in requiring that all authorities, in particular the Parliament and the executive authorities, be required proactively to consult the SJC and to consider its opinion on all matters relating to the judiciary, including judicial reforms.

### *Finance*

A significant issue that could be improved in relation to the competence of the SJC, and of crucial importance to its independence, is the authority it has over its budget and the budget of the judiciary as a whole. International standards, including the UN Basic Principles on the Independence of the Judiciary, hold that the State should ensure that the judiciary is provided with adequate resources in order to discharge its functions effectively.<sup>124</sup> In addition to the provision of resources, the judiciary should be involved in the determination of its own budget<sup>125</sup> in order to safeguard against inappropriate influence by the executive in judicial affairs, particularly where the outcome of sensitive cases may be concerned.<sup>126</sup> The UN Special Rapporteur on the independence of judges and lawyers has recommended that a fixed percentage of GDP should be established in favour of the judiciary and that this budget be progressively increased.<sup>127</sup>

Article 1 of Law No. 14 of 2013 law provides as follows: "To conduct its business, the SJC shall have a budget separate from the state budget. The President of the SJC shall have the same powers of a department head with respect to the disbursement of such budget." This gives the SJC a degree of power over the spending of its own budget. However, the SJC should also be mandated to proactively participate in discussions on the budget for the entire judiciary. The Minister of Justice retains control over the judiciary's budget, including in relation to judges' salaries, training and the Judicial Institute.

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sion' Marwan Tashani, Legal Agenda, 5 June 2016, p.19.

<sup>123</sup> A regional example can be found in article 115 of the Moroccan Constitution, which holds, "[r]epresentation of female judges shall be ensured [in the Supreme Judicial Council], amongst the ten elected members, in proportion with their presence in the Judicial body" but it must be noted that a quota that requires a number proportionate to the number in the judicial body can only be considered appropriate if efforts are made towards gender parity in the judicial body itself.

<sup>124</sup> UN Basic Principles on the Independence of the Judiciary, Principle 7; see also Concluding Observations of the Human Rights Committee on the Central African Republic, UN Doc. CCPR/C/CAF/CO/2, para.16.

<sup>125</sup> Report of the Special Rapporteur on the independence of judges and lawyers, UN Doc. A/HRC/11/41 (2009), para.39.

<sup>126</sup> ICJ Practitioner's Guide No. 1, p. 33.

<sup>127</sup> Report of the Special Rapporteur on the independence of judges and lawyers, Addendum, Mission to Maldives, UN Doc. A/HRC/4/25/Add.2 (2007), para.77; The Special Rapporteur also underlined that the reduction of the judiciary's budget significantly hampers the administration of justice: Report of the Special Rapporteur on the independence of judges and lawyers, UN Doc. A/HRC/11/41 (2009), para.41.



A number of ICJ interviewees suggested that a key reform that would enhance the independence of the judiciary would be to limit the role of the Ministry of Justice over the financial affairs of the judiciary.<sup>128</sup>

The ICJ therefore recommends that: the law be amended to accord the SJC the responsibility to participate in discussions relating to the budget of the judiciary as a whole; to grant the SJC control and oversight over the budget for the judiciary; and that the law provides that the state must allocate resources adequate for the judiciary to discharge its responsibilities in respect of the fair and effective administration of justice.

### **E. Draft Constitution**

The April 2016 draft Constitution differs from both the October 2015 draft and the February 2016 draft in its article on the composition of the SJC. Article 138 provides, “[t]he Higher Judicial Council shall be formed by a law provided that its independence and development are guaranteed.” The February 2016 draft provided, “[t]he Higher Judicial Council shall be composed of twelve members led by a counsellor from the Court of Cassation who is chosen by its General Assembly, counselors of the Courts of Appeal, judges of primary courts, a member of the public prosecution and two individuals with legal specialization outside of the judiciary and not belonging to any political party. And that shall be in accordance with the law.” The October 2015 draft provided in article 97, “[t]he Higher Judicial Council consists of: 1. President of the Court of Cassation, as President; 2. The Prosecutor-General, as Deputy; 3. President of Judicial Inspection Authority, as member; 4. Heads of Courts of Appeal, as members; 5. The Most senior Attorney-General as member; 6. The most senior head of a court of first instance for every Court of Appeal, as members. 7. A professor in law faculties in Libya universities and a lawyer accredited to appear before the Court of Cassation, they shall be selected by the legislative; two members; 8. A professor in law faculties in Libya universities and a lawyer accredited to appear before the Court of Cassation, they shall be selected by the President of the State; two members.”

The ICJ recommends that the composition of the Supreme Judicial Council should be outlined in the Constitution to protect against potential future interference by the executive. Echoing its recommendation in its December 2015 report, *Libya’s Draft Constitution: Procedural Deficiencies, Substantive Flaws*, (ICJ’s December 2015 report),<sup>129</sup> the ICJ recommends in particular that the Constitution should provide that no appointments to the SJC should emanate from the executive or the legislative power, and that the SJC is guaranteed to be composed of a majority of judges who are elected by their peers. The relevant article in the Constitution should also be amended to provide for a pluralistic and representative membership of the SJC. In particular, the ICJ recommends that the Constitution should provide a requirement for the SJC to be pluralistic and gender representative.<sup>130</sup>

The April 2016 draft Constitution closely echoes the October 2015 draft Constitution in its article on the mandate of the SJC by providing in article 136 that, “[t]he judiciary shall have a council named the Higher Judicial Council, which shall ensure the proper functioning, independence, integrity, effectiveness and development of the judiciary. It shall enjoy a legal personality as well as financial and administrative independence. It shall prepare its draft budget for discussion before the legislative authority. Its headquarters shall be in Tripoli and it may hold its meetings elsewhere inside the country.” The ICJ maintains its recommendation outlined in its December 2015 report that in addition to providing that the SJC shall prepare its budget, the Constitution should include the requirement that the judiciary is involved in the preparation of its own budget and be allocated sufficient funds, which are protected from misuse and cannot be used to exercise control over the judiciary.<sup>131</sup>

Article 137 of the April 2016 draft Constitution provides that the SJC “shall have the competence to appoint, promote, transfer, and discipline the members of the judiciary as well as [handle] their functional affairs.” This article echoes article 96 of the October 2015 draft, analysed in detail in the ICJ’s December 2015 report.<sup>132</sup> The ICJ reiterates its previous recommendations on the SJC’s mandate, in

<sup>128</sup> ICJ interviews conducted with a range of judicial actors in March 2016 (details on file with the ICJ).

<sup>129</sup> Available at <http://www.icj.org/libya-revise-draft-constitution-to-ensure-compliance-with-international-standards/>, see in particular pp.69-72, (last accessed 16 May 2016).

<sup>130</sup> See <http://www.icj.org/libya-revise-draft-constitution-to-ensure-compliance-with-international-standards/>, pp.69-72, (last accessed 16 May 2016).

<sup>131</sup> See <http://www.icj.org/libya-revise-draft-constitution-to-ensure-compliance-with-international-standards/>, pp.69-72, (last accessed 16 May 2016).

<sup>132</sup> See <http://www.icj.org/libya-revise-draft-constitution-to-ensure-compliance-with-international-standards/>, pp.69-72, (last accessed 16 May 2016).

particular that the Constitution ensures that the SJC is exclusively competent to manage the career of judges, including their selection, appointment, evaluation, promotion, transfer, and discipline, and that the SJC is consulted on all reforms relating to the organisation of the judiciary and the administration of justice.

**In light of the above, the Libyan authorities should ensure that the law on the Supreme Judicial Council:**

- 1. Provides for an SJC that is composed of a majority of judges and excludes representatives from the executive, the office of the prosecutor and of the public defence department, unless their independence from the executive is ensured;**
- 2. Provides that prosecutors and defence lawyers may never sit on a board considering a judge's promotion or disciplinary actions against a judge;**
- 3. Removes the Head of the JBID as a member of the SJC;**
- 4. Provides for a procedure for the election of members that is fair, inclusive, transparent and administratively independent;**
- 5. Provides that judges from all courts are entitled to participate in the election of members to the SJC and that there is some representation on the SJC of judicial members of the lower courts;**
- 6. Provides, in relation to the composition of the SJC, for a pluralistic and representative membership, and, in particular, substantial gender representation with a view ultimately to achieving approximate gender parity;**
- 7. Specifies fair, transparent and inclusive criteria for candidacy or appointment of members;**
- 8. Provides that individuals may not be excluded from candidacy or appointment to the SJC on the basis of their political opinions or on broad exclusionary measures;**
- 9. Ensures that the only disciplinary infractions which may serve as grounds for disqualification as a candidate from the SJC are those established since the SJC was reformed to enhance its independence under Law No. 4 of 2011, (amending Law No. 6 of 2006);**
- 10. Ensures that individuals are not excluded from candidacy or appointment to the SJC on the basis of mere association with those with whom they may have served in a professional legal capacity, including under the previous regime, provided that their representation or other association did not constitute a serious breach of professional ethics or serious criminal conduct;**
- 11. Provides for all decisions of the SJC relating to the transfer, promotion, and termination of tenure of judges to be subject to independent judicial review and substantive appeal to the Supreme Court;**
- 12. Provides that all authorities, in particular the Parliament and the Government, are required to consult the SJC and to consider its opinion on all matters relating to the judiciary, including judicial reforms;**
- 13. Provides for a separate budget for the SJC and empowers the SJC to consult directly with the legislative branch in setting the budget for the judiciary;**
- 14. Grants the SJC control and oversight over the budget for the judiciary; and**
- 15. Includes a requirement that the State allocate resources adequate for the judiciary to discharge its responsibilities in respect of the fair and effective administration of justice.**

**To better guarantee and safeguard judicial independence, the ICJ calls on the Constitutional Drafting Assembly to ensure that the new Libyan Constitution:**

- 1. Provides that the SJC is a truly independent body, granted the necessary authority to promote the efficient functioning of the judiciary and to safeguard its independence, including by:**
  - a. providing that a majority of members of the SJC are judges elected by their peers;**
  - b. providing that no appointments to the SJC should emanate from the executive or the legislative power;**
  - c. providing for a pluralistic and representative membership of the SJC, including adequate gender representation;**
  - d. providing that the SJC is exclusively competent to manage the careers of judges, including their selection, appointment, training, evaluation, promotion and discipline.**
- 2. Provides that members of the judiciary are subject only to the authority of the SJC in relation to professional incapacity or misconduct;**
- 3. Contains a requirement that the judiciary is involved in the development of its own budget and be allocated sufficient funds, which are protected from misuse and cannot be used to exercise control over the judiciary.**

## II. The Statute on the Judiciary

### A. Introduction

Safeguarding judicial independence extends to the process governing all aspects of judges' careers, as affirmed by the UN Basic Principles on the Independence of the Judiciary. As the UN Human Rights Committee puts it, the requirement of independence of the judiciary refers, in addition to freedom from political interference, to "the procedure and qualifications for the appointment of judges, and guarantees relating to their security of tenure until a mandatory retirement age or the expiry of their term of office, where such exist, the conditions governing promotion, transfer, suspension and cessation of their functions."<sup>133</sup> Similarly, the European Court of Human Rights, (ECtHR), has held that in order to establish whether a tribunal can be considered 'independent' "regard must be had, *inter alia*, to the manner of appointment of its members and their term of office, the existence of safeguards against outside pressures and the question whether it presents an appearance of independence."<sup>134</sup>

### B. Libyan Legal Framework

#### i. Appointment and Selection

Law No. 6 of 2006 specifies in article 49 that members of judicial bodies shall be appointed and promoted by decrees that are issued by the SJC, based on proposals from the JBID.<sup>135</sup> Under the 2006 composition of the then High Council of Judicial Bodies, this meant that the Minister of Justice, as President, had to approve all appointments and promotions, with significant implications for the independence of the judiciary. The new composition of the SJC, as explored in detail above, means it is solely members of the judiciary that have the power to appoint and promote judges, a significant step forward for ensuring their independence.

Part 5 of Law No. 6 of 2006 is entitled 'Members of Judicial Bodies'. Chapter 1 of Part 5 deals with 'Appointment, Seniority and Promotion'. Article 43 lays out the following conditions for "anyone appointed to a judicial body," as follows:

1. He must enjoy full capacity and hold Libyan nationality.
2. He must have obtained a university degree in Islamic Sharia or law from a college of the Great Jamahiriya, or hold an equivalent foreign diploma. In the latter case, the appointee must pass an examination organized as per a decision issued by the [Minister of Justice].
3. The appointee must successfully complete the prescribed qualification program at the Judicial Institute. This condition may be waived if the person has at least two years' experience in clerical work in judicial bodies. He must be commendable and of good reputation.
4. He must not have been found guilty of a felony or misdemeanour involving moral turpitude or dishonesty, even if he has been rehabilitated.
5. He must not have been dismissed or transferred to a non-judicial position by a disciplinary board.
6. He must be medically fit and must [not] suffer from any handicap that prevents him from performing his duties to the fullest extent, in accordance with the conditions and regulations issued by a decree of the Council.
7. For the position of counsellor, the appointee must not be less than forty years old. For the position of judge, the appointee must not be less than thirty years old. For all other members of judicial bodies, the appointee must not be less than twenty-one years old.
8. He must not be married to a non-Arab woman. This condition may be waived by a decree issued by the Council.

Article 44 of Law No. 6 of 2006 outlines conditions for the selection of judges to different grades. Most individuals shall be initially appointed to judicial bodies at the lowest grade, as set forth in a table attached to the law. Of note, appointments to "third-grade" judicial positions shall be from those who hold the position of assistant prosecutor or "equivalent positions in other judicial bodies, and who

<sup>133</sup> HRC GC No. 32, para.19.

<sup>134</sup> See generally *Incal v. Turkey*, ECtHR, Application No. 22678/93, Judgment of 9 June 1998, para.65; *Findlay v. United Kingdom*, ECtHR, Application No. 22107/93, Judgment of 25 February 1996, para.73; *Bryan v. United Kingdom*, ECtHR, Application No. 19178/91, Judgment of 22 November 1995, para.37.

<sup>135</sup> Article 49, Law No. 6 of 2006.

have fulfilled the conditions for promotion.” Thus rising in the ranks of other bodies considered part of the judiciary, including the prosecution services, can lead to appointment as judge at an equivalent senior level. This article also specifies that candidates with previous experience may be appointed to positions higher than the lowest grade. The type and length of experience that may count is to be specified in a decree.

Article 46 of the 2006 law defines in detail how ‘seniority’ will be considered for members within the judicial bodies, stating that it “shall be determined by the date of their appointment or promotion”, as long as another date is not specified by the decree by which they were appointed or promoted, “with approval of the Council.”<sup>136</sup> A table outlining how many years of service should lead to promotion is annexed to the law.

#### ii. Training and the Judicial Institute

Law No. 6 of 2006 makes clear that judges must have completed training in the Judicial Institute in order to qualify for appointment to the judiciary, other than a relatively new exception for those who have completed two years in a clerical position.<sup>137</sup> Decree No. 208 of 1988<sup>138</sup> outlines the rules and regulations of the Judicial Institute. Article 2 specifies that the Judicial Institute has a legal personality and is an independent financial entity, but it is subsidiary to the Ministry of Justice. The Director of the Institute is appointed by the Ministry of Justice, on recommendation by the Minister, and must hold the position of President of a First Instance Court or hold high qualifications in Islamic jurisprudence and law (article 8).

Article 4 of Decree No. 208 of 1988, as amended, outlines the administration committee of the Judicial Institute, as follows:

1. The President of the Inspectorate for Judicial Bodies, as chairperson.
2. The President of the Litigation Authority.
3. The President of the Department of Public Lawyers.
4. The Director of the Judicial Institute.
5. Two members with experience selected by the Ministry of Justice for one year, renewable.
6. Three members from the board of lecturers in the institute, selected by the board of lecturers for one year, renewable.

Article 5 of the same Decree gives a prominent position to the Minister of Justice, providing that, “[t]he Minister of Justice may call on the administration committee at any time, he may attend the meeting and should then chair the meeting.” Article 6 provides that this committee decides on, among others, the curriculum and the criteria for enrolment to the judicial institute but decisions are subject to the approval of the Minister of Justice (article 7).

#### iii. Promotion and Transfer

Chapter 5 of Law No. 6 of 2006 provides for a department to inspect the judiciary, the JBID, with a mandate to “monitor their activities and the extent to which they take care to perform the duties of their positions well, to achieve the prescribed performance levels, and to investigate complaints filed against members of the judiciary.”<sup>139</sup>

The department has the right to conduct “urgent and surprise” inspections of the “activities and behaviours” of members of judicial bodies and is responsible for the “technical inspection” of members up to the grade of President of the First Instance Court for “conflict of interest, or its equivalent.”<sup>140</sup>

Article 78 outlines the composition of the department, which consists of a president, deputies, and a “sufficient number of members, the grade of whom shall not be lower than that of counsellor of a court of appeal or its equivalent.” It provides that members of judicial bodies shall be delegated to work in the department by a decree issued by the SJC.

<sup>136</sup> Article 46 of Law No.6 of 2006 goes on to stipulate: “[i]f the appointment is being made for the first time, the most qualified individual shall be granted seniority. If two or more individuals hold the same qualifications, seniority shall be granted to the individual who graduated earliest, then to the individual who received highest grades, then to the oldest individual.”

<sup>137</sup> The introduction of an exemption for clerical officers was introduced by Law No. 42 of 2012.

<sup>138</sup> As amended by Decree No. 9 of 2002, Decree No. 15 of 2002, Decree No. 334 of 1990, and Decree No. 478 of 2000.

<sup>139</sup> Article 78 of Law No. 6 of 2006, as amended.

<sup>140</sup> Article 78 of Law No. 6 of 2006, as amended.



Article 79 provides that members of judicial bodies shall be notified by the JBID of information in their files concerning complaints, observations or other documents related to their work or conduct.

Annual inspections by the JBID of the activities of judicial bodies are provided for, as well as four levels of grades from below average to competent. A report is to be drafted within two months of the inspection and those concerned are to be notified within two weeks.<sup>141</sup> Article 100 provides that those who have received two consecutive evaluations of "below average" or three consecutive evaluations of "average" shall have their cases reviewed by the SJC, including the presentation of a statement, following which, "[t]he Council must decide whether to refer them to retirement or to transfer them from their judicial positions."

Further detailed regulations on the operation of the JBID are contained within Decision No. 4 of 2008. Chapter 3 outlines very specific guidelines for assessment, including by giving credit based on units of work done, such as specific amounts of cases heard (40 per month or 400 per year for judges).

Article 19 of Decision No. 4 of 2008 holds that "[t]he person under inspection may contest before the [SJC] within 30 days of the date of receipt the result of the report if the result was mediocre or below mediocre; the objection shall be in the form of filing submitted before the Council's Secretariat substantiated with documents supporting his requests. And the date of submission shall be noted by the employee who received it; the person who was provided with a copy of remarks may also object using the same procedure."

The conditions for promotion of members of the judiciary are outlined in article 47 of Law No. 6 of 2006. This article states that where promotion is to the grade of counsellor, its equivalent or lower, it shall be made according to "seniority and with consideration given to competence." The requirement to consider competence, however, does not extend beyond that of the grade of counsellor. All grades above that level shall be made "according to seniority." The article also specifies that promotions shall be made only to one grade above the grade from which the promotion is made.

Article 7 of Decision No. 4 of 2008 on Judicial Inspections provides, "[t]echnical inspection shall be conducted over the work of the members of judicial bodies who are candidates for promotion until and including the grade of President of Court of Appeal or equivalent; in order to verify their adequacy in fulfilling their mandates." Such inspection is to be carried out by the JBID. Article 9 of this Decision provides that a report on a judge's work following an inspection must include explicitly defined and detailed criteria, including on both an administrative and competence basis.

Disciplinary proceedings are initiated by the JBID but conducted by the SJC. The topic of disciplinary proceedings is explored in detail in Chapter III of this report.

Chapter two of Law No. 6 of 2006 addresses the issues of transfer, delegation, and secondment. Article 51 provides that members of judicial bodies may be transferred between each judicial body by a decree of the SJC based on a proposal of the Judicial Body Inspection Department. Such decrees are not subject to a substantive appeal. A member of a judicial body can be transferred within the same body when a decision is issued by the President of the SJC, based on a proposal from the head of that particular body.<sup>142</sup>

Law No. 4 of 1981 on establishing the department of public legal defence similarly provides that "[j]udges, members of public prosecutions, and workers in the State Lawsuits Authority may be transferred to the Department of People's Legal Defence. Members of the Department of People's Legal Defence may also be transferred to the judiciary, public prosecutions, and the Department of People's Legal Defence under the terms and conditions of appointment in the functions they are transferred to." A degree of fluidity between prosecution, defence and the judiciary is clearly provided for.

Article 53 provides that the SJC, based on a proposal by the head of the JBID, can issue a decree "delegating" a counsellor of the courts of appeal or a judge of the first instance courts to another court for the period of not more than one year "when necessary." Members of judicial bodies may be "delegated" to work in another judicial body by decree issued by the Council, also based on a proposal by the head of the JBID. Law No. 14 of 2013 amended this article to add the stipulation that the delegated member "shall be granted a delegation bonus equal to one quarter of his salary and the other financial benefits prescribed for the position to which he is delegated."<sup>143</sup>

<sup>141</sup> Article 80 of Law No. 6 of 2006, as amended.

<sup>142</sup> Article 50 and 51 of Law No. 6 of 2006, as amended.

<sup>143</sup> Article 6 of Law No. 14 of 2013 amending article 53 of Law 6 of 2006.

Significantly, article 56 gives the power to the President of the SJC to issue a decree “delegating” members of judicial bodies to work full time in any State or “semi-state body”<sup>144</sup> to undertake legal or judicial duties for a period of up to four years. This is subject to a requirement that the work “does not conflict with the duties of their positions.” Consent of the member to be transferred is not required for a delegation within the state. Article 57 provides that members of judicial bodies can be seconded to a “non-national” entity for a period not exceeding four years, to undertake legal or judicial duties, but differs from the previous article in that it provides that the member must confirm in writing that he accepts the secondment, thus introducing a requirement of consent for “non-national” transfers.

iv. Security of Tenure

Law No. 6 of 2006 provides for tenure for judges and other members of the judicial bodies up until a mandatory retirement age of sixty-five in article 99. Members can request early retirement from the age of fifty-five.<sup>145</sup> As explored below, the ability of the SJC to transfer judges from the judiciary into other judicial bodies, including the Prosecutor’s Office and the public defender’s office, has implications for judges’ tenure.

Similarly, the right of the SJC to “refer” judges to retirement or transfer from their judicial position where judges have received two or three low assessments by the JBID<sup>146</sup> would seem to be a broad power with implications for tenure.

v. Representation of Women in the Judiciary

There is no overarching prohibition of discrimination against women in Libyan legislation.

Colonel Gadhafi’s ‘Green Book’, stated that men and women are “equal as human beings”, but added that “there must be different prevailing conditions for each one in order that they perform their naturally different roles.”<sup>147</sup> This view appears to continue to inform official attitudes in Libya. For example, Law No. 12 of 2010 on labour rights, which affirmed that all citizens, male and female, have the right to work (Articles 2, 24, and 25) and the right to equal pay<sup>148</sup> states that women should work in jobs “suited to their nature”. It also, somewhat contradictorily, explicitly prohibits discrimination against women. The most recent draft of the Constitution states that “Women are men’s sisters,” implying that women’s status in society is defined in the context of their relationship to men and not as autonomous and equal individuals.<sup>149</sup>

While the 2011 Constitutional Declaration does not contain a clear prohibition of all forms of discrimination against women, it holds in article 6 that “Libyans shall be equal before the law. They shall enjoy equal civil and political rights, shall have the same opportunities, and be subject to the same public duties and obligations, without discrimination due to [among others] sex”. The April 2016 draft of the Constitution, contains a clearer prohibition of discrimination against women. Article 9 provides that “[m]ale and female citizens shall be equal in and before the law. There shall be no discrimination between them and all forms of discrimination for any reason such as ethnicity, colour, language, sex, birth, political opinion, disability, origin or geographical affiliation shall be prohibited in accordance with the provisions of this constitution.”

Article 57 of the April 2016 draft Constitution provides in full that: “[w]omen are men’s sisters. The State shall be committed to supporting and caring for women, enacting laws that ensure their protection, promoting their status in society, eliminating the negative culture and social customs that detract from their dignity, as well as prohibiting discrimination against them, and ensuring their right in public elections and enabling them [to have access] to opportunities in all areas; it shall also take the necessary measures to support their acquired rights.”<sup>150</sup>

<sup>144</sup> Examples of semi-state bodies include ports and corporations.

<sup>145</sup> Article 99 of Law No. 6 of 2006, as amended.

<sup>146</sup> Article 100 of Law No. 6 of 2006, as amended.

<sup>147</sup> Colonel Gadhafi’s ‘Green Book’ at 25.

<sup>148</sup> This law also provided for three months of fully paid maternity leave. See further Legal Agenda: *Women’s Rights: Preserving past gains, fearing for the future*, Jazya Gabriel, 18 December 2015.

<sup>149</sup> Draft Constitution, February 2016, article 58.

<sup>150</sup> See ICJ’s analysis of similar provisions in the October 2015 draft Constitution at: <http://www.icj.org/libya-revise-draft-constitution-to-ensure-compliance-with-international-standards/>, pp. 37-42, (last accessed 20 June 2016).

Under Law No. 51 of 1976, women were forbidden from holding judicial posts in Libya. However, following the accession by Libya to CEDAW in 1989, Law No. 51 of 1976 was annulled and Law No. 8 of 1989 was passed, which specifically provided for the right of women to hold judicial posts. Article 1 holds that women are entitled to hold posts in the Judiciary, Public Prosecution, and Judicial Administration under the same conditions as those prescribed for men. Article 2 of this law specified that any provision contrary to it shall be annulled.

Despite this law, in a wide ranging assessment conducted by the International Legal Assistance Consortium, (ILAC), in 2013, the authors found that women were underrepresented in the judiciary, stating “[f]rom a rule of law perspective, one of the most striking observations was the underrepresentation of women in the judiciary and other legal institutions, particularly in light of their predominance among law students. Although there is apparent geographical variation, the underrepresentation of women was particularly noticeable in senior and leadership positions. A common explanation was that female legal professionals were frequently expected to balance their careers with domestic responsibilities.”

A survey carried out by the SJC and quoted by the Libyan Judges Association in 2015 as “the most recent survey carried out”<sup>151</sup>, broke down women’s participation in the judiciary as follows:

- Senior judges in courts of appeal – 7%, 26 women out of 373 in total;
- Judges in First-instance courts – 18.5%, 107 women out of 581;
- Prosecution – 14%, 116 women out of 835 in total;
- Litigation Authority – 61%, 390 women out of 640 in total;
- Public Defence – 68%, 773 women out of 1139;
- Law Department – 21%, 9 women out of 26.

When the Litigation Authority and the Public Defence department are factored in, the figure for women’s participation in the Libyan judiciary is 39% or 1431 out of 2227. However, if you remove these non-judgeship positions and take the Courts of Appeal and First Instance Courts only, women constitute only 14% of sitting judges or 133 out of 954.

In a concerning trend, it would appear that women’s rights in Libya are being restricted even further in recent times on the basis of restrictive interpretations of *Sharia*. One example is the adoption of Law No. 14 of 2015, issued by the General National Congress, which amended article 14 of Law No. 10 of 1984, abrogating the legal competency of women to witness marriage contracts.<sup>152</sup> In fact, some observers view this as a first step towards a more general exclusion of women from the judiciary.<sup>153</sup>

Of particular concern, in 2013, Law No. 8 of 1989, providing for women’s participation in the judiciary, was challenged as unconstitutional in two separate appeals to the Supreme Court.<sup>154</sup> The cases were based on Article 1 of the Constitutional Declaration of 2011, which provides that Islamic law is the principal basis of all legislation.<sup>155</sup> The plaintiffs argued that Islamic law does not allow women to act as judges because of their “nature.”<sup>156</sup> This case is ongoing at time of writing.<sup>157</sup>

In addition, according to one prosecutor, “appointments, after the revolution, have tended to exclude women from holding judicial posts.”<sup>158</sup> Furthermore, reports indicate that women have come under pressure to confine themselves to family cases rather than criminal cases and in some cases unjustifiable warning notices have been issued to women lawyers, tarnishing their professional records.<sup>159</sup>

<sup>151</sup> Statement of the Libyan Judges Organisation, 9 March 2015, at: <http://www.alwasat.ly/ar/news/libya/64918/>, (last accessed 20 June 2016).

