

# Impunity No More

## A Roadmap to Strengthening Transitional Justice in Libya



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International Commission of Jurists  
P.O. Box 91  
Rue des Bains 33  
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Ministry of Foreign Affairs of the  
Netherlands

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## 1. Introduction

Libya has experienced decades of authoritarian rule in defiance of the rule of law under the regime of Muammar Gadhafi. The systematic and widespread human rights violations and abuses committed during that period, and following the 2011 uprising which toppled it, has left Libyan society in desperate need of truth, justice, reparation, reconciliation and rule of law reform. The Libyan National Transitional Council recognized the need to establish a legal and institutional framework for transitional justice, enacting *Law No. 17 of 2012 on the rules of national reconciliation and transitional justice* and then *Law No. 29 of 2013 on transitional justice*. Parties to the Libyan Political Agreement (LPA) of 2015 committed to “work towards the implementation of Law No. 29 of 2013.”<sup>1</sup> However the LPA was not implemented and the transitional justice process, including Law No. 29 of 2013, followed suit.

Gross human rights violations and abuses and serious violations of international humanitarian law (IHL) in Libya continue to be committed on a widespread and systematic basis by State and non-State actors,<sup>2</sup> with almost total impunity. In the absence of a transitional justice process, and in the context of political and territorial fragmentation and an increasingly volatile security environment, the justice system remains unable to ensure effective accountability for such violations, both in terms of its capacity and in terms of the legal framework which governs it. Investigations and prosecutions of crimes under international law by Libyan authorities have been limited to a handful of cases in which the accused’s fair trial rights were often violated, and substantial reforms to the legal framework are required to ensure fair and effective justice in future cases.<sup>3</sup> Notably, the Libyan authorities are unable to hold perpetrators of crimes against humanity and war crimes responsible because Libyan law does not penalize them.<sup>4</sup>

Participants in the Berlin Conference on Libya, held on 19 January 2020 to renew the stalled political process in Libya, encouraged the Libyan authorities to “further proceed with strengthening transitional justice,”<sup>5</sup> even though accountability for crimes has not been a central feature in these or ongoing discussions. This reflects the compartmentalization that has characterized approaches to solving the Libyan quagmire over the last nine years, with the need for a political agreement in one corner and the need for accountability in another. Time has shown that overlooking the necessity for justice in the interests of “peace” has compromised both justice and peace. The main objectives of transitional justice – ensuring accountability and serving justice<sup>6</sup> – are instrumental to achieving stabilization in Libya, including through incorporation into the political process.

This briefing paper, therefore, seeks to contribute to a series of analyses and recommendations by the International Commission of Jurists (ICJ) on domestic reforms necessary to ensure accountability for human rights violations or abuses and IHL violations in Libya. The ongoing armed conflict and fragmentation between the executive and legislative bodies does not make the situation ripe for legislative reform at the present time. However, improving the current transitional justice framework and providing for appropriate laws and institutional structures is necessary to ensure compliance with Libya’s obligations under international law and to provide for a sound platform for reform when this becomes possible.

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<sup>1</sup> United Nations Support Mission to Libya (UNSMIL), *Libyan Political Agreement*, 17 December 2015, art. 26(5).

<sup>2</sup> *Report of the International Commission of Inquiry on Libya*, UN Doc. A/HRC/17/44, 12 January 2012, para. 251; *Report of the International Commission of Inquiry on Libya*, UN Doc. A/HRC/19/68, 28 January 2014, para. 120; UNSMIL & OHCHR, *Abuse Behind Bars: Arbitrary and Unlawful Detention in Libya*, April 2018; UNSMIL & OHCHR, *Desperate and Dangerous: Report on the Human Rights situation of Migrants and Refugees in Libya*, December 2018; UNSMIL & OHCHR, *Torture and Deaths in Detention in Libya*, October 2013; UNSMIL & OCHR, *The Airstrikes on the Daman Building Complex, including the Tajoura Detention Centre*, 2 July 2019, February 2020; Human Rights Watch, *World Report 2020: Libya*, pp. 359-366.

<sup>3</sup> ICJ, *Accountability for Serious Crimes under International Law in Libya: An Assessment of the Criminal Justice System*, July 2019, pp. 73 ff.

<sup>4</sup> *Ibid.*, pp. 45-47. See section 2.1.1 below for further discussion.

<sup>5</sup> Berlin Conference Conclusions, 19 January 2020, available at <https://www.bundesregierung.de/breg-de/aktuelles/the-berlin-conference-on-libya-1713868>, para. 50.

<sup>6</sup> *The rule of law and transitional justice in conflict and post-conflict societies*, Report of the Secretary-General, UN Doc. S/2004/616, 23 August 2004, para. 8. See also *United Nations Approach to Transitional Justice*, Guidance Note of the Secretary-General, March 2010.

Under international law and standards, transitional justice should be grounded on three elements: (i) accountability for crimes under international law; (ii) the right to truth; and (iii) the right to a remedy and reparation.<sup>7</sup>

Accountability requires States to ensure that crimes under international law are also made crimes in their domestic systems, to investigate those crimes effectively and, if sufficient evidence exists, pursue prosecution in accordance with international fair trial standards.<sup>8</sup> The right to truth entitles victims of human rights violations or abuses, their families, and the society as a whole, to know the truth and obtain information, clarification and disclosure of the facts about such violations and their perpetrators.<sup>9</sup> To this end, States may establish truth commissions or other mechanisms to investigate such violations and abuses and preserve evidence.<sup>10</sup> The right to an effective remedy and reparation guarantees access to an independent and impartial body, with a view to obtaining a recognition of the violation, cessation of the violation if it is continuing, and adequate reparation for the harm suffered, including compensation, rehabilitation, restitution, satisfaction and guarantees of non-repetition.<sup>11</sup>

In this briefing paper, the ICJ analyzes shortcomings in the current legal framework governing transitional justice in Libya in these three areas, and makes concrete proposals to ensure that it is brought in line with international law and standards. This paper is focussed primarily on Law No. 29 of 2013, but addresses other Libyan laws intersecting with or relevant to transitional justice.

Law No. 29 of 2013 establishes mechanisms which aim to ensure perpetrators of “the grave and systematic violations of fundamental rights and freedoms to which Libyans were subjected by the state apparatuses under the [Gadhafi] regime” are held accountable, the disclosure of the truth about such violations, institutional and legal reform, and reparations for victims.<sup>12</sup> The principal mechanism is the Fact-Finding and Reconciliation Commission (FFRC), which is divided into six departments, each working on a different aspect of the transitional justice process. The FFRC is headed by an Administrative Board composed of nine members appointed by the legislative assembly. Appointment to the FFRC is subject to Law No. 13 of 2011 on political and administrative isolation,<sup>13</sup> a lustration measure targeting persons who worked in the State apparatus under the Gadhafi regime.<sup>14</sup>

Law No. 29 of 2013 entrusts the FFRC with a number of tasks, among which are conducting investigations into “grave and systematic human rights violations” and referring cases for prosecution; publishing reports and making recommendations; establishing the facts and disclosing the truth with regard to such violations; determining reparations for victims; and awarding amnesties.<sup>15</sup>

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<sup>7</sup> ICJ, *Achieving Justice for Gross Human Rights Violations in Tunisia – A Baseline Study*, 2018, pp. 7-9.

<sup>8</sup> *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 1465 UNTS 85, 10 December 1984 (CAT) (Libya acceded on 16 May 1989), arts. 4, 7, 12-13; *International Convention for the Protection of All Persons from Enforced Disappearance*, 2716 UNTS 3, 20 December 2006 (ICPPED) (Libya is not yet party to this treaty), arts. 4, 11-12; *Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity*, UN Doc. E/CN.4/2005/102/Add.1, 8 February 2005, principle 19; *General Comment No. 31: Nature of the General Legal Obligation on States Parties to the Covenant*, UN Doc. CCPR/C/21/Rev.1/Add.13, 26 May 2004, paras. 15, 18; ICJ, *The Investigation and Prosecution of Potentially Unlawful Death*, Practitioners’ Guide No. 14, June 2019, pp. 51-62, 113-116.

<sup>9</sup> *Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity*, principle 2; ICJ, *The Right to a Remedy and to Reparation for Gross Human Rights Violations*, Practitioners’ Guide No. 2, October 2018, p. 130. While the right to truth is explicitly included in article 24(2) of the ICPPED, it applies to all serious human rights violations; Human Rights Committee (HRC), *Concluding Observations: Guatemala*, UN Doc. CCPR/C/79/Add.63, 3 April 1996, para. 25; *Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity*, principles 2-5.

<sup>10</sup> *Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity*, principle 5.

<sup>11</sup> *International Covenant on Civil and Political Rights*, 999 UNTS 171, 16 December 1966 (ICCPR) (Libya acceded on 15 May 1970), art. 2(3); *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, UN Doc. A/RES/60/147, 16 December 2005, paras. 11, 15-23; Human Rights Committee, *General Comment No. 31*, paras. 15-16.

<sup>12</sup> Law No. 29 of 2013, arts. 1, 4-5.

<sup>13</sup> Law No. 29 of 2013, arts. 10, 12.

<sup>14</sup> See section 2.2.1 below.

<sup>15</sup> Law No. 29 of 2013, art. 7.

**Based on the analysis contained in this paper, the ICJ calls on Libyan authorities to amend Law No. 29 of 2013 or amend or enact other Libyan laws to:**

- **Grant the FFRC jurisdiction over all gross human rights violations or abuses and serious IHL violations, including those constituting crimes under international law, committed by State and non-State actors, and ensure crimes under international law are defined and penalized in domestic law in line with international law and standards;**
- **Set out conditions upon which amnesty may or may not be granted, which should ensure that all those responsible for crimes under international law are never subject to grants of amnesty;**
- **Ensure that the victims, their next of kin and other affected persons and those allegedly responsible can participate in a transparent and public truth-seeking process, subject to restrictions necessary for and proportionate to reasonable security and privacy concerns;**
- **Ensure immunities and statutory limitations do not apply to crimes under international law;**
- **Strengthen the independence, impartiality and competence of the FFRC, as well as the publicity of its work;**
- **Clarify the relationship between FFRC investigations and the general criminal justice framework, and ensure that the FFRC has all necessary investigative powers to carry out its mandate and complies with international law and standards governing the rights of the accused and victims, in particular where its investigations substitute those under the general criminal justice framework;**
- **Ensure the transparency of, and public participation in, the transitional justice process, including by notifying the public of investigations being undertaken by the FFRC and holding public hearings, subject to restrictions necessary for and proportionate to reasonable security and privacy concerns;**
- **Safeguard the right of victims and their families to obtain full disclosure of the FFRC's findings and access to all relevant information, including through the publication of FFRC reports;**
- **Provide adequate protection to victims and witnesses, FFRC members and alleged perpetrators; and**
- **Guarantee full and adequate reparation to victims of gross human rights violations or abuses and serious IHL violations, as well as to their families, including compensation, restitution, satisfaction, rehabilitation and guarantees of non-repetition.**

There are two important points to finally note. First, the reforms required for Law No. 29 of 2013 to meet international law and standards and the objectives of transitional justice are so extensive that the best solution may be to repeal and replace it with a new law. This may have been the impetus behind article 180 of the Consolidated Draft Constitution, not yet adopted, which requires the State to issue a law "regulating the uncovering of the truth and compensation of damages, accountability, responsibility, and the examination of institutions" and form a "body for transitional justice and reconciliation,"<sup>16</sup> without reference to existing laws. Nevertheless, this paper identifies numerous shortcomings of Law No. 29, and formulates recommendations to address them that can serve either for reforming it or for developing a new law.

Second, this briefing paper addresses the reforms required to be made to the Law without regard to the possible existence of regulations that may be issued under the powers accorded to the FFRC

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<sup>16</sup> 2017 Consolidated Draft Constitution, art. 180. Article 181 goes on to state: "A body for transitional justice and reconciliation shall be established and the law shall determine its formation, so as to ensure impartiality, independence, and efficiency. The law shall also regulate the term of the body. The body shall design and implement programs of transitional justice in the framework of comprehensive national reconciliation."



Administrative Board which it establishes.<sup>17</sup> Were such regulations to be issued, where appropriate, they could address some of the issues raised in this briefing paper.

## 2. Accountability for crimes under international law

Law No. 29 of 2013 does not provide for accountability for all crimes under international law committed in Libya during the Gadhafi era and the period following the 2011 uprising. The scope of application of Law No. 29 of 2013 is too narrow, and the role of the FFRC in ensuring accountability for crimes under international law too weak. The Law fails to include all crimes under international law and define them in accordance with international law and standards. It also fails to ensure that amnesties, immunities and statutory limitations cannot apply to them. Further, the independence, impartiality and competence of the FFRC is not guaranteed; its role in the general criminal justice framework and, in particular, in substituting criminal investigations ordinarily carried out by the Prosecutor or investigating judge is unclear; its investigative powers are too limited; and its reliance on traditional and customary forms of justice are not subject to due process requirements.

### 2.1. Narrow scope of application of the transitional justice law

#### 2.1.1. Failure to include all crimes under international law and define them accordingly

Law No. 29 of 2013 fails to ensure that all crimes under international law are governed by the transitional justice process and that they are penalized in accordance with international law. Libya has an obligation to investigate and, if sufficient evidence exists, prosecute and punish crimes under international law,<sup>18</sup> namely gross human rights violations and abuses and serious IHL violations,<sup>19</sup> which include, among others, torture and other serious forms of cruel, inhuman or degrading treatment or punishment (ill-treatment),<sup>20</sup> enforced disappearance,<sup>21</sup> arbitrary deprivation of life,<sup>22</sup> rape and other forms of sexual and gender-based violence,<sup>23</sup> slavery,<sup>24</sup> war crimes<sup>25</sup> and crimes against humanity.<sup>26</sup>

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<sup>17</sup> Law No. 29 of 2013, art. 11(2).

<sup>18</sup> *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, para. 4; *Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity*, definition B. Certain serious human rights violations, such as prolonged arbitrary detention or deliberate and systematic deprivation of health care, do not necessarily amount to crimes under international law.

