

Recommendations For The Negotiated Political Agreement In Libya

January 2020

The Libyan political process, of which the January 2020 Berlin Conference is part, should ensure that Libya's obligations under international law are fully complied with. Given both the historical and more recent patterns of authoritarianism, the vacuum of state authority, the dysfunction of justice institutions, the occurrence of gross human rights violations and widespread impunity in Libya, it is imperative that the Political Agreement (PA) serves as a solid foundation on which the rule of law can be established and human rights can be upheld.

In this paper, the International Commission of Jurists (ICJ) formulates concrete recommendations that are broadly grouped into three areas:

- enshrining the rule of law;
- upholding human rights; and
- ensuring accountability for crimes under international law.

A. Enshrining the Rule of Law

The negotiation of the PA follows decades of authoritarianism and years of armed conflict and political instability (that continues at the time of writing) in Libya. It provides a crucial opportunity to mark a departure from the past, by providing for the possibility of establishing a new system of government that adheres to the principles of the rule of law. This includes ensuring the accountability of armed groups, providing for the subordination of security and armed forces to civilian authorities, enshrining the separation of powers and the right of all Libyans to participate in the conduct of public affairs, and guaranteeing the independence and accountability of the judiciary and the Office of the General Prosecutor.

(i) Armed groups

The vacuum of state authority in many regions of Libya has been filled by many armed groups empowered to arrest, detain, and forcibly disappear individuals without any form of judicial oversight or accountability. Detainees under the control of armed groups are routinely subjected to serious violations of human rights, including killings, arbitrary detention, torture, rape and other acts of sexual violence.

Political divisions and fragmentation in Libya have also resulted in political authorities actively seeking the support of such armed groups to cement and further their political interests and control over parts of the Libyan territory, with many officials and members of these groups

being integrated into official armed and security forces without proper and adequate vetting procedures.

The PA should include provisions which commit to ensuring: that legitimate and legally constituted armed and security forces are operational, effective and fully compliant with international rule of law and human rights standards; that any process of integrating officials and members of armed groups in the State's armed and security forces is conducted through proper and adequate vetting standards and processes; and that those officials and members of armed groups responsible for crimes under international law and serious human rights violations are excluded from such a process and are held criminally accountable.

The PA should also include provisions which commit to ensuring: that the Libyan authorities gain control over detention facilities operating under the control of armed groups, and that those arbitrarily detained are immediately and unconditionally released and their right to reparation is fully ensured.

(ii) Civilian oversight over security and armed forces

The security and armed forces of the State should always ultimately be subject to civilian oversight by a democratically elected government. In Libya, a clear framework on civilian oversight is needed to ensure compliance with international standards. It should include specific parliamentary mechanisms to oversee the functioning of the security and armed forces, including by ensuring that they abide by the law and are held to account. Providing for the accountability of security forces is particularly important in light of current laws in force in Libya which provide for broad immunities for the armed and security forces.

Moreover, 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. Military tribunals should not be used to try civilians or for cases involving gross human rights violations or crimes under international law.

The PA should include provisions which commit to ensuring full and effective civilian oversight and control over, as well as accountability of, the security and armed forces. Such oversight may be achieved by providing for a clear legal framework which defines and limits their role to national defence and law enforcement activities, and excludes any influence or interference over or in the political process.

The PA should also include provisions which commit to ensuring that military courts do not have jurisdiction over civilians, and that their jurisdiction is limited to cases involving military personnel for alleged breaches of military discipline, and excluding crimes under international law committed by members of the armed and security forces.

In developing such provisions, importance ought to be given by the Libyan authorities to ensuring:

- the accountability of the armed and security forces and their effective subordination to a legally constituted civilian authority;
- that the role of the armed forces is adequately defined in the Constitution and related framework and specifically limited to matters of national defence only;

- that the Ministry of Defence is under the authority of a civilian, democratically elected leadership;
- the appropriate vetting of any armed groups' members integrated into State institutions, in order to prevent the recruitment of persons responsible for human rights abuses and violations of international humanitarian law;
- the functional independence and impartiality of military tribunals and that their functioning is in accordance with international fair trial standards; and
- that military courts do not have jurisdiction over cases concerning civilians who are either alleged perpetrators or victims, nor jurisdiction over crimes under international law committed by the military or armed forces.

(iii) The right of Libyans to take part in the conduct of public affairs

A Consolidated Draft Constitution was adopted on 29 July 2017 by the Constitutional Drafting Assembly, however it is yet to be approved by way of referendum. The political process is intended to provide a framework for the organization of the next parliamentary and presidential elections.