<sup>152</sup> For more examples of this apparent trend, see Legal Agenda: *Women’s Rights: Preserving past gains, fearing for the future*, Jazya Gabriel, 18 December 2015.

<sup>153</sup> According to a criminal law lecturer in an interview with the ICJ, March 2016, “[t]his is a first step towards depriving women from holding a judicial post since the rule is that whoever cannot be a witness, cannot be a judge.”

<sup>154</sup> Constitutional Appeal No. 60/10 of 2012 and No. 14/60 of June 9, 2013.

<sup>155</sup> Article 1 of the Constitutional Declaration 2011.

<sup>156</sup> For further detail on the arguments put before the Court see Legal Agenda, *Libya’s Judiciary, The Gender Ceiling*, Menna Omar, 10 December 2013.

<sup>157</sup> See further Legal Agenda: *Women’s Rights: Preserving past gains, fearing for the future*, Jazya Gabriel, 18 December 2015.

<sup>158</sup> According to a Libyan Prosecutor interviewed by the ICJ in March 2016 (name on file with the ICJ).

<sup>159</sup> Reported by Mohamed Eljarh in an article in Foreign Policy entitled, ‘First Libya’s Lady Lawyers Fought Qaddafi, Now They’re Fighting for Their Jobs’, published August 9, 2013, available at <http://foreignpolicy.com/2013/08/09/first-libyas-lady-lawyers-fought-qaddafi-now-theyre-fighting-for-their-jobs/> (last accessed 16 May 2016).

Other more abusive practices have been reported in what has been described as an attempt to sideline women in the judiciary. Leaflets have apparently been distributed to women lawyers who do not wear the hijab, preaching its importance, accompanied by quotes such as, “the voice of women in a council of men is an act of shame, even if she is reciting the Quran.” Of serious concern, some women lawyers have reportedly been threatened with kidnapping and rape in some areas where they do not acquiesce to the demand of wearing a hijab through anonymous messages and others have reportedly had family members threatened.<sup>160</sup>

vi. Freedom of expression and association

A Code of Conduct promulgated in 2008 provided in its article 4 for the right of judges to be “affiliated to associations or judicial clubs or equivalent.”

In 2012, the Libyan Judges’ Organisation was founded based on provisions in the Constitutional Declaration of 2011. This organization is wholly independent of government. Article 5 of its statute holds, “[t]he organisation aims at strengthening the rule of law, defending the independence and impartiality of the judiciary and promoting the principles of human rights.” The organization has over 300 members and is active in protecting the interests of an independent judiciary and promoting progressive reform, including through submissions to the Constitutional Drafting Assembly, presenting and commenting on draft laws, monitoring violations against the judiciary and interventions in the media to promote judges’ interests.

Also of note is article 64 of Law No. 6 of 2006, as amended, which prohibits members of judicial bodies from “engaging in political activity.”

### **C. International law and standards**

i. Appointment and Selection

International standards are clear that in order to guarantee their independence and impartiality, judges must be selected on the basis of transparent and objective criteria, including their training, qualifications, ability and integrity.<sup>161</sup> The UN Basic Principles state that persons “selected for judicial office shall be individuals of integrity and ability with appropriate training or qualifications in law”.<sup>162</sup> Thus merit and integrity must be key factors in the selection of judges.

The ACHPR Principles and Guidelines address the process of selection, requiring it to be “transparent and accountable” and that it “safeguard the independence and impartiality of the judiciary”.<sup>163</sup> Similarly, the Universal Charter of the Judge stipulates that, “[t]he selection and each appointment of a judge must be carried out according to objective and transparent criteria based on proper professional qualification.”<sup>164</sup> In order for these standards to be effectively met, authorities such as the Special Rapporteur on the independence of judges and lawyers recommend that an independent authority should be in charge of the selection of judges.<sup>165</sup>

<sup>160</sup> Reported by Mohamed Eljarh in an article in Foreign Policy entitled, ‘First Libya’s Lady Lawyers Fought Qaddafi, Now They’re Fighting for Their Jobs’, published August 9, 2013, available at <http://foreignpolicy.com/2013/08/09/first-libyas-lady-lawyers-fought-qaddafi-now-theyre-fighting-for-their-jobs/> (last accessed 16 May 2016).

<sup>161</sup> See generally ACHPR Principles and Guidelines, Section A, Principle 4(i) (noting that the “sole criteria” shall be the suitability of a candidate “by reason of integrity, appropriate training or learning and ability.”); CoM Recommendation (2010)12, para.44; European Charter on the Statute for Judges, para.2.1. See also ICJ Practitioners’ Guide No. 1, p. 41.

<sup>162</sup> UN Basic Principles on the Independence of the Judiciary, Principle 10.

<sup>163</sup> ACHPR Principles and Guidelines, Section A, Principle 4(h).

<sup>164</sup> Universal Charter of the Judge, article 9.

<sup>165</sup> Report of the Special Rapporteur on the independence of judges and lawyers, UN Doc. A/HRC/11/41, para.27 and UN Doc. A/67/305 (2012), para.113(k).. Human Rights Committee, Concluding Observations on the Congo, UN Doc. CCPR/C/79/Add.118, para.14; on Liechtenstein, UN Doc. CCPR/CO/81/LIE, para.12; on Tajikistan, UN Doc. CCPR/CO/84/TJK, para.17; on Honduras, UN Doc. CCPR/C/HND/CO/1, para.16; on Azerbaijan, UN Doc. CCPR/C/AZE/CO/3 (2009), para.12; and on Kosovo (Serbia), UN Doc. CCPR/C/UNK/CO/1 (2006), para.20. Reports of the UN Special Rapporteur on the independence of judges and lawyers, UN Doc. A/HRC/11/41 (2009), para.28-29, UN Basic Principles on the Independence of the Judiciary, Principle 10; ACHPR Principles and Guidelines, Principle A.4(h). Draft Universal Declaration on the Independence of Justice (also known as the Singhvi Declaration), article 11; Universal Charter of the Judge, article 9.

Of particular importance is the requirement that in the selection of judges, regardless of the system and procedures in operation, there must be no discrimination on any ground whatsoever. This is mandated as part of the general obligation of non-discrimination under international law, reflected in such instruments as the ICCPR (article 26) and the various provisions of CEDAW. Of particular note is article 7(b) of CEDAW, which provides that:

States Parties shall take all appropriate measures to eliminate discrimination against women in the political and public life of the country and, in particular, shall ensure to women, on equal terms with men, the right: (b) To participate in the formulation of government policy and the implementation thereof and to hold public office and perform all public functions at all levels of government.<sup>166</sup>

Standards relating to the judiciary reinforce the principle of non-discrimination in the selection of judges.<sup>167</sup> However, the requirement that a candidate be a national of the country concerned is not considered discriminatory.

Of particular note on the issue of selection are the Latimer House Guidelines, which set out the duty of States to work towards the removal of gender imbalance and discrimination and indicate that “judicial appointments to all levels of the judiciary should be made on merit with appropriate provision for the progressive removal of gender imbalance and of other historic factors of discrimination.”<sup>168</sup> The Special Rapporteur on the independence of judges and lawyers has also indicated that States should appoint judges from minorities and judges who are women.<sup>169</sup> The UN Human Rights Committee has called for similar measures.<sup>170</sup>

The appointment process must be designed to safeguard the individual and institutional independence of the judiciary, as well as its impartiality. While international standards do not mandate any single model for design and structure for judicial appointments body, nor of the appointments procedure, certain requirements must be met to ensure the separation of powers and the principle of checks and balances is upheld.<sup>171</sup> In particular, fair, inclusive and transparent procedures should be outlined for the appointment of judges.

International standards and authorities have indicated that it is highly preferable that judges be elected by their peers, or at least be appointed by a body that is independent of the executive and legislative branches of government and that the process is free from political considerations and influences.<sup>172</sup> The UN Human Rights Committee has criticized the involvement of the executive in the appointment of judges and has recommended the establishment of an independent body to safeguard appointment, as well as promotion and regulation of the judiciary.<sup>173</sup> The European Charter on the Statute for Judges envisages an authority “independent of the executive and legislative powers” for every decision “affecting the selection, recruitment, appointment, career progress or termination of office of a judge.”<sup>174</sup> Decisions to appoint a candidate to the judiciary should be taken by this

<sup>166</sup> See also UN Committee on the Elimination of Discrimination Against Women, *General Recommendation No. 23: Political and Public Life*, 1997, A/52/38, paras.31 and 32.

<sup>167</sup> UN Basic Principles on the Independence of the Judiciary, Principle 10: CoM Recommendation (2010)12, para.45; ACHPR Principles and Guidelines, Section A, Principle 4(j); Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region, OP 13. The *European Charter on the statute for judges* also reflects these principles, providing that judicial candidates should be selected, “on their ability to assess freely and impartially the legal matters which will be referred to them, and to apply the law to them with respect for individual dignity. The statute excludes any candidate being ruled out by reason only of their sex, or ethnic or social origin, or by reason of their philosophical and political opinions or religious convictions,” operative paragraph 2.1.

<sup>168</sup> Latimer House Guidelines for the Commonwealth on Parliamentary Supremacy and Judicial Independence, (approved by judges from Commonwealth countries) adopted on 19 June 1998, (“Latimer House Guidelines”) Principle 11.1.

<sup>169</sup> Report of the Special Rapporteur on the independence of judges and lawyers, UN Doc. A/HRC/11/41, para.34.

<sup>170</sup> In Concluding Observations on Sudan, UN doc. CCPR/C/79/Add.85, at para.21, the Human Rights Committee expressed its concern that “very few non-Muslims or women occupy judicial positions at all levels”. It recommended that “measures should be taken to improve the independence and technical competence of the judiciary, including the appointment of qualified judges from among women and members of minorities.

<sup>171</sup> See further ICJ Practitioners’ Guide No.1, p. 41.

<sup>172</sup> ICJ Practitioners’ Guide No. 1, p. 45.

<sup>173</sup> Concluding Observations of the Human Rights Committee on Honduras, UN Doc. CCPR/C/HND/CO/1, para.16.

<sup>174</sup> European Charter on the Statute for Judges, Principle 1.3.



independent authority or on its “proposal, or its recommendation or with its agreement or following its opinion.”<sup>175</sup> This does not preclude the executive having a role in affirming the choice. The need to ensure there are no “improper motives” in the appointment process is underlined by the UN Basic Principles and the Singhvi Declaration.<sup>176</sup>

## ii. Training

As affirmed by the UN Basic Principles, “persons selected for judicial office shall be individuals... with appropriate training or qualifications in law.”<sup>177</sup> However, the process of judicial training and education does not cease at the moment of appointment. Rather it remains an ongoing and integral part of the judicial career. For that reason, the UN Human Rights Committee has called on States to give particular attention to the training of judges to enable them to render justice promptly and impartially.<sup>178</sup> Both foundational and continuing training programmes should be implemented by an “independent authority” and “in full compliance with educational autonomy.”<sup>179</sup> The European Charter on the Statute for Judges provides that there should be an independent body composed of a majority of judges, which “ensures the appropriateness of training programmes and of the organization which implements them, in the light of the requirements of open-mindedness, competence and impartiality which are bound up with the exercise of judicial duties.”<sup>180</sup> The Latimer House Guidelines provide that, “[a] culture of judicial education should be developed. Training should be organized, systematic and ongoing and under the control of an adequately funded judicial body. Judicial training should include the teaching of the law, judicial skills and the social context, including ethnic and gender issues. The curriculum should be controlled by judicial officers who should have the assistance of lay specialists. For jurisdictions without adequate training facilities, access to facilities in other jurisdictions should be provided. Courses in judicial education should be offered to practising lawyers as part of their ongoing professional development training.”<sup>181</sup>

The Singhvi Declaration provides that “[c]ontinuing education shall be available to judges.”<sup>182</sup> In addition, the Bangalore Principles on Judicial Conduct hold in Principle 5 that “[e]nsuring equality of treatment to all before the courts is essential to the due performance of the judicial office.” In order to make this a reality, the Principles state at 5.1 that, “[a] judge shall be aware of, and understand, diversity in society and differences arising from various sources, including but not limited to race, colour, sex, religion, national origin, caste, disability, age, marital status, sexual orientation, social and economic status and other like causes.”

At all times, including in times of crisis and transition, it is an essential part of the judicial function to ensure not only judicial review, but also the administration of effective remedies and reparations for human rights violations.<sup>183</sup> Of particular relevance in the context of Libya’s transition, the Special Rapporteur on truth, justice, reparations and the promotion of guarantees of non-recurrence has recommended specific training for investigators, judges and prosecutors to enable them to pursue cases of mass human rights violations and ensure accountability.<sup>184</sup>

## iii. Security of Tenure

A basic condition for the independence of the judiciary is security of tenure, which protects judges from potential pressure in decisions relating to their terms of service, including continuity at their

<sup>175</sup> European Charter on the Statute for Judges, Principle 3.1. The Explanatory Memorandum further provides: “The wording of this provision is intended to cover a variety of situations, ranging from the mere provision of advice for an executive or legislative body to actual decisions by the independent body”.

<sup>176</sup> UN Basic Principles on the Independence of the Judiciary, Principle 10; Singhvi Declaration, para.11(c).

<sup>177</sup> UN Basic Principles on the Independence of the Judiciary, Principle 10.

<sup>178</sup> Concluding Observations of the Human Rights Committee on the Congo, UN Doc. CCPR/C/79/Add.118, para.14.

<sup>179</sup> CoM Recommendation (2010)12, para.57.

<sup>180</sup> The European Charter on the Statute for Judges, para.2.3, which refers to para.1.3 where the detailed requirements are set out.

<sup>181</sup> Latimer House Guidelines, II,3.

<sup>182</sup> Singhvi Declaration, Principle 12.

<sup>183</sup> Principle 2 of Geneva Declaration, Legal Commentary to the ICJ Geneva Declaration: available at: <http://icj.wplengine.netdna-cdn.com/wp-content/uploads/2011/05/ICJ-genevadeclaration-publication-2011.pdf> (last accessed 16 May 2016).

<sup>184</sup> Report of the Special Rapporteur on truth, justice, reparation and the promotion of guarantees of non-recurrence, A/HRC/30/42, 7 September 2015, para.61.

posts. The UN Basic Principles and other international standards provide that judges should have guaranteed tenure until a set retirement age or the expiry of their term of office.<sup>185</sup> The Latimer House Guidelines suggest that judicial appointments are permanent, i.e., until retirement, with no term expiration.<sup>186</sup> In any event, where fixed terms are established, they should be of substantial length, not dependent on renewal.

Where judges are subject to provisional appointments, and can be freely removed or suspended, their independence may be at risk. This is because the provisional character of these judges “implies that their actions are subject to conditions, and that they cannot feel legally protected from undue interference or pressure from other parts of judiciary or from external sources.”<sup>187</sup>

The UN Basic Principles provides, “the term of office of judges, their independence, security, adequate remuneration, conditions of service, pensions and the age of retirement shall be adequately secured by law.”<sup>188</sup>

Further, the UN Basic Principles make clear judges may only be subject to removal from office for reasons of incapacity or behaviour that renders them unfit to discharge their duties.<sup>189</sup> Importantly, decisions concerning suspension or removal should only be made following a fair hearing by an independent body on the basis of established standards of judicial conduct and should be subject to review.<sup>190</sup> The UN Human Rights Committee, for example, stated, “[t]he dismissal of judges by the executive, e.g. before the expiry of the term for which they have been appointed, without any specific reasons given to them and without effective judicial protection being available to contest the dismissal is incompatible with the independence of the judiciary.”<sup>191</sup>

#### iv. Promotion and Transfer

The UN Basic Principles provide that the promotion of judges “should be based on objective factors, in particular ability, integrity and experience.”<sup>192</sup> Outlining a clear system of promotion, based on objective criteria such as merit and seniority, is important to prevent the possibility of political considerations playing a role. The UN Human Rights Committee has noted that, if promotion decisions depend on the discretion of administrative authorities, it may “expose judges to political pressure and jeopardize their independence and impartiality.”<sup>193</sup> Similarly, the Singhvi Declaration states, “[p]romotion of a judge shall be based on an objective assessment of the judge’s integrity, independence, professional competence, experience, humanity and commitment to uphold the rule of law. No promotions shall be made from an improper motive.”<sup>194</sup> Any assessment of a judge should be based on “objective criteria” that is “published by the competent judicial authority” and judges should be able to express their views and to challenge assessments before an independent authority or a court.<sup>195</sup>

International standards are clear that the power to transfer judges should be with the judicial authority and not with the executive. While “[t]he assignment of cases to judges within the court to which they belong is an internal matter of judicial administration,”<sup>196</sup> for the transfer of judges to different jurisdictions or geographic locations the consent of the judge should preferably be obtained.

The Measures for the Effective Implementation of the Bangalore Principles, for example, provides, “[e]

<sup>185</sup> UN Basic Principles on the Independence of the Judiciary, Principle 12; ACHPR Principles and Guidelines, Section A, Principle 4(l); CoM Recommendation (2010)12, para.49.

<sup>186</sup> Latimer House Guidelines, Guideline II.1.

<sup>187</sup> *Report on the Situation of Human Rights in Venezuela*, OAS document OEA/Ser.L/V/II.118 doc. 4 rev. 2, 29, December 2003, para.159.

<sup>188</sup> UN Basic Principles, Principle 11.

<sup>189</sup> UN Basic Principles on the Independence of the Judiciary, Principle 18; ACHPR Principles and Guidelines, Section A, Principle 4(p).

<sup>190</sup> CoM Recommendation (2010)12, para.69; UN Basic Principles, Principles 17 & 20; ACHPR Principles and Guidelines, Section A, Principle 4(q).

<sup>191</sup> HRC General Comment No. 32, para.20.

<sup>192</sup> UN Basic Principles on the Independence of the Judiciary, Principle 13.

<sup>193</sup> Concluding Observations of the Human Rights Committee on Azerbaijan, UN Doc. CCPR/CO/73/AZE, para.14.

<sup>194</sup> Singhvi Declaration, para.14.

<sup>195</sup> CoM Recommendation (2010)12, para.58.

<sup>196</sup> UN Basic Principles, Principle 14.

cept pursuant to a system of regular rotation provided by law or formulated after due consideration by the judiciary, and applied only by the judiciary or by an independent body, a judge should not be transferred from one jurisdiction, function or location to another without his or her consent.”<sup>197</sup> Where such transfer concerns discipline, the Universal Charter of the Judge provides that “a judge cannot be transferred, suspended or removed from office unless provided for by law and then only by decision in the proper disciplinary procedure.”

The Singhvi Declaration states that “judges shall not be transferred from one jurisdiction or function to another without their consent, but when such transfer is in pursuance of a uniform policy formulated after due consideration by the judiciary, such consent shall not be unreasonably withheld by any individual judge”.<sup>198</sup> The European Charter on the Statute for Judges recommends that the decision to assign a judge to a tribunal be taken by an “independent authority” or “on its proposal, or its recommendation or with its agreement or following its opinion.”<sup>199</sup>

#### v. Representation of Women in the Judiciary

The ICCPR contains a general non-discrimination and equal protection clause in its article 26, which provides, “[a]ll persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.” The African Charter provides that, “[e]very individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, color, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status.” The Arab Charter provides in article 3(1) that, “[e]ach State party to the present Charter undertakes to ensure to all individuals subject to its jurisdiction the right to enjoy the rights and freedoms set forth herein, without distinction on grounds of race, colour, sex, language, religious belief, opinion, thought, national or social origin, wealth, birth or physical or mental disability,” and article 11 states, “[a]ll persons are equal before the law and have the right to enjoy its protection without discrimination.”

Of particular relevance to women’s representation in the judiciary in Libya is article 34(4) of the Arab Charter, which provides, “[t]here shall be no discrimination between men and women in their enjoyment of the right to effectively benefit from training, employment and job protection and the right to receive equal remuneration for equal work.”

The ICESCR, to which Libya acceded in 1970, provides for the right to work in article 7 with an emphasis on the right to equal conditions of work between men and women, holding that “[t]he States Parties to the present Covenant recognize the right of everyone to the enjoyment of just and favourable conditions of work which ensure, in particular: (a) Remuneration which provides all workers, as a minimum, with: (i) Fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work.”<sup>200</sup>

Article 3 of ICESCR mandates State Parties to ensure the equal right of men and women to the enjoyment of all the rights set out in the Covenant. The ICESCR Committee has emphasized that, in particular, “[t]he equal right of men and women to the enjoyment of economic, social and cultural rights is a mandatory and immediate obligation of States parties.”<sup>201</sup>

Article 25 of the ICCPR guarantees the right of citizens to take part in public affairs, to be elected, and to have access to public services.<sup>202</sup> The UN Human Rights Committee has held in General Comment

<sup>197</sup> Measures for the Effective Implementation of the Bangalore Principles on Judicial Conduct, Adopted by the Judicial Integrity Group, Lusaka Zambia, January 2010, at 13.5.

<sup>198</sup> Singhvi Declaration, para.15.

<sup>199</sup> European Charter on the Statute for Judges, Principle 3.1.

<sup>200</sup> See also article 8, ICESCR on the right of everyone to form trade unions and join the trade union of their choice.

<sup>201</sup> UN Doc. E/C.12/2005/3 13 May 2005 at para.16.

<sup>202</sup> ICCPR, Article 25: “Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:

(a) To take part in the conduct of public affairs, directly or through freely chosen representatives;  
 (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;

No. 28 that the right of women to participate in public affairs and public office includes positions in the judiciary.<sup>203</sup> CEDAW contains both general anti-discrimination provisions under Articles 1 and 2,<sup>204</sup> and under Article 7 it provides that women should participate in the formulation and implementation of government policy and perform all public functions at all levels of government.<sup>205</sup> According to CEDAW's General Recommendation No. 23, political and public life includes the exercise of judicial and administrative powers.<sup>206</sup> It also discusses the need to appoint women to the judiciary as a way to remove *de jure* barriers to women's equal participation in the public sphere.<sup>207</sup> The CEDAW Committee has also recommended that states "confront and remove all barriers to women's participation as professionals within all bodies and levels of judicial and quasi-judicial systems and providers of justice-related services" in order to meet their obligations under CEDAW.<sup>208</sup>

The Beijing Declaration and Platform of Action, agreed on by all States, affirmed that States must "ensure that women have the same right as men to be judges, advocates or other officers of the court"<sup>209</sup> and also "commit themselves to establishing the goal of gender balance...in the judiciary."<sup>210</sup>

The UN Basic Principles on the Independence of the Judiciary provides that there shall be no discrimination against a person on the basis of their sex.<sup>211</sup> This requirement is reaffirmed in the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa.<sup>212</sup>

The Special Rapporteur on the independence of judges and lawyers has argued that it is necessary to develop a gender-sensitive judiciary, which requires not only the appropriate training of all judges, but also adequate representation of women in the judiciary.<sup>213</sup>

vi. Freedom of expression and association

The ICCPR,<sup>214</sup> the African Charter<sup>215</sup> and the Arab Charter guarantee to all people the right to freedom of expression, conscience, belief, association and assembly. In particular, the Arab Charter, provides in article 24(6) that every citizen has the right to "freedom of association and peaceful assembly." Article 32(1) of the Arab Charter guarantees, "the right to information and to freedom of opinion and expression, as well as the right to seek, receive and impart information and ideas through any medium, regardless of geographical boundaries."

Respect for and protection of these rights and freedoms is especially important for judges in their role as guarantors of human rights and the rule of law. Principle 8 of the UN Basic Principles provides that "members of the judiciary are like other citizens entitled to freedom of expression, belief, association and assembly; provided, however, that in exercising such rights, judges shall always conduct themselves in such a manner as to preserve the dignity of their office and the impartiality and independence of the judiciary".<sup>216</sup> Principle 9 provides that judges "shall be free to form and join

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(c) To have access, on general terms of equality, to public service in his country."

<sup>203</sup> HRC, General Comment No. 28, Article 3 (The equality of rights between men and women), UN Doc. HRI/GEN/1/REV.9 (Vol. 1) (2000), para.29 provides, in part, "States parties must ensure that the law guarantees to women the rights contained in article 25 on equal terms with men and take effective and positive measures to promote and ensure women's participation in the conduct of public affairs and in public office, including appropriate affirmative action."

<sup>204</sup> See CEDAW, article 1.

<sup>205</sup> See CEDAW, article 7.

<sup>206</sup> CEDAW, General Recommendation 23, para.5.

<sup>207</sup> CEDAW, General Recommendation 23, para.15.

<sup>208</sup> Committee on the Elimination of Discrimination against Women, General Recommendation, No. 33 on women's access to justice, CEDAW/C/GC/33; para.15(f).

<sup>209</sup> Beijing Declaration and Platform for Action, para.232(m).

<sup>210</sup> Beijing Declaration and Platform for Action, para.190(a).

<sup>211</sup> UN Basic Principles on the Independence of the Judiciary, para.10.

<sup>212</sup> Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, Principles 4(i) and 4(j).

<sup>213</sup> Report of the Special Rapporteur on the independence of judges and lawyers, Gabriela Knaul, UN Doc. A/HRC/17/30 (2011) paras.47, 48, 49, 54, 55.

<sup>214</sup> See ICCPR, articles 18, 19, 21 and 22.

<sup>215</sup> See African Charter, articles 8,9,10,11 and 13.

<sup>216</sup> UN Basic Principles on the Independence of the Judiciary, Principle 8. Similarly, the Bangalore Principles state: "4.6 A judge, like any other citizen, is entitled to freedom of expression, belief, association and assembly, but in

associations of judges or other organizations to represent their interests, to promote their professional training and to protect their judicial independence". The Committee of Ministers Recommendation, the ACHPR Principles and Guidelines, the European Charter on the statute for judges, the Latimer House Guidelines, and the Beijing Principles all contain similar guarantees.<sup>217</sup>

#### **D. Assessment in light of international law and standards**

##### **i. Appointment and Selection**

As highlighted above, under international standards, the primary criteria to be used in the appointment process and selection criteria for judges are training, qualifications, ability and integrity, and these and any other appropriate and objective criteria should be made transparent.<sup>218</sup> Judicial appointments, like other public processes, should be governed by the principle of non-discrimination.

Law No. 6 of 2006 on the Judiciary lays out specific criteria for the selection of judges, which in general is objective and clear, thus meeting the initial requirement of explicit and objective standards for selection.<sup>219</sup> The main criteria include the following: the judge must "enjoy full capacity," hold Libyan nationality and hold a university degree in Islamic Sharia or law. Those who have a degree from abroad must pass an examination organized by the Minister of Justice. They must have completed a qualification program at the Judicial Institute; (though this was changed in 2012 to include a waiver for those who had completed two years in a clerical position in the judicial bodies.) Judges must reach a certain standard of integrity including being "commendable and of good reputation."<sup>220</sup> Provisions on training are addressed below.

These provisions do not meet international standards on non-discrimination. International standards are clear that in the selection of judges, there must be no discrimination on any ground, including sex, ethnic or social origin, religion or philosophical or political opinion,<sup>221</sup> except that the requirement that a candidate be a national of the country concerned is not considered discriminatory.<sup>222</sup> Libya, as a party to the ICCPR and CEDAW, has an obligation to work towards the removal of gender imbalance and discrimination and to appoint qualified judges from among women and members of minorities.<sup>223</sup>

A number of elements of the criteria outlined in the Statute on the Judiciary are concerning. First, article 43(7) of the Statute holds that a Judge must be "medically fit and must [not] suffer from any handicap that prevents him from performing his duties to the fullest extent." This requirement is overbroad and inappropriate in the absence of any legislation imposing an obligation to provide for reasonable accommodation to ameliorate any incapacitating effects from a disability, as provided under the UN Convention on the Rights of Persons with Disabilities. This provision therefore would constitute discrimination if a reasonable adjustment could be made to accommodate the person with a disability.<sup>224</sup> In addition, the Committee on Economic, Social and Cultural Rights has made clear

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exercising such rights, a judge shall always conduct himself or herself in such a manner as to preserve the dignity of the judicial office and the impartiality and independence of the judiciary."

<sup>217</sup> CoM Recommendation (2010)12, para.25; ACHPR Principles and Guidelines, Section A, Principles 4(s) and (t); European Charter on the Statute for Judges, paragraph 1.7; Latimer House Guidelines, Guideline VII.3.