<sup>19</sup> As the ICJ noted, "[a]lthough not formally defined in international law, 'gross violations' and 'serious violations' denote types of violations that affect in qualitative and quantitative terms the most basic rights of human beings, notably the right to life and the right to physical and moral integrity of the human person;" ICJ, *The Right to a Remedy and to Reparation for Gross Human Rights Violations*, Practitioners' Guide No. 2, October 2018, p. xii. The ICJ uses the term "crimes under international law" to refer to serious crimes arising from gross human rights violations and abuses and serious IHL violations, as identified in standards such as the *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, *Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity*, the *Rome Statute of the International Criminal Court*, ICCPR, CAT, and ICCPED, among others.

<sup>20</sup> CAT, arts. 2, 4.

<sup>21</sup> Libya is not party to the ICCPED. However, it is party to the ICCPR, which imposes a duty on Libya to criminalize, investigate, prosecute, punish, and provide reparation and remedies for acts of enforced disappearance; Human Rights Committee, *General Comment No. 31*, paras. 15, 18; *Boucherf v. Algeria*, UN Doc. CCPR/C/86/D/1196/2003, 27 April 2006, para. 9.2.

<sup>22</sup> *Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions*, UN Doc. E/1989/89, January 1991, principle 1; Human Rights Committee, *General Comment No. 36: Article 6 (The Right to Life)*, UN Doc. CCPR/C/GC/36, 30 October 2018, paras. 18-20; African Commission on Human and Peoples' Rights, *General Comment No. 3: The Right to Life (Article 4)*, 57th Ordinary Session, 4-18 November 2015, paras. 7, 10.

<sup>23</sup> *Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol)*, 11 July 2003 (Libya acceded on 23 May 2004), art. 2(a); Committee on the Elimination of Discrimination against Women, *General Recommendation No. 30: Women in Conflict Prevention, Conflict and Post-Conflict Situations*, UN Doc. CEDAW/C/GC/30, 18 October 2013, para. 38(a).

<sup>24</sup> ICCPR, art. 8; League of Arab States, *Arab Charter on Human Rights*, 22 May 2004 (Arab Charter) (Libya ratified on 7 August 2006), art. 10; *Slavery Convention*, 60 UNTS 254, 25 September 1926 (Libya acceded on 14 February 1957), arts. 2, 6-7; *Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery*, 266 UNTS 3, 7 September 1956 (Libya acceded on 16 May 1989), art. 1.

<sup>25</sup> *Convention relative to the Protection of Civilian Persons in Time of War*, 75 UNTS 287, 12 August 1949 (GC IV) (Libya acceded on 15 May 1956), arts. 146-147; *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts*, 1125 UNTS 3, 8 June 1977 (AP I) (Libya acceded on 7 June 1978), art. 85; ICRC Customary IHL Database, rule 158.

<sup>26</sup> Human Rights Committee, *General Comment No. 31*, paras. 15, 18. Crimes against humanity are also prohibited under international customary law; Inter-American Court of Human Rights, *Goiburú et al. v. Paraguay*, Series C No. 153, 22 September 2006, para. 128.

Law No. 29 of 2013 provides that the transitional justice process applies to “the grave and systematic violations of fundamental rights and freedoms to which Libyans were subjected by the state apparatuses under the former regime.” Grave and systematic violations are defined as:

...a violation of human rights through killing, abduction, physical torture, or the confiscation or destruction of funds, if committed as the result of an order issued by a person acting with a political motive, as well as breaches of fundamental rights that result in severe physical or moral repercussions.<sup>27</sup>

The scope of this definition is problematic because: (i) it does not definitively include all crimes under international law, risking impunity for such crimes; and (ii) the listed crimes, as well as other crimes under international law, are not defined in accordance with international law and standards.

With respect to (i), the term killing may not include all forms of arbitrary deprivation of life, in particular arbitrary and summary executions; the term “abduction” does not equate to enforced disappearance as it does not require a public official to refuse to disclose the fate or whereabouts of the person concerned or acknowledge the deprivation of liberty;<sup>28</sup> “physical torture” is too narrow insofar as it does not include “any act or severe pain or suffering, whether physical or mental;”<sup>29</sup> and it is unclear whether “breaches of fundamental rights that result in severe physical or moral repercussions” includes all other crimes under international law – namely enforced disappearance, rape and other forms of sexual violence, slavery, war crimes and crimes against humanity – particularly given some underlying acts of crimes against humanity and some war crimes would not necessarily have “physical or moral repercussions,” and the scope of “moral repercussions” is vague.

With respect to (ii), Law No. 29 of 2013 does not, itself, define and penalize these crimes, such that regard must be had to domestic law to determine the applicable crime and penalty. As set out in the ICJ’s report, *Accountability for Serious Crimes under International Law in Libya*, domestic law definitions of arbitrary deprivations of life, torture, “forced disappearance,” rape and other forms of sexual and gender-based crimes, and slavery are not compliant with the definitions under international law, and accordingly exclude conduct that Libya is obligated to penalize. Moreover, war crimes and crimes against humanity are not penalized at all.<sup>30</sup>

Where domestic law is deficient, the courts may have regard to crimes prescribed under international law at the time they were committed without violating the principle of legality and non-retroactivity.<sup>31</sup> However, in the absence of the legal basis for doing so, such an approach may violate the accused’s right to a fair trial.<sup>32</sup>

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<sup>27</sup> Law No. 29 of 2013, art. 2.

<sup>28</sup> ICPPED, art. 2; *Declaration on the Protection of All Persons from Enforced Disappearance*, UN Doc. A/RES/47/133, 18 December 1992 (DPED), preamble. Enforced disappearance entails a violation of multiple rights protected by a number of treaties to which Libya is party; ICCPR, arts. 6, 7, 9, 16; DPED, art. 1(2); Human Rights Committee, *General Comment No. 31*, para. 18; *Boucherf v. Algeria*, UN Doc. CCPR/C/86/D/1196/2003, 27 April 2006, para. 9.2; Committee against Torture, *General Comment No. 2: Implementation of Article 2 by States Parties*, UN Doc. CAT/C/GC/2, 24 January 2008, para. 6.

<sup>29</sup> CAT, art. 1.

<sup>30</sup> ICJ, *Accountability for Serious Crimes under International Law in Libya: An Assessment of the Criminal Justice System*, July 2019, pp. 40-47.

<sup>31</sup> ICCPR, art. 15(2); Human Rights Committee, *Klaus Dieter Baumgarten v. Germany*, UN Doc. CCPR/C/78/D/960/2000, 31 July 20013, para. 9.4. See also ICJ, *Accountability Through the Specialized Criminal Chambers: The Adjudication of Crimes under Tunisian and International Law*, Practical Guide 1, December 2019, p. 19: “... the principle of non-retroactivity does not prevent a court from applying the definitions of crimes that applied under international law at the time when conduct occurred, even if national law did not at that time criminalize the conduct, or did not do so consistently with international law. Article 15(2) applies exclusively to conduct that constituted a crime under international law (such as torture, enforced disappearance, or crimes against humanity) and has no bearing on conduct that did not qualify as a crime under international law at the relevant time ... at the relevant time. For all conduct that was neither criminalized by international law nor national law at the time it occurred, article 15(1) requires that national courts abide by the principle of non-retroactivity.”

<sup>32</sup> *Ibid.*, pp. 23-26.

### **2.1.2. Inadequate basis for requiring that crimes be committed pursuant to an order**

The requirement that “grave and systematic human right violations” must be “committed as the result of an order issued by a person acting with a political motive” to fall with the scope of Law No. 29 of 2013 is also inconsistent with international law, which requires that perpetrators are held liable whether they are perpetrated pursuant to an order or on the basis of a political motive.<sup>33</sup> The ordering of a crime is a mode of liability under international criminal law, not an element of the crime. The political motive underlying criminal conduct may be an element of the crime against humanity of persecution,<sup>34</sup> but it is irrelevant to determining liability for other crimes under international law.

### **2.1.3. Ambiguity regarding application to non-State actors and the post-uprising period**

While the Law unambiguously applies to crimes committed by members of the Gadhafi regime, it lacks clarity regarding its application to crimes committed during and after the 2011 uprising by State and non-State actors. Article 1 provides that “transitional justice” means addressing violations committed “by the state apparatuses under the former [Gadhafi] regime,”<sup>35</sup> which article 4(3) confirms includes “individuals acting on its behalf.”<sup>36</sup> Article 1 also states that transitional justice shall include “some of the effects of the 17 February Revolution, specifically: 1. Positions and actions which led to ruptures in the social fabric; 2. Acts which were necessary to protect the revolution and which were marred by some behaviours that did not adhere to its principles.” Article 4(5) further provides that one of the Law’s objectives is the “[d]etermination of the responsibility of the state apparatuses or of any other parties for human rights violations.”

The references to “acts necessary to protect the revolution” and “any other parties” in articles 1 and 4(5) respectively, as well as a reference in article 8 requiring the FFRC to “conduct fact-finding into human rights violations committed following the fall of the Gaddafi regime,” appear to incorporate crimes committed by State and non-State actors during and after the 2011 uprising. However, the vagueness of “positions and actions which led to ruptures in the social fabric” and acts that were “marred by some behaviours that did not adhere to [the revolution’s] principles” leaves the question whether such acts fall within the definition of grave and systematic violations unanswered.

Immunity from prosecution for crimes under international law committed by State and non-State actors not aligned with the Gadhafi regime during and following the uprising directly contravenes Libya’s obligation to investigate crimes under international law.<sup>37</sup> Law No. 29 of 2013 requires amendment to ensure that crimes committed by both State and non-State actors preceding, during and following the uprising fall within the transitional justice process.

### **2.1.4. Amnesties for crimes under international law**

The intersection of Law No. 38 of 2012 with Law No. 29 of 2013 could also provide a basis for immunizing State and non-State actors for crimes committed during and after the 2011 uprising. Law No. 38 provides that “[t]here is no penalty for necessities of the 17 February Revolution in terms of military, security or civil acts carried out by revolutionaries to save or protect the revolution.”<sup>38</sup> Law No. 38 of 2012 is recalled in the preamble of Law No. 29 of 2013, however the relationship between the two is not expressly regulated in the Law and therefore remains unclear.

<sup>33</sup> *Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity*, principle 8.

<sup>34</sup> *Rome Statute of the International Criminal Court*, 2187 UNTS 3, 17 July 1998, art. 7(1)(h).

<sup>35</sup> Law No. 29 of 2013, art. 1.

<sup>36</sup> Article 8 also requires the FFRC to establish a department to investigate “human rights violations of a public and collective nature committed in the era of the former regime” as well as “individual violations.” The phrase “public and collective nature” has no equivalent in international law and is unclear.

<sup>37</sup> Human Rights Committee, *General Comment No. 36*, para. 21; African Commission on Human and Peoples’ Rights, *General Comment No. 3*, para. 9; Committee against Torture, *General Comment No. 2*, para. 18. See also ICJ, *Accountability for Serious Crimes under International Law in Libya: An Assessment of the Criminal Justice System*, July 2019, pp. 55-56.

<sup>38</sup> Law No. 38 of 2012 on some Procedures concerning the Transitional Phase, art. 4.

Moreover, the phrase “acts carried out by revolutionaries to save or protect the revolution” is subject to political considerations which should be irrelevant to a determination of criminal liability.

In addition, Law No. 35 of 2012 pardons certain crimes committed between 15 February 2011 and 2 May 2012, except (i) crimes committed by the next of kin and assistants of Ghaddafi; (ii) so-called *hudud* crimes – specific acts criminalized under Islamic law – when referred to the judiciary; (iii) kidnapping, torture and forced intercourse crimes; and (iv) drug trafficking.<sup>39</sup> A third amnesty law, Law No. 6 of 2015, which was issued by the House of Representatives (HoR) in 2015 and purportedly repealed Law No. 35 of 2012, grants a “general amnesty to all Libyans” for crimes committed from 15 February 2011 until 7 September 2015,<sup>40</sup> except for (i) terrorism; (ii) drug trafficking; (iii) sexual crimes; (iv) murder, abduction, forced disappearance and torture; (v) *hudud* crimes,<sup>41</sup> when reported; and (vi) corruption and corruption-related crimes.

As for the potential exclusion of State and non-State actors from the scope of Law No. 29 of 2013, blanket amnesty for crimes under international law provided for by these laws contravenes Libya’s obligation to investigate crimes under international law committed by State and non-State actors.<sup>42</sup>

Under international law and standards, such amnesties are forbidden. Principle 24 of the UN Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity, recommended to all States by the UN Human Rights Commission in 2005, states that:

Even when intended to establish conditions conducive to a peace agreement or to foster national reconciliation, amnesty and other measures of clemency shall be kept within the following bounds ... [t]he perpetrators of serious crimes under international law may not benefit from such measures until such time as the State has met the obligations to which principle 19 refers or the perpetrators have been prosecuted before a court with jurisdiction - whether international, internationalized or national - outside the State in question.

Principle 19 requires that:

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

The provision of amnesties for crimes under international law would constitute a violation of Libya’s obligations under the International Covenant on Civil and Political Rights (ICCPR). The UN Human Rights Committee has made this clear in relation to crimes under international law such as torture and similar ill-treatment, summary and arbitrary killing and enforced disappearance.<sup>43</sup> The African Commission on Human and Peoples’ Rights has declared that “an amnesty law adopted with the aim of nullifying suits or other actions seeking redress that may be filed by the victims or their beneficiaries [...] cannot shield that country from fulfilling its international obligations under the Charter.”<sup>44</sup> The African Commission also clearly held that “[t]he granting of amnesty to absolve

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<sup>39</sup> Law No. 35 of 2012 on the Amnesty of Particular Crimes, art. 1.

<sup>40</sup> Law No. 6 of 2015 on General Amnesty, arts. 1, 11.

<sup>41</sup> These are specific acts criminalized under Islamic law.

<sup>42</sup> *Prosecutor v. Saif al-Islam Gaddafi*, Case No. ICC-01/11-01/11, Pre-Trial Chamber I, Decision on the ‘Admissibility Challenge by Dr. Saif Al-Islam Gaddafi pursuant to Articles 17(1)(c), 19 and 20(3) of the Rome Statute’, 5 April 2019, paras. 61, 77; Human Rights Committee, *General Comment No. 31*, para. 18; *Hugo Rodríguez v. Uruguay*, UN Doc. CCPR/C/51/D/322/1988, 9 August 1994, para. 12.4; Inter-American Court of Human Rights, *Barrios Altos v. Peru (Merits)*, Series C No. 75, 14 March 2001, para. 41.