This process and the resulting PA should enshrine the right of Libyans to take part in the conduct of public affairs. Under international standards, this right includes the right of citizens to freely determine their political status, to choose the form of their constitution and government, and to decide public issues through a referendum, representatives or another electoral process.

The PA should include provisions which commit to conducting the constitutional-making process with full inclusiveness and under conditions allowing full freedom of debate, including with a view to ensuring full compliance with the international rule of law and human rights standards, transparency in all stages of the constitutional drafting and adoption process, and the effective and meaningful participation of all relevant actors, including representatives of opposition parties and the full range of civil society representatives.

Particular measures ought to be provided for to ensure that all stakeholders, including sections of the population who have been marginalised, such as ethnic minorities and women, are guaranteed an adequate opportunity to participate and take part in the conduct of public affairs, including in the context of the next presidential and parliamentary elections.

(iv) The Separation of powers

Providing for the separation of powers in the PA and the Libyan Constitution is essential to ensure the promotion and protection of human rights and adherence to the rule of law in Libya. After more than four decades of authoritarianism and abusive use of the executive power under the Gadhafi regime, an independent judiciary and the effective parliamentary oversight of the executive are a *sine qua non* for a rule of law-based State. The power of judicial review over all legislative and executive acts should be enshrined in both the PA and the Constitution.

The PA should include provisions which commit to ensuring the separation of powers as a cardinal safeguard against the recurrence of authoritarianism and repression in Libya. This should be achieved through enshrining a clear attribution of competencies and checks and balances between the legislature, the executive

and the judiciary, and expressly recognizing and guaranteeing the power of judicial review over all legislative and executive acts.

In developing such provisions, importance ought to be given by the Libyan authorities to:

- fully embedding the rule of law in the framework for the functioning of the State, including by ensuring the clear separation of powers, attribution of competencies and checks and balances between the legislature, the executive and the judiciary;
- enshrining the power of judicial review over all legislative and executive acts;
- clearly and unambiguously recognizing the primacy of the Constitution over all other aspects of domestic law, and ensuring that these aspects are adopted and implemented in full compliance with the Constitution;
- asserting the primacy of international law over domestic law by unequivocally stating that internal law, including the Constitution, cannot be used as a justification for non-compliance with human rights conventions and treaties ratified by Libya.

(v) The independence of the judiciary

The trust of Libyans in public institutions, including the judiciary, has significantly eroded after long periods of conflict, political instability and the decades of the Gadhafi dictatorship. Restoring trust in the judiciary is fundamental to the re-establishment of the rule of law and for ensuring accountability for human rights abuses. To achieve this objective, Libya must fully comply with its obligations under international law to respect and protect the independence of the judiciary, including by ensuring that the High Judicial Council (HJC) is designed and established to manage and regulate the careers of judges from training to appointment, promotion to discipline, and tenure to retirement. Libya should also ensure that the HJC functions independently and acts as a crucial check against the risk of executive control over and interference in the work of the judiciary.

Prosecutors should also be able to carry out their functions independently, impartially and objectively, in defence of and in a manner which respects human rights. Under Libyan law, the Office of the Prosecutor-General is considered to be a judicial body, yet certain provisions continue to grant the Minister of Justice particular powers to give instructions to prosecutors. The Libyan authorities should ensure a clearer division between judges and prosecutors in law and practice, recognizing their distinct roles and independence from one another. The authorities should also ensure that no executive power be exercised over the prosecution, including that instructions from the executive to the prosecutor not to prosecute, should be prohibited.

The PA should include provisions which commit to safeguarding the independence, impartiality and accountability of the judiciary, including by ensuring that: the HJC is institutionally, economically, and administratively independent and is fully responsible for managing the career of judges, including their appointment, selection, tenure, promotion, transfer, and discipline; criteria and procedures for managing the career of judges is in line with international law and standards; and the HJC is consulted in respect of all matters relating to the judiciary, including judicial reforms.

The PA should also include a commitment to ensuring the independence and autonomy of prosecutorial authorities, including with a view to increasing public confidence in the prosecution's ability to investigate and prosecute cases of abuse of power and serious human rights violations.