<sup>218</sup> See generally ACHPR Principles and Guidelines, Section A, Principle 4(i) (noting that the "sole criteria" shall be the suitability of a candidate "by reason of integrity, appropriate training or learning and ability."); UN Basic Principles on the Independence of the Judiciary, Principle 10; CoM Recommendation (2010)12, para.44; European Charter on the Statute for Judges, para.2.1. See also, ICJ Practitioners' Guide No. 1, p. 41.

<sup>219</sup> Article 43 of Law No.6 of 2006, as amended.

<sup>220</sup> Articles 4,5,6 of Law No.6 of 2006, as amended.

<sup>221</sup> European Charter on the statute for judges, operative paragraph 2.1. The Charter further envisages that "The statute makes provision for the conditions which guarantee, by requirements linked to educational qualifications or previous experience, the ability specifically to discharge judicial duties," (operative paragraph 2.2).

<sup>222</sup> UN Basic Principles on the Independence of the Judiciary, Principle 10: CoM Recommendation (2010)12, para.45; ACHPR Principles and Guidelines, Section A, Principle 4(j); Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region, OP 13. *European Charter on the statute for judges, doc. cit.*, operative paragraph 2.1. The Charter further envisages that "The statute makes provision for the conditions which guarantee, by requirements linked to educational qualifications or previous experience, the ability specifically to discharge judicial duties," (operative paragraph 2.2).

<sup>223</sup> Latimer House Guidelines, Principle 11.1; Report of the Special Rapporteur on the independence of judges and lawyers, UN Doc. A/HRC/11/41, para.34; *Concluding Observations of the Human Rights Committee on Sudan*, UN doc. CCPR/C/79/Add.85, para.21.

<sup>224</sup> Libya signed the Convention on the Rights of Persons with Disabilities on 1 May 2008. International law pro-



that similar accommodation is required in order to discharge the right to work obligations under the ICESCR.<sup>225</sup> The ICJ recommends that this language is removed, especially given that the requirement of “full capacity” is already contained within article 43(1).

Article 43(9) is also of concern. It holds that a judge “must not be married to a non-Arab woman. This condition may be waived by a decree issued by the Council.” This provision has no reasonable basis. Further, it may constitute a breach of non-discrimination based on status as well as the judge’s right to privacy, protected under the ICCPR and the Arab Charter, and also impairs the right to family life.<sup>226</sup>

As noted above, optimally judges should be elected by their peers or appointed by a body that is independent of the executive and legislative branches of government and the process should be free from political considerations.<sup>227</sup> In fact, such an independent body should be responsible for every decision “affecting the selection, recruitment, appointment, career progress or termination of office of a judge.”<sup>228</sup> Decisions to appoint a candidate as a judge should be taken by this independent authority or by executive authorities on this authority’s “proposal, or its recommendation or with its agreement or following its opinion.”<sup>229</sup>

As explored in detail above, judges in Libya are appointed by the SJC, which, following the removal of the Minister of Justice from its ranks in 2011, can be considered an independent body. The participation of other bodies, as noted above, including prosecutors and the public defence department in the SJC, raises some considerable concern as a matter of best practice. However, its composition as a body of a majority of judges is in conformity with international standards.

The Statute also contains a clear system for appointments, which is salutary,<sup>230</sup> holding that most individuals shall be initially appointed at the lowest grade, as set forth in a table attached to the law. An exception is made for those holding more senior positions in other judicial bodies. The ability to transfer from one judicial body to another, including from prosecutor to judge, is addressed below.

While the process for selection and appointment goes some way towards meeting international standards, the ICJ believes it could be improved in the following ways. First, the criteria for all judicial appointments should be objective and appropriate and should include training and qualifications in ordinary law, integrity, high competency and experience. Second the selection of judges should take place through a transparent and publicly accessible competitive selection process, and unsuccessful candidates should be entitled to receive the reasons for and to challenge such a decision or the procedures under which the decision was made. Finally, judicial appointments should never be subject to inappropriate criteria extrinsic to those related to the judicial function, including political considerations.

It should be noted that despite the progress in the law, in practice the current political instability in Libya has impacted on judicial appointments, with the OHCHR noting in February 2016 that, “[k]ey appointments with respect to judges and other judicial officials have become caught up in the broader political dispute in Libya.”<sup>231</sup> The ICJ calls on all authorities in Libya to respect the independence of the judiciary and avoid undue interference in any way, and in particular in relation to appointments.

While there is no indication on the face of it that conditions for judges are inadequate, there are some reports that judges, as with many other public servants, have had salaries delayed since early 2015. A functioning judiciary to effectively administer justice and protect the rule of law is important in contributing to the reestablishment of stability and the Rule of Law. Thus, adequate salaries, paid on time, should be ensured for judges, including as a means to avoid creating conditions that can lead

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hibits signatories to treaties from acting in contravention of the object and purpose of the treaty, even if not yet ratified; see article 27 of the Vienna Convention on the Law of Treaties. Under article 5(3) of the CRPD State parties are required to make ‘reasonable accommodation’ for persons with disabilities to ensure their rights on an equal basis with others.

<sup>225</sup> See ICESCR Committee, General Comment 5, paras. 20-27.

<sup>226</sup> ICCPR, article 17; Arab Charter, article 21.

<sup>227</sup> ICJ Practitioners’ Guide No. 1, p. 45.

<sup>228</sup> European Charter on the Statute for Judges, Principle 1.3.

<sup>229</sup> European Charter on the Statute for Judges, Principle 3.1. The Explanatory Memorandum further provides: “The wording of this provision is intended to cover a variety of situations, ranging from the mere provision of advice for an executive or legislative body to actual decisions by the independent body”.

<sup>230</sup> Article 44 of Law No. 6 of 2006.

<sup>231</sup> OHCHR Report, February 2016, p.55.

to corruption.

ii. Training and the Judicial Institute

The UN Human Rights Committee has called on States to give particular attention to the training of judges to enable them to render justice promptly and impartially. As noted above, judicial training and education is particularly important to the judicial career and to enhancing the capacity of judges to independently, fairly and effectively administer justice.<sup>232</sup> The training institutions and proceedings should be independent. Both foundational and continuing training programmes should be implemented by an “independent authority” and “in full compliance with educational autonomy.”<sup>233</sup> As noted above, Law No.6 of 2006 makes clear that judges must have completed training in the Judicial Institute in order to qualify for appointment to the judiciary, other than the relatively recently established exception for those who had completed two years in a clerical position.

Decree 208 of 1988<sup>234</sup> specifies that the Judicial Institute is subsidiary to the Ministry of Justice. The Director of the Institute is appointed by the Government on recommendation by the Minister of Justice (article 8). Two members of the administration committee are selected by the Minister of Justice and all administrative and other decisions are subject to approval by the Minister of Justice.<sup>235</sup> In addition, the Minister of Justice may convene a meeting of the Administrative Committee at any time and may attend and chair such a meeting.<sup>236</sup>

The ICJ is concerned that the significant role of the Minister of Justice in the administration of the judicial training institute affects the independence of the judiciary. The ICJ therefore recommends that the Judicial Institute be placed under the supervision and administration of the SJC and the role of the Minister of Justice be removed. In addition, the ICJ recommends that the relevant statute provides that the Judicial Institute shall be adequately resourced and shall be exclusively competent to dispense appropriate initial and on-going training for judges.

The ICJ is concerned that Law No. 6 of 2006, as amended, allows for training in Islamic Sharia alone to satisfy legal education, without further legal training, which may not constitute adequate training for a judge, who will be expected to rule on cases under ordinary laws. A judge without adequate legal training cannot fairly and effectively administer justice. In addition, this provision could allow for the favouring of a background of a judge with a particular religious conviction over another in contravention of international law and standards that prohibit discrimination on the grounds of religion. Religious discrimination is prohibited under the ICCPR (article 18) and the Arab Charter (article 30). The UN Human Rights Committee has said:

The fact that a religion is recognised as a State religion or that it is established as official or traditional or that its followers comprise the majority of the population, shall not result in any impairment of the enjoyment of any of the rights under the Covenant, including articles 18 and 27, nor in any discrimination against adherents of other religions or non-believers. In particular, certain measures discriminating against the latter, such as measures restricting eligibility for government service to members of the predominant religion or giving economic privileges to them or imposing special restrictions on the practice of other faiths, are not in accordance with the prohibition of discrimination based on religion or belief and the guarantee of equal protection under article 26.<sup>237</sup>

In light of this reasoning, the ICJ recommends that the requirement to have a degree in ordinary law should be compulsory for all judges.

The 2012 introduction of a waiver of the qualification program for those who have completed two years in a clerical position in a judicial body is likely not sufficient to meet the requirement of adequate judicial training, given the significantly different professional requirements of a clerical position and a judicial position. While much depends on the precise nature of the duties and functions of such a clerical worker, it is highly unlikely that such experience by itself would cover for the range of areas of

<sup>232</sup> Concluding Observations of the Human Rights Committee on the Congo, UN Doc. CCPR/C/79/Add.118, para.14.

<sup>233</sup> CoM Recommendation (2010)12, para.57.

<sup>234</sup> As amended by Decree No. 9 of 2002, Decree No. 15 of 2002, Decree No. 334 of 1990, and Decree No. 478 of 2000.

<sup>235</sup> Article 6 and article 7 of Decree No. 208 of 1988.

<sup>236</sup> Article 5 of Decree No. 208 of 1988.

<sup>237</sup> Human Rights Committee, General Comment No. 22, CCPR/C/21/Rev.1/Add.4, 30 July 1993, paras 5 and 9.

a legal education under minimal professional standards. Thus the ICJ recommends that this exception be removed.

Regarding the availability of continuing legal education,<sup>238</sup> Decree No.4 of 2008 provides that the JBID can recommend judges to undertake additional training and to grant leave to judges to undertake full time study.<sup>239</sup> However, there seems to be no requirement for judges to undertake continuous professional development training in Libya. Some observers have suggested that there is a need for more emphasis on the training of judges in Libya because of the legacy of Colonel Gadhafi's 'People's Court', which saw less qualified and more politicized judges appointed to the 'People's Court' and later reappointed to work in the ordinary courts when the 'People's Court' was disbanded.<sup>240</sup> Other sources have suggested that up to 40 percent of judges in Libya have not been properly trained.<sup>241</sup>

Given these deficiencies, the ICJ recommends that the SJC introduce a requirement for continuous professional development training for all judges, and assesses the need for additional training for all judges who have not been through the professional training programme at the Judicial Institute, provided for in article 3 of Law No.6 of 2006.

In addition, the ICJ recommends that in the context of the significant human rights violations perpetrated under Colonel Gadhafi's regime and during the transition in Libya, specific training for investigators, prosecutors and judges on addressing cases of gross human rights violations and principles of impunity be provided.

### iii. Promotion and Transfer

As explained above, any assessment of a judge should be based on "objective criteria" that is "published by the competent judicial authority" and judges should be able to express their views and to challenge assessments before an independent authority or a court.<sup>242</sup>

The assessment procedure contained in chapter 5 of Law No. 6 of 2006 and Decision 4 of 2008 provides for detailed regulations, inspection and grading from below average to competence. The former provides that members of judicial bodies must be notified of the assessment,<sup>243</sup> and the latter provides that they may submit work to the inspection body and to appeal a decision if they are graded in the two lowest categories. The fact that judges are able to challenge and feed into the assessment process is in compliance with international standards.

Chapter 3 of Decision No. 4 of 2008 outlines highly specific guidelines for assessment, including by giving credit based on units of work done, such as specific number of cases heard depending on type of case and level of the court.<sup>244</sup> While this may constitute an objective criterion for assessment, it is not necessarily an appropriate criterion. Providing a high rating for numbers of cases may have the perverse effect of lowering the quality of justice by incentivizing judges to rush through cases in a hasty manner rather than in one that most fairly administers justice. An assessment of the quality of work produced should be the basis for a fair assessment. While limited qualitative criteria is set forth at article 9(9)<sup>245</sup>, they are insufficient for a proper qualitative assessment and, in any event, do not appear to be given sufficient weight in assessments.<sup>246</sup> Thus the relevant law should provide that assessments of judges take into account appropriate performance criteria and not primarily the quantity of cases adjudicated.

Promotions should be based on "ability, integrity and experience."<sup>247</sup> The conditions for promotion of

<sup>238</sup> Singhvi Declaration, Principle 12.

<sup>239</sup> Decision No. 4 of 2008, article 4(3) and 4(4).

<sup>240</sup> See ICG Report, p.12; ILAC Report 2013, p.22.

<sup>241</sup> ICG Report, p.12.

<sup>242</sup> CoM Recommendation (2010)12, para.58.

<sup>243</sup> Article 78-80 of Law No. 6 of 2006, as amended.

<sup>244</sup> Article 23 of Decision No. 4 of 2008 outlines numbers of cases for judges.

<sup>245</sup> Article 9(9) of Decision No. 4 of 2008 provides, "The extent of the proper implementation of the discretionary power provided to him by law, and the adequacy of the legal and substantive guarantees required for this implementation" [shall be taken into account as assessment criteria].

<sup>246</sup> According to an ICJ interview with a senior Libyan judge (name on file with the ICJ).

<sup>247</sup> UN Basic Principles on the Independence of the Judiciary, Principle 13. Principle A, paragraph 4 (o) of the Prin-

members of judicial bodies are outlined in article 47 of Law No. 6 of 2006. This article provides that where promotion is to the grade of counsellor, its equivalent, or lower, it shall be made according to "seniority and with consideration given to competence." The requirement to consider competence, however, does not extend beyond that of the grade of counsellor. All grades above that level shall be made "according to seniority." Detailed provisions for promotion are provided for in a table attached to Law No. 6 of 2006. Thus clear criteria are outlined for promotions, in line with international standards.

The Statute provides that the JBID should prepare a draft law for promotions based on its reports on members for the grade of president of the First Instance Courts "or equivalent or below" and that appointments and promotions shall be made by the SJC, based on proposals from the JBID.<sup>248</sup> Given that this body consists of a majority of judges and is regulated by the SJC, it can be considered an appropriate body to make recommendations for promotion. However, the criteria for promotion should better reflect international standards by requiring that "ability, integrity and experience" are taken into account and not just 'seniority' or, for lower court judges, 'seniority and competence'.

The power to transfer judges should be vested in the judicial authority and not the executive. Libyan law is in compliance with this principle, given that it is the SJC with the JBID that has the power to transfer judges.

Judges should be consulted and the consent of the judge should be obtained before a transfer, as long as it is not unreasonably withheld and except pursuant to a system of regular rotation provided by law or formulated after due consideration by the judiciary.<sup>249</sup> The conditions for transfers to other jurisdictions should be clearly defined in law and judges should not "serve in a non-judicial capacity which compromises their judicial independence."<sup>250</sup>

Libyan law provides for the transfer, delegation and secondment of judges.<sup>251</sup> Members of judicial bodies may be transferred between each judicial body by a decree of the SJC based on a proposal of the JBID.<sup>252</sup> A member of a judicial body can be transferred within the same body when a decision is issued by the President of the SJC, based on a proposal from the head of that particular body.<sup>253</sup> The President of the SJC can also delegate a judge to another court for a period of up to a year "where necessary", and judges can be "delegated" to work in state or "semi-state bodies" for up to four years, where this does not "conflict with the duties of their positions"<sup>254</sup> both within and outside of Libya.

The law does not provide for consultation with judges, or for their consent, other than where a judge may be transferred to a position outside of Libya. This is concerning given the history of the use of transfers during the Gadhafi period to punish and reward judges for their judgments. It is also of concern in light of the fact that some observers have noted that since the transition, transfers without consent have been used as a means of vetting and disciplining judges, without going through the ordinary and proper disciplinary procedure.

The ICJ recommends that the law be amended to include a requirement of consultation with judges where they are to be transferred, delegated or seconded and consent to the transfer should be required, as long as such consent is not unreasonably withheld and except pursuant to a system of regular rotation provided by law or formulated after due consideration by the judiciary. The ICJ also recommends that the law be reformed to provide that a judge may not be transferred or delegated to a non-judicial position, which may compromise his or her independence.

A somewhat unusual feature of the Libyan law in this area is the provision that allows for the transfer of members of judicial bodies between the judiciary, the prosecution and the public defence department. A degree of fluidity between prosecution, defence and the judiciary is clearly envisaged. The ICJ considers these roles are distinct and, while the barriers separating them need not be airtight, too much fluidity in persons moving from one to the other is bound to create problems in the admin-

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principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa is identical.

<sup>248</sup> Article 48 and 49 of Law No. 6 of 2006, as amended.

<sup>249</sup> Measures for the Effective Implementation of the Bangalore Principles on Judicial Conduct, Adopted by the Judicial Integrity Group, Lusaka Zambia, January 2010, at 13.5.

<sup>250</sup> Singhvi Declaration, Principle 22.

<sup>251</sup> Chapter two of Law No. 6 of 2006, as amended.

<sup>252</sup> Article 51 of Law No. 6 of 2006.

<sup>253</sup> Article 50 and 51 of Law No. 6 of 2006, as amended.

<sup>254</sup> Article 57 and 57 of Law No. 6 of 2006.

istration of justice. Such practices may be problematic from the perspective of safeguarding both the actual and perceived independence of individual judges, in addition to the independence of prosecutors. (The role of prosecutors is explored in Chapter V). Given the distinct role of each of these sectors within the judicial system, the ICJ recommends that transfers among them should be done on the basis of individual career choices and not imposed by the authorities in pursuance of a general policy.

iv. Security of Tenure

A basic condition for the independence of the judiciary is security of tenure, which protects judges from potential pressure in decisions relating to renewal of their posts. Judges should have guaranteed tenure until a set retirement age or the expiry of their term of office.<sup>255</sup> Law No. 6 of 2006 provides for tenure for judges and other members of the judicial bodies up until a mandatory retirement age of sixty-five. Members can request early retirement from the age of fifty-five.<sup>256</sup> The provision for tenure until a set retirement age is appropriate and should be retained.

Also of relevance to the issue of tenure is the requirement under international standards that judges should only be subject to removal from office for reasons of incapacity or behaviour that renders them unfit to discharge their duties, as found following a fair hearing on the basis of established standards.<sup>257</sup> The disciplinary procedure provided for in Law No. 6 of 2006 allows for the removal of a judge in circumstances which are overbroad, discriminatory and do not meet international standards on tenure. This is explored in more detail in the next chapter on judicial accountability.<sup>258</sup>

v. Representation of Women in the Judiciary

Women have a right to participate in public affairs and hold public office, including in the judiciary, in a manner equal to men.<sup>259</sup> This right imposes a duty on the State to remove obstacles to women's participation in the judiciary and to take positive measures to establish gender balance within the judiciary.<sup>260</sup> A gender-sensitive judiciary requires not only the appropriate training of all judges, but also adequate representation of women in the judiciary.<sup>261</sup>

Law No. 8 of 1989 provides for the right of women to hold judicial posts. The ICJ recommends that this law remain in force and is bolstered by additional affirmative provisions in the law. Courts hearing challenges to this law should bear in mind Libya's non-discrimination obligations under the ICCPR, the ICESCR and CEDAW. Any attempt to exclude women from holding judicial posts would be explicitly contrary to the non-discrimination provisions of international law and specific provisions in the ICCPR and CEDAW providing for the right of women to participate in public life.

Law No. 12 of 2010 affirms that women have the right to work and forbids discrimination.<sup>262</sup> However, the ICJ expresses its concern that any provision that has the effect of *de jure* or *de facto* restricting women's ability to work in jobs of her choosing, providing she has the competence and training, is also contrary to international standards on non-discrimination. As such, any provision in law including in Law No. 12 of 2010, which specifies that women should work in jobs "suited to their nature" should be removed.

In light of the figures from the most recent survey of the SJC that women constitute just 14% of sitting judges in the Courts of Appeal and First Instance Courts, the ICJ recommends, in line with

<sup>255</sup> CoM Recommendation (2010)12, para.49; UN Basic Principles on the Independence of the Judiciary, Principle 12; ACHPR Principles and Guidelines, Section A, Principle 4(l).

<sup>256</sup> Article 99 of Law No. 6 of 2006, as amended.

<sup>257</sup> UN Basic Principles on the Independence of the Judiciary, Principle 18: ACHPR Principles and Guidelines, Section A, Principle 4(p).

<sup>258</sup> CoM Recommendation (2010)12, para.69; UN Basic Principles, Principles 17 & 20; ACHPR Principles and Guidelines, Section A, Principle 4(q).

<sup>259</sup> ICCPR, Article 25; CEDAW, article 7 CEDAW, General Recommendation 23, para.5; UN Basic Principles on the Independence of the Judiciary, para.10.

<sup>260</sup> Beijing Declaration and Platform for Action, para.190(a); Committee on the Elimination of Discrimination against Women, General recommendation No. 33 on women's access to justice, CEDAW/C/GC/33; para.15(f) Report of the Special Rapporteur on the independence of judges and lawyers, Gabriela Knaul, UN Doc. A/HRC/17/30 (2011) paras.47, 48, 49, 54, 55.

<sup>261</sup> Report of the Special Rapporteur on the independence of judges and lawyers, UN Doc. A/HRC/17/30 (2011), para.49.

<sup>262</sup> Law No. 12 of 2010, articles 2, 24, and 25.



recommendations by the CEDAW Committee and the Special Rapporteur on the independence of judges and lawyers, that the Libyan authorities take specific measures to ensure the appropriate representation of women in the judiciary, both across the entire judiciary and in specific courts where women are underrepresented, such as criminal courts and higher courts, with fixed benchmarks to demonstrate increased representation with a view to achieving approximate gender parity. The ICJ also recommends that the Libyan authorities take proactive measures such as education and training to combat societal stereotypes and discrimination that prevent women from fully participating in public life, including in the judiciary. In addition, in light of reports that women judges have received specific threats relating to their gender, proper and adequate protection must be provided for all women judges, as well as thorough investigations into such threats and prosecutions, where appropriate.

vi. Freedom of expression and association

International standards are clear that judges, like all individuals, have a right to freedom of expression and freedom of association, as long as in the exercise of these rights judges act in accordance with the dignity of their office and in a manner that preserves the impartiality and independence of the judiciary.<sup>263</sup> As part of this right, judges “shall be free to form and join associations of judges or other organizations to represent their interests, to promote their professional training and to protect their judicial independence.”<sup>264</sup>

In Libya, article 72 of Law No. 6 of 2006 provides that “[s]ocial clubs shall be established for the members of judicial bodies.” The Minister of Justice is tasked with “issu[ing] a decree determining the cost of membership in these clubs, stating the clubs’ purposes, and organizing their affairs.”<sup>265</sup> The significant role that the Minister of Justice played in these associations undermined their independence and potential for representing the affairs of judges.

As noted above, the first independent Libyan Judges’ Organization was founded in 2012 to promote and protect judges’ interests, based on provisions in the Constitutional Declaration of 2011. The organization has over 300 members and is active in protecting the interests of an independent judiciary and promoting progressive reform, including through submissions to the Constitutional Drafting Assembly, presenting and commenting on draft laws, monitoring violations against the judiciary and interventions in the media to promote judges’ interests. The Libyan Judges’ Organization presently faces several challenges. In particular, threats received by judges have meant some judges have been forced to flee the country. The security situation has affected its ability to meet and to function as an organization for the whole country. The political divides across the country have affected this association, with some judges refusing to join it because its headquarters are in Benghazi; perceived by some as peripheral to the centres of power. This is reflected in the founding of another judges’ organization in Tripoli in 2013. Thus, while the laws facilitate the founding of a judges’ association to represent judges’ interests, the political and security situation has rendered such associations less effective and less representative than they otherwise may be.

Of some concern in relation to the right of judges to exercise freedom of expression is article 64 of Law No. 6 of 2006, which prohibits members of judicial bodies from “engaging in political activity”. While it is warranted to prohibit judges from campaigning in the area of partisan politics, this is an overbroad prohibition. It may be used to prevent judges from engaging on questions related to the judiciary, the administration of justice and the improvement of conditions for judges and working to protect and promote the interests of the judiciary in law and in practice. These are appropriate areas for judges to express their views. The ICJ recommends that this language be amended to reflect international standards on the right of judges to exercise freedom of expression and association.

### **E. Draft Constitution**

Article 132 of the April 2016 draft Constitution provides that “[a] member of the judiciary shall only be removed, dismissed, transferred from office or disciplined through a justified decision by the Higher Judicial Council in accordance with the safeguards and cases defined by the law”. This article echoes

<sup>263</sup> UN Basic Principles on the Independence of the Judiciary, Principle 8; Similarly the Bangalore Principles state: “4.6 A judge, like any other citizen, is entitled to freedom of expression, belief, association and assembly, but in exercising such rights, a judge shall always conduct himself or herself in such a manner as to preserve the dignity of the judicial office and the impartiality and independence of the judiciary.”

<sup>264</sup> CoM Recommendation (2010)12, para.25; ACHPR Principles and Guidelines, Section A, Principles 4(s) and (t); European Charter on the Statute for Judges, paragraph 1.7; Latimer House Guidelines, Guideline VII.3.

<sup>265</sup> Article 72 of Law No. 6 of 2006, as amended.

article 92 of the October 2015 draft, analysed in detail in the ICJ's December 2015 report.<sup>266</sup> As noted above, the ICJ maintains its recommendations outlined in that report, including that the provisions in the Constitution should be expanded to include the requirement of security of tenure, which is a cornerstone for the independence of judges; that the Constitution should [...] provide that judges may only be removed for reasons of incapacity or behaviour that renders them unfit to discharge their duties; and that all disciplinary, suspension or removal proceedings shall be determined in accordance with established standards of judicial conduct.<sup>267</sup> In addition, the Constitution should outline that judges facing disciplinary, suspension or removal proceedings should be entitled to guarantees of a fair hearing including the right to be represented by a legal representative of their choice and to an independent review of decisions of disciplinary, suspension or removal proceedings.<sup>268</sup> Further, the promotion of judges should be constitutionally-mandated to be merit based and the Constitution should contain a requirement that judges be consulted before being transferred.<sup>269</sup>

**In light of the above, the ICJ urges the authorities in Libya to ensure that the Statute on the Judiciary:**

- 1. Sets out fair and transparent procedures for the selection of trainee judges and the appointment of all judges and expressly prohibits discrimination on any status grounds in this process. In this regard article 43(7) on medical fitness should be removed or substantially amended to ensure that it only encompasses incapacitation to which no reasonable accommodation is possible, in accordance with the UN Convention on the Rights of Persons with Disabilities and article 43(9) on marriage to a non-Arab woman of Law No. 6 of 2006 should be removed;**
- 2. Sets forth objective and appropriate criteria for all judicial appointments, which include training and qualifications in ordinary law, integrity, high competency and experience;**
- 3. Ensures that the selection of all judges takes place through a transparent and publicly accessible competitive selection process, and provides for unsuccessful candidates to receive the reasons for and to challenge such a decision or the procedures under which the decision was made;**
- 4. Ensures that judicial appointments are not subject to inappropriate criteria extrinsic to those related to the judicial function, including political considerations;**
- 5. Guarantees adequate, appropriate, effective initial and on-going training for judges at the expense of the State;**
- 6. Ensures that Decree 208 of 1988 is revised so as to place the Judicial Institute under the supervision and administration of the SJC and not the Ministry of Justice;**
- 7. Provides that the Judicial Institute shall be adequately resourced and shall be exclusively competent to dispense appropriate initial and on-going training for judges;**
- 8. Ensures training in ordinary law is compulsory for all judges;**
- 9. Removes the exception to judicial training for those who have completed two years of clerical work in the judiciary;**
- 10. Ensures that judges are required to undertake continuing legal education and training;**
- 11. Provides for the assessment of the need for additional training for all judges who have not been through the professional training programme at the Judicial Institute;**
- 12. Ensures specific training for investigators, prosecutors and judges on addressing cases of gross human rights violations and combating impunity;**
- 13. Provides for education and training to combat gender stereotypes that prevent women from fully participating in public life, including in the judiciary;**
- 14. Provides that assessments of judges take into account appropriate performance criteria and not primarily the quantity of cases adjudicated;**
- 15. Provides for criteria for judicial career promotion that better reflect international standards by requiring that "ability, integrity and experience" are taken into account;**

<sup>266</sup> See ICJ Report 'Libya's Draft Constitution: Procedural Deficiencies, Substantive Flaws', (ICJ Report 2015), pp.69-72, available at <http://www.icj.org/libya-revise-draft-constitution-to-ensure-compliance-with-international-standards/>, (last accessed 20 June 2016).