<sup>43</sup> Human Rights Committee, *General Comment No. 31*, para. 18; *General Comment No. 36*, para 27.

<sup>44</sup> African Commission on Human and Peoples’ Rights, *Malawi African Association et al v. Mauritania*, Communications Nos. 54/91, 61/91, 98/93, 164/97-196/97 and 210/98, 11 May 2000, para 83.

perpetrators of human rights violations from accountability violates the right of victims to an effective remedy.”<sup>45</sup>

Law No. 35 of 2012, Law No. 38 of 2012 and Law No. 6 of 2015 require repeal or reform to ensure that crimes under international law are not subject to amnesties or immunities.

### 2.1.5. Uncertain temporal scope

The temporal scope of Law No. 29 of 2013 is uncertain, and overly expansive. The Law applies “to events that occurred between 1 September 1969 and the end of the transitional period as of the election of the legislature based on the permanent constitution.”<sup>46</sup> Although the HoR was elected on 25 June 2014,<sup>47</sup> Libya does not yet have a permanent Constitution and the Constitutional Declaration of 2011, which was intended to govern the transitional period only,<sup>48</sup> remains in force.<sup>49</sup> Consequently, the Law applies to “gross and systematic human rights violations” committed from 1 September 1969 until now. Given the scale and magnitude of the gross human rights violations committed under the former regime and the violations that continue to be committed today in Libya by State and non-State actors, the Libyan authorities should ensure that the Law’s open timeframe does not undermine its objective to address the legacy of gross human rights violations and to facilitate a transition to the establishment of the rule of law. If such temporal scope is to be maintained, the FFRC should be provided with the necessary means, expertise and human resources to effectively carry out and complete its mandate.

### 2.1.6. Statutory limitations

The application of statutory limitations could also serve as a barrier to holding perpetrators of crimes under international law to account. Article 27 of Law No. 29 of 2013 prescribes that “[c]riminal proceedings for crimes committed before Law No. 11 of 1997 came into effect and which were committed for political, security, or military motives shall not be subject to the statute of limitations.” While article 1 of Law No. 11 of 1997 removed statutory limitations for crimes and criminal proceedings,<sup>50</sup> a Supreme Court decision has affirmed that the 10-year statutory limitation for felonies set by article 107 of the Penal Code still applies.<sup>51</sup> Such statutory limitation was applied by the Tripoli Appeals Court on 15 December 2019 to acquit the defendants in the *Abu Salim* case.<sup>52</sup> Such practices run counter to Libya’s obligations under international law, which prohibits statutory limitations for crimes under international law.<sup>53</sup> Principle 23 of the UN Impunity Principles

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<sup>45</sup> African Commission on Human and Peoples’ Rights, *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*, Doc. OS(XXX)247, 2003, principle C (d).

<sup>46</sup> Law No. 29 of 2013, art. 3.

<sup>47</sup> At present, Libya has two centres of power. One is the government of Abdullah al-Thinni – whose mandate is null and void under the LPA – which operates from the city of al-Bayda located in eastern Libya. The second is the Presidency Council, based in Tripoli since 2016, which presides over the internationally recognized Government of National Accord (GNA), headed by Fayez al-Serraj. According to the LPA, the HoR should endorse the GNA by ratifying the agreement, but it has refused to do so on a number of occasions. See ICJ, *Accountability for Serious Crimes under International Law in Libya: An Assessment of the Criminal Justice System*, July 2019, pp. 15-17.

<sup>48</sup> 2011 Constitutional Declaration, preamble: “The interim National Transitional Council has decided to promulgate this Constitutional Declaration in order to be the basis of governance in the transitional stage until a permanent Constitution is ratified in a popular referendum;” art. 34: “Constitutional documents and laws which were applicable before this Declaration entered into force shall be repealed.”

<sup>49</sup> The most recent Consolidated Draft Constitution (2017) has not been approved by way of referendum.

<sup>50</sup> Law No. 11 of 1997 adopting certain provisions pertaining to criminal cases and amending provisions of the Penal Code and the Code of Criminal Procedure, art. 1.

<sup>51</sup> Cited in American Bar Association Rule of Law Initiative, *Transitional Justice in Libya: Assessment of the Legal Framework*, 2018, p. 31.

<sup>52</sup> UNSMIL, *Report of the Secretary-General*, UN Doc. A/HRC/43/75, 23 January 2020, para. 67: “On 15 December, the Tripoli Appeals Court acquitted all defendants in the Abu Salim trial case relating to the massacre of 1,200 people in 1996, including former intelligence Abdullah Senussi. Five defendants who were acquitted died while on trial, while other defendants were acquitted on the basis of the statute of limitations, as contained in the Penal Code.”

<sup>53</sup> ICJ, *International Law and the Fight against Impunity*, Practitioners’ Guide No. 7, January 2015, pp. 363-372, 374, 378-384. Various international instruments provide for the exclusion of limitation periods; see *Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity*, 754 UNTS 73, 26 November 1968 (Libya acceded on 16 May 1989), art. 1; ICC Statute, art. 29; *Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity*, principle 23; *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, paras. 6-7. See also

makes clear that “[p]rescription [a form of which are statutory limitations] shall not apply to crimes under international law that are by their nature imprescriptible.”<sup>54</sup>

**In light of the above, the Libyan authorities should:**

- **Amend article 2 of Law No. 29 of 2013, the Penal code and related laws to:**
  - **Adequately define or criminalize arbitrary deprivation of life, torture and serious ill-treatment, enforced disappearance, rape and other forms of sexual and gender-based violence, slavery, war crimes and crimes against humanity in line with international law and standards;**
  - **Include all such crimes under international law within the Law’s scope of application;**
  - **Repeal the provision requiring violations to be “committed as the result of an order issued by a person acting with a political motive” to fall within the scope of the Law;**
- **Amend articles 1 and 4, as well as any other relevant articles, to ensure that gross human rights violations or abuses and serious IHL violations, including crimes under international law, committed by State and non-State actors during and following the 17 February uprising fall under the Law’s scope of application;**
- **Repeal or amend Law No. 35 of 2012, Law No. 38 of 2012 and Law No. 35 of 2015 to remove amnesties that apply to crimes under international law;**
- **Amend article 3 of Law No. 29 of 2013 to clearly define its temporal scope of application, and ensure that such a scope does not have the effect of defeating the Law’s objective of addressing the legacy of human rights violations; and**
- **Amend article 27 of Law No. 29 of 2013, as well as article 107 of the Penal Code, to remove any statutory limitations applying to crimes under international law.**

## **2.2. The establishment of the FFRC and its role in the criminal justice process**

### **2.2.1. Independence, impartiality and competence of the FFRC**

Law No. 29 of 2013 does not adequately guarantee the independence, impartiality and competence of the FFRC required under international law.<sup>55</sup> Where commissions of inquiry are established in transitional justice processes, they must be independent, impartial and competent. The basic standard is set out in Principle 7 of the UN Impunity Principles:

Commissions of inquiry, including truth commissions, must be established through procedures that ensure their independence, impartiality and competence. To this end, the terms of reference of commissions of inquiry, including commissions that are international in character, should respect the following guidelines:

- (a) They shall be constituted in accordance with criteria making clear to the public the competence and impartiality of their members, including expertise within their membership in the field of human rights and, if relevant, of humanitarian law. They shall also be constituted in accordance with conditions ensuring their independence, in particular by the irremovability of their members during their terms of office except on grounds of incapacity or behaviour rendering them unfit to discharge their duties and pursuant to procedures ensuring fair, impartial and independent determinations;

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Human Rights Committee, General Comment No. 31, para. 18; *Concluding Observations: Argentina*, UN Doc. CCPR/CO/70/ARG, 15 November 2000, para. 11.

<sup>54</sup> See also Human Rights Committee, *Concluding Observations: Argentina*, UN Doc. CCPR/CO/70/ARG, 3 November 2000, para. 9.

<sup>55</sup> *Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity*, principles 7, 11.



- (b) Their members shall enjoy whatever privileges and immunities are necessary for their protection, including in the period following their mission, especially in respect of any defamation proceedings or other civil or criminal action brought against them on the basis of facts or opinions contained in the commissions' reports;
- (c) In determining membership, concerted efforts should be made to ensure adequate representation of women as well as of other appropriate groups whose members have been especially vulnerable to human rights violations.

More generally, international law requires investigations to be conducted independently and impartially.<sup>56</sup>

With respect to independence, article 7 of Law No. 29 of 2013 provides that the FFRC must be established by the Libyan legislature<sup>57</sup> as an "independent commission" enjoying "legal personality and financial independence."<sup>58</sup> However, there are no safeguards for guaranteeing the independence of FFRC members in the law. In particular, the Law does not specify that FFRC members are irremovable "except on grounds of incapacity or behaviour rendering them unfit to discharge their duties," or contain disciplinary procedures that might apply for disciplinary infractions that are akin to those applying to public or judicial officials. The Law also does not grant the necessary immunity from criminal or civil action against FFRC members for carrying out their legitimate activities.<sup>59</sup> Such immunities are particularly important in the context of fact-finding with respect to human rights violations or abuses and serious IHL violations committed by persons currently in positions of authority within the Libyan government. Moreover, aside from ensuring "financial independence," the Law does not ensure the FFRC has transparent funding and control over its own budget necessary to guarantee its independence.<sup>60</sup>

The members of the FFRC should also be able to carry out their functions without favour, bias or prejudice. While the guarantee of impartiality is not clearly enshrined in the law, article 12 makes appointments of all members of the FFRC, including its Administrative Board,<sup>61</sup> subject to the terms of Law No. 13 of 2013 on political and administrative isolation,<sup>62</sup> a lustration measure banning persons connected to the Gadhafi regime from a number of leadership posts in the State civil and military apparatuses, academic institutions and media and publishing outlets for a period of ten years.<sup>63</sup> The procedure followed by the commission tasked with reviewing whether a person is subject to the Law's criteria does not meet international due process standards.<sup>64</sup> For example, the Law does not require a case-by-case analysis of whether an individual has committed human rights violations and abuses for some categories, or set out the standard the commission must apply to make determinations regarding whether an individual should be excluded from public office.<sup>65</sup> Law No. 13 of 2013 was reportedly repealed by the HoR in 2015, and was subject to a legal challenge before the Supreme Court, which has not yet issued a pronouncement. Given political

<sup>56</sup> CAT, art. 12; ICCPR, art. 12(1). See also *Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions*, principle 9; *Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, UN Doc. A/RES/55/89, 4 December 2000, principle 2; DPED, art.13(1).

<sup>57</sup> Law No. 29 of 2013 refers to the General National Congress (GNC), the Libyan legislative authority from August 2012 to August 2014. The GNC has been replaced by the HoR. Given the current uncertainty characterizing the Libyan political and institutional context, all references to the GNC in the Law will be replaced by the more generic expression "Libyan legislature."

<sup>58</sup> Under article 13, the FFRC shall have an independent budget.

<sup>59</sup> *Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity*, principle 7. On the importance of including members of indigenous groups in the FFRC, see American Bar Association's Rule of Law Initiative, *In Legal limbo: An Assessment of Laws and Practices Affecting Amazigh, Tebu and Tuareg in Libya*, 2020, pp. 53-57.

<sup>60</sup> *Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity*, principle 11.

<sup>61</sup> The Board must be composed of nine members appointed by the Libyan legislature and "known for their independence, impartiality, and competence," and is tasked with forming the departments and committees prescribed by the Law and drafting the FFRC's final report. Law No. 29 of 2013, art. 10. See also arts. 14, 21.

<sup>62</sup> For analysis of this law, see ICJ, *Challenges for the Libyan Judiciary: Ensuring Independence, Accountability and Gender Equality*, July 2016, pp. 56-58.

<sup>63</sup> Law No. 13 of 2013 on political and administrative isolation, 8 May 2013, arts. 2, 18.

<sup>64</sup> Law No. 13 of 2013, arts. 1, 10-13.

<sup>65</sup> As a result of the Law, many individuals were unfairly removed from office, including members of the judiciary. See ICJ, *Challenges for the Libyan Judiciary: Ensuring Independence, Accountability and Gender Equality*, July 2016, pp. 53, 56-57.

fragmentation in Libya and the fact that HoR decisions are not necessarily recognized by the executive, the current status of the law remains unclear.<sup>66</sup>

Instead of referring to the problematic provisions of the Law on political and administrative isolation, Law No. 29 of 2013 should be amended with a view to ensuring the impartiality of the FFRC and its members, who shall avoid all activity that may imply, or may be seen to imply, that their decisions may be influenced by external factors and that could, thus, erode public confidence in the FFRC.

With respect to competence, the Law does not include merit-based criteria for the appointment of FFRC members. FFRC membership should include expertise in international law, particularly human rights law and IHL, and a range of professions and backgrounds, including jurists, doctors, human rights professionals and others.<sup>67</sup> Moreover, criteria should ensure an equal representation of women, as well as the representative appointment of members of minorities and "other appropriate groups whose members have been especially vulnerable to human rights violations."<sup>68</sup>

## **2.2.2. The FFRC's relationship to the general criminal justice framework**

The role of the FFRC in complementing or substituting the competent authorities – the judicial police, prosecutor and/or investigating judge – in the conduct of investigations, as well as other *ad hoc* committees established after 2011, is unclear. Under the general criminal justice framework, prosecutors and judicial police acting under their authority, or investigating judges, are responsible for conducting investigations.<sup>69</sup> Law No. 29 of 2013 makes little reference to this procedure. The Law "aims to achieve ... [the i]nvestigation, documentation and preservation of the events subject to transitional justice,"<sup>70</sup> and sets out basic investigative powers which accord the FFRC authority equivalent to that of the judicial police.<sup>71</sup> The Law then makes several references to the FFRC's power to refer cases to the "civil or criminal courts"<sup>72</sup> and "prosecution,"<sup>73</sup> stating that the FFRC's report may include recommendations with respect to "measures or procedures for referring individuals or incidents to the competent authorities."<sup>74</sup>

In light of the FFRC's assumption of powers ordinarily accorded to domestic authorities and provision regarding referral of cases to the criminal courts, the Law could imply that their investigation substitutes that of the competent authorities under the general criminal justice framework. Equally, the absence of detailed provisions regarding the referral process and role of the competent authorities could imply that the general criminal justice framework is unaffected by the FFRC's investigations, and that any referral is only accorded the status of a recommendation or requirement to conduct further investigations. In light of the FFRC's ability to award amnesties for crimes, which prevents further investigation and prosecution by the competent authorities, the former situation seems to apply. The Law is equally unclear with respect to whether a referral to or consideration of a case by the FFRC prevents other domestic criminal justice authorities from exercising its authority under the general criminal justice framework.