In developing such provisions, importance ought to be given by the Libyan authorities to:

- setting out fair and transparent procedures for the selection of trainee judges, the appointment of all judges and to expressly prohibiting discrimination on any status grounds in such process;
- ensuring specific training for investigators, prosecutors and judges on addressing cases of gross human rights violations and combating impunity;
- requiring consultation with and consent of a judge before any judicial 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;
- providing 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;
- affirming and guaranteeing a clear separation between the role and functions of judges and prosecutors;
- removing the hierarchical authority of the Minister of Justice over the Prosecutor's Office, including the ability to control and direct prosecutions over specific cases, and revoking the power of the Minister of Justice to authorize or initiate prosecutions in specific crimes;
- ensuring that prosecutors guarantee the protection of human rights and the right to fair trial in all proceedings within their mandate;
- providing for a HJC that is composed of a majority of judges, excluding representatives from the executive, and that judges from all courts are entitled to participate in the election of members to the HJC and to be represented in it;
- providing, in relation to the composition of the HJC, for a pluralistic and representative membership and, in particular, substantial gender representation with a view ultimately to achieving gender parity; and
- providing that all authorities, in particular the Parliament and the Government, are required to consult the HJC and to consider its opinion on all matters relating to the judiciary, including judicial reforms.

II. Upholding Human Rights

Under international law, Libya is bound by the provisions of the human rights treaties it has ratified and must perform its obligations under these treaties in good faith. It must take the necessary steps to give effect within its domestic legal order to the rights recognized in human rights treaties, including through the adoption of a comprehensive Bill of Rights.

The Libyan authorities should also ensure that the protection of rights and liberties in the Draft Constitution and relevant laws conform, at a minimum, to the definition and scope of the rights contained within the treaties duly ratified by Libya. Any scope for limitation of a right under the Draft Constitution should not exceed the permissible scope for limitation under international law. Limitations must be lawful, reasonable and capable of being demonstrably justified in a democratic society. Limitations also should be clear, accessible and not be arbitrary.

The Libyan authorities should also recognize each of the non-derogable rights, including, among others, the right to life, the right to be free from torture or other ill-treatment, the right not to be subject to enforced disappearance, aspects of the right to a fair trial, the

application of the principle of legality, and the right to challenge the lawfulness of detention (*habeas corpus*).

Any provisions which purport to subjugate human rights protections in the Draft Constitution to religious laws or prescriptions are incompatible with Libya's obligations under international law and should, therefore, be removed or substantively amended.

The PA should include provisions which commit to the development and adoption of a comprehensive Bill of Rights that complies with Libya's obligations under international human rights law and with universally recognised human rights standards. This involves including a comprehensive general anti-discrimination clause, covering at least all the grounds covered by the conventions ratified by Libya; strong protections for minorities, including by asserting their rights to enjoy their own culture and to use their own language and to participate in public life and in the conduct of public affairs; an absolute prohibition of torture and other cruel, inhuman or degrading treatment or punishment; and an explicit and absolute prohibition of slavery, servitude, and arbitrary deprivation of life.

In developing such provisions, importance ought to be given by the Libyan authorities to:

- including a comprehensive section on rights that complies with Libya's obligations under international human rights law and with universally recognized human rights standards;
- expressly providing that, should any conflict arise between provisions of the Constitution in their interpretation and application, the provision or interpretation providing for the greater protection of rights should always take precedence;
- ensuring that any scope for the limitation of rights conforms to the criteria for such limitations under international law; and
- specifically recognizing each of the non-derogable rights, including, among others, the right to life, the right to be free from torture or other ill-treatment, the right not to be subject to enforced disappearance, aspects of the right to a fair trial, the application of the principle of legality, and the right to challenge the lawfulness of detention (*habeas corpus*), as being rights from which no derogation is accepted, including in times of emergency.

III. Ensuring accountability for crimes under international law

The upsurge in hostilities in Libya since April 2019 has highlighted the devastating impact that impunity for crimes under international law committed by State actors and armed groups has engendered. Civilians taking no part in hostilities are being displaced *en masse*, unlawfully killed and subject to other violations of international humanitarian law (IHL) and gross human rights violations, including indiscriminate attacks against civilians and civilian objects, arbitrary detention, torture and ill-treatment, enforced disappearance, enslavement, and rape and other acts of sexual violence. Despite the scale and magnitude of such violations and abuses, only a handful of investigations and prosecutions have been undertaken, resulting in a situation of near total impunity.

(i) Penalization, investigation and prosecution of crimes under international law

The Libyan legal framework does not adequately penalize crimes under international law. Crimes against humanity and war crimes are not penalized under Libyan law at all. The definitions of torture and other serious cruel, inhumane or degrading treatment or

punishment, enforced disappearance, some forms of arbitrary deprivations of life, rape and other forms of sexual violence, and slavery are also inconsistent with definitions under international treaty and customary law binding on Libya. The definition of superior responsibility is also inconsistent with the definition under customary international law.