<sup>267</sup> UN Basic Principles on the Independence of the Judiciary, Principles 18 and 19.

<sup>268</sup> UN Basic Principles on the Independence of the Judiciary, Principles 17-20. The African Principles and Guidelines on the Right to a Fair Trial, 4(q).

<sup>269</sup> See ICJ Report 2015, available at <http://www.icj.org/libya-revise-draft-constitution-to-ensure-compliance-with-international-standards/>, (last accessed 20 June 2016).

16. **Guarantees that adequate numbers of appropriately-trained judges and appropriately-resourced courts with sufficient infrastructure are provided for;**
17. **Details the specific situations in which, and the relevant time period for which, a judge can be transferred or assigned to another position and the applicable procedure in this regard;**
18. **Requires consultation with and consent of a judge before any transfer is effected, as long as such consent is not unreasonably withheld and except pursuant to a system of regular rotation provided by law or formulated after due consideration by the judiciary;**
19. **Ensures that transfers between judicial bodies should be done on the basis of individual career choices and not imposed by the authorities in pursuance of a general policy;**
20. **Guarantees fair conditions of tenure for judges, including adequate working conditions and remuneration;**
21. **Limits the instances in which a judge may be removed from office to the following: reaching retirement age, if applicable, or the end of a fixed period of tenure; resignation; certified as medically unfit; or as a result of the imposition of a lawful and proportionate sanction of dismissal imposed following a full and fair disciplinary procedure;**
22. **Provides that specific and proactive measures are taken to ensure the increased appropriate representation of women in the judiciary with a view to achieving approximate gender parity, both across the entire judiciary and in specific courts where women are underrepresented such as criminal courts and higher courts with fixed benchmarks to demonstrate increased representation; and**
23. **Affirms and protects the rights of judges to freedom of association, assembly and expression, including the right to form and join associations aimed at representing their interests, promoting their professional training and protecting their judicial independence and restrict any limitations to those required to ensure that judges conduct themselves in such a manner as to preserve the dignity of their office and the impartiality and independence of the judiciary. Article 62 of Law No. 6 of 2006, which prohibits members of judicial bodies from “engaging in political activity” should be revised accordingly.**

**To better guarantee and safeguard judicial independence, the ICJ calls on the Constitutional Drafting Assembly to ensure that the new Libyan Constitution:**

1. **Set out objective criteria and clear procedures for the appointment, tenure, promotion, suspension and dismissal of the members of the judiciary and disciplinary sanctions taken against them;**
2. **Includes a provision to explicitly prohibit discrimination of any kind in the selection and appointment process of judges;**
3. **Provides that judges may only be removed for reasons of incapacity or behaviour that renders them unfit to discharge their duties, and that all disciplinary, suspension or removal proceedings shall be determined in accordance with established standards of judicial conduct.**

### III. Judicial Accountability and Vetting

#### A. Introduction

Under rule of law principles, judiciaries must not only be independent and impartial, they must also be accountable. The trust of citizens in public officials and institutions tends to be significantly eroded during authoritarian rule and during protracted periods of armed conflict and internal political instability. In such situations, “the capacity of judges and lawyers...to fulfil their essential role as protectors and guarantors of human rights may come under enormous strain.”<sup>270</sup> Restoration of this trust is vital for the reestablishment of the rule of law. For Libya, restoring trust in state institutions, and, in particular, in the judiciary, will be fundamental for the reestablishment of the rule of law<sup>271</sup> and ensuring accountability for human rights abuses.

Ensuring accountability in the judicial sector requires two key processes. The first is to set clear standards of conduct for judges and to provide a fair disciplinary procedure for those who are alleged to have breached these standards. The second is to ensure that judges who are alleged to have been complicit in human rights violations, corruption or criminal behaviour during the previous regime and period of conflict are held accountable through a fair and targeted vetting procedure and, where warranted, removed from office.

Regarding standards and procedures, there is a comprehensive framework in place in Libya for standard setting and the disciplining of judges. A code of conduct establishes the required standards and a now independent body is responsible for conducting disciplinary proceedings. These procedures, while generally providing for a fair hearing, should be brought closer in line with international standards.

Actions undertaken thus far aimed at holding judges and other public officials accountable for collaboration with the corruption and human rights violations committed during the rule of Colonel Gadhafi, have been inadequate and not in conformity with international standards. The legislation providing for vetting of Gadhafi era public officials, known as the ‘Political Isolation Law’, failed to provide for clear criteria for those being vetted, or for a case-by-case analysis of each individual affected, and failed to ensure that due process standards would be applied to vetting proceedings. As a result, many individuals were unfairly removed from their positions and statutorily excluded from holding public office for ten years from the date of their exclusion. The extension of the ‘Political Isolation Law’ to the judiciary in 2013 was met with protests and challenges in Court and the GNC reportedly repealed the law in early 2014. However, given the complicated political and legislative situation in Libya, its status in law is currently unclear, with a challenge in the Constitutional Court pending.

#### B. Libyan Legal Framework

##### i. Grounds for discipline and removal and Code of Ethics and Conduct

The SJC issued a comprehensive Code of Ethics and Conduct for members of judicial bodies through Decision No.3 of 2008. The Code affirms the principle of independence, including by requiring that judges should not be subject to any external pressure and should ensure public trust by upholding the code of conduct (article 1). The requirement of impartiality is contained within article 2, applicable to court proceedings and to decisions in each case. Article 2 prohibits favours or bias, requires the maintenance of a good reputation and trust, and the need to withdraw from cases that may lead to a conflict of interest, including where the judge may have previously acted as a lawyer in the case or where the judge may have some financial interest in the case.

Other articles outline the need to act with integrity (article 3) and decency (article 4). Article 4 specifies that a judge should “[e]xercise his freedom of expression, belief and association, while maintaining the dignity, independence and impartiality of the judiciary.” This article also provides that judges may participate in law-related activities, or activities on judicial organization and administration of justice, or any similarly relevant topic, while, “maintaining the framework of good performance and without prejudice to the principle of impartiality and independence” and judges “may be affiliated to

<sup>270</sup> Legal Commentary to the ICJ Geneva Declaration, Preamble.

<sup>271</sup> In 2013, a survey by ILAC found that the general public had little trust in the judicial sector in Libya, ILAC Report 2013, p.36.

associations or judicial clubs or equivalent”.

Article 6 addresses equality, including the need to be “aware of diversity” and the need to treat everyone with respect and without discrimination.” Article 7, entitled “efficiency and care”, provides that judges should be efficient and conscientious in their work, including by maintaining and improving their knowledge and following developments in international law and “modern principles of human rights”.

Article 8 of the Code gives specific “guidelines” on behaviour, which go into extensive detail, on what behaviour is expected of a judge, including in relation to social relationships.

In addition to the code, article 50 of Law No. 4 of 2008 sets out various examples of “Disciplinary misconduct”, that include: an act that prejudices honour or dignity or ethics, a breach of professional obligations, failure or negligence, a breach of the Code of Ethics and Conduct, not attending training programs without a valid excuse, not completing studies in the time specified for it (for those studying), not starting work immediately after the completion of studies, without excuse.

## ii. Disciplinary Procedure

As noted above, a dedicated body responsible for disciplinary procedures in Libya is provided for by Law No. 6 of 2006 and its functions are outlined in more detail by Decree 1001 of 2003,<sup>272</sup> as amended by Decision 4 of 2008. As well as assessing the performance of judges, the JBID is responsible for investigating complaints filed against members of judicial bodies and initiating disciplinary procedures before the SJC.<sup>273</sup>

Chapter 6 of Law No. 6 of 2006 provides for the ‘discipline and prosecution’ of members of judicial bodies. Article 82 provides that, “[m]embers of judicial bodies shall only be dismissed or relieved from a position based on a disciplinary trial and in accordance with the rules and procedures stipulated in this law.” Decision No. 4 of 2008 outlines specific rules on the disciplinary process to be undertaken by the JBID.

If a complaint about a judge’s behaviour is received by the JBID, its President may take one of three steps: a) issue a warning to the judge, b) initiate disciplinary proceedings, or c) if it concerns an alleged criminal offence the complaint can be referred to the Prosecutor’s Office.<sup>274</sup>

In addition to the head of the JBID, the President of the SJC and the heads of judicial bodies can warn judges and other members of judicial bodies if they “fail to fulfil” their duties. This applies to judges of first instance courts and summary courts, as well as the equivalent grades in other judicial bodies. The judges in question have the right to make statements, either orally or in writing before the warning is issued. A member may object to a warning within ten days of being informed of the matter. The SJC may then review the objection and warning and conduct investigations, after which they may either approve or dismiss the warning. The original complainant cannot sit on the SJC when it reviews the warning.<sup>275</sup>

The JBID initiates and can also conduct the investigations where a judge or other member of a judicial body is accused of failing to “fulfil his duties”.<sup>276</sup> The case will then be heard by the SJC, acting as a disciplinary board, where the JBID submits a petition with a charge and supporting evidence.<sup>277</sup> For members holding the grade of counsellor, namely judges in the appellate court and the Supreme Court, and its equivalent in other judicial bodies, the administrative investigation must be undertaken by a President of the Court of Appeal.<sup>278</sup> As noted above, the Head of the JBID sits as a member of the SJC, which has implications for the impartiality of the disciplinary board.

<sup>272</sup> Decree of the General People’s Committee for Justice and Public Security on the Inspection Regulation for Judicial Bodies.

<sup>273</sup> Article 78 of Law No. 6 of 2006, as amended.

<sup>274</sup> Article 47, Decision No. 4 of 2008.

<sup>275</sup> Article 83, Law No. 6 of 2006.

<sup>276</sup> Article 85, Law No. 6 of 2006.

<sup>277</sup> Article 84 and article 86, Law No. 6 of 2006.

<sup>278</sup> Article 85 of Law No. 6 of 2006.



When a person is under investigation, he or she is notified and asked to appear and the SJC is then tasked with undertaking its own investigations.<sup>279</sup> The person may then be suspended or considered to be on mandatory leave until the hearing is completed, with full salary.<sup>280</sup> The disciplinary case can result in the termination of the service of the person under inspection.<sup>281</sup>

The SJC or member delegated to conduct the investigation can call witnesses, as per article 91; however, the right to call witnesses does not seem to be extended to the judge who is the subject of the investigation appearing before the SJC. The accused has the right to present a defence and, while previously restricted to requesting a member of a judicial body to represent him, Law No. 4 of 2011 extended this right to request a private lawyer, certified by the Courts of Appeal, as his or her representative.<sup>282</sup>

A ruling can be made in the person's absence only "if it is verified that he was properly notified"<sup>283</sup> and he must be notified of the ruling "within 48 hours."<sup>284</sup> The case is held in closed sessions and the ruling must include reasons.<sup>285</sup>

Article 93 holds that the ruling in the disciplinary case shall be final.<sup>286</sup> The previous version of this article stated that the case "shall be final and shall not be subject to any form of appeal." However, in light of article 33 of the Constitutional Declaration that "Laws shall not provide for any administrative decision to be immune from judicial oversight," the law was amended by Law No. 4 of 2011 to remove "and shall not be subject to any form of appeal." Like other decisions of the SJC, this means disciplinary decisions can be subject to judicial review on the legality of the decision. It does not, however, include a substantive appeal.

Penalties are outlined in article 94, as follow:

1. Reprimand
2. Withholding of one of the bonuses prescribed for members of judicial bodies for a period of not more than six months.
3. Denial of promotion for a period of not less than one year and not more than
4. three years.
5. Transfer from the judicial position.
6. Dismissal.

Article 95 states that, "[i]n the event that a sentence of transfer from the judicial position is issued, the sentenced member of the judicial bodies shall be transferred to a position equivalent to the judicial position that he held."

Article 85 of Law No. 6 of 2006 specifies that if a criminal investigation is underway, this may be considered sufficient and separate disciplinary proceedings may be unnecessary.

### iii. Criminal Accountability

The 2006 Statute provides for a particular framework to be applied to criminal proceedings against members of judicial bodies. Immunity is presumptively available to all members of judicial bodies. However, judges and other members of the judiciary may be arrested, detained, interrogated or subjected to criminal proceedings when authorized by a high ranking Committee, consisting of a counselor of the Supreme Court as its chairman, selected by its General Assembly, and two presidents of the Courts of Appeal, selected by the SJC.<sup>287</sup> Article 96 of Law No.6 of 2006 mandates that this Committee "shall be formed". It would appear, therefore, that this is a standing Committee and is not created in response to a request for the lifting of immunity.

<sup>279</sup> Article 87 and 88 of Law No. 6 of 2006.

<sup>280</sup> Article 89 of Law No. 6 of 2006.

<sup>281</sup> Article 90 of Law No. 6 of 2006.

<sup>282</sup> Article 92, (as amended by Law No. 4 of 2011).

<sup>283</sup> Article 92 of Law No. 6 of 2006.

<sup>284</sup> Article 95 of Law No. 6 of 2006.

<sup>285</sup> Article 93 of Law No. 6 of 2006, as amended by Law No.4 of 2011.

<sup>286</sup> Article 93 of Law No. 6 of 2006, as amended by Law No.4 of 2011.

<sup>287</sup> Article 96 of Law No. 6 of 2006.

The Prosecutor General must request authorization from this Committee in order to investigate, arrest, detain or bring criminal proceedings against a member of the judiciary.

Significantly, this Committee must authorize investigations against crimes allegedly committed by members of judicial bodies even where the alleged crime was not carried out in the course of their duties.<sup>288</sup> No member of a judicial body is subject to arrest or detention except with the authorization of the Committee, save in cases of *in flagrante delicto*.<sup>289</sup> In the latter case, the Prosecutor General must submit the matter to the Committee within 24 hours of the arrest or detention of the member. The Committee has the power to decide whether to keep the member in detention or to release the member, either with or without bail. The member has the right to ask the Committee to hear a statement and the Committee shall decide on the initial period of his detention and any extension thereto.<sup>290</sup>

Members of judicial bodies can only be detained and serve custodial sentence in locations specifically established for this purpose.<sup>291</sup> A member may be suspended from his work during investigations or trial proceedings, but suspension shall not result in the deprivation of his salary unless he is convicted of a crime.<sup>292</sup>

This Committee is also responsible for designating the court that will adjudicate cases of “felonies or misdemeanours committed by members of judicial bodies.”<sup>293</sup>

#### iv. Vetting

Since 2011 the transitional authorities have introduced a number of laws outlining a procedure for vetting public officials who held positions of authority during the Gadhafi regime or who were known to oppose the February 2011 Uprising and providing for their exclusion from high ranking political and administrative positions for a period of time. A High Commission for the Application of Standards of Integrity and Patriotism was first created by the National Transitional Council in Law No. 177 of 2011, supplemented initially by Law No. 192 of 2011, promulgated in December 2011, on “determining and applying integrity and patriotism regulations and standards” and later by Law No. 26 of 2012 (amended numerous times) and finally by a wider ranging Law No. 13 of 2013, which repealed all of the former laws on vetting.

The SJC presented the government with draft legislation on vetting of judges in October 2012.<sup>294</sup> The law proposed that all members of the judiciary should be dismissed and must be then approved by a committee for readmission, which would include the head of the SJC and members of the judiciary who could show “tangible participation in the 17th February Revolution” and “are proven to have good ethics.”<sup>295</sup> Problematic elements of this proposal included the fact that the Committees’ deliberations would not be public, there would be no right of appeal and vetting criteria included the handing down of ‘unfair’ sentences and issuing verdicts to ‘please the regime’, as well as those who were ‘famous for being corrupt’ and former members of the ‘People’s Court’ or ‘People’s Prosecution’.<sup>296</sup> The ICJ understands that due to the controversy it generated this legislation was rejected by both the general assemblies of courts in Libya and by the Legislative Committee of the GNC.<sup>297</sup>

Law No. 13 of 2013<sup>298</sup> on “administrative and political isolation” repealed former laws on exclusion and vetting and adopted far more expansive categories of people to be excluded from public positions. This approach appears in part to have been impelled by the demands of militias which surrounded the Parliament at the time of the law’s adoption, demanding the removal of all Gadhafi era officials from positions of power.<sup>299</sup>

<sup>288</sup> Article 96 of Law No. 6 of 2006.

<sup>289</sup> Article 97 of Law No. 6 of 2006.

<sup>290</sup> Article 97 of Law No. 6 of 2006.

<sup>291</sup> Article 97 of Law No. 6 of 2006.

<sup>292</sup> Article 98 of Law No. 6 of 2006.

<sup>293</sup> Article 95 of Law No.6 of 2006.

<sup>294</sup> ICG Report, p. 21.

<sup>295</sup> As quoted in ICG Report, p. 21.

<sup>296</sup> ICG Report, p. 21.

<sup>297</sup> Interview with Libyan Judge, May 2016 (details on file with the ICJ).

<sup>298</sup> Amended by Law No. 6 of 2014 amending Law No. 28 of 2013, which applied the law to candidates for the Constitutional Drafting Assembly.

<sup>299</sup> See e.g., Human Rights Watch, ‘Libya: Reject Political Isolation Law’, May 4, 2013, available at: <https://www.hrw.org/report/2013/05/04/libya-reject-political-isolation-law>.

Article 1 listed two categories of people to be excluded from public office and article 18 specified that the exclusion would be for ten years. The first category listed 14 political, educational, business and military positions, including the “[d]irector and secretary of bodies, authorities, institutions, services, or councils affiliated with the cabinet, the Revolutionary Command Council, the General People’s Committee, or General People’s Congress,” and “[a]ny person who held a leadership position in any institution associated with the Gaddafi family, and any of their commercial business partners.” Anyone who had held these positions from September 1969 to October 2011 would be excluded from holding high ranking positions in the new Libyan administration for ten years from the date of their exclusion.

The second category described the exclusion of individuals “based on any conduct leading to political and economic corruption of the country during the period mentioned in the previous article, as described by a number of behavioural patterns”, including:

1. Civilians who cooperated with the Gaddafi regime security services, if such cooperation resulted in violations of any human right.
2. Any person who repeatedly glorified Gaddafi or his regime or promoted the Green Book, whether through the media or direct public speech.
3. Any person who opposed the 17 February Revolution whether by action, instigation, agreement, or assistance.
4. Any person who committed or contributed in any way to the murder, imprisonment, or torture of Libyan citizens for the service of the former regime, whether inside or outside the country.

It also expanded the categories of public positions encompassed for exclusion to include ambassadorships and other foreign service jobs, all educational institutions, members of unions and all political positions. Law No. 13 of 2013 includes “judicial bodies” as a body from which all those that fell into the categories outlined in article one would be excluded.

The article that proved most controversial for the judiciary was article 16, which provided that “the Supreme Judicial Council shall apply the criteria stipulated by Article (1) to the members of judicial bodies,” meaning all members who were considered to have been appointed by the previous regime could potentially be excluded from their posts for ten years.

According to members of the judicial bodies interviewed by the ICJ, the ‘Political Isolation Law’ was met with ad-hoc strikes by members of the judiciary and by the Libyan Judges Organisation and the law was never explicitly implemented in relation to the judiciary. However, many members of the judiciary believe the SJC has applied it in a roundabout way, using transfers of members out of judicial positions and into other bodies, mainly into the public defence department without specifying that the transfers were pursuant to the ‘Political Isolation Law’.<sup>300</sup> This led to the “exclusion of many experienced members in the judiciary” who were variously accused of working in exceptional courts, ‘the People’s Court’, performing work for the regime or holding executive posts under the previous regime or performing various tasks specified by the former SJC.<sup>301</sup>

Prior to this, the SJC issued Decree No. 103 of 2012, which transferred up to 180 judges out of the judicial body and into either the prosecution or the public defence. This was seen as a means of imposing vetting without a fair or transparent procedure.<sup>302</sup> Some 80 percent of judicial members who were affected by this mass transfer challenged the Decree in the Tripoli Court of Appeal, which in fact annulled the Decree through judgment No. 167 of 2014. This judgment only applied to those who had challenged the transfers in court. The remainder of the judges affected by Decree No. 103 of 2012 were only returned to their original posts this year, through an SJC decree, No. 3 of 2016.

The constitutionality of the ‘Political Isolation Law’ has been challenged in the Supreme Court but the Court has not yet issued a ruling. The ICJ understands that the HoR has overturned the law

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[hrw.org/news/2013/05/04/libya-reject-political-isolation-law](http://hrw.org/news/2013/05/04/libya-reject-political-isolation-law) (last accessed 16 May 2016).

<sup>300</sup> According to a Libyan Prosecutor and a Retired Libyan Magistrate, interviewed by the ICJ in March 2016. In order to link these transfers to the ‘Political Isolation law’, some observers point to the fact that the SJC issued Decree No. 49 of 2013 approving a questionnaire that was prepared pursuant to Law No. 13 of 2013 on Political Isolation. The Chairman of the SJC issued Decision No. 158 of 2013 to form a committee that would examine the questionnaires.

<sup>301</sup> According to a Libyan Supreme Court Judge, interviewed by the ICJ in March 2016 (details on file with the ICJ).

<sup>302</sup> Member of the Libyan Prosecution, in an interview with the ICJ in March 2016 (details on file with the ICJ).

but the status of it is unclear because of the existence of two legislative bodies in Libya.<sup>303</sup> The ICJ understands that it is still in force in the areas under the control of the GNC, but it has not been fully applied to the judiciary.

Also of relevance to the issue of vetting is Law No. 29 of September 2013 on Transitional Justice issued by the GNC, which provided in article 1 that grave and systematic violations of fundamental rights and freedoms would be addressed “through legislative, judicial, social, and administrative measures, 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.” Article 4 outlines the “Objectives of the Law”, which include, among others, “[a]ccountability for human rights violations that were committed under the auspices of the state or one of its institutions, or by individuals acting on its behalf, [...], [d]etermination of the responsibility of the state apparatuses or of any other parties for human rights violations, [...], [t]he reformation of state institutions.” Chapter 2 provides for a ‘Fact-Finding and Reconciliation Commission’ to address transitional justice issues. This Commission was created with the assistance of the UN but the ICJ understands it is not yet operational.<sup>304</sup>

The ‘Political Isolation Law’ was not applied fully to the judiciary and its status in Libya is unclear, having been overturned by the HoR and challenged in the Supreme Court. Other attempts to vet the judiciary by the SJC by using unfair procedures such as transfers have now been overturned. Given these factors, it can be concluded that no successful, fair and targeted attempt has been made to vet the judiciary of those who may have been complicit in corruption, human rights violations or the serious crimes committed by the previous regime.

### **C. International law and standards**

International standards that specifically address judicial accountability focus on two key issues. First, any disciplinary sanctions taken against judges should be in line with an established, accessible code of ethics and the disciplinary proceedings should meet established standards of due process. The second is that judges should be presumptively immune, subject to exceptions, from civil suits related to decisions made in the discharge of their duties. However, this immunity should not extend to criminal behaviour or to complicity in human rights violations.

Of note also is the UN Convention against Corruption, which Libya ratified in 2005.<sup>305</sup> This Convention obliges states to promote integrity in the judiciary, “in order to fight corruption, each State Party shall promote, inter alia, integrity, honesty and responsibility among its public officials, in accordance with the fundamental principles of its legal system,”<sup>306</sup> and “each State Party shall endeavour to apply, within its own institutional and legal systems, codes or standards of conduct for the correct, honourable and proper performance of public functions.”<sup>307</sup>

#### **i. Grounds for discipline and removal and Code of Conduct**

The UN Basic Principles provides the judges shall be subject to suspension or removal only for reasons of incapacity or behaviour that renders them unfit to discharge their duty. Clear grounds for and decisions about discipline, including suspension or removal, should be based on established standards of judicial conduct.<sup>308</sup> A judicial code of conduct should contain the ethical standards that judges are required to meet in the discharge of their professional duties.<sup>309</sup>

The Bangalore Principles of Judicial Conduct (the Bangalore Principles), which were elaborated by a group of chief justices under the auspices of the UN<sup>310</sup> and endorsed by resolutions of the UN

<sup>303</sup> See e.g. BBC, “Libya revokes bill which banned Gaddafi-era officials from office,” 2 February 2015 available at: <http://www.bbc.com/news/world-latin-america-31104099> (last accessed 16 May 2016).

<sup>304</sup> OHCHR Report, January 2015, paras.57 and 58.

<sup>305</sup> Libya ratified this Convention on 7 June 2005.

<sup>306</sup> UN Convention against Corruption, article 8, para.1

<sup>307</sup> UN Convention against Corruption, article 8, para.2.

<sup>308</sup> UN Basic Principles on the Independence of the Judiciary, Principle 19; Singhvi Declaration, Principle 27.

<sup>309</sup> CoM Recommendation (2010)12, para.73; UN Basic Principles on the Independence of the Judiciary, Principle 19; Singhvi Declaration, para.27.

<sup>310</sup> For drafting history see UNODC, Commentary on the Bangalore Principles of Judicial Conduct (September

Commission on Human Rights and the Economic and Social Council,<sup>311</sup> provide authoritative guidance on judicial ethics. They are organized around six core values: independence, impartiality, integrity, propriety, equality, and competence and diligence.

Numerous international instruments provide that judges should play a leading role in the development of such codes and should be able to seek advice on ethics from a body within the judiciary.<sup>312</sup>

## ii. Disciplinary Procedure

International standards make clear that any allegation of judicial misconduct must be investigated independently, impartially, thoroughly and fairly and adjudicated in the context of fair proceedings before a competent, independent and impartial body. Under such procedures, due process and fair trial safeguards should apply.<sup>313</sup>

The UN Human Rights Committee affirmed that pursuant to a State's obligations under article 14 of the ICCPR judges should "only be removed in accordance with an objective, independent procedure prescribed by the law".<sup>314</sup> The UN Basic Principles on the Independence of the Judiciary and the African Union Principles and Guidelines on the Right to a Fair Trial provide that judges facing disciplinary, suspension or removal proceedings are entitled to guarantees of a fair hearing including the right to be represented by a legal representative of their choice.<sup>315</sup>

Further, the UN Basic Principles on the Independence of the Judiciary clarify that the law should guarantee that judges enjoy personal immunity from civil suits relating to acts or omissions in the exercise of their judicial functions.<sup>316</sup> This is a necessary safeguard of judicial independence. In particular, disciplinary proceedings or civil suits should not be undertaken against judges for the manner in which they interpret the law, assess the facts or weigh the evidence in any given case.<sup>317</sup> Judges should not be subject to disciplinary procedures if their decisions are overruled or modified on appeal.<sup>318</sup>

Sanctions, including disciplinary measures, suspension or removal, must be proportionate and subject to appeal before an independent judicial body.<sup>319</sup> The right of appeal must at all times be respected.<sup>320</sup> The UN Basic Principles and the African Union Principles and Guidelines on the Right to a Fair Trial provide for the right of judges to an independent review of decisions of disciplinary, suspension or removal proceedings.<sup>321</sup>

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2007).

<sup>311</sup> Commission on Human Rights Resolution 2003/43, UN Doc. E/CN.4/2003/L.11/Add.4; UN Economic and Social Council (ECOSOC), Strengthening Basic Principles of Judicial Conduct, UN Doc. E/RES/2006/23.

<sup>312</sup> Bangalore Principles, para.8 of the preamble; see also CoM Recommendation (2010)12, paras. 73 & 74; and see, Legal Commentary to the ICJ Geneva Declaration, p. 211.

<sup>313</sup> Report of the Special Rapporteur on the independence of judges and lawyers, UN Doc. A/HRC/11/41, para.61.

<sup>314</sup> Concluding Observations of the Human Rights Committee on the Republic of Moldova, UN Doc. CCPR/CO/75/MDA, para.12.

<sup>315</sup> UN Basic Principles on the Independence of the Judiciary, Principles 17-20; the African Principles and Guidelines on the Right to a Fair Trial, *infra* 281, 4(q); the Singhvi Declaration also holds that, "a complaint against a judge shall be processed expeditiously and fairly" and (b) The proceedings for judicial removal or discipline when such are initiated shall be held before a Court or a Board predominantly composed of members of the judiciary, [...] [t]he proceedings for discipline of judges shall ensure fairness to the judge and the opportunity of a full hearing; [j]udgments in disciplinary proceedings instituted against judges, whether held in camera or in public, shall be published," Singhvi Declaration, paras.25-29.

<sup>316</sup> UN Basic Principles on the Independence of the Judiciary, Principle 16.