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<sup>66</sup> ICJ, *Challenges for the Libyan Judiciary: Ensuring Independence, Accountability and Gender Equality*, July 2016, pp. 57-58.

<sup>67</sup> See *UN Basic Principles on the Independence of the Judiciary*, Principle 10; *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*, Principle A, paragraph 4(i), (h) and (k).

<sup>68</sup> *Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity*, principle 7. See also Report of the UN Special Rapporteur on the independence of Judges and Lawyers to the General Assembly, A/66/289, 10 August 2011, paras. 22-33, 92; Committee on the Elimination of Racial Discrimination, *General Recommendation XXXI on the prevention of racial discrimination in the administration and functioning of the criminal justice system*, A/60/18, 2005, pp. 98-108, para. 5(d).

<sup>69</sup> Code of Criminal Procedure, arts. 51-53. See also ICJ, *Accountability for Serious Crimes under International Law in Libya: An Assessment of the Criminal Justice System*, July 2019, pp. 52-53.

<sup>70</sup> Law No. 29 of 2013, art. 4(6).

<sup>71</sup> Law No. 29 of 2013, art. 8(2)-(4).

<sup>72</sup> Law No. 29 of 2013, art. 20.

<sup>73</sup> Law No. 29 of 2013, art. 26.

<sup>74</sup> Law No. 29 of 2013, art. 17.

Under international law, to meet their obligation to investigate, prosecute, punish and provide an effective remedy and reparation for gross human rights violations or abuses and serious IHL violations,<sup>75</sup> a State may establish special mechanisms of investigation, including transitional justice mechanisms with specialized competencies, provided they are based in law, and are capable of leading to the identification and, if appropriate, the punishment of the perpetrator(s) of the violations.<sup>76</sup> The UN Impunity Principles clarify that truth commissions cannot replace judicial authorities, particularly criminal courts, which only should be deputed to establishing the criminal liability of an individual.<sup>77</sup> Special investigative procedures must comply with international standards governing the conduct of investigations.<sup>78</sup> Such standards require that investigations be (i) prompt; (ii) effective and thorough; (iii) independent and impartial; and (iv) transparent, and must comply with other fair trial requirements under international law and standards.<sup>79</sup>

To the extent that the FFRC substitutes the relevant competent authorities under the general criminal justice framework, the Law requires significant revisions to ensure that its procedures are governed by law and it meets the standards required to guarantee the rights of the accused and victims (see further in sections 3.2-3.3 below). To the extent that the FFRC does not replace such competent authorities, their place in the general criminal justice process, particularly in light of their ability to grant amnesties, should be clearly defined. Law No. 29 of 2013 should, in particular, specify that the FFRC's work will not prejudice the work of prosecuting and judicial authorities.<sup>80</sup>

The relationship between the FFRC and other similar *ad hoc* committees established through the enactment of subsequent laws and decrees is also unclear, notwithstanding the overlap between their mandate. In particular: (i) Law No. 31 of 2013 entrusts a committee to conduct fact-finding with respect to the Abu Salim prison massacre, prepare a database of the dead and the missing, present recommendations on how to address the massacre's impact, and work to settle the status of the victims' families;<sup>81</sup> (ii) Decree No. 19 of 2013 establishes a committee to "undertake fact-finding and information gathering relating to the events that have occurred in the Gargour district of Tripoli on 25 November 2013;"<sup>82</sup> and (iii) Law No. 1 of 2014 creates a General Commission for the Search and Identification of Missing Persons in relation to the 17 February revolution.<sup>83</sup> Such laws should be amended to clarify the relationship between the FFRC and these other bodies.<sup>84</sup>

<sup>75</sup> ICCPED, arts. 3, 10, 12, and 13; ICCPR, art. 2(3); Human Rights Committee, *General Comment No. 31*, paras. 15, 18); CAT, art. 12; *Convention on the Rights of Persons with Disabilities*, 2515 UNTS 3, 13 December 2006 (CRPD) (Libya ratified on 13 February 2018), art. 16; ICRC Customary IHL Database, rule 158 (the obligation is a customary international law norm applicable in both international and non-international armed conflicts). See also African Commission on Human and Peoples' Rights, *Malawi African Association et al v Mauritania*, Communications Nos. 54/91, 61/91, 98/93, 164/97-196/97 and 210/98, 11 May 2000, recommendations, lit.1; Rome Statute of the International Criminal Court, Preamble. For further support, see ICJ, *International Law and the Fight Against Impunity*, Practitioners' Guide No. 7, January 2015, pp. 133-139; ICJ, *The Right to a Remedy and Reparation for Gross Human Rights Violations*, Practitioners' Guide No. 2, October 2018, pp. 88-96.

<sup>76</sup> *Inter-American Court of Human Rights, Velásquez Rodríguez v. Honduras*, Series C No. 4, 29 July 1988, paras. 166 and 174; European Court of Human Rights, *Finucane v. the United Kingdom*, Application No. 29178/95, 1 July 2003, para. 69.

<sup>77</sup> *Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity*, principles 5, 8; Inter-American Commission on Human Rights, *Ignacio Ellacuría S.J. et al. (El Salvador)*, Report No. 136/99, 22 December 1999, paras. 229 ff.

<sup>78</sup> *Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions*, principle 11; *The Minnesota Protocol on the Investigation of Potentially Unlawful Death* (2016), paras 38-40.

<sup>79</sup> Human Rights Committee, *General Comment No. 31: Nature of the General Legal Obligation on States Parties to the Covenant*, UN Doc. CCPR/C/21/Rev.1/Add.13, 26 May 2004, paras. 15-16; African Commission on Human and Peoples' Rights, *General Comment No. 3*, para. 7. Detailed criteria for ensuring an investigation meets these requirements are set out in, for example, *Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions*, principles 9 – 17; *Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, principles 1-6; *The Minnesota Protocol on the Investigation of Potentially Unlawful Death* (2016), paras. 19, 22 ff; *Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the Istanbul Protocol)*, Doc. HR/P/PT/8/Rev.1, UN Office of the High Commissioner for Human Rights, New York/Geneva 2004.

<sup>80</sup> *Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity*, principle 8. For example, article 6 of Law No. 31 of 2013, which establishes an ad hoc committee to conduct fact-finding on the Abu Salim prison massacre, clarifies that the latter's work is "[w]ithout prejudice to the competences of the investigating magistrate and the Public Prosecution in initiating investigation and bringing criminal action against the Abu Salim prison massacre."

<sup>81</sup> Law No. 31 of 2013 adopting provisions pertaining to the Abu Salim prison massacre, art. 6.

<sup>82</sup> Decree No. 19 of 2013 on forming a fact-finding committee and defining its functions, art. 2.

<sup>83</sup> Law No. 1 of 2014 on assisting the families of martyrs and missing persons of 17th February Revolution, art. 4.

<sup>84</sup> Article 8(6) of Law No. 29 of 2013 provides that the "department for arbitration and reconciliation" should "have permanent contact with the reconciliation committees," however, given the Law was enacted prior to the established of the other *ad hoc* bodies mentioned, it seems this provision was not intended to refer to them.

### 2.2.3. Investigative powers of the FFRC

The FFRC's investigative and sanction powers require strengthening, particularly if their investigations substitute those under the general criminal justice framework. The specialized department appointed by the FFRC to investigate "grave and systematic violations of human rights"<sup>85</sup> is accorded investigative powers "to order individuals, inspect locations, seize and seal documents and evidence and visit locations relevant to the subjects under investigation," for which they have "judicial police powers." They "may ask any person to reveal information, documents, or materials" and "interrogate any witnesses," as well as submit requests for assistance from other States.<sup>86</sup> Although they have judicial police powers, which under the Code of Criminal Procedure includes the appointment of experts,<sup>87</sup> and "the assistance of members of the police and other local administration officials,"<sup>88</sup> they do not have an explicit power to order experts to conduct exhumations and autopsies and preserve forensic evidence. The requirement under international law that an investigation be thorough and effective and, as such, exhaustive,<sup>89</sup> requires that investigators collect and verify biological and physical evidence,<sup>90</sup> which involves the careful collection, analysis, and storage of forensic evidence,<sup>91</sup> including the recovery and analysis of human remains through exhumations and autopsies by independent and impartial experts.<sup>92</sup> This requirement is particularly important in enforced disappearance and extrajudicial killing cases, and provisions explicitly granting the FFRC this power and setting out relevant procedures should be added to the Law.

The FFRC also has limited means to ensure persons can be sanctioned for non-compliance with orders issued pursuant to the exercise of its powers, even where the life or safety of persons cooperating with it are threatened. Article 31 of the Law imposes a maximum of six months' imprisonment and 1,000 Libyan Dinars (US\$709) fine on "[a]nyone who refrains from allowing the authorities charged with implementing [the] law to examine any evidence or documents in his possession, or who refuses to appear before the FFRC or its committees without an acceptable justification." The provision does not apply more broadly to any other coercive powers exercised by the FFRC, such as the execution of a search warrant, limiting its ability to ensure its orders are complied with. International norms and standards stipulate that measures must be available to prevent and sanction persons that hinder investigations.<sup>93</sup>

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<sup>85</sup> Law No. 29 of 2013, arts. 4(6) and 7.

<sup>86</sup> Law No. 29 of 2013, art. 16.

<sup>87</sup> Code of Criminal Procedure, arts. 69, 265.

<sup>88</sup> Law No. 29 of 2013, art. 16(2).

<sup>89</sup> ICPPED, art. 12,1; DPED, art. 13,1; *Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions*, principle 9; *Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment*, principle 2; *The Minnesota Protocol on the Investigation of Potentially Unlawful Death* (2016), paras. 22-33, 39.

<sup>90</sup> *The Minnesota Protocol on the Investigation of Potentially Unlawful Death* (2016), para. 24.

<sup>91</sup> See, for example, UN General Assembly Resolutions 61/155 of 19 December 2006 and 68/165 of 18 December 2013; UN Commission on Human Rights Resolutions 1993/33 of 5 March 1993, 1994/31 of 4 March 1994, 1996/31 of 19 April 1996, 1998/36 of 17 April; UN Human Rights Council Resolutions Nos. 10/26 of 27 March 2009, and 15/5 of 29 September 2010; OAS General Assembly Resolution No. AG/RES. 2717 (XLII-O/12) of 4 June 12 and Resolution No. AG/RES. 2794 (XLIII-O/13) of 5 June 2013; Committee against Torture, *Conclusions and Recommendations on Colombia*, UN Doc. CAT/C/CR/31/1, 4 February 2004, para. 10(f) ("in cases of violation of the right to life any signs of torture, especially sexual violence, that the victim may show [must] be documented. That evidence should be included in forensic reports so that the investigation may cover not only the homicide but also the torture"); Inter-American Court of Human Rights, *Myrna Mack-Chang v. Guatemala*, Series C No. 101, 25 November 2003, para. 167 (the protection of the scene of crime, the preservation of fingerprints, the taking of blood samples and carrying out of respective laboratory tests, the examination of clothes and the photographing of the victim's wounds are essential parts of the investigations).

<sup>92</sup> *Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions*, principles 11-12; *The Minnesota Protocol on the Investigation of Potentially Unlawful Death* (2016), section V(D). The *Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions* affirm the need for an "adequate autopsy" to be "conducted by a physician, who shall, if possible, be an expert in forensic pathology" and who shall have "the right of access to all investigative data, to the place where the body was discovered, and to the place where the death is thought to have occurred;" see principle 12. See also principle 13 on the facts that the autopsy should discover. It is imperative for those conducting the autopsy "to function impartially and independently of any potentially implicated persons or organizations or entities;" *ibid.*, principle 14.

<sup>93</sup> ICPPED, arts. 12(4), 22 and 25(1)(b); DPED, art. 13(5). See also *Case of Caracazo v. Venezuela*, Series C No. 95, 29 August 2002, para. 119.

Moreover, the Law does not impose any penalties on persons for unlawfully interfering (or attempting to do so) in an investigation, such as by intimidating a witness, tampering with evidence or bribing a witness or FFRC member. The UN Impunity Principles require investigating authorities to have access to “court action under an emergency procedure or take other appropriate measures” whenever “the life, health or safety of a person concerned by its inquiry is threatened or that there is a risk of losing an element of proof.”<sup>94</sup> Although the Code of Criminal Procedure and Penal Code impose sanctions for revealing confidential information (by a public official),<sup>95</sup> bribing (or attempting to bribe) a witness, expert or interpreter,<sup>96</sup> destroying evidence of an offence or giving false information,<sup>97</sup> whether they apply to investigations by FFRC is unclear. Law No. 29 of 2013 should therefore be amended to ensure appropriate sanctions can be awarded in accordance with due process for any interference in the work of the FFRC which threatens the life, health or safety of a person or loss of evidence in the case.

## **2.2.4. Reliance on traditional and customary dispute resolution mechanisms**

Law No. 29 of 2013 lacks clarity regarding resort to traditional and customary dispute resolution mechanisms. The department for arbitration and reconciliation of the FFRC, which has competence over “reconciliation” and “legislative and general amnesty,” is tasked with having “permanent contact with reconciliation committees and wise individuals in the regions,” and “[t]he FFRC may seek the assistance of elders and wise individuals known for their effective role in resolving civil conflicts through traditional methods” when carrying out its fact-finding functions.<sup>98</sup> The Law does not prescribe conditions upon or mechanisms by which “elders” and “wise persons” may be consulted, or specify the scope of their role in making determinations in regard to accountability for grave and systematic violations or grants of amnesty.