The PA should include provisions which commit to the penalization of crimes under international law and related modes of liability consistent with international law and standards; the independent investigation and effective prosecution of past and ongoing crimes under international law perpetrated by all State and non-State actors in Libya; and the adjudication of such crimes before ordinary, civilian courts in accordance with international fair trial standards, including the right to legal counsel, the right to challenge the lawfulness of detention, the right to adequate time and facilities to prepare a defence, and the right to appeal.

The PA should also include provisions which enshrine a duty on the State to implement appropriate measures that comply with international standards on the right to truth, justice, reparation and guarantees of non-recurrence. Such provisions may include the establishment of a transitional justice mechanism that can lead to the uncovering of the truth about past and ongoing serious human rights violations, the prosecution of those responsible of such violations, and the provision of victims with effective remedies and reparation.

In developing such provisions, importance ought to be given by the Libyan authorities to:

- penalizing war crimes and crimes against humanity, and defining torture and other serious acts of cruel, inhuman or degrading treatment or punishment, enforced disappearance, arbitrary deprivations of the right to life, including extrajudicial, arbitrary and summary executions, rape and other forms of sexual and gender-based violence, and slavery consistently with international law.
- ratifying or acceding to the International Convention for the Protection of all Persons from Enforced Disappearance, the Optional Protocol to the Convention against Torture, the Second Optional Protocol to the International Covenant on Civil and Political Rights, the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, the Optional Protocol to the Convention on the Rights of the Child on communications procedure and the Optional Protocol to the Convention on the Rights of Persons with Disabilities;
- amending the Code of Criminal Procedure to ensure that the fair trials rights of the accused are upheld in accordance with the recommendations contained in the ICJ's 2019 report, including by ensuring that the right to and participation of legal counsel from the moment of arrest, as well as the rights to *habeas corpus*, adequate time and facilities to prepare a defence, presence at trial, appeal errors of law are all upheld, and the use of information and evidence obtained or extracted through torture or ill-treatment as evidence is prohibited at trial;
- preventing that evidence gathered by members of armed groups, who are not independent, impartial and competent authorities, be improperly relied upon during investigations and trials.
- introducing institutional and legislative reforms to ensure the protection of victims and witnesses at trial.

(ii) Amnesties, immunities and defences applying to crimes under international law

Currently, a web of amnesties, immunities and defences continue to pose significant barriers to accountability in Libya. The amnesty laws adopted in 2012 and 2015 raise concerns in terms of accountability of perpetrators insofar as they do not exclude certain crimes under international law from their scope of application. Immunities and defences included in the Penal Code also exclude criminal liability of public officials without providing exceptions with respect to crimes under international law.

The PA should include provisions committing to explicitly and absolutely prohibiting amnesties, immunities and defences in cases of crimes under international law committed by State and non-State actors, and which amend or repeal laws necessary to give effect to such a prohibition.

In developing such provisions, importance ought to be given by the Libyan authorities to:

- amending or repealing Law No. 35 of 2012, Law No. 38 of 2012 and Law No. 6 of 2015 to exclude crimes under international law from the scope of the amnesties;
- excluding the defence of superior orders for manifestly unlawful orders;
- providing for the criminal liability of public officials responsible for crimes under international law in the performance of their duties.

(iii) Victims' right to an effective remedy and reparation

The right to an effective remedy and reparation is a general principle of law. It obliges the responsible State to provide an effective remedy to victims or their next of kin by ensuring that they have access to a competent body to file a claim and to adequate reparation for the harm suffered. Libyan law does not provide a duty of the State to provide redress for crimes under international law for which it is responsible, therefore failing to comply with international law. The amnesty laws fail to provide for satisfaction, rehabilitation and guarantees of non-repetition as forms of reparation. Further, Law No. 38 of 2012 bars civil proceedings against persons who have unlawfully and arbitrarily deprived former Gadhafi-era officials of their liberty.

The PA should include provisions which commit to ensuring effective remedies for victims of crimes under international law, including full and adequate reparation, in all its forms, by the State.

In developing such provisions, importance ought to be given by the Libyan authorities to:

- ensuring the right of victims to claim reparations against the State;
- precluding that amnesty laws bar (i) effective access to satisfaction, rehabilitation and guarantees of non-repetition, and (ii) civil claims against persons who have unlawfully deprived former Gadhafi-era officials of their liberty;
- amending other laws and policies granting compensation so that they require an assessment of whether the award is proportionate to the gravity of the violation, and to ensure they do not bar effective access to satisfaction, rehabilitation, restitution and guarantees of non-repetition.