<sup>317</sup> ACHPR Principles and Guidelines, Section A, Principle 4(n) ("Judicial officers shall not be: (i) liable in civil or criminal proceedings for improper acts or omissions in the exercise of their judicial functions").

<sup>318</sup> CoM Recommendation (2010)12, para.70; see also ACHPR Principles and Guidelines, Section A, Principle 4(n) (ii); Concluding Observations of the Human Rights Committee on Vietnam, UN Doc. CCPR/CO/75/VNM, para.10.

<sup>319</sup> CoM Recommendation (2010)12, para.69; UN Basic Principles on the Independence of the Judiciary, Principles 17 & 20; ACHPR Principles and Guidelines, Section A, Principle 4(q).

<sup>320</sup> Report of the Special Rapporteur on the independence of judges and lawyers, UN Doc. A/HRC/11/41, para.61.

<sup>321</sup> UN Basic Principles on the Independence of the Judiciary, Principles 17-20. The African Principles and Guidelines on the Right to a Fair Trial, *infra* 281, 4(q).



### iii. Criminal Accountability

Judges should generally enjoy immunity from criminal proceedings for acts and omissions undertaken in the course of their judicial functions;<sup>322</sup> however, there must be no immunity for acts or omissions that constitute corruption, human rights violations, or crimes under international law. Judges, like other individuals, are also accountable in criminal law for acts they may commit in their private capacity.<sup>323</sup> The Special Rapporteur on the independence of judges and lawyers has stated, “immunity should never be applied to cases of serious crime, including accusations of corruption.”<sup>324</sup> The UN Human Rights Committee has also recommended that States should take measures to eradicate corruption by investigating, prosecuting and punishing alleged perpetrators, including judges.<sup>325</sup> It has further stated that “if corruption is established, the officials concerned should face criminal and not only disciplinary sanctions”.<sup>326</sup>

### iv. Vetting

Vetting of the judiciary has happened in several countries in transitional periods after times of authoritarian rule, armed conflict, internal instability or severe corruption with the aim of restoring societal trust in the judiciary and holding those who were complicit in mass violations accountable.<sup>327</sup> The Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence has noted that some judiciaries are so “tainted with complicity” that it is “virtually impossible for them to gain trust without a major vetting or screening of their personnel, from the top down.”<sup>328</sup> In particular, a judiciary “entirely appointed by a predecessor regime, seen as complicit in past mass violations, will stand in need of major personnel review.”<sup>329</sup>

The Special Rapporteur goes on to acknowledge the particular challenges of vetting the judiciary because such procedures must “respect the separation of powers, judicial autonomy, due process guarantees and, [...], the general principle of the irremovability of judges, which may only be transgressed in exceptional cases.”<sup>330</sup>

The same requirements of procedural fairness and proportionality should apply to vetting procedures as apply to other accountability proceedings, in particular the establishment of clear criteria. The Special Rapporteur on the independence of judges and lawyers stated that, “in order to prevent abuses of power and improper influence by the supervising parties, a clear set of standards must be established so that justice operators and institutions are not held to account in an arbitrary way. Accountability presupposes the recognition of the legitimacy of established standards, clear mechanisms and procedures established by law, and clear rules on the authority of the supervising parties.”<sup>331</sup>

Principle 30 of the Updated set of principles for the protection and promotion of human rights through action to combat impunity states that, “judges unlawfully appointed or who derive their judicial power from an act of allegiance may be relieved of their functions by law in accordance with the principle of parallelism. They must be provided an opportunity to challenge their dismissal in proceedings that meet the criteria of independence and impartiality with a view toward seeking reinstatement.”<sup>332</sup> The

<sup>322</sup> ACHPR Principles and Guidelines, Section A, Principle 4(n).

<sup>323</sup> CoM Recommendation (2010)12, para.71.

<sup>324</sup> A/HRC/26/32 28 April, 2014, para.52.

<sup>325</sup> See, for example, Human Rights Committee, Concluding observations on Turkmenistan, UN Doc. CCPR/C/TKM/CO/1 (2012), para.13; and Cape Verde, UN Doc. CCPR/C/CPV/CO/1 (2012), para.15.

<sup>326</sup> See Human Rights Committee, Concluding observations on Yemen, UN Doc. CCPR/C/YEM/CO/5, para.17.

<sup>327</sup> Recent examples include Bosnia following the 1992-1996 war and Kenya after the violence following the elections of 2007.

<sup>328</sup> Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, A/HRC/30/42 7 September 2015, para.54.

<sup>329</sup> Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, A/HRC/30/42 7 September 2015, para.54.

<sup>330</sup> Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, A/HRC/30/42 7 September 2015, para.55.

<sup>331</sup> Report of the Special Rapporteur on the independence of judges and lawyers (2014), UN Doc. A/HRC/26/32, para.52.

<sup>332</sup> Updated Set of principles for the protection and promotion of human rights through action to combat impunity, E/CN.4/2005/102/Add.1 8 February 2005.

Basic Principles on the Independence of the Judiciary affirm that, “[a] charge or complaint made against a judge in his/her judicial and professional capacity shall be processed expeditiously and fairly under an appropriate procedure. The judge shall have the right to a fair hearing”.<sup>333</sup>

#### ***D. Assessment in light of international standards***

##### ***i. Grounds for Discipline and Removal and Code of Ethics and Conduct***

The Code of Ethics and Conduct created by Decision No. 3 of 2008 outlines an extensive set of standards, which, in particular, reflect the requirements of the Bangalore Principles’ guidance to address the following six core values: independence, impartiality, integrity, propriety, equality, competence and diligence. While it is clear that this Code of Ethics and Conduct is heavily based on the Bangalore Principles, the standards outlined in the Code of Ethics and Conduct are not entirely faithful to those principles. Not all elements are reflected and, in some cases, the Code of Ethics and Conduct goes too far in outlining what behaviour is acceptable for judges, addressing questions that go beyond judicial ethics and may inappropriately prohibit certain forms of conduct.

One key element missing from the Principles under the heading ‘Propriety’ in the Libyan Code of Ethics and Conduct is the requirement under 4.12 of the Bangalore Principles that a judge shall not practice law while a holder of judicial office. This principle should be added to the Libyan code. In addition, two elements have been omitted from the Libyan Code of Ethics and Conduct under the section pertaining to ‘Equality’, reflected in 5.4 and 5.5 of the Bangalore Principles, as follows: “[a] judge shall not knowingly permit court staff or others subject to the judge’s influence, direction or control to differentiate between persons concerned, in a matter before the judge, on any irrelevant ground” and “[a] judge shall require lawyers in proceedings before the court to refrain from manifesting, by words or conduct, bias or prejudice based on irrelevant grounds, except such as are legally relevant to an issue in proceedings and may be the subject of legitimate advocacy.” Both of these elements are crucial in order to ensure that the principle of non-discrimination is upheld and should therefore be added to the Libyan Code of Ethics and Conduct.

On the other hand, article 8 on the ‘Guidelines on interpretation of previous principles’ of the Libyan Code of Ethics and Conduct goes far beyond the Bangalore Principles in outlining the conduct required of judges. Certain provisions appear to be overbroad and may constitute unwarranted interference in both judicial discretion and a judge’s right to privacy. Of particular concern are articles 8(2) and 8(3) which prohibit “unjustified postponements” and “long deadlines or trial dates”. The scheduling of court business is an administrative concern which does not touch on any particular ethical issue. While the Judge should ensure that the ‘promptness’ requirement of the right to a fair trial is upheld, this is a distinct issue, relating to the rights of defendants. A judge should have the discretion to postpone trials if the parties to a case need more time to prepare without considering postponements as an ethical issue. These principles should therefore be removed.

In addition, Principle 8(7) requires that judges do not accept invitations to dine from people who are not colleagues, or relatives or very close friends. This could be considered an unreasonable restriction on a judge’s behaviour and an undue interference in a judge’s right to privacy and family life. This article and others that go beyond what can be considered reasonable restrictions on a judge’s behaviour should be removed.

Finally, some observers have noted that the Code of Ethics and Conduct is not consistently applied, giving rise to concerns of arbitrariness.<sup>334</sup>

Thus, the ICJ recommends that the Code of Ethics and Conduct be brought closer in line with the Bangalore Principles in content and that it is consistently applied in all disciplinary proceedings. The ICJ further recommends that the judiciary should be responsible for the redrafting of the Code of Ethics and Conduct.

Article 50 of Law No. 4 of 2008 defines “[d]isciplinary misconduct”, as including acts beyond the Code of Ethics and Conduct, including, among others, an act that prejudices honour or dignity or ethics, a breach of professional obligations, and failure or negligence. This appears to allow for disciplinary proceedings not based on the Code of Ethics and Conduct. In addition, these provisions, in particular, the terms “honour” and “dignity”, could be broadly interpreted and are too vague to give

<sup>333</sup> Basic Principles on the Independence of the Judiciary, Principle 17.

<sup>334</sup> ILAC Report 2013, p. 24.

reasonable notice of what conduct is prohibited. Similar terms have been interpreted in Tunisia as drinking alcohol outside of working hours in the absence of proof of any resulting disorderly conduct.<sup>335</sup> Article 50 should therefore be amended in a manner that is consistent with the principle of legality. In particular, it should state that only a violation of the Code of Ethics and Conduct constitutes a disciplinary offence.

As such, the ICJ recommends that disciplinary proceedings are brought on the basis of a failure to uphold the conduct outlined in the Code of Ethics and Conduct only and article 50 is amended to reflect this.

ii. Disciplinary Procedure

The disciplinary procedure outlined in both Law No. 6 of 2006 and in Decision No. 4 of 2008 goes some way towards meeting international standards on the right of judges to be heard by an independent body in accordance with a fair procedure. The law provides for a thorough investigation where judicial misconduct is alleged and for a disciplinary case to be held before the SJC, an independent body, subject to the recommended reforms outlined above. It is appropriate that the accused has the right to respond to submit initial statements to the investigator, respond to warnings and represent himself or herself before a disciplinary board. However, significant deficiencies remain which undermine the fairness of the process and the law should be reformed in a number of respects.

Most importantly, international standards provide that individuals have the right to appeal a disciplinary decision.<sup>336</sup> Article 93 of Law No. 6 of 2006 states that all decisions by the SJC, sitting as a disciplinary board, are final. As noted above, this has been interpreted as allowing for judicial review of the legality of the decision but not an appeal on the substance of the decision. The ICJ recommends that the law be amended to include a right to a substantive appeal on the merits of the decision, for example to the Supreme Court.

Second, the fact that the disciplinary board has a right to call witnesses under article 91 of the same law, but there is no equivalent provision for the individual being investigated would appear to contravene the right of the accused to a fair procedure, and specifically to the right to equality of arms, a fundamental principle of fair trials and proceedings. The ICJ recommends that the law be amended to provide that the person accused of a disciplinary infraction has the right to equality of arms, and in particular, to call witnesses.

Third, under article 94 of Law No. 6 of 2006, transfer may be used as a punitive measure. Transfers should not be used as punishments for disciplinary infractions, and in any event should only be done pursuant to proper consultation and consent.<sup>337</sup>

Fourth, article 90 and article 94 make it clear that the disciplinary case can result in the termination of the service of the person under inspection and dismissal. International standards require a high threshold of misconduct before a judge can be dismissed. The misconduct must render the judge "unfit" to discharge his or her duties as a judge.<sup>338</sup> The ICJ recommends that this high threshold for dismissal is reflected in the law and that all disciplinary penalties are required to be proportionate to the "seriousness, degree of fault and impact of misconduct, and that this requirement be respected in practice".<sup>339</sup> The law should provide that a warning may be issued to a judge found to be in breach of disciplinary standards before a more serious penalty is imposed.

The UN Basic Principles on the Independence of the Judiciary clarify that the law should guarantee that judges enjoy personal immunity from civil suits relating to acts or omissions in the exercise of their judicial functions.<sup>340</sup> This is a necessary safeguard of judicial independence. In particular, disciplinary proceedings or civil suits should not be used against judges for the manner in which they

<sup>335</sup> See further ICJ Report 'The independence and accountability of the Tunisian judicial system: learning from the past to build a better future', available at <http://icj.wengine.netdna-cdn.com/wp-content/uploads/2014/05/Tunisia-Strengthen-Judicial-Independence-Report-2014-ENG.pdf> (last accessed 16 May 2016).

<sup>336</sup> Report of the Special Rapporteur on the independence of judges and lawyers, UN Doc. A/HRC/11/41, para.61.

<sup>337</sup> See e.g., the Singhvi Declaration, para.15.

<sup>338</sup> See, Principle 18 of the UN Basic Principles on the Judiciary, "Judges shall be subject to suspension or removal only for reasons of incapacity or behaviour that renders them unfit to discharge their duties;" the Singhvi Declaration, para.22.

<sup>339</sup> See ICJ, Judicial Accountability, A Practitioner's Guide, 2016.

<sup>340</sup> UN Basic Principles on the Independence of the Judiciary, Principle 16.

interpret the law, assess the facts or weigh the evidence in any given case.<sup>341</sup> Judges should not be subject to disciplinary procedures if their decisions are overruled or modified on appeal.<sup>342</sup> This should be explicitly stated in the Statute on the Judiciary.

In addition, the law should clarify that the State should guarantee compensation for any harm suffered by individuals as a result of acts or omissions by judges in the improper or unlawful exercise of their judicial functions. This is required under the right to effective remedy and reparation.<sup>343</sup>

The ICJ also understands that in practice investigations often take place without informing the concerned judge that he or she is under investigation.<sup>344</sup> All judges must have the right to defend their case and therefore must be informed of an investigation from the outset.

### iii. Criminal Accountability

Judges should generally enjoy immunity from criminal proceedings for acts and omissions undertaken in the course of their judicial functions.<sup>345</sup> However, there must be no immunity for acts or omissions that constitute corruption, human rights violations, or crimes under international law. Judges like other individuals are also accountable in criminal law for acts they may commit in their private capacity.<sup>346</sup> As the Special Rapporteur on the independence of judges and lawyers has stated, "total immunity would only nourish distrust among the public towards the justice system as a whole."<sup>347</sup>

Libyan law provides that judges can only be arrested, detained or prosecuted once a special high ranking judicial committee is consulted, (except where they may be caught red handed).<sup>348</sup> This provides a bulwark against politically motivated prosecutions and is, therefore, positive as a safeguard of the independence of the judiciary. On the other hand, the fact that the permission of a Special Committee must be obtained for criminal prosecutions even for acts allegedly committed outside of the course of a judge's duties may contravene standards on accountability for judges.

In addition, the law should ensure that there is no immunity for any individual in cases where there is reasonable suspicion of criminal responsibility for a serious crime such as corruption, gross human rights violation or crime under international law. The ICJ recommends that the law be reformed to reflect these important exceptions to judicial immunity. Requiring the lifting of immunity by a special committee could constitute an impediment to the prosecution of serious crimes. Where there is *prima facie* evidence of gross human rights violations, crimes under international law and serious crimes judges should be subject to the ordinary criminal justice process without the need for permission from a special committee.

In addition, the ICJ recommends that the law should clarify that the State should guarantee remedy and reparation for any harm suffered by individuals as a result of acts or omissions by judges in the improper or unlawful exercise of their judicial functions.

### iv. Vetting

The issue of vetting and holding judges accountable for complicity in the corrupt practices of a previous regime, as well as potential complicity in human rights violations, is of particular importance in the Libyan context. Restoring trust in judicial institutions requires some form of vetting, in particular of the judges who operated in 'the People's Court', which, as discussed above, blatantly contravened human rights standards. Others who took bribes or worked on behalf of the regime contrary to clear ethical standards should also be held accountable. However, efforts so far have not met international standards of due process or established clear criteria.

<sup>341</sup> ACHPR Principles and Guidelines, Section A, Principle 4(n) ("Judicial officers shall not be: (i) liable in civil or criminal proceedings for improper acts or omissions in the exercise of their judicial functions").

<sup>342</sup> CoM Recommendation (2010)12, para.70; see also ACHPR Principles and Guidelines, Section A, Principle 4(n) (ii); Concluding Observations of the Human Rights Committee on Vietnam, UN Doc. CCPR/CO/75/VNM, para.10.

<sup>343</sup> ICCPR, article 2(3); UN 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, General Assembly resolution, 60/147 (2005).

<sup>344</sup> According to a Libyan judge, who expressed this view during an ICJ Conference in May 2016.

<sup>345</sup> ACHPR Principles and Guidelines, Section A, Principle 4(n).

<sup>346</sup> CoM Recommendation (2010)12, para.71.

<sup>347</sup> Report of the Special Rapporteur on the independence of judges and lawyers (2014), UN Doc. A/HRC/26/32, para.52.

<sup>348</sup> Article 96, Law No. 6 of 2006.

In particular, Law No. 13 of 2013 on Political Isolation (the 'Political Isolation Law') outlines ill-defined criteria for those to be removed from public office and does not outline fair procedures for the vetting process of public officials. The ICJ recommends that this law is reformed to meet international standards, in particular as it may apply to the judiciary.

Alternative vetting procedures that the SJC has reportedly imposed on a large number of judges is of serious concern. In particular, the SJC reportedly imposed transfers without a fair process or seeking the consent of the judges concerned and removed a large number of competent judges without outlining specific criteria for removal or applying a fair procedure. The ICJ recommends that these procedures are revisited and all judges who were transferred or removed from office without a fair procedure, should be reinstated and subjected to a fair procedure that meets international standards of due process, including being made aware of all charges against them, the right to a defence, equality of arms, adequate time to prepare a defence, and a right to appeal. All transfers made either pursuant to the 'Political Isolation Law' or in general without the consent of the judge concerned should be reversed unless the explicit consent of the judge concerned is granted, which should not be unreasonably withheld if the transfers are pursuant to a system of regular rotation provided by law or formulated after due consideration by the judiciary.

In addition, the ICJ recommends that a fair and comprehensive vetting procedure that meets international standards on fair hearings and due process should be put in place to restore trust in the judiciary and ensure the accountability of the judiciary.

### **E. Draft Constitution**

Article 198 of the April 2016 draft Constitution provides that the State shall be committed to "exam[in]g public institutions for their structural reform and to clear them from those who committed human rights violations and corruption crimes, [...], review[ing] the entitlements of ranks, grades, and positions in accordance to the law. Any public institution found to be in violation of the Constitution must be dissolved." This could be interpreted to apply to the judiciary.. The ICJ recommends that the Constitution should define vetting procedures narrowly and provide that vetting procedures should conform to standards of fairness and transparency.

Article 197(5) of the April 2016 draft Constitution provides, in part, that "the state shall be committed to [...] [p]rosecut[ing] criminally all those who had a role in human rights violations and corruption crimes provided that all of this is in accordance with international standards and national reconciliation requirements within the framework of the Islamic Sharia. Legal provisions that are in conflict with the mechanisms of transitional justice shall not be applied." Judges are as capable as any other kind of public official of perpetrating or being complicit in violations of international human rights. In such cases of serious judicial misconduct, however, judges' individual criminal, civil or disciplinary responsibility, must be determined, in accordance with international human rights standards, including due process rights.

**In light of the above and in order to ensure the accountability of the Libyan judiciary in a manner that is consistent with its independence and impartiality, the SJC and the Libyan authorities should ensure that:**

- 1. The disciplinary procedure for addressing complaints against judges for alleged breaches of the Code of Ethics and Conduct is set out in law and affords judges the right to a fair hearing before an independent and impartial body and includes:**
  - a. The right to a prompt and fair determination of the complaint before an independent and impartial body;**
  - b. The right to be promptly informed of the complaint;**
  - c. The right to consult with and be represented by legal counsel;**
  - d. Enjoyment of equality of arms and the right to call and examine witnesses and present and test evidence;**
  - e. The right to an adequate amount of time to prepare a defence and the provision of all relevant information relating to the complaint, including information about the basis of the allegations and any exculpatory information;**
  - f. A full hearing by the independent and impartial decision-making body, during which the accused judge has an opportunity to present a defence;**
  - g. A decision based on the Code of Ethics and Conduct, in the light of objective and relevant evidence;**
  - h. In the event of a finding of misconduct, the availability of a range of sanctions to be issued proportionately such as to require a steep threshold for termination of**



- service, such as a judge being “unfit” for service;
  - i. Exclusion of transfer as a form of sanction;
  - j. The confidentiality of the complaint or charges until a decision is made, unless the judge concerned agrees otherwise;
  - k. The right to a substantive appeal against any disciplinary decision or sanction to a higher independent body or court, such as the Supreme Court; and
  - l. The disciplinary decision to be published and communicated upon its determination;
2. Disciplinary proceedings or civil suits may never be used against judges for the manner in which they interpret the law, assess the facts or weigh the evidence in any given case;
  3. Judges are not to be subject to disciplinary procedures for having their decisions overruled or modified on appeal;
  4. The Code of Ethics and Conduct is reviewed by the judiciary, in consultation with judges and their professional associations, to bring it fully in line with the Bangalore Principles of Judicial Conduct, in particular by adding provisions that reflect Bangalore Principle 4.12 requiring that a judge may not practice law while the holder of judicial office and articles 5.4 and 5.5 requiring that a judge ensures there is no discrimination or prejudice by any judicial, legal or clerical actors in the court room;
  5. A judge may only be disciplined on the basis of breaching established conduct as outlined in the Code of Ethics and Conduct and article 50 of Law No. 4 of 2011 is revised accordingly;
  6. The law is amended to ensure that judges enjoy personal immunity from civil suits for monetary damages or from criminal prosecution for improper acts or omissions in the exercise of their judicial functions. Such immunity should be subject to waiver by a court if it determines that the immunity would impede the course of justice;
  7. The law is amended to ensure that no immunity is provided for in cases in which there is reasonable suspicion on the basis of *prima facie* evidence of criminal responsibility for a gross human rights violation, a crime under international law or other serious crime;
  8. The law should clarify that the State should guarantee appropriate remedy and reparation for harm suffered by individuals as a result of acts or omissions by judges in the unlawful exercise of their judicial functions;
  9. A fair and comprehensive vetting procedure that meets international standards on fair hearings and due process should be introduced to restore trust in and ensure the accountability of the Libyan judiciary;
  10. The status of Law No. 13 on Political Isolation is clarified and that, if it is determined to remain in force, it is repealed or significantly amended to provide for clear and fair criteria, on a case by case basis, and a fair procedure meeting international standards on fair hearings and due process; and
  11. All judges who were transferred or dismissed previously, pursuant to an unfair vetting procedure, be reinstated and, if further action is considered warranted, subjected to fair processes that meet the standards required for all disciplinary proceedings as outlined above.

To better guarantee and safeguard judicial independence, the ICJ calls on the Constitutional Drafting Assembly to ensure that the new Libyan Constitution:

1. Defines vetting procedures narrowly and provides that vetting procedures must conform to standards of fairness and transparency.
2. Ensures that in cases of serious judicial misconduct, such as perpetrating or being complicit in human rights violations, the judges’ individual criminal, civil or disciplinary responsibility, is determined in accordance with international human rights standards, including due process rights.

## IV. Military Tribunals and Specialized Courts

### A. Introduction

The right to a fair trial, enshrined in article 14 of the ICCPR, is equally applicable to military court proceedings as to those of ordinary courts. Ensuring that any tribunal that administers justice is competent, independent and impartial plays a crucial role in safeguarding this right. The composition and nature of military courts and their role within the military hierarchy is such that their use should be strictly limited in terms of both personal and subject matter jurisdiction. The general view of most international human rights authorities is that the use of military tribunals should not be used to try civilians or for cases involving gross human rights violations or crimes under international law.

In Libya, military courts are regulated by the Military Penal Code<sup>349</sup> and the Military Criminal Procedure Code.<sup>350</sup> Until the promulgation of Law No. 11 of 2013,<sup>351</sup> military courts exercised jurisdiction over civilians for several types of crimes, including crimes committed against military institutions. Additionally, military courts have, in the past, tried cases and handed down sentences, including the death penalty, for crimes committed against civilians that should have been tried by civilian courts.<sup>352</sup>

This chapter analyzes the military justice system in Libya, in particular in light of international law and standards. The ICJ then offers recommendations for legal reforms that would bring the use of military courts in Libya in line with its international human rights obligations.

### B. Libyan Legal Framework

#### i. Personal jurisdiction

Law No. 11 of 2013, amending the Military penal code and criminal procedure code, can be considered a positive development because it restricts, in article 1, the personal jurisdiction of military tribunals to “regular military personnel as defined by Law No. 40 of 1974” and “regular prisoners of war”. Military personnel include officers, cadets of military academies, non-commissioned officers, and privates of the Armed Forces, whether in permanent or temporary service.<sup>353</sup> “Regular” prisoners of war are not defined further in the military penal code or in supplementary laws, for example by reference to how such prisoners are so defined under international human rights law.

Article 1 of Law No. 11 of 2013 contrasts significantly with former article 2 of the Military penal code, which held that the persons subject to the provisions of the Military penal code, included, among others, military personnel even after their discharge from the army, civilians who assist members of the military to commit certain military crimes, and civilians working in the army in time of mobilization or enemy engagement.<sup>354</sup>

Article 4 of Law No. 11 of 2013 further provides that in the event of a multi-defendant case, where both military personnel and civilians are accused of participating in the same crime, such a case shall be referred to a civilian court only.

#### ii. Subject matter jurisdiction

Article 2 of Law No. 11 of 2013 amends article 45 of the Military Penal Code, providing that military courts shall exercise jurisdiction over crimes stipulated in the Military Penal Code committed by individuals subjected to it. Article 45 of the Military Penal Code had previously provided that ordinary crimes committed by military personnel should also be tried by military tribunals and that certain

<sup>349</sup> Law No. 37 of 1974, amended by Law No. 5 of 1978, and latest amendment in Law No. 11 of 2013.

<sup>350</sup> Law No. 1 of 1999, latest amendment in Law No. 11 of 2013.

<sup>351</sup> Law No. 11 of 2013 on the Amendment of the Penal Code and Military Procedures.

<sup>352</sup> Libya: Al-Gaddafi Loyalists at risk of ‘revenge’ death sentences, Amnesty International, 2 August 2013: “On 5 June, the Military Court in Misratah sentenced to death two soldiers on charges of opening indiscriminate fire on civilians in April 2011. This followed death sentences for five soldiers last November by the Military Court of Benghazi. Military jurisdictions should never have the power to impose the death penalty”.

<sup>353</sup> Law No. 40 of 1974, article 1.

<sup>354</sup> Military penal code, article 2.

crimes such as crimes against the State should be tried by a military tribunal, even if allegedly committed by a civilian.

This amendment is a significant improvement from the previous article 45, in that it excludes some ordinary crimes from the jurisdiction of the military courts. However, military courts retain jurisdiction over certain ordinary crimes that, by virtue of their inclusion in the Military Penal Code, are considered as military offences because they were committed by military personnel. For example, the Military Penal Code currently provides for criminal as well as disciplinary sanctions for offences including pillaging, vandalism and looting under "financial crimes" (articles 107-108 and 110, respectively) and "crimes against military honour", which includes acts such as sodomy (article 114), consumption of alcohol and entry into dubious places (article 115), gambling (article 116), cohabitation with a prostitute (article 117), marriage to a woman of ill repute (article 118). The military penal code also refers to crimes that could be committed in armed operations, such as "killing or harming wounded persons" (article 55) and "abandoning wounded persons" (article 56). These offenses, in some instances, could be qualified as grave breaches of the Geneva Conventions on the laws of war and crimes under international humanitarian law, particularly if committed in the context of armed conflict.<sup>355</sup>

### iii. Independence and impartiality of military courts

#### *Composition, selection and appointment*

The independence of the military judiciary is provided for in article 36 of the Military Criminal Procedure Code, which provides that, "[j]udges of the Armed People's Courts shall be independent. They shall only be subject, in the administration of justice, to the authority of the law and conscience." The obstruction of military justice and abuse of power to obstruct justice is punishable by sentences ranging from one year to more than two years' imprisonment.<sup>356</sup> However, as discussed below, the military tribunals are not truly independent given the significant role that the Commander-in-chief and the Minister of Defence play in determining the composition of military courts and their procedures.