As discussed by the ICJ in *Indigenous and Other Traditional or Customary Justice Systems–Selected International Sources*, while mechanisms for traditional and customary dispute resolution mechanism may be envisaged as part of transitional justice processes,<sup>99</sup> and traditional and customary forms of justice may complement the criminal justice system,<sup>100</sup> they must respect international law and standards, particularly those governing the right to a remedy and the right to a fair trial.<sup>101</sup> In addition, according to the Human Rights Committee, such mechanisms should not “hand down binding judgements recognized by the State,” unless they are limited to “minor civil and criminal matters” and they are subject to appeal in accordance with article 14 of the ICCPR.<sup>102</sup>

## **2.2.5. Criteria for granting amnesties and referral for prosecution**

Law No. 29 of 2013 fails to specify the criteria and procedures according to which the FFRC can grant amnesty or must refer cases for (investigation and) prosecution. As mentioned above, the FFRC can recommend “measures or procedures for referring individuals or incidents to the

<sup>94</sup> *Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity*, principle 10(a-b).

<sup>95</sup> Code of Criminal Procedure, art. 236.

<sup>96</sup> Code of Criminal Procedure, art. 269.

<sup>97</sup> Code of Criminal Procedure, art. 270.

<sup>98</sup> Law No. 29 of 2013, arts. 8(6), 16.

<sup>99</sup> *The rule of law and transitional justice in conflict and post-conflict societies*, Report of the Secretary-General, UN Doc. S/2004/616, 23 August 2004, para. 36; ICJ, *Indigenous and Other Traditional or Customary Justice Systems–Selected International Sources*, November 2019, pp. 141-152.

<sup>100</sup> *Study on access to justice in the promotion and protection of the rights of indigenous peoples*, UN Doc. A/HRC/24/50, 30 August 2013, para. 84; African Commission on Human and Peoples’ Rights, *Study on Transitional Justice and Human Rights*, 2019, para. 62: “[t]he African Charter, in affirming the African values of social cohesion and providing for a ‘rights culture,’ establishes a firm legal basis for relying on and making use of local or indigenous mechanisms as a vehicle for [transitional justice]. Apart from Article 17(2), which provides for the right of individuals to take part in cultural life, the right to culture is further recognised under Article 22 as a collective right of peoples to their cultural development. Under Article 29(7), the Charter provides for the preservation and strengthening of positive African cultural values, of which the local or indigenous dispute settlement mechanisms form a part.”

<sup>101</sup> Human Rights Committee, *General Comment No. 32: Right to Equality before Courts and Tribunals and to a Fair Trial (Article 14)*, UN Doc. CCPR/C/GC/32, 23 August 2007, para. 24; ICJ, *Indigenous and Other Traditional or Customary Justice Systems–Selected International Sources*, November 2019, pp. 79-104.

<sup>102</sup> Human Rights Committee, *General Comment No. 32*, para. 24.

competent authorities” and “make referrals to ... criminal courts.”<sup>103</sup> With respect to amnesties, article 5 states that transitional justice “shall be based on ... legislative amnesty and general amnesty,” which are undefined. For this purpose, the FFRC must establish a “department of arbitration and reconciliation based on the call for consensual reconciliation and legislative and general amnesty,” and can “adopt amicable approaches and conduct goodwill efforts to resolve conflicts, including mediation and arbitration.”<sup>104</sup> The FFRC may also refer decisions to award compensation to “amnesty committees,” and more generally to “arbitration [and] reconciliation ... committees.”<sup>105</sup> The only criteria for cessation of prosecutions is contained in article 30, which provides that criminal proceedings regarding “illicitly gained funds” shall be dropped if they are voluntarily returned.

As discussed in section 2.1.4, two laws provide for amnesties for crimes committed in Libya, where defined conditions are met. Law No. 35 of 2012 pardons certain crimes subject to (i) reconciliation with the victim, his or her legal guardian or the so-called guardian of the blood, (ii) making a declaration of repentance and (iii) returning any embezzled public funds and handing over objects, weapons and other tools employed to perpetrate the crime. The amnesty must be revoked if the perpetrator commits “an international offence” following the Law’s entry into force.<sup>106</sup> Law No. 6 of 2015 grants a general amnesty to all Libyans for certain crimes committed provided a competent judge is satisfied that the person has (i) provided a written pledge of repentance and that they will not re-offend; (ii) returned money (for financial crimes); (iii) reconciled with the victim or his heir or a pardon is granted by the victim’s heir, as the case may be; (iv) surrendered weapons and equipment used to commit the crime; and (v) provided restitution for crimes against property and movables.<sup>107</sup> Law No. 38 of 2012 provides for a blanket immunity without condition.

Criteria compliant with international law and standards should be clearly defined in the Law, pursuant to which the FFRC must determine which cases should be referred for criminal prosecution. To meet Libya’s obligation to investigate and prosecute,<sup>108</sup> such criteria must ensure that any acts or omissions that constituted crimes under domestic or international law at the time they were committed are submitted for prosecution by the competent authorities.<sup>109</sup> Amnesties may not be granted for crimes under international law, irrespective of the fact they are subject to an alternate transitional justice mechanism.<sup>110</sup> More generally, amnesties cannot prejudice the rights of victims and their families to truth and to a remedy and reparation.<sup>111</sup>

Apart from a reference to “consensual reconciliation,” a blanket amnesty has already been granted under Law No. 38 of 2012 for the “necessities of the 17 February Revolution in terms of military, security or civil acts carried out by revolutionaries to save or protect the revolution,”<sup>112</sup> and article 5 of Law No. 29 of 2013 leaves open the possibility that further blanket amnesties may be awarded. Amnesties designed to facilitate reconciliation and full disclosure of human rights violations must be granted based on clearly-defined and transparent criteria that respect the

<sup>103</sup> Law No. 29 of 2013, arts. 17(d), 20(2).

<sup>104</sup> Law No. 29 of 2013, arts. 8(6), 16.

<sup>105</sup> Law No. 29 of 2013, art. 20.

<sup>106</sup> Law No. 35 of 2012, arts. 2-3.

<sup>107</sup> Law No. 6 of 2015, arts. 2, 6.

<sup>108</sup> CAT, art. 12; CRPD, art. 16; ICCPR, arts. 3, 10; DPED, art. 13(1); *Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity*, principle 19; *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, principle III, para. 4; *Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions*, principle 9; *Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, principle 2; GC IV, art. 146(1-2); ICRC Customary IHL Database, rule 158; Human Rights Committee, *General Comment No. 31*, para. 18.

<sup>109</sup> See footnote 18 above.

<sup>110</sup> *The Minnesota Protocol on the Investigation of Potentially Unlawful Death* (2016), para. 40 (“The effective conduct of a special investigative mechanism – designed, for example, to investigate the systemic causes of rights violations or to secure historical memory – does not in itself satisfy a state’s obligation to prosecute and punish, through judicial processes, those responsible for an unlawful death”); See also *ibid.*, paras. 8(c), 24; Human Rights Committee, *General Comment No. 36*, para. 27.

<sup>111</sup> *Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity*, principle 24(b).

<sup>112</sup> Law No. 38 of 2012, art. 4.



obligation to hold those responsible for gross human rights violations and abuses and serious IHL violations accountable, and to ensure victims have access to a remedy and reparation and to the truth. Although Law No. 35 of 2012 and Law No. 6 of 2015 make amnesty conditional on meeting specified criteria, they still fall short of international law, which provides that amnesties cannot be awarded for crimes under international law even when adopted as a component of transitional justice.<sup>113</sup> Moreover, and as discussed in more detail below, the scope of victim participation in the process and consent to the grant of amnesty is not described in the laws.

**In light of the above, the Libyan authorities should:**

- **Amend articles 10 and 12 of Law No. 29 of 2013 to:**
  - **Delete references to Law No. 13 of 2013;**
  - **Prescribe that all the members of the FFRC:**
    - **Have the necessary expertise in human rights and international law;**
    - **Have security of tenure during the entire term of their office, except on grounds of incapacity or behaviour rendering them unfit to discharge their duties;**
    - **Are granted the necessary immunities and privileges to carry out their functions without undue interference;**
  - **Ensure an adequate representation of women and marginalized groups, including ethnic minority groups, in the composition of the FFRC;**
  - **Clarify the relationship between the FFRC and other ad hoc committees, especially with regard to their respective mandates;**
- **Amend Law No. 29 of 2013 to grant the FFRC the power to:**
  - **Order exhumations and autopsies and preserve forensic evidence;**
  - **Apply to a judicial authority for sanctions to be imposed for non-compliance with orders;**
  - **Apply to a judicial authority to request “action under an emergency procedure or take other appropriate measures” whenever “the life, health or safety of a person concerned by its inquiry is threatened or that there is a risk of losing an element of proof;”**
- **Amend article 31 of Law No. 29 of 2013 to adequately criminalize conduct that unduly interferes with the FFRC’s work, including intimidating witnesses, tampering with evidence or bribing a witness or FFRC member, or attempting to commit any of such acts;**
- **Amend Law No. 29 of 2013 to ensure that traditional and customary dispute resolutions do not affect the investigation, prosecution and punishment of crimes under international law, clearly identify traditional and customary mechanisms, processes and subjects that may be employed under the Law, and ensure the compliance of such mechanisms and processes with Libya’s obligations under international law;**
- **Amend Law No. 29 of 2013 to define the criteria and related processes according to which the FFRC must refer a case to competent judicial authorities in accordance with international law and standards, and impose a mandatory requirement to refer all crimes under international law for prosecution;**
- **Amend Law No. 29 of 2013 to define the criteria for granting amnesty;**

<sup>113</sup> *Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity*, principle 24. See also African Union, *Transitional Justice Policy*, February 2019, paras. 89-92; Human Rights Committee, *General Comment No. 31*, para. 18; International Criminal Court, *Prosecutor v. Saif al-Islam Gaddafi*, Case No. ICC-01/11-01/11, Pre-Trial Chamber I, Decision on the ‘Admissibility Challenge by Dr. Saif Al-Islam Gaddafi pursuant to Articles 17(1)(c), 19 and 20(3) of the Rome Statute’, 5 April 2019, paras. 61, 77; Human Rights Committee, *Hugo Rodríguez v. Uruguay*, UN Doc. CCPR/C/51/D/322/1988, 9 August 1994, para. 12.4; Inter-American Court of Human Rights, *Barrios Altos v. Peru (Merits)*, Series C No. 75, 14 March 2001, para. 41. For further reference on amnesties, see ICJ, *The Right to a Remedy and to Reparation for Gross Human Rights Violations*, Practitioners’ Guide No. 2, October 2018, pp. 250 ff. See also *The rule of law and transitional justice in conflict and post-conflict societies*, Report of the Secretary-General, UN Doc. S/2004/616, 23 August 2004, para. 10. See also ICJ, *Accountability for Serious Crimes under International Law in Libya: An Assessment of the Criminal Justice System*, July 2019, pp. 55-57.

- **Amend Law. No 29 of 2013 to clearly set out the procedure that must be followed to determine whether amnesty may be granted or whether a crime must be referred for prosecution in compliance with international law and standards, including those governing due process rights, which must:**
  - **Specify the bodies responsible for making such determinations, the procedure they must follow and their powers;**
  - **Ensure that victims and perpetrators can participate in the decision-making process;**
  - **Ensure that decisions can be appealed to an independent and impartial authority;**
- **Amend (or repeal) Law No. 35 of 2012 and Law No. 6 of 2015 to exclude enforced disappearance, torture and other ill-treatment, arbitrary deprivation of life, rape and other forms of sexual violence, slavery, war crimes and crimes against humanity from the scope of amnesties; amend (or repeal) article 4 of Law No. 38 of 2012 to exclude crimes under international law committed during the 2011 conflict from the scope of the amnesty; and ensure any amnesties are granted in accordance with Libya's obligations under international law, including the obligations to investigate and prosecute crimes under international law, and to ensure access to a remedy and reparation.**

### **3. The right to truth: ensuring public, victims and alleged perpetrators participation in the transitional justice process**

International law accords victims, their families and society as a whole the right to truth.<sup>114</sup> Principle 2 of the UN Impunity Principles states that "[e]very people has the inalienable right to know the truth about past events concerning the perpetration of heinous crimes and about the circumstances and reasons that led, through massive or systematic violations, to the perpetration of those crimes. Full and effective exercise of the right to the truth provides a vital safeguard against the recurrence of violations." Truth and other commissions are key to giving effect to the right to truth; their mandate complements the State's obligation to investigate, prosecute and punish crimes under international law, without replacing it.<sup>115</sup> As Principle 4 of the UN Impunity Principles makes clear, "[i]rrespective of any legal proceedings, victims and their families have the imprescriptible right to know the truth about the circumstances in which violations took place and, in the event of death or disappearance, the victims' fate."<sup>116</sup>

To achieve the objectives of transitional justice and reveal the truth, and thereby facilitate reconciliation, public participation in transitional justice processes and transparency regarding the transitional justice mechanisms' work, including their procedures, investigations and findings, are essential. Beyond the establishment of departments to review legislation, to conduct fact-finding, to deal with displaced persons and for arbitration and reconciliation, Law No. 29 of 2013 contains little indication of what procedures the FFRC will undertake to carry out its fact-finding, investigative and decision-making functions, and no safeguards to ensure the publication of or participation in them by victims and other affected persons, alleged perpetrators or the public more broadly. In particular, there is an absence of, or lack of clarity in, provisions with respect to: (i) the

<sup>114</sup> The right to truth is explicitly included in article 24(2) of the ICPPED in relation to enforced disappearance, and more generally applies to all serious human rights violations and abuses and IHL violations. See Human Rights Committee, *Concluding Observations: Guatemala*, UN Doc. CCPR/C/79/Add.63, 3 April 1996, para. 25. See also Human Rights Council, Resolution 42/17, UN Doc. A/HRC/RES/42/17, 26 September 2019; Resolution 21/7, UN Doc. A/HRC/RES/21/7, 27 September 2012; Resolution 9/11, UN Doc. A/HRC/RES/9/11, 18 September 2008; Resolution 12/12, UN Doc. A/HRC/RES/12/12, 1 October 2009.

<sup>115</sup> *Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity*, principles 5, 8.