The Military Criminal Procedure Code, in article 1, establishes a "General Judicial Authority of the Armed People" (now known as the General Military Judicial Authority (GMJA)), under the General Interim Committee for Defence (Ministry of Defence), composed of prosecution offices and Military courts, as well as other departments and branches as provided by military regulations. Article 1 provides that "[t]he organization, appointment of the chairman (who shall be of the rank of colonel or above), competences, operating procedures, and the rights and obligations of the personnel thereof shall be determined by a decision issued by [the Minister of Defence]".<sup>357</sup>

The GMJA is regulated by a Decree of the Minister of Defence, No. 15 of 2000. This decree lays out the composition of the Military Prosecution, the GMJA and the military courts.

According to Law No. 11 of 2012, the Minister of Defence shall "issue decrees related to appointing and promoting the military prosecutor general and members of [military] judicial bodies and establishing military tribunals, based on a nomination by the Chief of General Staff."<sup>358</sup>

The Chief of General Staff, in addition to recommending nominations for the abovementioned appointments to the Minister of Defence, shall also "establish the partial and plenary military prosecutions and clarify their administrative boundaries" and "determine the powers of periodic courts and organize their procedures and the crimes decided therein."<sup>359</sup>

There are four main types and degrees of military courts, all established, appointed and regulated by the Minister of Defence.<sup>360</sup>

- The Supreme Military Court is a subsidiary organ of the Ministry of Defence.<sup>361</sup> It is composed

<sup>355</sup> See Convention (III) relative to the Treatment of Prisoners of War. Geneva, 12 August 1949, article 3 (Conflicts not of an international character) referring to persons *hors de combat*.

<sup>356</sup> Military Penal Code, articles 72 and 102.

<sup>357</sup> Military Criminal Procedure Code, article 1.

<sup>358</sup> Law No. 11 of 2012, article 4 (8).

<sup>359</sup> Law No. 11 of 2012, articles 5 (14) and (15).

<sup>360</sup> Military Code of Criminal Procedure, article 41.

<sup>361</sup> Decree No. 15 of 2000 by the Minister of Defence, article 21.

- of five members, only one of whom is required to hold a law degree.<sup>362</sup>
- The Permanent Military Courts, which are subsidiary to the GMJA,<sup>363</sup> are composed of three members, one of whom should at least hold a law degree.<sup>364</sup>
- Circuit Courts may be established within Military units, composed of three members, with no less than a three years term for each. Circuit courts are competent to hear specific disciplinary crimes determined by the Minister of Defence.<sup>365</sup> The circuit court's proceedings do not require prosecution or defence, and judgments are not subject to appeal.
- Field courts are established by order of the commanding officer of a military detachment that is in confrontation with an enemy, or in the case of a declaration of a state of alert, issuance of a warning order, or assignment of combat missions or other missions related to natural disasters.<sup>366</sup> A field court is composed of three members who have spent at least three years of service in the military. Unlike circuit courts, the law does not restrict the types of crimes that fall under the jurisdiction of field courts. The commanding officer shall appoint a member to conduct the investigation and enjoy the same powers of the Prosecution in this respect. Judgments are final, subject to the ratification by the commanding officer, and death sentence is final upon ratification by the Minister of Defence.<sup>367</sup>

### *Prosecutors*

The Military Criminal Procedure Code allocates the mandate of investigation and prosecution to the office of the Military Prosecutor. This mandate is regulated under Part 3 of the Code (articles 11 to 27). The Military Justice sector is established through a decree issued by the Minister of Defence.<sup>368</sup> The Prosecution, being part of the military justice sector,<sup>369</sup> is composed of a chief prosecutor (who must be a state prosecutor) and "a sufficient number" of prosecution members, clerks and administrators.<sup>370</sup> Members of judicial bodies and legal magistrates may be delegated to work in the Military Prosecution. A member of the military prosecution must attend trial hearings and conduct the case brought before the court, unless stated otherwise.<sup>371</sup>

Articles 10 and 11 of Decree No. 15 of 2000 by the Minister of Defence respectively set out the qualification criteria for the Military Prosecutor General and the members of military prosecution. Members of the military prosecution must hold a law degree, with at least two years of legal experience or must have attended a legal course of at least one year in the Judicial Institute.<sup>372</sup>

Article 28 (Part 3) provides for an exception entitling the commanding officer of a military detachment, or an officer he assigns, to investigate and prosecute cases involving disciplinary crimes. Disciplinary crimes, if qualified as such, fall under the procedure of "Summary Trial", which is discussed below.

### *Trials before military courts*

Trials before military courts, pursuant to article 29, are divided into two categories: summary trials (conducted by and before the commanding officer) and ordinary trials (conducted before the military courts).

### *Summary trials*

Summary trials fall entirely under the competence of the commanding officer, including the power to investigate, prosecute and impose a penalty. Article 32 of the Military Criminal Procedure Code

<sup>362</sup> Military Criminal Procedure Code, article 37.

<sup>363</sup> Decree No. 15 of 2000 by the Minister of Defence, article 21.

<sup>364</sup> Military Criminal Procedure Code, article 38.

<sup>365</sup> Military Criminal Procedure Code, article 39. *See also* Minister of Defence Decree No. 269 of 2000 (re-organizing circuit courts, and determining their mandate, procedure and jurisdiction), crimes subject to this law include, escaping the military, crimes resulting from car accidents and accidents by military vehicles.

<sup>366</sup> Military Criminal Procedure Code, article 40.

<sup>367</sup> Military Criminal Procedure Code, article 40.

<sup>368</sup> Decree No. 15 of 2000 by the Minister of Defence on the organization of the public judicial authority for the Armed Forces.

<sup>369</sup> Decree No. 15 of 2000 by the Minister of Defence, article 1.

<sup>370</sup> Decree No. 15 of 2000 by the Minister of Defence, article 3.

<sup>371</sup> Military Criminal Procedure Code, article 42; Law No. 11 of 2012.

<sup>372</sup> Decree No. 15 of 2000 by the Minister of Defence, article 11.

further adds that “every commanding officer for disciplinary purposes shall be conferred the power to impose penalties on subordinates who commit discipline crimes in accordance with the Table of Powers attached to the Military Penal Code.”

There are two categories of disciplinary crimes: non-specific crimes of a disciplinary nature stipulated in article 120 of the Military Penal Code<sup>373</sup> and all crimes stipulated by the same code punishable by a maximum penalty not exceeding six months,<sup>374</sup> such as looting (article 110), abuse of power for personal gain (article 113), entering bars, prostitution or gambling establishments or other places offensive to military honour (article 115(2)), gambling (article 116) and marriage to a woman of ill repute (article 118).

Pursuant to article 28 of the Military Criminal Procedure Code, the commanding officer may initiate such cases *proprio motu*, or by referral from the Prosecutor. In addition to acting as a prosecutor, the commanding officer is entitled by the same article, to “impose a penalty on the perpetrator if it falls under his jurisdiction,” or “refer [a] case file to the Prosecution if the incident does not fall under his jurisdiction”.

After a penalty is imposed, article 33 of the Military Criminal Procedure Code provides that the higher-ranking commanding officer may, within 30 days of the judgment, reduce or decrease the penalty or refer the case to a competent entity in case of lack of jurisdiction. However, the article does not grant the higher-ranking commanding officer the power to reverse acquittals.

### *Ordinary military trials*

The Permanent Military Courts, composed as described above and established by article 38 of the Military Criminal Procedure Code, are the backbone of ordinary military trials. Judgments issued by permanent military courts are subject to appeal before the Supreme Military Court within thirty days from the date of issuance of the grounds for the judgment. Appeals may be filed by the prosecution or the indicted person.<sup>375</sup> Decisions of non-competence may be subject to appeal before the Supreme Military Court.<sup>376</sup> The law, as written, is unclear as to whether a decision asserting competence (as opposed to “non-competence”) could be subject to appeal.

Article 48 of the Military Criminal Procedure Code provides that trial hearings shall be public unless the court decides otherwise in order to preserve public order, military secrets or public morals. Article 51 addresses defence rights, through which the Court shall appoint defence counsel if the crime is punishable by no less than imprisonment and if the defendant has not done so already. The defendant may appoint counsel in other crimes.

According to Law No. 11 of 2012, the Commander-in-Chief of the Libyan Army shall, among other things, “approve final death sentences issued by military tribunals,” and “pardon or commute sentences handed down by military tribunals”.<sup>377</sup> Pursuant to former Law No. 5 of 1978, the Commander-in-Chief, in addition to these powers, had the power to “temporarily halt trial proceedings before any military tribunal” and “issue and amend military laws”.

### **C. International Law and Standards**

Three treaties to which Libya is a party set out the basic obligations required by the right to a fair trial. The ICCPR, in article 14, provides for the right to a fair trial by a competent, independent and impartial tribunal established by law. This provision is applicable both to civilian and military tribunals. The right is also contained in the African Charter (article 7) and the Arab Charter (articles 12 and 13).

Principle 5 of the UN Basic Principles on the Independence of the Judiciary states, “[e]veryone shall have the right to be tried by ordinary courts or tribunals using established legal procedures. Tribunals that do not use the duly established procedures of the legal process shall not be created to displace

<sup>373</sup> Military Penal Code, article 120: “Whoever commits any act, carelessness, or negligence that disrupts or prejudices discipline or military order shall be punished by a disciplinary penalty if no specific penalty is stipulated by this law. The execution of such penalty shall fall under the jurisdiction of chief judicial officers.”

<sup>374</sup> Military Penal Code, article 38.

<sup>375</sup> For further details on appeal procedures, see Military Criminal Procedure Code, articles 87-90.

<sup>376</sup> Military Criminal Procedure Code, article 69.

<sup>377</sup> Law No. 11 of 2012, article 3.



the jurisdiction belonging to the ordinary courts or judicial tribunals.”

Concerns about the purpose, composition and procedures of military courts, and their typical lack of formal and actual independence and impartiality have led a number of human rights authorities to conclude that the jurisdiction of military courts should exclude cases involving ordinary crimes, international crimes and human rights violations.<sup>378</sup> In addition, a growing number of human rights mechanisms and experts have recommended that military courts should be limited to cases involving military personnel for breaches of military discipline. The law should also prohibit military courts from exercising any form of jurisdiction over civilians, even if the crime at issue is defined as a military crime.

Military tribunals, like all courts, are required to uphold each element of the right to a fair trial, as outlined in article 14 of the ICCPR. The UN Human Rights Committee has affirmed that “the provisions of article 14 apply to all courts and tribunals within the scope of that article whether ordinary or specialised, civilian or military.”<sup>379</sup>

The UN Updated Set of Principles for the protection and promotion of human rights through action to combat impunity provide, in Principle 29, that:

The jurisdiction of military tribunals must be restricted solely to specifically military offences committed by military personnel, to the exclusion of human rights violations, which shall come under the jurisdiction of the ordinary domestic courts or, where appropriate, in the case of serious crimes under international law, of an international or internationalised criminal court.<sup>380</sup>

i. Personal jurisdiction

Under international standards, military tribunals should not exercise jurisdiction over civilians.<sup>381</sup>

The African Charter’s Principles and Guidelines state that military courts should not “in any circumstances whatsoever have jurisdiction over civilians”.<sup>382</sup> The UN impunity principles affirm a similar principle, as do the UN Draft Principles Governing the Administration of Justice through Military Tribunals (Decaux Principles) which “[m]ilitary courts should, in principle, have no jurisdiction to try civilians. In all circumstances, the State shall ensure that civilians accused of a criminal offence of any nature are tried by civilian courts”.

The issue of personal jurisdiction before courts does not only apply to defendants, but also to civilian victims. The Working Group on Arbitrary Detention has taken the position that military courts should be incompetent to try civilians or military personnel if the victims include civilians, or try civilians and military personnel “in the event of rebellion, sedition or any offence that jeopardizes or involves risk of jeopardizing a democratic regime.”<sup>383</sup>

<sup>378</sup> See Updated Set of principles for the protection and promotion of human rights through action to combat impunity, Report of the independent expert to update the set of principles to combat impunity, Diane Orentlicher, UN Doc. E/CN.4/2005/102/Add.1, 8 February 2005, principle 29. The Updated set principles were recommended by the UN Commission on Human Rights at Resolution 2005/81, E/CN.4/RES/2005/81, 21 April 2005 and see UN Draft Principles Governing the Administration of Justice through Military Tribunals (Decaux Principles).

<sup>379</sup> Human Rights Committee, General Comment 32, para.22

<sup>380</sup> Updated Set of principles for the protection and promotion of human rights through action to combat impunity.

<sup>381</sup> Report of the Special Rapporteur on the independence of judges and lawyers, Mission to Peru, UN Doc. E/CN.4/1998/39/Add.1, paras.78-79; *Satik v. Turkey (No. 2)*, ECtHR, Application No. 60999/00, Judgment of 8 July 2008, para.44; see also Report of the Special Rapporteur on the independence of judges and lawyers, UN Doc. A/HRC/11/41, para.36. In this respect, the Committee on Human Rights, in its General Comment 13 on article 14 of the International Covenant on Civil and Political Rights, stated that while the Covenant does not prohibit military tribunals, the use of such courts for trying civilians should be very exceptional and take place in conditions which genuinely afford the full guarantees of article 14 (HRI/GEN/1/Rev.3, para.4). The Special Rapporteur has reservations on this particular general comment in the light of the current development of international law which is towards the prohibition of military tribunals trying civilians”; Report of the Special Rapporteur on the independence of judges and lawyers, UN Doc. A/HRC/11/41, para.36: “The Special Rapporteur further points to the Draft Principles on the Administration of Justice by Military Tribunals which set out the principle that military courts should have no jurisdiction to try civilians.”

<sup>382</sup> ACHPR Principles and Guidelines, Section A, Principle L (c).

<sup>383</sup> Report of the Working Group on Arbitrary Detention, UN Doc. E/CN.4/1999/63, para.80; *Abla Sa’adat et al. v. Israel*, Working Group on Arbitrary Detention, U.N. Doc. E/CN.4/2005/6/Add.1 at 30 (2004), para.28.

ii. Subject matter jurisdiction

*Gross human rights violations and crimes under international law*

Gross human rights violations and crimes under international law should never be adjudicated by military tribunals. This standard is affirmed by Principle 29 of the UN Updated Set of Principles for the protection and promotion of human rights through action to combat impunity, as quoted above. In addition, the Decaux Principles provide that, “[i]n all circumstances, the jurisdiction of military courts should be set aside in favour of the jurisdiction of the ordinary courts to conduct inquiries into serious human rights violations such as extrajudicial executions, enforced disappearances and torture, and to prosecute and try persons accused of such crimes”.<sup>384</sup> The requirement of removing human rights violations from military jurisdiction has also been emphasized by the UN Human Rights Committee,<sup>385</sup> as well as the UN Committee against Torture.<sup>386</sup>

This principle is compelling in light of the difficulty in achieving accountability and justice and finding out the truth about gross human violations and crimes under international law. Following an extensive survey of human rights bodies and mechanisms, the ICJ concluded that trying military personnel accused of human rights violations in military courts is incompatible with international human rights law because “[g]ross human rights violations – such as extrajudicial executions, torture and enforced disappearance – carried out by members of the military or police cannot be considered to be military offences, service-related acts, or offences committed in the line of duty.”<sup>387</sup>

Doubts over military courts’ ability to establish truth and justice, especially for serious violations of human rights, were raised by the Special Rapporteur of the Sub-Commission on the Promotion and Protection of Human Rights in comments on the Decaux Principles. He stated that “military authorities might be tempted to cover up such cases by questioning the appropriateness of prosecutions, tending to file cases with no action taken or manipulating ‘guilty pleas’ to victims’ detriment. [...] The initiation by a civilian judge of a preliminary inquiry is a decisive step towards avoiding all forms of impunity. The authority of the civilian judge should also enable the rights of the victims to be taken fully into account at all stages of the proceedings.”<sup>388</sup>

*Jurisdiction over military offences*

The African Charter’s Principles and Guidelines state that “the only purpose of Military Courts shall be to determine offences of a purely military nature committed by military personnel.”<sup>389</sup> This principle has been affirmed by other regional bodies.<sup>390</sup>

<sup>384</sup> E/CN.4/2006/58, 13 January 2006 at Principle 9. The Decaux Principles were drafted by a Rapporteur of the UN Sub Commission on the Promotion and Protection of Human Rights, a main body of the UN Commission on Human Rights. See Note by the Secretary-General transmitting the report of the Special Rapporteur on the independence of judges and lawyers, UN Doc. A/68/285 (2013) para.92. See also Principle 29 of the ‘Updated Set of Principles for the protection and promotion of human rights through action to combat impunity’; see also *Ergin v. Turkey* (No. 6), ECtHR, Application No. 47533/99, Judgment of 4 May 2006, para.45.

<sup>385</sup> Human Rights Committee, Concluding Observations on Colombia, CCPR/C/79/Add.76, para.34. Concluding Observations of the Human Rights Committee on Venezuela, UN Doc. CCPR/C/79/Add.14, para.10; Concluding Observations of the Human Rights Committee on Brazil, UN Doc. CCPR/C/79/Add.66, para.315; Concluding Observations of the Human Rights Committee on Brazil, UN Doc. CCPR/C/BRA/CO/2, para.9; Concluding Observations of the Human Rights Committee on Colombia, UN Doc. CCPR/C/79/Add2, para.393; Concluding Observations of the Human Rights Committee on the Democratic Republic of Congo, UN document CCPR/C/COD/CO/3, para.21.

<sup>386</sup> Conclusions and Recommendations of the Committee against Torture on Guatemala, UN Doc. CAT/C/GTM/CO/4, para.14; Conclusions and Recommendations of the Doc. against Torture on Mexico, UN Doc. CAT/C/MEX/CO/4, para.14; Conclusions and Recommendations of the Committee against Torture on Peru, UN Doc. CAT/C/PER/CO/4, para.16. See generally ICJ, *Military jurisdiction and international law*, pp. 61-71.

<sup>387</sup> ICJ, *Military jurisdiction and international law: military courts and gross human rights violations*, Vol. I, Geneva, 2004, p.12 and see the Inter-American Court *Judgment of 23 November 2009*, IACTHR, Radilla-Pacheco v. Mexico, para.275.

<sup>388</sup> E/CN.4/2006/58, 13 January 2006, para.32.

<sup>389</sup> ACHPR Guidelines and Principles, Section A, Principle L(a).

<sup>390</sup> See, e.g., recommendations to member states on improving the administration of justice, the Inter-American Commission observed, “[m]ilitary justice has merely a disciplinary nature and can only be used to try Armed Forces personnel in active service for misdemeanours or offences pertaining to their function”, *IACHR Annual Report 1997*, OAS Doc. OEA/Ser.L/V/II.98 doc. 6 rev. 13 (1998), Ch. VII Recommendation I; See also *Judgment of 6 August 2000*, IACTHR, Durand and Ugarte v. Peru, para.118. See also *Judgment of 23 November 2009*, IACTHR,

The notion of military crimes has been narrowly interpreted by several international bodies. In particular, a crime should not qualify as military simply because it was committed by, or against, military personnel. As the Inter-American Commission explained, “trying common crimes as though they were service-related offences merely because they were carried out by members of the military violates the guarantee of an independent and impartial court.”<sup>391</sup>

Thus, best practice dictates that the subject matter jurisdiction of military tribunals should be restricted to ‘disciplinary’ offences.

### iii. Independence and impartiality of military courts

The functional independence and impartiality of military courts must be guaranteed by law. This requirement protects the right to fair trial as set out in international law and standards, including in article 14 of the ICCPR. This fundamental right applies to proceedings over all criminal offences and in all courts and tribunals without exception.<sup>392</sup>

Both the European Court of Human Rights and the Inter-American Court of Human Rights have also emphasized that military judges cannot be considered independent and impartial in such cases because they are part of the hierarchy of the army.<sup>393</sup>

This rationale can be clearly seen in the jurisprudence of the European Court of Human Rights which has, in several cases, examined the applicability of ‘the right to fair trial’ (article 6 of the European Convention) to military proceedings. It found that a court’s independence and impartiality is established based on the “manner of the appointment of its members, their terms of office, the existence of guarantees against outside pressures and whether the military criminal courts presented an appearance of independence.”<sup>394</sup> In *Incal v. Turkey*,<sup>395</sup> the European Court heard the case of the trial of a civilian by a specialized security court, one of whose members was a military judge. Although it noted that domestic law provided certain procedural guarantees of independence and impartiality, it found where a judge remained subject to military discipline his or her independence could not be guaranteed.

#### *Right to Appeal*

For the purpose of the right to a fair trial, judgments issued by military courts for criminal offences must be subject to appeal before a higher judicial court.<sup>396</sup> Not only should a higher court review military court judgments, but this higher court must also belong to the ordinary judicial system.

First of all, with regards to the question of judicial review by a higher court *per se*, the UN Human Rights Committee has stated that the right to have one’s conviction and sentence reviewed “imposes on the State party a duty to review substantively, both on the basis of sufficiency of the evidence and of the law, the conviction and sentence, such that the procedure allows for due consideration of the nature of the case.”<sup>397</sup>

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Radilla-Pacheco v. Mexico, para.272 & n. 274 and cases cited therein.

<sup>391</sup> Report No. 55/01 of 16 April 2001, Inter-American Commission on Human Rights, Case Nos.11.286, 11.406, 11.407, 11.412, 11.413, 11.415, 11.416 and 11.417, *Aluisio Cavalcante et al. v. Brazil*, para.153.

<sup>392</sup> General Comment No. 32, para.22; Concluding Observations of the Human Rights Committee on the Democratic Republic of the Congo, UN Doc. CCPR/C/COD/CO/3, para.21; see also Decaux Principles, Principle No. 2; ACHPR Principles and Guidelines, Section A, Principle L(b).

<sup>393</sup> *Findlay v. United Kingdom*, ECtHR, Application No. 110/1995/616/706, Judgment of 25 February 1997; *Incal v. Turkey*, ECtHR, Application No. 41/1997/825/1031, Judgment of 9 June 1998; and see the Inter-American Court Judgment of 23 November 2009, IACTHR, *Radilla-Pacheco v. Mexico*.

<sup>394</sup> *Ibrahim Gurkan v. Turkey*, ECtHR, Application No. 10987/10, Judgment of 3 July 2012, para.17; see generally Decaux Principles, Principle No. 13 and paras 45-47; see also *Report on Chile*, Inter-American Commission on Human Rights, OAS Doc. OEA/Ser.L/V/II.66 Doc.17 (1985), Ch. VIII, para.140.

<sup>395</sup> *Incal v. Turkey*, ECtHR, Application No. 41/1997/825/1031, Judgment of 9 June 1998, paras.67- 68 & 72-73.

<sup>396</sup> Article 14 (5) of the ICCPR; See generally, *Report on Chile*, Inter-American Commission on Human Rights, OAS Doc. OEA/Ser.L/V/II.66 Doc.17 (1985), Ch. VIII, para.172; Singhvi Declaration, Principle 5(f); Decaux Principles, Principle No. 15.

<sup>397</sup> General Comment No. 32, para.48; see also *Report on Terrorism and Human Rights*, Inter-American Commission on Human Rights, OAS Doc. OEA/Ser.L/V/II.116, Doc. 5 rev. 1 corr. (2002), Chapter III, para.239.

Second, concerning judicial review by an *ordinary* higher court, Principle 17 (Recourse procedures in the ordinary courts) of the Decaux Principles provides that:

In all cases where military tribunals exist, their authority should be limited to ruling in first instance. Consequently, recourse procedures, particularly appeals, should be brought before the civil courts. In all situations, disputes concerning legality should be settled by the highest civil court.

Conflicts of authority and jurisdiction between military tribunals and ordinary courts must be resolved by a higher judicial body, such as a supreme court or constitutional court, that forms part of the system of ordinary courts and is composed of independent, impartial and competent judges.

The Special Rapporteur added with regard to this principle that “the requirements of proper administration of justice by military courts dictate that remedies, especially those involving challenges to legality, are heard in civil courts”.<sup>398</sup> The Special Rapporteur also emphasized the importance of establishing “an impartial judicial mechanism for resolving conflicts of jurisdiction or authority,” which “guarantees that military tribunals do not constitute a parallel system of justice outside the control of the judicial authorities.”<sup>399</sup>

#### ***D. Assessment in light of international law and standards***<sup>400</sup>

The reforms brought in by Law No. 11 of 2013 have gone some way towards improving the military justice system and restricting its jurisdiction to appropriate cases. However, the current status of Libyan law with regards to the subject matter and personal jurisdiction and the composition of military courts still falls short of meeting international standards and jurisprudence and advice of UN treaty bodies, the ACHPR, the Special Rapporteur on the independence of judges and lawyers, the Inter-American Court of Human Rights, the Inter-American Commission on Human Rights, and the Decaux Principles.

First, several ordinary crimes fall under the jurisdiction of military courts, as well as crimes that could amount to violations of human rights. Second, the current legislation lacks clarity on jurisdiction of ordinary courts over crimes committed by military personnel involving civilian victims. Third, concerns arise in a number of respects with regards to the functional independence and impartiality of military courts in Libya.

##### i. Personal jurisdiction

Law No. 11 of 2013 abolished the trial of civilians before military courts,<sup>401</sup> and where civilians may have participated with military personnel in committing a crime, the entire case is referred to a civilian court.<sup>402</sup> This is satisfactory and welcome from the perspective of international standards. Remaining issues relating to trials that may concern civilians as victims are examined below.

Military tribunals have jurisdiction over “regular prisoners of war”, but this category is not defined further in the military penal code or in supplementary laws, for example, by reference to how such prisoners are defined under international humanitarian law. This gap is of concern given that there are thousands of illegally detained prisoners in Libya who, absent a clearer definition in the law, risk being classified as prisoners of war. The Libyan authorities should ensure that any prisoner held illegally by militias or by the Libyan authorities should not be considered a prisoner of war and should be tried in an ordinary court. Further, it should be made clear that human rights law must apply to the detention and treatment of any detainee held in a non-international armed conflict.

##### ii. Subject matter jurisdiction

The promulgation of Law No. 11 of 2013 brought Libya a step closer to establishing the appropriate

<sup>398</sup> E/CN.4/2006/58, 13 January 2006, para.56.

<sup>399</sup> E/CN.4/2006/58, 13 January 2006, para.57.

<sup>400</sup> See also ICJ recommendations on military tribunals in, “The Draft Libyan Constitution: Procedural Deficiencies, Substantive Flaws”, ICJ, December 2015, available at: <http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2015/12/Lybia-Draft-Constitution-Flaws-Deficiencies-Publications-Reports-2015-ENG.pdf> (last accessed 16 May 16, 2016).

<sup>401</sup> Law No. 11 of 2013, article 1.

<sup>402</sup> Law No. 11 of 2013, article 4.

matters to come before military courts. Significantly, this law removed the military court's competence to hear "crimes committed against the State" which are provided for in the ordinary Penal Code.<sup>403</sup> This restricted the military courts' jurisdiction to crimes only stipulated in the Military Penal Code. The current Libyan military code contains ordinary crimes that should not be qualified as military crimes and should not fall under the jurisdiction of military courts. This is due to the fact that such crimes may extend to human rights violations, or crimes against civilian victims.

Under the current law on military crimes, civilians could potentially be secondary parties to military court cases as victims. Such military crimes include all "financial crimes" (Chapter 6 of the Military Penal code) such as "pillaging" (article 107) and "vandalism" (article 108) as forms of misuse of power or exceeding military duties for personal benefit. The military penal code further provides for penalties, including the death penalty, in aggravating circumstances if these two acts are committed with the use of force, or causes physical disability to the victim or leads to death. The military penal code also refers to crimes that could be committed in armed operations, such as "killing or harming wounded persons" (article 55) and "abandoning wounded persons" (article 56). These crimes could be qualified, in some instances, as grave breaches of international humanitarian law if committed in the context of international or non-international armed conflict.<sup>404</sup>

The provision for "crimes against Military Honour,"<sup>405</sup> needs to be modified in light of the fact that some of the conduct contemplated would not constitute a serious criminal offence, for example the crimes of "cohabitation with a prostitute" and "marriage to a woman of ill repute" and "sodomy". The first two may impair the rights of women, in particular by potentially dragging their names and reputations into a public spotlight without necessarily providing them with the opportunity to defend themselves. Such women, because they would not be represented in the case, may not be considered to be entitled to the constituent elements of a fair trial such as the right to access evidence. The ICJ recommends that at least these three 'crimes' be removed from the military code.

The jurisdiction of military courts should also be amended to explicitly exclude human rights violations<sup>406</sup> and cases where victims are civilians.<sup>407</sup>

### iii. Independence and impartiality of military courts

The ICJ has serious concerns regarding the functional independence and impartiality of military courts in Libya. This is due to the appointment procedure, the composition of the court, and the executive role in the administration of military justice.

Despite providing for the principle of independence in its article 72, the Military Criminal Procedure Code, as mentioned above, places the General Military Judicial Authority, under the authority of the Minister of Defence. The GMJA contains the entire military judicial system, from the Supreme Military Court to the permanent courts as well as the military prosecutor's office. Nothing in the law places the members of the military judiciary under an independent civilian authority, such as the Supreme Judicial Council. Decree No. 15 of 2000 by the Minister of Defence (article 19) regulates inspectorates and disciplinary procedures concerning the members of the military judiciary.

In addition, Law No. 11 of 2012 provides that the Chief of General Staff has the power to recommend to the Minister of Defence nominations and promotions for military judicial appointments, including the military prosecutor general and the Minister of Defence has the power to issue such appointments and promotions; thereby giving a clear role to the military hierarchy and a member of the executive in the careers of military judicial actors.

Furthermore, according to Law No. 11 of 2012, the Commander-in-Chief of the Libyan Army has the power to "approve final death sentences issued by military tribunals," and "pardon or commute sentences handed down by military tribunals." This power illustrates the extent of the authority of the

<sup>403</sup> Law No. 11 of 2013, article 2.

<sup>404</sup> See Convention (III) relative to the Treatment of Prisoners of War. Geneva, 12 August 1949, article 3 (Conflicts not of an international character) referring to persons *hors de combat*.

<sup>405</sup> Military Penal Code, articles 114-119, which include "sodomy", "consumption of alcohol and entry into dubious places", "gambling", "cohabitation with a prostitute" and "marriage to a woman of ill repute".

<sup>406</sup> See Updated set of principles for the protection and promotion of human rights through action to combat impunity, Report of the independent expert to update the set of principles to combat impunity, Diane Orentlicher, UN Doc. E/CN.4/2005/102/Add.1, 8 February 2005, Principle 29.

<sup>407</sup> See Report of the Working Group on Arbitrary Detention, UN Doc. E/CN.4/1999/63, para.80.



Minister of Defence or Commander-in-Chief over the military prosecution.

The ICJ recommends that all decisions related to the appointment and career progression of military judges be made by an independent judicial council.

In addition, the ICJ opposes the death penalty unconditionally and in all circumstances and considers that its imposition in all cases is a violation of the right to life and the prohibition of torture and other cruel, inhuman or degrading treatment or punishment. It therefore recommends that the provision for death sentences in the penal code, or any code in Libya, be removed, in line with repeated resolutions of the UN General Assembly, most recently in December 2014, calling for all States to impose a moratorium on the death penalty with a view to abolition.

Another issue of concern in relation to the appointments of military judges is the very low bar set regarding their legal qualifications. For instance, the Military Criminal Procedure Code requires that only one of the five judges sitting in the Supreme Military Court has a legal background and merely holding a law degree is considered a legal background. The same applies to the permanent courts. Legal experience is not required at all for circuit courts and field courts.

Legal qualifications and competence should be key criteria in the appointment of judges.<sup>408</sup> For instance, Principle 13 of the Decaux Principles states, “[t]he persons selected to perform the functions of judges in military courts must display integrity and competence and show proof of the necessary legal training and qualifications.”<sup>409</sup> The ICJ recommends that additional criteria, including comprehensive legal qualifications, be added to the appointment process of military judges.

### *Right to Appeal*

The ICJ has two concerns relating to the review process for military tribunals.

First, as described above, there is no appeal process for summary trial judgments, which are conducted not by a judge, but rather by the responsible commanding officer, including investigation, prosecution and the issuing of a verdict.<sup>410</sup> This is exacerbated by the fact the only form of review may be exercised through the absolute discretion of a higher ranking commanding officer who can amend or annul, only *proprio motu*, a penalty.<sup>411</sup> Besides summary trials, judgments handed down by circuit courts (which do not provide for defence or prosecution)<sup>412</sup> and field courts (which are entirely conducted by a member appointed by the commanding officer) are not subject to appeal.

Judgments issued by the Permanent Military Court, and decisions by a court of non-competence are subject to appeal but only before the Supreme Military Judicial Council.

As described in further detail above, and as stated by Principle 17 of the Decaux Principles, judgments issued by military courts as well as decisions on issues of legality, must be reviewed by a higher, independent, civilian court.<sup>413</sup> The ICJ therefore recommends that such a right of appeal be introduced into the relevant legislation.

## **E. Draft Constitution**

Article 145 of the April 2016 draft Constitution addresses military courts as follows, “[t]he military judiciary shall be competent with military offences committed by military persons in accordance with the actions defined by law, in a manner that ensures fair trial. This shall include the right to appeal as specified by law.” This reflects article 103 of the October 2015 draft though the language explicitly providing for a right to appeal is new. Article 103 is analysed in full in the ICJ’s December 2015 report.<sup>414</sup> Maintaining its recommendation in that report, the ICJ recommends that the Constitution

<sup>408</sup> See generally Decaux Principles, Principle No. 13 and paras 45-47; see also *Report on Chile*, Inter-American Commission on Human Rights, OEA/Ser.L/V/II.66 Doc.17 (1985), Ch. VIII, para.140.

<sup>409</sup> E/CN.4/2006/58, 13 January 2006, at Principle 13.

<sup>410</sup> Military Criminal Procedure Code, article 28.

<sup>411</sup> Military Criminal Procedure Code, article 33.

<sup>412</sup> Decree of the Minister of Defence No. 269 of 2000.

<sup>413</sup> E/CN.4/2006/58, 13 January 2006, para.57.

<sup>414</sup> See ICJ Report 2015, available at <http://www.icj.org/libya-revise-draft-constitution-to-ensure-compliance-with-international-standards/>, (last accessed 20 June 2016).

limit the jurisdiction of military courts to alleged breaches of military discipline and that it explicitly states that human rights violations alleged to have been committed by military personnel and other law enforcement officials should be under the jurisdiction of civilian courts.

**In light of the above, and in order to enhance the independence and impartiality of the judiciary and ensure fair trials in military courts, the ICJ urges the Libyan authorities to reform the military justice system so as to:**

- 1. Guarantee the functional independence and impartiality of military tribunals;**
- 2. Retain the limited personal jurisdiction of military tribunals over military personnel and ensure that military courts do not have jurisdiction over cases concerning civilians, whether as alleged perpetrator or victim;**
- 3. Explicitly restrict the jurisdiction of military tribunals to cases involving members of the military for alleged breaches of military discipline and to this end:**
  - a. limit the offences set out in the Military Criminal Procedure Code accordingly;**
  - b. explicitly exclude the jurisdiction of military courts in cases involving human rights violations and crimes under international law such as torture, enforced disappearance, extrajudicial executions or torture, war crimes and crimes against humanity;**
- 4. Ensure that allegations of violations of human rights committed by the military or armed forces are investigated by civilian authorities;**
- 5. Provide safeguards for the independence and impartiality of military tribunal judges, in particular by ensuring that:**
  - a. the selection of judges is based on clear criteria, including adequate legal qualifications, experience and integrity;**
  - b. the civilian Supreme Judicial Council plays a role in the selection of judges for military courts through an impartial and independent selection process;**
  - c. 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;**
- 6. Ensure that proceedings before military tribunals are carried out in a manner that is consistent with requirements of fair trial guaranteed in international standards; and**
- 7. Ensure everyone before a military tribunal has the right to appeal and there is the possibility of judicial review of all judgments issued by military courts, and that such review is conducted before a higher, independent and civilian court.**

## V. Office of the Public Prosecutor

### A. Introduction

Under Libyan law, the Office of the Prosecutor General is considered to be a judicial body. It is regulated by Law No. 6 of 2006 organizing the Judicial System, as well as by the criminal procedure code and other additional laws that amend existing provisions of Law No. 6 of 2006, including in particular Law No. 4 of 2011 and Law No. 14 of 2013. In Libya, the public prosecution has both prosecutorial and investigatory powers. It is also the principle organ in charge of administering and supervising detention facilities. Certain provisions however, grant the Minister of Justice particular powers to give instructions to prosecutors. In some instances, the investigation of a case may be entrusted to an investigating judge rather than to a prosecutor.

The Prosecutor's Office for ordinary crimes is known as the 'Public Prosecution'. Under the now abolished 'People's Court', a separate parallel prosecution office was created known as the 'People's Prosecution' for crimes of a political nature. The 'People's Court' was abolished in 2006, but its legacy of serious abuse of fair trial rights and right to liberty, resulting in numerous instances of arbitrary detention, during investigation and trial still taints the ordinary courts.<sup>415</sup> In fact certain legal procedures attached to the 'People's Court' such as prolonged pre-trial detention remained in the law until they were deemed unconstitutional by the Supreme Court in 2012.<sup>416</sup>

Today in Libya, while no authority maintains effective control over the entire State territory, and the security situation is adversely affecting the administration of justice, the Prosecution Office, amidst the current crisis, is continuing to operate and has recently announced in the media that there are many criminal, terror, financial and drug-related cases under investigation.<sup>417</sup> However, suggestions that the public Prosecutor's Office is operating on the instructions of the GNC has somewhat embroiled the Prosecutor's Office in the ongoing political dispute in Libya.<sup>418</sup> In addition, the detention of thousands of individuals in unofficial detention centres by militias has placed a significant number of detainees beyond the prosecutor's power. The powerful protection of the militias and competing armed groups has also placed many alleged perpetrators out of the prosecutor's reach, at least for the moment. The ongoing conflict has also seen the targeting of prosecutors with significant repercussions for their work and personal safety.

### B. Libyan Legal Framework

#### i. The organization and independence of the prosecution

Pursuant to Article 1 of Law No. 6 of 2006 (organizing the Judicial System), the Prosecutor General presides over the Prosecution Office, which is considered a judicial body. Therefore, regulations on appointment, seniority and promotion that apply to all judicial bodies, as outlined above, also apply to prosecutors,<sup>419</sup> with certain exceptions. Procedures for the functioning of the Prosecutor's Office are provided for in Part 4 of Law No. 6 of 2006, as amended. In terms of appointment, article 38 provides that "[t]he Prosecutor General must meet the same conditions as are required to be appointed as a Magistrate on the Supreme Court, and he shall have all of the rights and guarantees prescribed for a Magistrate of the Supreme Court."<sup>420</sup> The Constitutional Declaration of 2011 provides that the Prosecutor General shall be appointed by the GNC.<sup>421</sup> The UN-brokered Libyan Political Agreement,

<sup>415</sup> Law No. 7 of 2006.

<sup>416</sup> Article 2 of Law No. 7 of 2006 has handed over the power of the People's Court's prosecution to the general prosecution. While the People's Court was abolished, its procedure was used in criminal proceedings until a Supreme Court decision in 2012 found this practice unconstitutional.

<sup>417</sup> Public Prosecutors Office reveals hundreds of terror, criminal, kidnapping, drugs cases under investigation, Libya Herald, 13 February 2016, available at: [www.libyaherald.com/2016/02/13/public-prosecutors-office-reveals-hundreds-of-terror-criminal-kidnapping-drugs-cases-under-investigation/](http://www.libyaherald.com/2016/02/13/public-prosecutors-office-reveals-hundreds-of-terror-criminal-kidnapping-drugs-cases-under-investigation/) (last accessed 16 May 2016).

<sup>418</sup> Tripoli public prosecutor threatens arrested Security Committee members with treason charges: report, Libya Herald, 8 March 2016, available at: <https://www.libyaherald.com/2016/03/08/tripoli-public-prosecutor-threatens-arrested-security-committee-members-with-treason-charges-report/> (last accessed 16 May 2016).

<sup>419</sup> Law No. 6 of 2006, articles 43 *et seq.*

<sup>420</sup> Law No. 6 of 2006, article 38.

<sup>421</sup> Article 30 of the Constitutional Declaration 2011 provides that, "The GNC shall also appoint the heads of sovereign functions". The position of Prosecutor General is considered a sovereign function.

signed on 17 December 2015, provides that the Prosecutor General shall be appointed by the House of Representatives in accordance with the procedure provided for in Article 15 of the agreement.<sup>422</sup>

Law No. 6 of 2006 provides that a prosecution office shall be established in the jurisdiction of each court, creating an appellate prosecution, a first instance prosecution and a summary prosecution. Transferring and delegating members of the prosecution to work in an entity other than the first instance prosecution to which they belong shall occur by decision of the SJC Chairperson, based on a recommendation from the Prosecutor General.<sup>423</sup> The Statute gives the Prosecutor General additional powers of transfer, namely, "the right to transfer members of the Public Prosecution within the district of the prosecution in which they have been appointed. He shall have the right to delegate them to work outside of this district for a period of not more than three months. This period shall be renewable."<sup>424</sup>

The functions of prosecutors are regulated by the Libyan Code of Criminal Procedure. The Public Prosecution in Libya has the power to initiate investigations and prosecutions, except in certain cases where investigations and prosecutions must be authorized by the Minister of Justice for the initiation of proceedings before the Criminal Court.<sup>425</sup> The crimes concerned are outlined in article 224 of the Penal Code.<sup>426</sup>

Crimes that require **authorization** from the Minister of Justice for prosecution include the following:

- Article 167 (Plotting with Foreigners to the Detriment of Libya's Military or Political Status)
- Article 168 (Recruitment against a Foreign State)
- Article 175 (Inciting Political Defeatism)
- Article 177 (Inciting Economic Defeatism)
- Article 178 (Activity of Libyans Abroad against the Interests of the State)
- Article 180 (Failure to Perform Supply Obligations to the Government or Fraud Therein)
- Article 181 (Purchase of Arms or Supplies that Are Unfit for Use)
- Article 195 (Acts prejudicing the 17 February revolution, or insulting public authorities)<sup>427</sup>
- Article 208 (Formation of or Joining Non-Political International Associations without Permission)

Crimes that require the **initiative** of the Minister of Justice for prosecution include the following:

- Article 219 (Attack on the Liberty of Heads of Foreign States)
- Article 220 (Offence to the Dignity of the Heads of Foreign States)
- Article 221 (Attack on Representatives of Foreign States)
- Article 222 (Attack against the Flag of a Foreign State or International Body)

Pursuant to Article 51 of the Criminal Procedure code, the Public Prosecution may, in relation to felonies and misdemeanours, either request the presiding judge of the First Instance Court to delegate the case to an investigating judge or proceed itself to conducting the investigation. The competent chief prosecutor may also request the Court of Appeal to delegate a specific case or crime to an investigating judge, in which case the judge would exercise exclusive control over the investigation. The defendant, in cases of felonies, may request that an investigating judge, rather than the prosecution, be appointed to conduct the investigation. The presiding judge takes such a

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<sup>422</sup> Article 15 of the Political Agreement provides that: "1. While taking into consideration the Libyan legislation in force, the House of Representatives shall consult with the State Council, based on the mechanism stipulated in Annex 3 of this Agreement, in order to reach consensus within thirty (30) days of the endorsement of this Agreement, to agree on the incumbents of the following sovereign leadership positions: (...) The Prosecutor General. 2. After the implementation of paragraph 1 of this article, the appointment and removal of sovereign positions indicated in the previous paragraph shall require the approval of two thirds members of the House of Representatives."

<sup>423</sup> Law No. 6 of 2006, article 39.

<sup>424</sup> Law No. 6 of 2006, article 39.

<sup>425</sup> Criminal Procedure Code, articles 8-9.

<sup>426</sup> Penal Code, article 224 (Permission to Institute and Request Proceedings) reads: Proceedings may not be instituted without the permission of the Minister of Justice in the case of the offences set forth in Articles (167), (168), (175), (177), (178), (180), (181), (195), and (208) of this Code. 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.

<sup>427</sup> As amended by Law No. (5) of 2014 amending article (195) of the Penal Code, article 1 to state: Without prejudice to any harsher penalty, whoever commits an act that prejudices the 17 February Revolution shall be punished by imprisonment. The same penalty shall be imposed on any person who publicly insults the legislative, executive, or judicial branches or any member thereof during or due to the performance of duties, or who insults the state emblem or flag.

decision after hearing the prosecution's response. The decision is not subject to appeal.

In some instances, if the investigating judge finds that the incident constitutes a felony he is to refer it to the Accusation Chamber,<sup>428</sup> which exercises the same mandate of the investigating judge, in terms of investigation, detention orders and the extension thereof.<sup>429</sup>

Except for the abovementioned exceptions, the public prosecution in Libya is in charge of the investigatory and prosecutorial aspects of all cases.<sup>430</sup>

### *Legacy of the 'People's Court'*

Pursuant to articles 19 and 26 of Law No. 5 of 1988, the 'People's Court' procedure, with regards to specific crimes generally of a political nature, vested the so-called People's Prosecution with the equivalent powers of the investigating judge, the Public Prosecution and the Accusation Chamber. Thus, the People's Prosecution investigated, prosecuted and referred cases immediately to the 'People's Court', without the possibility of involving an investigating judge or an accusation chamber. In addition, the 'People's Court' procedure included longer detention periods, no judicial review and no right to be represented by a lawyer during interrogations.

Even with the abolition of the 'People's Court' by Law No. 7 of 2006, article 2 of this law transferred this same extended mandate of the People's Prosecution to the Public Prosecution, rather than returning it to each authority respectively, i.e., the prosecutor, the investigating judge and the accusation chamber. In 2012, article 2 of Law No. 7 of 2006 was challenged before the Constitutional Chamber of the Supreme Court,<sup>431</sup> and struck down on the grounds that it violated the constitutional principle of equality provided for in article 6 of the Constitution Declaration of 2011. The Supreme Court declared the 'People's Court's' procedures, which were still implemented by the Prosecution, unconstitutional.<sup>432</sup> However, while it is now compulsory to implement ordinary criminal procedure, it has been reported that Libyan authorities still maintain certain practices as a legacy of the practices of the 'People's Court', including preventing detainees from seeing their legal counsel.<sup>433</sup>

#### ii. Prosecutors and the protection of rights

The Public Prosecution also oversees judicial police officers,<sup>434</sup> and "correction and rehabilitation institutions" (prisons) and other places in which judicial orders and rulings are executed.<sup>435</sup> In this regard, the Criminal Procedure Code provides for the public prosecution, acting within its competence, to inspect prisons, and to take action against unlawful detention.<sup>436</sup> In addition, defence attorney visits are organized subject to the authorization of the public prosecution or the investigation.<sup>437</sup>

### **C. International law and standards**

The provisions of international human rights law, including the ICCPR, the African Charter and Arab Charter, are binding on prosecutors, and prosecutorial acts engage the responsibility of the State of Libya. Prosecutors must take care to ensure that their conduct is consistent with, among other provisions, the right to liberty (ICCPR article 9) and the right to a fair trial (ICCPR article 14).

The universal body of standards applicable to the prosecutorial institution is the UN Guidelines on the Role of Prosecutors (UN Guidelines).<sup>438</sup> Additionally applicable is the Standards of professional

<sup>428</sup> Criminal Procedure Code, article 136.

<sup>429</sup> Criminal Procedure Code, article 151.

<sup>430</sup> Criminal Procedure Code, articles 52 and 172.

<sup>431</sup> Constitutional Challenge No. 25 of year 59 (2012).

<sup>432</sup> Constitutional Chamber of the Supreme Court, Ruling on Challenge 59/25, December 2012; see also ICG Report 2013, pp. 2, 12-15.

<sup>433</sup> ICG Report 2013, p.34, footnote 147.

<sup>434</sup> Law No. 6 of 2006, article 41.

<sup>435</sup> Law No. 6 of 2006, article 42.

<sup>436</sup> Criminal Procedure Code, article 31-33.

<sup>437</sup> Law No. 5 of 2005 on correction and rehabilitation institutions, article 51.

<sup>438</sup> Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders in 1990.



responsibility and statement of the essential duties and rights of prosecutors adopted by the International Association of Prosecutors in 1999. Other standards are set out in instruments adopted by the Council of Europe, the African Charter and the Inter-American Commission on Human Rights. Relevant requirements and principles are elaborated further in General Comments, Concluding Observations and Recommendations of UN Treaty Bodies, as well as the jurisprudence of regional human rights courts.

Prosecutors, while they may come under either executive or judicial administration, must maintain functional independence in relation to their prosecutorial function. The independence and autonomy of prosecutorial authorities is critical to ensure the fair administration of justice. In addition, an independent prosecutor facilitates trust because this increases the public's confidence in the prosecution's ability to investigate and prosecute.<sup>439</sup> The importance of preventing political pressure and maintaining public confidence in prosecutors has been underlined by a number of international legal authorities,<sup>440</sup> Prosecutorial independence is a matter of public interest that ensures the possibility of prosecuting officials without obstruction, especially in cases of abuse of power and serious human rights violations.<sup>441</sup>

i. The organization and independence of the prosecution

Due to the non-uniformity of national legal systems, international standards differ on the subject of the prosecution's independence from the executive or from the judiciary as a whole. Nevertheless, international standards are clear that institutional independence is preferable as the best way to protect prosecutors from undue executive pressure.<sup>442</sup>

The ICJ considers that no executive power should be exercised over the prosecution and that instructions not to prosecute should be prohibited. However, if the institutional independence of the Prosecutor's Office is not guaranteed, specific procedures should be put in place to maximize prosecutorial independence. For instance, instructions should be in writing, explained and carried out with guarantees of transparency and equity. The government should also be under a duty to seek prior written advice from the prosecutorial body and instructions not to prosecute must be subject to specific controls.<sup>443</sup> In addition, as affirmed by the Special Rapporteur on the independence of judges and lawyers, "prosecutors should have the right to challenge the instructions received, especially when they are deemed unlawful or contrary to professional standards or ethics."<sup>444</sup>

ii. Prosecutors and the protection of rights

The UN Guidelines on the Role of Prosecutors provide that "Prosecutors shall, in accordance with the law, perform their duties fairly, consistently and expeditiously, and respect and protect human dignity and uphold human rights, thus contributing to ensuring due process and the smooth functioning of the criminal justice system".<sup>445</sup>

In addition, prosecutors are to "give due attention to the prosecution of crimes committed by public officials, particularly corruption, abuse of power, grave violations of human rights and other crimes recognized by international law...".<sup>446</sup>

The duty to uphold the protection of human rights during proceedings includes the right to legal

<sup>439</sup> See Report on Mission to Mexico of the Special Rapporteur on the independence of judges and lawyers, UN Doc. A/HRC/17/30/Add.3, paras. 16 & 87; See also Inter-American Commission on Human Rights, Report on the situation of Human Rights in Mexico, OEA/Ser.L/V/II.100, Doc. 7 rev. 1, 24 September 1998, para.381.

<sup>440</sup> Report of the Special Rapporteur on the independence of judges and lawyers, UN Doc. A/HRC/20/19, para.27.

<sup>441</sup> CoM Recommendation (2000)19, para.16; See also ACHPR Principles and Guidelines, Section F, Principle (k); see also, Consultative Council of European Judges (CCJE) and Consultative Council of European Prosecutors (CCPE), Judges and Prosecutors in a Democratic Society, CM(2009)192 (hereafter "Bordeaux Declaration"), Explanatory Note, para.27.

<sup>442</sup> See ICJ Practitioners' Guide No. 1 p. 71; Inter-American Commission on Human Rights, Report on the situation of Human Rights in Mexico, OEA/Ser.L/V/II.100, Doc. 7 rev. 1, 24 September 1998, paras 372 and 381.

<sup>443</sup> CoM Recommendation (2000)19, para.13(a)-(f); see also, Bordeaux Declaration, paras 3, 9; CoM Recommendation (2000)19, para.17.

<sup>444</sup> Report of the Special Rapporteur on the independence of judges and lawyers, UN Doc. A/HRC/20/19, para.116.

<sup>445</sup> UN Guidelines on the Role of Prosecutors, Guideline 12.

<sup>446</sup> UN Guidelines on the Role of Prosecutors, Guideline 15.

assistance, as provided for by Article 14(3) of the ICCPR, especially at the stage of investigation. This is of crucial importance due to the vulnerability of the accused in proceedings. Its importance has been underlined by the European Court of Human Rights,<sup>447</sup> and the International Criminal Tribunal for Rwanda.<sup>448</sup> Protection of human rights during proceedings also includes the prohibition of *incommunicado* detention, as highlighted by the UN Human Rights Committee,<sup>449</sup> and the UN Commission on Human Rights which has repeatedly found that “prolonged *incommunicado* detention may facilitate the perpetration of torture and can in itself constitute a form of cruel, inhuman or degrading treatment or even torture.”<sup>450</sup>

### iii. Rights and security of prosecutors

The UN Guidelines on the Role of Prosecutors provide that: “prosecutors like other citizens are entitled to freedom of expression, belief, association and assembly. In particular, they shall have the right to take part in public discussion of matters concerning the law, the administration of justice and the promotion and protection of human rights and to join or form local, national or international organizations and attend their meetings, without suffering professional disadvantage by reason of their lawful action or their membership in a lawful organization. In exercising these rights, prosecutors shall always conduct themselves in accordance with the law and the recognized standards and ethics of their profession.”<sup>451</sup>

Regarding freedom of association, Guideline 9 of the UN Guidelines on the Role of Prosecutors echoes the parallel provisions in the UN Basic Principles on the Independence of the Judiciary, providing that, “Prosecutors shall be free to form and join professional associations or other organizations to represent their interests, to promote their professional training and to protect their status.”

International standards have also emphasized the obligation of States to protect the safety of prosecutors while exercising their functions. The UN Guidelines provide for this specific duty to protect prosecutors and their families “when their personal safety is threatened as a result of the discharge of prosecutorial functions.”<sup>452</sup>

In a joint report, the Special Rapporteur on the question of torture and the Special Rapporteur on extrajudicial, summary or arbitrary executions recommended that “effective protection should be provided for all members of the judiciary and the Public Ministry from threats and attempts on their lives and physical integrity, and investigations into such threats and attempts should be carried out with a view to determining their origin and opening criminal and/or disciplinary proceedings, as appropriate.”<sup>453</sup> This has also been emphasized by the Council of Ministers (CoM) Recommendation (2000)19,<sup>454</sup> as well as by the Declaration on Minimum Standards concerning the Security and Protection of Public Prosecutors and their Families, adopted by the International Association of Prosecutors.

## **D. Assessment in light of international law and standards**

### i. The organization and independence of the prosecution

Prosecutors should be enabled to carry out their functions independently, impartially, with objectivity and in defence of and in a manner which respects human rights. Any influence or interference from any source outside the Prosecutor’s Office itself as well as any attempts to undermine the independence and impartiality of prosecutors should be prohibited.

Under Libyan law, prosecutors are considered part of the judiciary. Therefore, regulations on appointment, seniority and promotion that apply to all judicial bodies also apply to prosecutors,<sup>455</sup> with certain exceptions. Thus, the recommendations outlined above in relation to the judiciary as

<sup>447</sup> *Pavlenko v. Russia*, ECtHR, Application No. 42371/02, Judgement, 1 April 2010, para.101.

<sup>448</sup> Bagosora et al., Decision on the Prosecutor’s Motion for the Admission of Certain Materials under Rule 89(C), Case No. ICTR-98-41-T, T. Ch. 14 October 2004, para.16.

<sup>449</sup> UN Human Rights Committee, General Comment No. 20, para.11.

<sup>450</sup> UN Commission on Human Rights, Resolution 2003/32, para.14.

<sup>451</sup> UN Guidelines on the Role of Prosecutors, Guideline 8.

<sup>452</sup> UN Guidelines on the Role of Prosecutors, Guidelines 4-5.

<sup>453</sup> Joint report of the Special Rapporteur on the question of torture and the Special Rapporteur on extrajudicial, summary or arbitrary executions on their visit to Colombia, UN Document E/CN.4/1995/111, para.117 (d).

<sup>454</sup> CoM Recommendation (2000)19, para.5(g).

<sup>455</sup> Law No. 6 of 2006, Articles 43 *et seq.*

a whole also apply in general to prosecutors, in particular, that there must be no discrimination in appointments and adequate and appropriate training in human rights should be provided. International standards have emphasized the importance of ensuring the functional independence and autonomy of prosecutorial authorities.<sup>456</sup> The ICJ recommends that the Libyan authorities undertake an independent review with a view to adopting statutory reform that reflects the distinct and independent functions of a prosecutor from the rest of the judiciary.