<sup>116</sup> See also Commission on Human Rights, *Study on the right to the truth*, UN Doc. E/CN.4/2006/91, 8 February 2006, para. 36.

initiation of cases by victims; (ii) the role of victims in FFRC investigations and decision-making; (iii) the role of alleged perpetrators in FFRC investigations; (iv) publication of the existence of investigations and the scheduling of public hearings; (v) the transmission of information to victims and alleged perpetrators about the outcomes of investigations; (vi) the publication of FFRC reports; and (vii) public access to archives.

### 3.1. Initiation of cases by victims

Article 18 of Law No. 29 of 2013 does not explicitly permit victims to instigate proceedings before the FFRC, limiting the investigation of cases to those identified *motu proprio* or referred by the former GNC, the Government, civil society organizations and the “parties to a dispute, or one of them.” The reference to “parties to a dispute” is unduly narrow insofar as it assumes the commission of a human rights violation must always constitute a “dispute” and that the complaint be filed by a “party” to it.

Victims, as well as their next of kin or others who have suffered harm when intervening to assist victims of human rights violations or abuses and IHL violations, should have standing to file a complaint to competent authorities, a principle which applies to transitional justice mechanisms.<sup>117</sup> Principle 8 of the *UN Principles Basic Principles and Guidelines on the Right to a Remedy and Reparation* provides:

For purposes of the present document, victims are persons who individually or collectively suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that constitute gross violations of international human rights law, or serious violations of international humanitarian law. Where appropriate, and in accordance with domestic law, the term ‘victim’ also includes the immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization.

Principle 9 further provides: “[a] person shall be considered a victim regardless of whether the perpetrator of the violation is identified, apprehended, prosecuted, or convicted and regardless of the familial relationship between the perpetrator and the victim.”<sup>118</sup>

### 3.2. Victim participation in FFRC investigations and decision-making

The Law contains limited provisions regulating the involvement of the victims and other affected persons in the investigation and decision-making process. The FFRC must “[c]ollect and publish the perspectives of the victims” and “[d]ocument the verbal accounts of the victims,” and establish a “department of arbitration and reconciliation based on the call for consensual reconciliation and legislative and general amnesty.”<sup>119</sup> Although “consensual reconciliation” implies that the victims (and perpetrators) participate in the process, there are no provisions defining the scope of such consensual reconciliation or setting out the procedure and conditions under which it might be achieved.

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<sup>117</sup> *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, para. 8; *Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity*, principle 19. See also CAT, art. 13; ICCPR, art. 12(1); *Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions*, principle 16; *The Minnesota Protocol on the Investigation of Potentially Unlawful Death* (2016), paras. 19, 39; Human Rights Committee, *Almeida de Quinteros et al v. Uruguay*, UN Doc. CCPR/C/OP/2, 21 July 1983, paras. 14, 16; *Sharma v. Nepal*, UN Doc. CCPR/C/94/D/1469/2006, 6 November 2008, para. 9; Inter-American Court of Human Rights, *Velásquez Rodríguez v Honduras* (Compensatory damages), Series C No. 7, 21 July 1989, paras. 50-52.

<sup>118</sup> *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, principles 8 and 9.

<sup>119</sup> Law No. 29 of 2013, arts. 7 and 8(6).

Victims and witnesses should be afforded the opportunity to participate in proceedings affecting them, on a strictly voluntary basis.<sup>120</sup> Under international law governing the right to a remedy, victims and others who have suffered harm<sup>121</sup> must have the right to, *inter alia*, present and request evidence; present, request and obtain witnesses' testimony; access documentation and evidence; and question or challenge the evidence and witnesses presented by an accused.<sup>122</sup> Such rights are particularly important where FFRC investigations constitute a substitute for criminal investigations under the general criminal justice framework.

### **3.3. Participation by alleged perpetrators in FFRC proceedings**

There are also no provisions regulating the involvement of the alleged perpetrators in FFRC proceedings. According to the UN Impunity Principles, before they can be identified, alleged perpetrators must be afforded "an opportunity to provide a statement setting forth their version of the facts either at a hearing convened by the commission while conducting its investigation or through submission of a document equivalent to a right of reply for inclusion in the commission's file."<sup>123</sup> To the extent that the FFRC proceedings might result in trials, the alleged perpetrators right to a fair trial under international law, in particular the ICCPR and ACHPR, must be upheld. This includes their right to participate during the investigative phase of a case to ensure they can defend themselves.<sup>124</sup> The presumption of innocence and the right to defence are among the fundamental fair trial guarantees accused persons must enjoy at all times. Truth or other commissions should adhere to these principles in their efforts to identify perpetrators of gross human rights violations or abuses and serious violations of IHL. Law No. 29 of 2013 should afford them the necessary guarantees to defend themselves from and respond to any accusations, and also protect the identity of alleged perpetrators of gross human rights violations or abuses and serious IHL violations until sufficient evidence is gathered.

### **3.4. Public participation in the transitional justice process**

Law No. 29 of 2013 contains no provisions ensuring the publication of the work of the FFRC or public participation in it. Notably, there is no requirement to hold public hearings. While article 7 of Law No. 29 of 2013 mandates the FFRC to "[c]ollect and publish the perspectives of the victims," it remains silent on whether victims and witnesses will be called to testify orally, either in public or in private, or through written statements. Public hearings may further the right to truth of both individuals and the society at large. The African Union Transitional Justice Policy indicates that "[transitional justice] commissions should create opportunities for victims and ordinary people to speak out in the face of possible official denial in order to get public recognition and official acknowledgement of crimes and injustices they have suffered."<sup>125</sup>

Under international law, investigations of human rights violations or abuses and violations of IHL must be conducted transparently to ensure the public can monitor their efficacy and victims can participate in them.<sup>126</sup> Such transparency should extend to the existence of investigations, their

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<sup>120</sup> *Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity*, principle 10(a).

<sup>121</sup> *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, para. 8.

<sup>122</sup> For a detailed discussion, see ICJ, *International Law and the Fight Against Impunity*, Practitioners' Guide No.7, January 2015, Chapter IV(e); ICJ, *The Right to a Remedy and Reparation for Gross Human Rights Violations*, Practitioners' Guide No. 2, October 2018. See also African Commission on Human and Peoples' Rights, *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*, principles N(f) and P(f)(2); *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, principles 11(c), 12, 24; *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, UN Doc. A/RES/40/34, 29 November 1985, para. 6.

<sup>123</sup> *Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity*, principle 9.

<sup>124</sup> An overview of the accused's rights in this regard is beyond the scope of this paper, but see Amnesty International, *Fair Trial Manual*, 2014; ICJ, *A Manual on Trial Observation*, Practitioners' Guide No. 5, July 2009; ICJ, *International Principles on the Independence and Accountability of Judges, Lawyers and Prosecutors*, Practitioners' Guide No. 1, April 2005.

<sup>125</sup> African Union, *Transitional Justice Policy*, February 2019, para. 53(vi).

<sup>126</sup> *The Minnesota Protocol on the Investigation of Potentially Unlawful Death* (2016), para.22. See ICPPED, arts. 12, 24. A victim's immediate family "must be involved in the procedure to the extent necessary to safeguard his or her legitimate

procedures and their findings, including factual and legal bases,<sup>127</sup> subject to restrictions strictly necessary for a legitimate purpose, including protecting the privacy and safety of affected individuals,<sup>128</sup> ensuring the integrity of ongoing investigations, or securing sensitive details about intelligence sources or military or police operations.<sup>129</sup> The publicity of investigations is particularly important in transitional justice contexts, subject also to restrictions imposed for legitimate security reasons or to “avoid pressure on witnesses or commission members.”<sup>130</sup> Moreover, public participation in the work of the FFRC and development of its recommendations is essential to achieving the broader objectives of the transitional justice process, which include determining State responsibility for human rights violations, legislative reform, reform of state institutions, reconciliation and the provision of reparations.<sup>131</sup>

### 3.5. Publication of the FFRC findings and reports

Law No. 29 of 2013 lacks clarity regarding whether victims and other affected persons will be informed of the outcomes of individual investigations and whether FFRC reports should be published. The FFRC fact-finding department must produce a “comprehensive report” on the results of their fact-finding into violations of a “collective and public nature,” to which a detailed report of the results of its fact-finding into individual violations and abuses should be attached.<sup>132</sup> The report should contain “evidence, applications, affected persons, and recommendations.”<sup>133</sup> Although article 8(2) requires that the comprehensive FFRC report be “widely published in the media,”<sup>134</sup> it is unclear whether the individual files attached to it must be publicized.

Under international standards, reports issued by truth commissions or similar mechanisms should “be made public in full and shall be disseminated as widely as possible.”<sup>135</sup> Victims, in particular, and their families “have the imprescriptible right to know the truth about the circumstances in which violations took place and, in the event of death or disappearance, the victims’ fate,” irrespective of any legal proceedings.<sup>136</sup>

### 3.6. Preservation of and access to archives

Law No. 29 of 2013 fails to guarantee the creation and preservation of, and access to, archives. In particular, the Law does not impose any obligation to preserve records of government, local and other State agencies pertaining to human rights violations or abuses and IHL violations, or measures to prevent their removal, destruction, concealment or falsification.<sup>137</sup> It also does not impose an obligation to ensure that the records of the FFRC, including evidence collected by them, are stored in an archive that is publicly accessible, subject to reasonable restrictions based on security and/or privacy. While article 17(2) of Law No. 29 of 2013 requires the individual reports for each case, including the relevant evidence, to be attached to the comprehensive report, there is

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interests;” *Interim Report of the UN Special Rapporteur on extrajudicial, summary or arbitrary executions*, UN Doc. A/65/321, 23 August 2010; European Court of Human Rights, *Hugh Jordan v. UK*, Application No. 24746/94, 4 May 2001, para. 109. See also African Commission on Human and Peoples’ Rights, *General Comment No. 3*, para. 7.

<sup>127</sup> *The Minnesota Protocol on the Investigation of Potentially Unlawful Death* (2016), para. 32.

<sup>128</sup> Under article 137 of GC IV, information concerning a protected person, including about his/her death, may be withheld by the Information Bureau if transmission is “detrimental” to the relatives.

<sup>129</sup> *The Minnesota Protocol on the Investigation of Potentially Unlawful Death* (2016), para. 33.

<sup>130</sup> *Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity*, principle 13.

<sup>131</sup> Law No. 29 of 2013, art. 4.

<sup>132</sup> Law No. 29 of 2013, arts. 8(2), 17(2).

<sup>133</sup> Law No. 29 of 2013, art. 8(2).

<sup>134</sup> According to article 17(2), the comprehensive report must include: (a) a full statement of the facts, supported by evidence; (b) the results that were reached through study and investigation, including a precise determination of the extent of damages, responsibility, and the individuals concerned; (c) the attempts made by the FFRC to bring about reconciliation between the parties; and (d) recommendations for ways to address the violations or resolve the conflicts, such as taking measures or procedures or referring individuals or incidents to the competent body.

<sup>135</sup> *Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity*, principle 13.

<sup>136</sup> *Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity*, principle 4.

<sup>137</sup> *Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity*, definition E.

no requirement that the records of the FFRC more broadly be preserved or that any records and evidence collected by the FFRC be stored and made accessible.

Preservation of and access to such records and evidence is essential to the realization of victims' rights, the rights of the accused<sup>138</sup> in any legal proceedings relating to the commission of human rights violations and abuses and IHL violations, as well as to the public's right to truth.<sup>139</sup> According to international standards, technical measures must be taken to preserve records of violations and abuses to ensure any transitional or criminal justice mechanisms, as well as victims, perpetrators and members of the public, can access them.<sup>140</sup> Further, the terms of reference of a truth commission or other such mechanism should "highlight the importance of preserving the commission's archives" and, at the commencement of the commission's work, they "should clarify the conditions that will govern access to their documents, including conditions aimed at preventing disclosure of confidential information while facilitating public access to their archives."<sup>141</sup> Measures for facilitating, as well as restricting access on privacy or security grounds, should be established by law and subject to judicial review.<sup>142</sup>

### **3.7. Safety and security of FFRC members and other participants in the transitional justice process**

Law No. 29 of 2013 fails to ensure that FFRC members, victims and other persons who participate in FFRC processes are adequately protected from any threats to their life or safety, which is particularly problematic given the general absence of relevant protection programmes in Libya and the prevalence of attacks against justice system actors, human rights defenders, victims and witnesses.<sup>143</sup> Article 22 of Law No. 29 of 2013 requires the FFRC to "work to take the necessary measures and procedures to protect witnesses and to encourage them to present their statements before the competent committees." However, the Law does not put in place any mechanisms to do so.<sup>144</sup> Moreover, there are no provisions to ensure the protection of FFRC members, or alleged perpetrators subject to the FFRC's jurisdiction.

To ensure effective participation in the transitional justice process, protection programmes must be in place to safeguard the security of victims and witnesses who participate in FFRC procedures, as required under international law and standards.<sup>145</sup> This should include clear rules governing the disclosure of victim and witness information, as well as the opportunity to provide information to the FFRC anonymously.<sup>146</sup>

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<sup>138</sup> *Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity*, principle 15 (access to archives "... shall be facilitated, as necessary, for persons implicated, who request it for their defence").

<sup>139</sup> *Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity*, principles 3, 5, 14-15. See also definition E ("archives" includes materials collected by truth commissions and other investigative bodies).

<sup>140</sup> *Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity*, principle 14.

<sup>141</sup> *Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity*, principle 8(f).

<sup>142</sup> *Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity*, principles 15-17.

<sup>143</sup> ICJ, *Accountability for Serious Crimes under International Law in Libya: An Assessment of the Criminal Justice System*, July 2019, pp. 9, 19-20, 22, 70, 87.

<sup>144</sup> During the proceedings before the International Criminal Court (ICC), Libya affirmed that "[u]nder article 275 of the Libyan Criminal Procedure Code a criminal trial judge can accept evidence in whatever form he or she deems appropriate. This is a very flexible procedure which permits a trial judge to hear evidence by way of video-link, to preserve witness anonymity (from the public rather than from the accused) by hearing the witness in closed session, or for the witness to give their evidence in advance of the court hearing by way of a written statement made to a notary." However, article 275 of the Code of Criminal Procedure does not concern evidence and, in its decision, the ICC found that Libyan law does not have an adequate witness protection programme. See International Criminal Court, *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, Case No. ICC-01/11-01/11, Pre-Trial Chamber I, Decision on the admissibility of the case against Saif Al-Islam Gaddafi, 31 May 2013, para. 211.

<sup>145</sup> CAT, art. 13; ICCPED, art. 12; *Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions*, principle 15; *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, para. 12(b); Human Rights Committee, *General Comment No. 36*, para. 28; *Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity*, principle 10. See also *Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence*, UN Doc. A/HRC/34/62, 27 December 2016, paras. 67-69, 99.

<sup>146</sup> *Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity*, principle 10 (d). See also *Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence*,



Members of truth or other commissions should also be adequately protected in order to preserve their personal security, independence and impartiality. This should include protection against "intimidation, hindrance, harassment or improper interference," as well as "threat of prosecution or other sanctions for any action taken in accordance with recognized professional duties, standards and ethics."<sup>147</sup>

**In light of the above, the Libyan authorities should:**

- **Amend article 18 of Law No. 29 of 2013 to ensure that victims, their next of kin and others who have suffered harm as a result of human rights violations or abuses and IHL violations have standing to initiate a case before the FFRC;**
- **Amend Law No. 29 of 2013 to ensure the participation of victims and other affected persons, as well as alleged perpetrators, in investigations conducted by the FFRC, which must guarantee the rights of victims and accused persons under international law and standards;**
- **Amend Law No. 29 of 2013 to protect the identity of alleged perpetrators of human rights violations and abuses and IHL violations until sufficient evidence is gathered;**
- **Amend Law No. 29 of 2013 to ensure public participation in the proceedings before the FFRC;**
- **Amend articles 8, 11 and 17 of Law No. 29 of 2013 to require the FFRC to publish and disseminate its final report, and to include the outcomes of its investigations and decisions to refer cases for prosecution, award amnesty and grant reparations in the report;**
- **Amend Law No. 29 of 2013 to:**
  - **Require the preservation of government, local and other State agencies records pertaining to human rights violations or abuses and IHL violations, and institution of measures to prevent their removal, destruction, concealment or falsification;**
  - **Require the preservation and storage of FFRC archives;**
  - **Prescribe a procedure and conditions for ensuring public access to such archives, including conditions aimed at preventing disclosure of confidential information;**
  - **Ensure that the victims and their families have a right to obtain exhaustive information and full disclosure of the FFRC's findings, to access all relevant documentation, and to communicate directly with the FFRC;**
- **Enact legislation to establish a victim and witness protection programme, and protection programmes for justice system actors governing proceedings by the FFRC and criminal proceedings under the general criminal justice framework;**
- **Amend article 22 of Law No. 29 of 2013 to provide for the possibility of non-disclosure of the information given by victims and witnesses, and of testifying anonymously upon reasonable grounds.**

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UN Doc. A/HRC/34/62, 27 December 2016, paras. 67-69, 99. Additionally "social workers and/or mental health-care practitioners should be authorized to assist victims, preferably in their own language, both during and after their testimony, especially in cases of sexual assault;" *Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity*, principle 10(b).

<sup>147</sup> *The Minnesota Protocol on the Investigation of Potentially Unlawful Death (2016)*, para. 30. See also *Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions*, principle 15; Human Rights Committee, *General Comment No. 36*, para. 28. See also *Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity*, principle 7(b).

#### 4. The right to a remedy and reparation: ensuring access to adequate reparations

Law No. 29 of 2013 fails to provide for full and adequate reparations to victims of human rights violations or abuses<sup>148</sup> and IHL violations, and their next of kin. Under international law, the right to an effective remedy and reparation obliges States to ensure that victims or their next of kin have access to a competent body to file a claim and to adequate reparation for the harm suffered.<sup>149</sup> Reparation should be proportional to the gravity of the violation and the harm suffered by the victim, and be tailored to the needs of the victim, as appropriate.<sup>150</sup> Under international law, amnesties must not prejudice the right to a remedy and reparation.<sup>151</sup>

Article 23 of Law No. 29 of 2013 states that, subject to a binding decision by the FFRC,<sup>152</sup> “adequate” reparations must be provided to “[a]nyone who is subjected to grave and systematic human rights violations” by the State, in one or more of the following forms:

1. The payment of monetary compensation for material damages, according to the loss incurred by the affected person, except the loss of earnings. This shall be for cases in which the misdeed which caused the damage was committed for a political motive.
2. Memorialization, as determined by the FFRC.
3. Treatment, rehabilitation, and provision of social services.
4. Any other form determined by the Cabinet, based on a proposal submitted by the FFRC.

The provision is not fully compliant with international law and standards insofar as it does not expressly provide for other forms of reparation, including restitution of liberty and property, restoration of citizenship, the right to safe and voluntary return of internally displaced persons (IDPs) and refugees as forms of restitution, forms of satisfaction other than memorialisation, and guarantees of non-repetition. The Law also does not clarify how the Law interacts with other laws providing for satisfaction. The residual provision in article 23(4), which provides that other forms of reparation may be awarded by the Government upon a proposal of the FFRC, is not sufficiently adequate to ensure that all forms of reparation are guaranteed to victims of human rights violations or abuses and IHL violations. The FFRC, as an independent, impartial and competent body, should be the entity tasked with granting reparations, which should not be subject to the discretionary powers of the cabinet.

##### 4.1. Compensation

The scope of compensation that may be awarded is too narrow. Article 23(1) of Law No. 29 of 2013 limits compensation to “material damages” resulting from acts committed with a “political motive.” Under international law, compensation must be awarded for “any economically assessable damage,” including physical and mental harm, moral damages, and “lost opportunities, including employment, education and social benefits.”<sup>153</sup> As discussed above in section 2.1.2, the motive

<sup>148</sup> A State is responsible, and therefore has an obligation to make reparations, for the human rights abuses of non-State actors acting under the control or with the authorization, acquiescence, complicity or acknowledgment of State agents, or where the non-State actor is empowered by the State to exercise elements of governmental authority. Moreover, a State’s responsibility may be engaged when it fails to act with due diligence in protecting all persons from human rights abuses committed by non-State actors. See ARSIWA, arts. 5, 8, 11; Human Rights Committee, *General Comment No. 31*, para. 8; *General Comment No. 36*, para. 21.

<sup>149</sup> ICCPR, art. 2(3); Arab Charter, arts. 12 and 23; *African Charter on Human and Peoples’ Rights*, 1520 UNTS 217, 27 June 1981 (ACHPR) (Libya ratified on 19 July 1986), art. 7(1)(a); *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, paras. 2(c), 3(c-d), 11, 15-23. See also *Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity*, principle 31; Human Rights Committee, *General Comment No. 31*, para. 16.

<sup>150</sup> *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, para. 18; Committee against Torture, *General Comment No. 3: Implementation of Article 14 by States Parties*, UN Doc. CAT/C/GC/3, 13 December 2012, para. 6.

<sup>151</sup> *Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity*, principle 24(b); Human Rights Committee, *General Comment No. 36*, para. 27. See section 2.1.4 above.

<sup>152</sup> Law No. 29 of 2013, art. 7.

<sup>153</sup> *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, para. 20 (Compensation should include “(a) Physical or mental harm; (b) Lost opportunities, including employment, education and social benefits; (c) Material damages and

underpinning the perpetration of human rights violations and abuses or IHL violations is immaterial, and should have no bearing on the award of reparation.

Article 20 read together with article 24 provides that decisions about eligibility for compensation are determined by relevant FFRC departments or committees, which the “FFRC shall [then] refer” to a “Compensation Assessment Committee” composed of five members and headed by a judge for a determination to be finally “approved by the FFRC.” Compensation is then to be paid by an ad hoc “Victims’ Compensation Fund” at the completion of the FFRC’s work.<sup>154</sup> The Law does not specify which body of the FFRC is responsible for “final approval,” and does not provide for a right to appeal or seek review of the decision to a higher judicial authority, as required under international standards.<sup>155</sup>

The interaction of Law No. 29 of 2013 with other laws facilitating access to compensation by designated categories of people is also not regulated. Law No. 10 of 2012 provided for the disbursement of a sum of money to each Libyan family, or to unmarried family members, on the first anniversary of the 17 February Revolution.<sup>156</sup> Law No. 50 of 2012 provided a compensation scheme for political opponents detained under the Gadhafi regime.<sup>157</sup> Law No. 4 of 2013 provided for the disbursement of a monthly allowance to persons with permanent disability injured (i) while fighting during the 2011 armed conflict against the Gadhafi regime or (ii) as civilian victims of the regime’s attacks.<sup>158</sup> Law No. 31 of 2013 provided benefits to families of persons killed in the Abu Salim prison massacre.<sup>159</sup> Law No. 1 of 2014 provided for a monthly allowance for families of persons that died or went missing in connection to the 17 February Revolution and the ensuing conflict.<sup>160</sup>

## 4.2. Restitution

Law No. 29 of 2013 fails to adequately provide for restitution by ensuring restoration of liberty, property and citizenship, and the right to return to one’s place of residence. According to the UN Principles on Remedy and Reparation, “[r]estitution should, whenever possible, restore the victim to the original situation” before gross human rights violations or abuses and serious IHL violations occurred; it should include, “as appropriate: restoration of liberty, enjoyment of human rights, identity, family life and citizenship, return to one’s place of residence, restoration of employment and return of property.”<sup>161</sup>

### 4.2.1. Restoration of personal liberty

Article 26 of Law No. 29 of 2013 provides that the Ministers of Justice, Interior, and Defence (or their delegates) must refer accused persons associated with the former regime to the Prosecution within 90 days of the Law’s issuance,<sup>162</sup> or release them. The Law does not require them to be brought before a judicial authority “promptly” or, indeed, at all, as required under international

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loss of earnings, including loss of earning potential; (d) Moral damage; (e) Costs required for legal or expert assistance, medicine and medical services, and psychological and social services”).

<sup>154</sup> Law No. 29 of 2013, art. 25(1).

<sup>155</sup> *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, para. 12.

<sup>156</sup> Law No. 10 of 2012 on disbursing a sum of money to Libyan families on the first anniversary of the 17 February Revolution.

<sup>157</sup> Law No. 50 of 2012 on compensation of political prisoners. See also Decree No. 513 of 2013 issuing the executive regulation of Law No. 50 of 2012 on the compensation of political prisoners.

<sup>158</sup> Law No. 4 of 2013 on the issuance of provisions relating to War of Liberation victims with permanent disability.

<sup>159</sup> Law No. 31 of 2013 adopting Provisions pertaining to the Abu Salim Prison Massacre.

<sup>160</sup> Law No. 1 of 2014 on assisting the families of martyrs and missing persons of 17th February Revolution.

<sup>161</sup> *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, para. 19. See also Permanent Court of International Justice, *Case Concerning the Factory at Chorzów (Merits)*, Series A No. 17, 13 September 1928, p. 47; Committee against Torture, *General Comment No. 3*, para. 8.

<sup>162</sup> Article 1 of Law No. 9 of 2014, which amended article 26 of Law No. 29 of 2013, set another fourth-month deadline to either prosecute or release the said detainees. Article 1 of the prior Law No. 38 of 2012 set a two-month deadline from the date of its promulgation (May 2nd) to either refer for prosecution or release all 2011 conflict-related detainees, but was not implemented. See UNSMIL & OHCHR, *Abuse Behind Bars: Arbitrary and Unlawful Detention in Libya*, April 2018, pp. 15-16.

law.<sup>163</sup> The Prosecutor does not constitute a judicial authority under international law.<sup>164</sup> Article 26 also provides that their “detention shall not be considered illegal if there is sufficient evidence that they have committed acts considered to be crimes under the law.” An initially unlawful detention cannot be deemed lawful by the subsequent institution of charges,<sup>165</sup> and persons who have been subject to arbitrary or unlawful detention must be compensated.<sup>166</sup> Moreover, pursuant to the presumption of innocence,<sup>167</sup> pre-trial detention is only permitted on a case-by-case basis subject to an assessment of the standards of last resort, reasonableness, necessity and proportionality.<sup>168</sup>

Clarity regarding the intersection between Law No. 29 of 2013 and Decree Nos. 1301, 1304 and 1307 issued by the Libyan Presidency Council and the Supreme Judicial Council in September 2018, establishing two committees to screen of the detainees held at the Mitiga prison in Tripoli, is also required. Although at the time of writing these decrees were not publicly available or accessible to the ICJ, UNSMIL reported that, as of December 2019, 1200 detainees of an estimated total of 3,600 detainees had been screened and 500 released.<sup>169</sup>

Law No. 29 of 2013 should be amended to address, not facilitate, arbitrary detention. All those arbitrarily detained must be released, their personal liberty must be restored, and compensation must be provided for the harm they suffered.

#### **4.2.2. Restoration of property**

Law No. 29 of 2013 does not ensure restoration of property as a reparation measure. Article 28, which is not included in the section on reparation measures, provides that “[a]n independent commission shall be established to provide redress for real estate grievances based on a law that shall be issued in this regard.” This provision is unclear regarding what “grievances” it refers to and, at the time of writing, the law that would establish such a commission has not been enacted. The right to property is protected under international law,<sup>170</sup> and arbitrary or unlawful deprivation of this right imposes an obligation on the State to ensure restoration of property.<sup>171</sup> IDPs and refugees have a specific right to restitution of housing and property.<sup>172</sup>

#### **4.2.3. Restoration of citizenship**

Law No. 29 of 2013 does not ensure restoration of citizenship as a form of reparation but imposes revocation of citizenship as a form of lustration. Article 29 provides that a “legal committee” must be formed by the President of the then GNC to review decisions granting Libyan nationality, which can take all necessary measures, including by proposing to revoke and nullify the Libyan nationality of (i) persons who were granted nationality based on decisions issued as of 15 February 2011; (ii) persons to whom nationality was granted for military purposes or political orientations under the former regime; and (iii) persons to whom nationality was granted in violation of the provisions of the legislation in force at the time of the issuance of the decision to grant nationality. Category (i) is understood to apply to persons that were granted nationality by the Gadhafi regime in 2011 and

<sup>163</sup> ICCPR, art. 9; Arab Charter, art. 14; ACHPR, art. 6.

<sup>164</sup> Human Rights Committee, *General Comment No. 35: Article 9 (Liberty and Security of Person)*, UN Doc. CCPR/C/GC/35, 16 December 2014, para. 32.

<sup>165</sup> *Ibid.*, para. 44.