International standards provide that case-specific instructions to prosecutors are to be avoided, but, where they exist, they must be in writing and in conformity with clear rules of transparency and equity. Any instruction not to prosecute should be either prohibited or exceptional.<sup>457</sup> Additionally, the prosecution should be enabled by law to challenge executive instructions that concern their jurisdiction.<sup>458</sup>

Pursuant to article 224 of the Libyan Penal Code, there are many crimes that require either the initiative or the authorization of the Minister of Justice in order to be prosecuted. This provision lacks any requirement for a justified decision by the Minister of Justice for his or her decision whether or not to prosecute nor does it provide for a provision allowing for the instructions of the Minister of Justice to be challenged.

The ICJ recommends that the law be revised to eliminate or significantly limit the use of case-specific instructions from the Ministry of Justice. Where instructions are issued they should follow the principles of equity and transparency and politically motivated instructions should be specifically prohibited. Instructions from the executive to cease an investigation or prosecution should also be prohibited. Prosecutors should have the right to challenge any instruction if they deem it unlawful or contrary to professional standards or ethics.

## ii. Prosecutors and the protection of rights

According to international standards, prosecutors are obliged to ensure the protection of human rights and right to fair trial during proceedings. This includes ensuring no evidence is used that has been obtained through illegal methods; defendants have legal representation, safeguards are in place against arbitrary and *incommunicado* detention; and protection from torture and other forms of ill-treatment is guaranteed.<sup>459</sup> Where there are allegations of such violations it is incumbent upon prosecutors to undertake prompt, thorough and impartial investigations with a view to bringing to justice those responsible. According to numerous reports, arbitrary detention, torture and other ill-treatment, including prolonged *incommunicado* detention and detention in illegal detention facilities is widespread and systemic in Libya.<sup>460</sup> This was most recently confirmed by the OHCHR's report on Libya, issued on 15 February 2016.<sup>461</sup>

The Libyan Criminal Procedural code provides that prosecutors and inspection judges can inspect any public prison to ensure there are no illegally detained prisoners there and should they find that an individual has been arbitrarily detained they are entitled to order his release.<sup>462</sup> In addition, strict regulations are in place as to what circumstances detention is legal, outlined clearly in Law No. 5 of 2005.<sup>463</sup>

<sup>456</sup> See Report on Mission to Mexico of the Special Rapporteur on the independence of judges and lawyers, UN Doc. A/65/274, paras. 16 & 87 ; See also Report on the Situation of Human Rights in Mexico, para.381.

<sup>457</sup> See ICJ Practitioners' Guide No. 1, p. 71; CoM Recommendation (2000)19, para.13(a)-(f); see also Bordeaux Declaration, paras 3, 9; CoM Recommendation (2000)19, para.17.

<sup>458</sup> See Report of the Special Rapporteur on the independence of judges and lawyers, UN Doc. A/HRC/20/19, para.116.

<sup>459</sup> See article 14(3) of the ICCPR; UN Human Rights Committee, General Comment No. 20, para.11; UN Commission on Human Rights, Resolution 2003/32, para.14.

<sup>460</sup> Opinions adopted by the Working Group on Arbitrary Detention at its sixty-fifth session, 14-23 November 2012 - No. 60/2012 (Libya), 16 August 2013; *Torture and Deaths in Detention in Libya*, October 2013, Report of the United Nations Support Mission in Libya and Office of the United Nations High Commissioner for Human Rights, p.15; Saif Al-Islam Gaddafi v. Libya, Working Group on Arbitrary Detention, Opinion No. 41/2013, UN Doc. A/HRC/WGAD/2013/41 (2014), 7 April 2014.

<sup>461</sup> Investigation by the Office of the United Nations High Commissioner for Human Rights on Libya: detailed findings, 15 February 2016, A/HRC/31/CRP.3, paras 125-147.

<sup>462</sup> Criminal Procedure Code, articles 31-33; Law No. 5 of 2005 on correction and rehabilitation institutions, article 51.

<sup>463</sup> Criminal Procedure Code, articles 31-33; Law No. 5 of 2005 on correction and rehabilitation institutions, article

While acknowledging the challenges inherent in the current security situation, the ICJ urges the Libyan authorities and the Prosecutor's Office to take immediate measures to end arbitrary detention across Libya and to uphold the conditions for detention as outlined in Law No. 5 of 2005, in particular the provisions of article 4, which states, "[c]ustodial penalties may not be implemented outside of correctional facilities or rehabilitation institutions. Persons subject to provisional detention shall be held in local institutions and they may not be detained outside such institutions, unless the Public Prosecution, for the benefit of the investigation or in remote areas, decides to detain them in other locations prepared for such purpose, provided they meet the necessary requirements for accommodation. In all cases, the detention period in such locations shall not exceed fifteen days". The length of pre-trial detention as ordered by a prosecutor is outlined in article 1 of Law No. 3 of 2013.<sup>464</sup>

The ICJ urges prosecutors to ensure that all detainees across Libya are provided with their fair trial rights. This includes the right not to be detained arbitrarily and to a prompt trial where criminal charges have been brought.

The ICJ recommends that the Libyan authorities and in particular high ranking prosecutors ensure that all those responsible for human rights violations amounting to crimes under international law, including unlawful killings, torture and other ill treatment are held accountable. This entails conducting independent, impartial and thorough investigations and, where the evidence warrants, criminal prosecutions.

### iii. Rights and security of prosecutors

International standards provide for an obligation on States to ensure the physical protection of public prosecutors in case of a threat on their personal safety as a result of the proper discharge of their functions.<sup>465</sup>

The ongoing instability has significantly impacted the ability of the prosecution service in Libya to discharge its duties. The independence of the Public Prosecution has been hindered by the power of militias and other armed groups in Libya, including control over detention centres, cases of illegal detention, illegal executions and torture, and attacks on prosecutors. This has led to many documented cases of serious violations against which the public prosecution is unable to fulfil its mandate to independently conduct investigations, obtain testimonies, prosecute alleged perpetrators, or issue detention or acquittal orders, in part because of fear of reprisals.<sup>466</sup> This is in addition to attacks on courts and assassinations of members of the judiciary, as documented by UNSMIL and the OHCHR.<sup>467</sup>

The ICJ urges all relevant actors in Libya to respect the independence of members of the Prosecutor's Office and ensure they can fulfil their functions in safety and with effective guarantees for their personal security.

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51.

<sup>464</sup> This provides, "[t]he detention order of the Public Prosecution shall only be effective for two weeks. If an extension of the detention is considered, the documents shall be submitted to the competent judge in order to issue the order to release or extend the detention period of the accused after hearing his statements, provided that such detention is extended for one or more successive periods not exceeding forty-five days each, until completion of the investigation."

<sup>465</sup> UN Guidelines on the Role of Prosecutors, Guidelines 4-5; Joint report of the Special Rapporteur on the question of torture and the Special Rapporteur on extrajudicial, summary or arbitrary executions on their visit to Colombia, UN Document E/CN.4/1995/111, para.117 (d); CoM Recommendation (2000)19, para.5(g); the Declaration on Minimum Standards concerning the Security and Protection of Public Prosecutors and their Families, adopted by the International Association of Prosecutors.

<sup>466</sup> ILAC Report 2013, p.47; See in general Amnesty International, *Libya: Rule of law or rule of militias?* in particular p. 33 (July 2012); "Lawyers for Justice in Libya and REDRESS Trust's Observations Pursuant to Rule 103 of the Rules of Procedure and Evidence," filed in the Situation in Libya in the Case of the Prosecutor v. Saif al-Islam Gaddafi and Abdullah al-Senussi, ICC-01/11-01/11 (08 June, 2012); "Decision on the admissibility of the case against Saif Al-Islam Gaddafi" in the case of The Prosecutor v. Saif al-Islam Gaddafi and Abdullah Al-Senussi, paras 36, 209, 210.

<sup>467</sup> *Torture and Deaths in Detention in Libya*, October 2013, Report of the United Nations Support Mission in Libya and Office of the United Nations High Commissioner for Human Rights, p.15. Investigation by the Office of the United Nations High Commissioner for Human Rights on Libya: detailed findings, 15 February 2016, A/HRC/31/CRP.3, paras.209-214.

### **E. Draft Constitution**

Article 141 of the April 2016 draft Constitution provides that the “Public prosecution shall be part of the judiciary and shall be presided [over] by the Prosecutor General. Members of the public prosecution shall act on behalf of the Prosecutor General in exercising jurisdictions related to criminal proceedings except as excluded by the law. The President of the Republic shall decree the appointment of the Prosecutor General based on a nomination by the Higher Judicial Council from among the judges of the Court of Cassation, the presidents at the Court of Appeals, or the public attorneys of category A, for a period of six years or for the remaining period until reaching the age of retirement, whichever comes sooner and for one term only.” This mirrors the language in the October 2015 draft, which is analysed in full in the ICJ’s December 2015 report on p.73 and 74.<sup>468</sup> The ICJ recommends that the Constitution should provide that the Prosecutor General is appointed through an independent process and that the Office of the Prosecutor is not subject to undue executive control, has a duty to act impartially and with operational independence, to respect and uphold human rights, and to fight impunity for human rights violations, and is empowered to investigate private and public officials and actions.

**In light of the above, with the aim of enhancing the independence of prosecutors and tackling impunity, the ICJ recommends that Libyan authorities ensure that the relevant laws on the organization of the Prosecutor’s Office:**

- 1. Require prosecutors to carry out their functions independently, impartially, with objectivity and in defence of and in a manner which respects human rights and, to this end, among other things, specifies that any influence or interference from any source outside the Prosecutor’s Office itself as well as any attempt to undermine the independence and impartiality of prosecutors is prohibited;**
- 2. Affirm and guarantee a clear separation between the role and functions of judges and prosecutors and to this end the Libyan authorities should undertake and adopt statutory reforms that reflect the distinct and independent functions of the prosecutor from the rest of the judiciary;**
- 3. Remove the hierarchical authority of the Minister of Justice over the Prosecutor’s Office, including the ability to control and direct prosecutors over specific cases;**

**Additionally, the Libyan authorities should undertake reforms to:**

- 4. Revoke the power of the Minister of Justice to authorize or initiate prosecutions in specific crimes (article 244 of the Penal Code);**
- 5. Where the power to issue written instructions extends to the executive, define in law the nature and scope of any power to issue written instructions, including a prohibition on the authority to issue instructions not to prosecute or to require prosecution in a specific case, as well as recognition that the issuance of written instructions does not preclude the ability of the prosecutor to submit to the court any legal arguments of their choice;**
- 6. Require that any power to issue written instructions should follow the principles of equity and transparency, in accordance with international and national law, and politically motivated instructions be specifically prohibited. In this connection, written instructions should become part of the case file where they relate to a specific case and should therefore be made available to other parties, who are entitled to comment on the instructions;**
- 7. Ensure that prosecutors enjoy the right to challenge any instruction they deem unlawful or contrary to professional standards or ethics;**
- 8. Prohibit any interference in the decisions of prosecutors or any attempts to undermine their objectivity and impartiality;**
- 9. Ensure that Prosecutors guarantee the protection of human rights and the right to fair trial in all proceedings within their mandate;**
- 10. Take immediate measures to end arbitrary detention across Libya and to uphold the conditions for detention that meet international standards, as well as ensuring to all detainees the right to a fair trial;**
- 11. Ensure that all alleged human rights violations amounting to crimes, including unlawful killings, torture and other ill treatment are impartially and thoroughly investigated and prosecuted and the perpetrators held accountable; and**
- 12. Respect the independence of members of the Prosecutor’s Office and ensure they can fulfil their functions in safety and with effective guarantees for their**

<sup>468</sup> See ICJ Report 2015, available at <http://www.icj.org/libya-revise-draft-constitution-to-ensure-compliance-with-international-standards/>, (last accessed 20 June 2016).



**personal security.**

**To better guarantee and safeguard judicial independence, the ICJ calls on the Constitutional Drafting Assembly to ensure that the Constitution:**

- 1. Ensures both the actual and perceived independence of the Prosecutor General through his or her appointment by an independent process in line with the UN Guidelines on the Role of Prosecutors;**
- 2. Ensures that the Office of the Prosecutor is not subject to undue executive control, has a duty to act impartially and with operational independence, to respect and uphold human rights, and to fight impunity for human rights violations, and is empowered to investigate private and public officials and actions.**

## RECOMMENDATIONS

### Supreme Judicial Council

In light of the above, the Libyan authorities should ensure that the law on the Supreme Judicial Council:

1. Provides for an SJC that is composed of a majority of judges and excludes representatives from the executive, the office of the prosecutor and of the public defence department, unless their independence from the executive is ensured;
2. Provides that prosecutors and defence lawyers may never sit on a board considering a judge's promotion or disciplinary actions against a judge;
3. Removes the Head of the JBID as a member of the SJC;
4. Provides for a procedure for the election of members that is fair, inclusive, transparent and administratively independent;
5. Provides that judges from all courts are entitled to participate in the election of members to the SJC and that there is some representation on the SJC of judicial members of the lower courts;
6. Provides, in relation to the composition of the SJC, for a pluralistic and representative membership, and, in particular, substantial gender representation with a view ultimately to achieving approximate gender parity;
7. Specifies fair, transparent and inclusive criteria for candidacy or appointment of members;
8. Provides that individuals may not be excluded from candidacy or appointment to the SJC on the basis of their political opinions or on broad exclusionary measures;
9. Ensures that the only disciplinary infractions which may serve as grounds for disqualification as a candidate from the SJC are those established since the SJC was reformed to enhance its independence under Law No. 4 of 2011, (amending Law No. 6 of 2006);
10. Ensures that individuals are not excluded from candidacy or appointment to the SJC on the basis of mere association with those with whom they may have served in a professional legal capacity, including under the previous regime, provided that their representation or other association did not constitute a serious breach of professional ethics or serious criminal conduct;
11. Provides for all decisions of the SJC relating to the transfer, promotion, and termination of tenure of judges to be subject to independent judicial review and substantive appeal to the Supreme Court;
12. Provides that all authorities, in particular the Parliament and the Government, are required to consult the SJC and to consider its opinion on all matters relating to the judiciary, including judicial reforms;
13. Provides for a separate budget for the SJC and empowers the SJC to consult directly with the legislative branch in setting the budget for the judiciary;
14. Grants the SJC control and oversight over the budget for the judiciary; and
15. Includes a requirement that the State allocate resources adequate for the judiciary to discharge its responsibilities in respect of the fair and effective administration of justice.

To better guarantee and safeguard judicial independence, the ICJ calls on the Constitutional Drafting Assembly to ensure that the new Libyan Constitution:

1. Provides that the SJC is a truly independent body, granted the necessary authority to promote the efficient functioning of the judiciary and to safeguard its independence, including by:
  - a. providing that a majority of members of the SJC are judges elected by their peers;
  - b. providing that no appointments to the SJC should emanate from the executive or the legislative power;
  - c. providing for a pluralistic and representative membership of the SJC, including adequate gender representation;
  - d. providing that the SJC is exclusively competent to manage the careers of judges, including their selection, appointment, training, evaluation, promotion and discipline.
2. Provides that members of the judiciary are subject only to the authority of the SJC in relation to professional incapacity or misconduct;

3. **Contains a requirement that the judiciary is involved in the development of its own budget and be allocated sufficient funds, which are protected from misuse and cannot be used to exercise control over the judiciary.**

### **The Statute on the Judiciary**

**In light of the above, the ICJ urges the authorities in Libya to ensure that the Statute on the Judiciary:**

1. **Sets out fair and transparent procedures for the selection of trainee judges and the appointment of all judges and expressly prohibits discrimination on any status grounds in this process. In this regard article 43(7) on medical fitness should be removed or substantially amended to ensure that it only encompasses incapacitation to which no reasonable accommodation is possible, in accordance with the UN Convention on the Rights of Persons with Disabilities and article 43(9) on marriage to a non-Arab woman of Law No. 6 of 2006 should be removed;**
2. **Sets forth objective and appropriate criteria for all judicial appointments, which include training and qualifications in ordinary law, integrity, high competency and experience;**
3. **Ensures that the selection of all judges takes place through a transparent and publicly accessible competitive selection process, and provides for unsuccessful candidates to receive the reasons for and to challenge such a decision or the procedures under which the decision was made;**
4. **Ensures that judicial appointments are not subject to inappropriate criteria extrinsic to those related to the judicial function, including political considerations;**
5. **Guarantees adequate, appropriate, effective initial and on-going training for judges at the expense of the State;**
6. **Ensures that Decree 208 of 1988 is revised so as to place the Judicial Institute under the supervision and administration of the SJC and not the Ministry of Justice;**
7. **Provides that the Judicial Institute shall be adequately resourced and shall be exclusively competent to dispense appropriate initial and on-going training for judges;**
8. **Ensures training in ordinary law is compulsory for all judges;**
9. **Removes the exception to judicial training for those who have completed two years of clerical work in the judiciary;**
10. **Ensures that judges are required to undertake continuing legal education and training;**
11. **Provides for the assessment of the need for additional training for all judges who have not been through the professional training programme at the Judicial Institute;**
12. **Ensures specific training for investigators, prosecutors and judges on addressing cases of gross human rights violations and combating impunity;**
13. **Provides for education and training to combat gender stereotypes that prevent women from fully participating in public life, including in the judiciary;**
14. **Provides that assessments of judges take into account appropriate performance criteria and not primarily the quantity of cases adjudicated;**
15. **Provides for criteria for judicial career promotion that better reflect international standards by requiring that "ability, integrity and experience" are taken into account;**
16. **Guarantees that adequate numbers of appropriately-trained judges and appropriately-resourced courts with sufficient infrastructure are provided for;**
17. **Details the specific situations in which, and the relevant time period for which, a judge can be transferred or assigned to another position and the applicable procedure in this regard;**
18. **Requires consultation with and consent of a judge before any transfer is effected, as long as such consent is not unreasonably withheld and except pursuant to a system of regular rotation provided by law or formulated after due consideration by the judiciary;**
19. **Ensures that transfers between judicial bodies should be done on the basis of individual career choices and not imposed by the authorities in pursuance of a general policy;**
20. **Guarantees fair conditions of tenure for judges, including adequate working conditions and remuneration;**
21. **Limits the instances in which a judge may be removed from office to the following: reaching retirement age, if applicable, or the end of a fixed period of tenure; resig-**

- nation; certified as medically unfit; or as a result of the imposition of a lawful and proportionate sanction of dismissal imposed following a full and fair disciplinary procedure;
22. Provides that specific and proactive measures are taken to ensure the increased appropriate representation of women in the judiciary with a view to achieving approximate gender parity, both across the entire judiciary and in specific courts where women are underrepresented such as criminal courts and higher courts with fixed benchmarks to demonstrate increased representation; and
  23. Affirms and protects the rights of judges to freedom of association, assembly and expression, including the right to form and join associations aimed at representing their interests, promoting their professional training and protecting their judicial independence and restrict any limitations to those required to ensure that judges conduct themselves in such a manner as to preserve the dignity of their office and the impartiality and independence of the judiciary. Article 62 of Law No. 6 of 2006, which prohibits members of judicial bodies from “engaging in political activity” should be revised accordingly.

To better guarantee and safeguard judicial independence, the ICJ calls on the Constitutional Drafting Assembly to ensure that the new Libyan Constitution:

1. Set out objective criteria and clear procedures for the appointment, tenure, promotion, suspension and dismissal of the members of the judiciary and disciplinary sanctions taken against them;
2. Includes a provision to explicitly prohibit discrimination of any kind in the selection and appointment process of judges;
3. Provides that judges may only be removed for reasons of incapacity or behaviour that renders them unfit to discharge their duties, and that all disciplinary, suspension or removal proceedings shall be determined in accordance with established standards of judicial conduct.

#### Accountability and Vetting

In light of the above and in order to ensure the accountability of the Libyan judiciary in a manner that is consistent with its independence and impartiality, the SJC and the Libyan authorities should ensure that:

1. The disciplinary procedure for addressing complaints against judges for alleged breaches of the Code of Ethics and Conduct is set out in law and affords judges the right to a fair hearing before an independent and impartial body and includes:
  - a. The right to a prompt and fair determination of the complaint before an independent and impartial body;
  - b. The right to be promptly informed of the complaint;
  - c. The right to consult with and be represented by legal counsel;
  - d. Enjoyment of equality of arms and the right to call and examine witnesses and present and test evidence;
  - e. The right to an adequate amount of time to prepare a defence and the provision of all relevant information relating to the complaint, including information about the basis of the allegations and any exculpatory information;
  - f. A full hearing by the independent and impartial decision-making body, during which the accused judge has an opportunity to present a defence;
  - g. A decision based on the Code of Ethics and Conduct, in the light of objective and relevant evidence;
  - h. In the event of a finding of misconduct, the availability of a range of sanctions to be issued proportionately such as to require a steep threshold for termination of service, such as a judge being “unfit” for service;
  - i. Exclusion of transfer as a form of sanction;
  - j. The confidentiality of the complaint or charges until a decision is made, unless the judge concerned agrees otherwise;
  - k. The right to a substantive appeal against any disciplinary decision or sanction to a higher independent body or court, such as the Supreme Court; and
  - l. The disciplinary decision to be published and communicated upon its determination;
2. Disciplinary proceedings or civil suits may never be used against judges for the manner in which they interpret the law, assess the facts or weigh the evidence in any given case;

3. Judges are not to be subject to disciplinary procedures for having their decisions overruled or modified on appeal;
4. The Code of Ethics and Conduct is reviewed by the judiciary, in consultation with judges and their professional associations, to bring it fully in line with the Bangalore Principles of Judicial Conduct, in particular by adding provisions that reflect Bangalore Principle 4.12 requiring that a judge may not practice law while the holder of judicial office and articles 5.4 and 5.5 requiring that a judge ensures there is no discrimination or prejudice by any judicial, legal or clerical actors in the court room;
5. A judge may only be disciplined on the basis of breaching established conduct as outlined in the Code of Ethics and Conduct and article 50 of Law No. 4 of 2011 is revised accordingly;
6. The law is amended to ensure that judges enjoy personal immunity from civil suits for monetary damages or from criminal prosecution for improper acts or omissions in the exercise of their judicial functions. Such immunity should be subject to waiver by a court if it determines that the immunity would impede the course of justice;
7. The law is amended to ensure that no immunity is provided for in cases in which there is reasonable suspicion on the basis of *prima facie* evidence of criminal responsibility for a gross human rights violation, a crime under international law or other serious crime;
8. The law should clarify that the State should guarantee appropriate remedy and reparation for harm suffered by individuals as a result of acts or omissions by judges in the unlawful exercise of their judicial functions;
9. A fair and comprehensive vetting procedure that meets international standards on fair hearings and due process should be introduced to restore trust in and ensure the accountability of the Libyan judiciary;
10. The status of Law No. 13 on Political Isolation is clarified and that, if it is determined to remain in force, it is repealed or significantly amended to provide for clear and fair criteria, on a case by case basis, and a fair procedure meeting international standards on fair hearings and due process; and
11. All judges who were transferred or dismissed previously, pursuant to an unfair vetting procedure, be reinstated and, if further action is considered warranted, subjected to fair processes that meet the standards required for all disciplinary proceedings as outlined above.

To better guarantee and safeguard judicial independence, the ICJ calls on the Constitutional Drafting Assembly to ensure that the new Libyan Constitution:

1. Defines vetting procedures narrowly and provides that vetting procedures must conform to standards of fairness and transparency.
2. Ensures that in cases of serious judicial misconduct, such as perpetrating or being complicit in human rights violations, the judges' individual criminal, civil or disciplinary responsibility, is determined in accordance with international human rights standards, including due process rights.

### Military Tribunals

In light of the above, and in order to enhance the independence and impartiality of the judiciary and ensure fair trials in military courts, the ICJ urges the Libyan authorities to reform the military justice system so as to:

1. Guarantee the functional independence and impartiality of military tribunals;
2. Retain the limited personal jurisdiction of military tribunals over military personnel and ensure that military courts do not have jurisdiction over cases concerning civilians, whether as alleged perpetrator or victim;
3. Explicitly restrict the jurisdiction of military tribunals to cases involving members of the military for alleged breaches of military discipline and to this end:
  - a. limit the offences set out in the Military Criminal Procedure Code accordingly;
  - b. explicitly exclude the jurisdiction of military courts in cases involving human rights violations and crimes under international law such as torture, enforced disappearance, extrajudicial executions or torture, war crimes and crimes against humanity;
4. Ensure that allegations of violations of human rights committed by the military or armed forces are investigated by civilian authorities;



5. **Provide safeguards for the independence and impartiality of military tribunal judges, in particular by ensuring that:**
  - a. **the selection of judges is based on clear criteria, including adequate legal qualifications, experience and integrity;**
  - b. **the civilian Supreme Judicial Council plays a role in the selection of judges for military courts through an impartial and independent selection process;**
  - c. **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;**
6. **Ensure that proceedings before military tribunals are carried out in a manner that is consistent with requirements of fair trial guaranteed in international standards; and**
7. **Ensure everyone before a military tribunal has the right to appeal and there is the possibility of judicial review of all judgments issued by military courts, and that such review is conducted before a higher, independent and civilian court.**

To better guarantee and safeguard judicial independence, the ICJ calls on the Constitutional Drafting Assembly to ensure that the Libyan Constitution:

1. **Limits the jurisdiction of military tribunals to alleged breaches of military discipline and ensures that cases involving alleged violations of human rights committed by military personnel and other law enforcement officials are under the jurisdiction of civilian courts.**

#### **Office of the Public Prosecutor**

In light of the above, with the aim of enhancing the independence of prosecutors and tackling impunity, the ICJ recommends that Libyan authorities ensure that the relevant laws on the organization of the Prosecutor's Office:

1. **Require prosecutors to carry out their functions independently, impartially, with objectivity and in defence of and in a manner which respects human rights and, to this end, among other things, specifies that any influence or interference from any source outside the Prosecutor's Office itself as well as any attempt to undermine the independence and impartiality of prosecutors is prohibited;**
2. **Affirm and guarantee a clear separation between the role and functions of judges and prosecutors and to this end the Libyan authorities should undertake and adopt statutory reforms that reflect the distinct and independent functions of the prosecutor from the rest of the judiciary;**
3. **Remove the hierarchical authority of the Minister of Justice over the Prosecutor's Office, including the ability to control and direct prosecutors over specific cases; Additionally, the Libyan authorities should undertake reforms to:**
4. **Revoke the power of the Minister of Justice to authorize or initiate prosecutions in specific crimes (article 244 of the Penal Code);**
5. **Where the power to issue written instructions extends to the executive, define in law the nature and scope of any power to issue written instructions, including a prohibition on the authority to issue instructions not to prosecute or to require prosecution in a specific case, as well as recognition that the issuance of written instructions does not preclude the ability of the prosecutor to submit to the court any legal arguments of their choice;**
6. **Require that any power to issue written instructions should follow the principles of equity and transparency, in accordance with international and national law, and politically motivated instructions be specifically prohibited. In this connection, written instructions should become part of the case file where they relate to a specific case and should therefore be made available to other parties, who are entitled to comment on the instructions;**
7. **Ensure that prosecutors enjoy the right to challenge any instruction they deem unlawful or contrary to professional standards or ethics;**
8. **Prohibit any interference in the decisions of prosecutors or any attempts to undermine their objectivity and impartiality;**
9. **Ensure that Prosecutors guarantee the protection of human rights and the right to fair trial in all proceedings within their mandate;**
10. **Take immediate measures to end arbitrary detention across Libya and to uphold the conditions for detention that meet international standards, as well as ensuring to all detainees the right to a fair trial;**
11. **Ensure that all alleged human rights violations amounting to crimes, including unlawful killings, torture and other ill treatment are impartially and thoroughly**

- 12. investigated and prosecuted and the perpetrators held accountable; and Respect the independence of members of the Prosecutor's Office and ensure they can fulfil their functions in safety and with effective guarantees for their personal security.**

**To better guarantee and safeguard judicial independence, the ICJ calls on the Constitutional Drafting Assembly to ensure that the Constitution:**

- 1. Ensures both the actual and perceived independence of the Prosecutor General through his or her appointment by an independent process in line with the UN Guidelines on the Role of Prosecutors;**
- 2. Ensures that the Office of the Prosecutor is not subject to undue executive control, has a duty to act impartially and with operational independence, to respect and uphold human rights, and to fight impunity for human rights violations, and is empowered to investigate private and public officials and actions.**



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July 2016 (for an updated list, please visit [www.icj.org/commission](http://www.icj.org/commission))

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ISBN 978-92-9037-237-0



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