<sup>166</sup> ICCPR, art. 9(5).

<sup>167</sup> ICCPR, art. 9(3); AComHPR, *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*, principle M(1)(e).

<sup>168</sup> Human Rights Committee, *General Comment No. 32*, para. 35.

<sup>169</sup> UNSMIL, *Report of the Secretary-General*, UN Doc. A/HRC/43/75, 23 January 2020, para. 60.

<sup>170</sup> ACHPR, art. 14; Arab Charter, art. 31.

<sup>171</sup> Human Rights Committee, *Brok v. Czech Republic*, UN Doc. CCPR/C/73/D/774/1997, 31 October 2001, paras. 7.4, 9; *Des Fours Walderode v. Czech Republic*, UN Doc. CCPR/C/73/D/747/1997, 21 November 1996, paras. 8.4, 9.2; African Commission on Human and Peoples Rights, *Malawi African Association et al v Mauritania*, Communications Nos. 54/91, 61/91, 98/93, 164/97-196/97 and 210/98, 11 May 2000, paras. 127-128 and recommendation 2.

<sup>172</sup> ICRC Customary IHL Study, rule 133; Sub-Commission on the Promotion and Protection of Human Rights, *UN Principles on Housing and Property Restitution for Refugees and Displaced Persons*, UN Doc. E/CN.4/Sub.2/2005/17, 28 June 2005, principle 2; *Guiding Principles on Internal Displacement*, UN Doc. E/CN.4/1998/53/Add.2, 11 February 1998, principles 29(2). See also *African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention)*, 22 October 2009, art. 11(4-5) (Libya is not yet party to this Convention).

hired as mercenaries in the context of the uprising and subsequent armed conflict.<sup>173</sup> Category (ii) amounts to a lustration measure akin to those adopted through Law No. 13 of 2013 on political and administrative isolation. “Reasoned” revocation and nullification decisions must be taken by the executive authorities “in accordance with the general rules pertaining to loss of nationality.”<sup>174</sup>

The categories prescribed by Article 29 are overly broad, and do not take due account of the personal circumstances under which a person may have been granted citizenship under Libyan law, which would require a case-by-case assessment. The procedure according to which the decision to revoke nationality shall be taken also does not ensure the necessary due process guarantees, including participation by the affected person or the right to seek review of or appeal the decision to a competent judicial authority. The right to nationality is enshrined in various human rights conventions.<sup>175</sup> Article 29 of the Arab Charter specifically prescribes that “... no citizen shall be deprived of his nationality without a legally valid reason.” Moreover, deprivations of citizenship require restoration as a remedy,<sup>176</sup> which Law No. 29 of 2013 does not guarantee.

Law No. 29 of 2013 should not facilitate the revocation of citizenship as a form of punishment. Rather, it should be amended to ensure the restoration of citizenship of those who were arbitrarily deprived of it.

#### **4.2.4. Return to one’s place of residence**

While Law No. 29 of 2013 addresses the issue of IDPs and refugees, it does not provide for a right to return to one’s place of residence as a form of restitution. Article 7 mandates the FFRC to “[s]tudy the circumstances of internally and externally displaced persons and make decisions about the measures necessary to provide them with a life of dignity, to enable them to enjoy their rights as do other Libyans, and to prevent any discrimination against them;” and to “[w]ork to return externally displaced Libyan citizens and to solve the problem of internally displaced persons.” Article 8 provides for the creation of “[a] department for issues of displaced persons.” Article 23, however, is silent on the return to one’s place of residence as a form of reparation. International law recognizes the right to return in one’s country,<sup>177</sup> and States have a corresponding obligation to ensure the safe and voluntary return of persons who have been deprived of such a right.<sup>178</sup> IDPs and refugees also have a right to return in safety and dignity.<sup>179</sup>

#### **4.3. Satisfaction**

Article 23(2) of Law No. 29 of 2013 envisages “memorialization” as the only type of satisfaction. Other forms, such as full and public disclosure of the truth, the search for the disappeared and missing and the remains of persons killed, and the documentation of “grave and systematic human rights violations,” are listed in article 7 as part of the mandate of the FFRC. Memorialization is also provided for in Law No. 31 of 2013 adopting provisions pertaining to the Abu Salim prison

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<sup>173</sup> American Bar Association’s Rule of Law Initiative, *In Legal limbo: An Assessment of Laws and Practices Affecting Amazigh, Tebu and Tuareg in Libya*, 2020, p. 55.

<sup>174</sup> Inserted footnote: see also Law No. 24 of 2010 on provisions of Libyan nationality.

<sup>175</sup> ICCPR, art. 24(3); Arab Charter, art. 29; *Convention on the Rights of the Child*, 1577 UNTS 3, 20 December 1989 (CRC) (Libya acceded on 15 April 1993), art. 8.

<sup>176</sup> Working Group on Enforced or Involuntary Disappearances, *General Comments on Article 19 of the Declaration on the Protection of All Persons from Enforced Disappearance*, UN Doc. E/CN.4/1998/43, 12 January 1998, para. 75; African Commission on Human and Peoples Rights, *Malawi African Association et al. v. Mauritania*, Communications Nos. 54/91, 61/91, 98/93, 164/97-196/97 and 210/98, 11 May 2000, para. 126 and recommendation 2; *John K. Modise v. Botswana*, Communication 97/93, 6 November 2000, recommendation 1.

<sup>177</sup> ICCPR, art. 12(4); Arab Charter, art. 27; ACHPR, art. 12(1-2).

<sup>178</sup> Human Rights Committee, *Jiménez Vaca v. Colombia*, UN Doc. CCPR/C/74/D/859/1999, 15 April 2002, para. 9; Working Group on Enforced or Involuntary Disappearances, *General Comments on Article 19 of the Declaration on the Protection of All Persons from Enforced Disappearance*, UN Doc. E/CN.4/1998/43, 12 January 1998, para. 75; African Commission on Human and Peoples Rights, *Malawi African Association et al. v. Mauritania*, Communications Nos. 54/91, 61/91, 98/93, 164/97-196/97 and 210/98, 11 May 2000, recommendation 2; *John D. Ouko v. Kenya*, Communication 232/99, 6 November 2000, recommendation 1.

<sup>179</sup> See footnote 172 above.

massacre,<sup>180</sup> and in Law No. 1 of 2014 on assisting the families of martyrs and missing persons of the 17th February Revolution.<sup>181</sup> The Law does not include other forms of satisfaction, which include: “[e]ffective measures aimed at the cessation of continuing violations; a “public apology, including acknowledgement of the facts and acceptance of responsibility;” “[c]ommemorations and tributes to the victims;” and “inclusion of an accurate account of the violations that occurred in international human rights law and IHL training and in educational materials.”<sup>182</sup> Law No. 29 of 2013 should expand the forms of satisfaction that victims of gross human rights violations or abuses and IHL violations, and their families, are entitled to.

#### 4.4. Rehabilitation

Article 23(3) of Law No. 29 of 2013 provides for “[t]reatment, rehabilitation, and provision of social services.” To ensure compliance with international standards, Law No. 29 of 2013 should specify that rehabilitation includes medical and psychological care,<sup>183</sup> that social services must aim for the full inclusion and participation of victims in the society,<sup>184</sup> and that these measures must encompass the victims’ next of kin.<sup>185</sup>

#### 4.5. Guarantees of non-repetition

While some guarantees of non-repetition are provided for in Law No. 29 of 2013, others are absent. Article 23 does not list guarantees of non-repetition as a form of reparation. However, legislative and institutional reform is provided for in other parts of Law No. 29 of 2013, including in its objectives to repeal “unjust laws that violated human rights and allowed for tyranny in the country” and “reformation of state institutions,”<sup>186</sup> and in the FFRC’s requirement to “... review legislation related to the issue of transitional justice” and “work to repeal unjust laws and restore proper legal life, in accordance with the constitution and with Sharia law.”<sup>187</sup>

Guarantees of non-repetition should include, among others, “ensuring effective civilian control of military and security forces; [e]nsuring that all civilian and military proceedings abide by international standards of due process, fairness and impartiality; [s]trengthening the independence of the judiciary; [and] [r]eviewing and reforming laws contributing to or allowing gross violations of human rights law and serious violations of [IHL].”<sup>188</sup> Law No. 29 of 2013 should accordingly envisage other guarantees of non-repetition especially germane to the Libyan context, including:

<sup>180</sup> Law No. 31 of 2013, arts. 6, 8.

<sup>181</sup> Law No. 1 of 2014, arts. 1-2, 9-10 (with respect to persons who went missing between 15 February 2011 and 23 October 2011). At the time of writing, this Law has not been implemented.

<sup>182</sup> *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, para. 22. Other forms of satisfaction, such as publication of the truth and circumstances of the violations and justice for them, have been discussed elsewhere in this paper. See sections 3.5-3.6 above.

<sup>183</sup> *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, para. 21.

<sup>184</sup> Committee against Torture, *General Comment No. 3*, para. 11.

<sup>185</sup> CAT, art. 14; ICCPED, art. 24(5)(b).

<sup>186</sup> Law No. 29 of 2013, art. 4. Article 5 further lists the following as components of the transitional justice process “[t]he issuance of laws and constitutional provisions that reveal the just nature of the 17 February Revolution, the injustice of the former regime, and the illegitimacy of unjust laws.” Article 6 states that “[t]he legislation issued by the former regime as an expression of its desires and without any legal or constitutional basis is unjust and shall be considered invalid and unconstitutional as of its drafting. Such legislation may not be used against established rights. The negative effects of such legislation on individuals and on society must be addressed.”

<sup>187</sup> Law No. 29 of 2013, art. 8(1). Article 1 of the 2011 Constitutional Declaration states that “Islam is the religion of the State and the principal source of legislation is the Islamic Sharia.” Article 6 of the 2017 Consolidated Draft Constitution employs similar language: “Islam shall be the religion of the State and Islamic Shariah shall be the source of legislation.” The present text does not include the requirement contained in previous drafts that the Constitution be interpreted in line with Sharia law and therefore the supremacy of Sharia over international law. The ICJ has previously expressed its concerns about the possible supremacy of Sharia law over international law in Libya. See ICJ, *The Draft Libyan Constitution: Procedural Deficiencies, Substantive Flaws*, December 2015, pp. 26–27; *Challenges for the Libyan Judiciary: Ensuring Independence, Accountability and Gender Equality*, July 2016, pp. 14–15.

<sup>188</sup> *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, para. 23.



- (i) Ensuring that the integration of officials and members of armed groups in the State's armed and security forces is conducted through proper and adequate vetting standards and processes, excluding persons responsible for crimes under international law;
- (ii) Ensuring the establishment of full and effective civilian oversight and control over security and armed forces;
- (iii) Ensuring that military courts do not have jurisdiction over civilians or over crimes under international law;
- (iv) Safeguarding the independence, impartiality and accountability of the judiciary, including by ensuring that: the High Judicial Council 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 are in line with international law and standards; and the High Judicial Council is consulted in respect of all matters relating to the judiciary, including judicial reforms;
- (v) 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 gross human rights violations and abuses and serious IHL violations;
- (vi) Ensuring 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, and that this is included in the new Constitution.

**In light of the above, the Libyan authorities should:**

- **Amend article 23(1) of Law No. 29 of 2013 to ensure compensation for any economically assessable damage, including physical and mental harm, moral damages, and lost opportunities including employment, education and social benefits, as well as material damages, and to exclude the "political motive" requirement;**
- **Amend articles 20 and 24-25 of Law No. 29 of 2013 to ensure that decisions on awards of compensation can be reviewed by or appealed to judicial authorities;**
- **Amend articles 23, 26, 28 and 29 of Law No. 29 of 2013 to:**
  - **Ensure that restitution of liberty is provided for as a form of reparation consistent with international law and standards prohibiting arbitrary detention, and grant compensation to victims of arbitrary or unlawful detention;**
  - **Expand the forms of restitution to include:**
    - **Restoration of property;**
    - **Restoration of citizenship;**
    - **The right to safe and voluntary return of IDPs and refugees;**
  - **Ensure the restoration of citizenship of those who were arbitrarily deprived of it as a form of reparation, and revoke any provisions that have the effect of facilitating the revocation of citizenship as a form of punishment;**
- **Amend article 23(2) of Law No. 29 of 2013 to include other forms of satisfaction, including measures aimed at the cessation of continuing violations; a public apology and acknowledgement of the facts and acceptance of State responsibility, and inclusion of information about violations of human rights law and IHL in training and education programmes;**
- **Amend article 23(2) of Law No. 29 of 2013 to ensure that rehabilitation includes medical and psychological care, that social services provide for the full inclusion and participation of victims in society, and that rehabilitation measures be addressed to the victims' next of kin;**
- **Amend Law No. 29 of 2013 to ensure guarantees of non-repetition as a form of reparation, particularly to:**<sup>189</sup>

<sup>189</sup> See further ICJ, *The Draft Libyan Constitution: Procedural Deficiencies, Substantive Flaws*, December 2015; *Challenges for the Libyan Judiciary: Ensuring Independence, Accountability and Gender Equality*, July 2016; *Accountability for Serious Crimes*

- Establish effective vetting standards and procedures to ensure that officials and members of armed groups responsible for crimes under international law and gross human rights violations and abuses and serious violations of IHL are not integrated into the State's armed and security forces;
- Establish full and effective civilian oversight and control over security and armed forces;
- Ensure that military courts do not have jurisdiction over civilians or over crimes under international law;
- Safeguard the independence, impartiality and accountability of the judiciary, and ensure that the High Judicial Council has the necessary powers and resources to act independently and impartially;
- Ensure the independence and autonomy of prosecutorial authorities;
- Ensure reform of the criminal justice framework to comply with international law and standards;
- Ensure that the new Constitution incorporates Libya's international human rights obligations;
- Amend article 23(4) of Law No. 29 of 2013 to entrust the FFRC, not the Government, to award other forms of reparations not expressly envisaged by the Law.

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Prof. Rodrigo Uprimny Yepes, Colombia



**International  
Commission  
of Jurists**

P.O. Box 91  
Rue des Bains 33  
CH 1211 Geneva 8  
Switzerland

**t** +41 22 979 38 00

**f** +41 22 979 38 01

[www.icj.org](http://www.icj.org)