

Women's Human Rights in the Libyan Draft Constitution

Ensuring equality,
overcoming discrimination

A legal briefing



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1. Introduction

National constitutions must provide for equal participation of women in public affairs, protect women against discrimination, including gender-based violence, and ensure gender equality, equality before the law and equal protection of the law without discrimination.

To this end, women's meaningful and effective participation in constitutional reform processes is critical. Indeed, any new constitutional settlement in Libya will not deliver justice, enduring peace, the rule of law and human rights for all without women's effective participation in the constitutional revision process, and without ensuring that the new constitutional dispositions fully guarantee women's and girls' human rights (hereafter women's human rights), as enshrined in international human rights law and standards.

In Libya, the process that led to the 2017 Consolidated Draft Constitution¹ (the latest version of the constitutional text proposed that has arisen from the constitutional reform process ongoing in the country, hereafter the 2017 Draft Constitution), has failed to ensure the meaningful and effective participation of women,² and many of the provisions on women's human rights included in the 2017 Draft Constitution fail, in numerous ways, to respect, protect and fulfill women's human rights in accordance with international law and standards.

At present, given the lack of clarity on the holding of a referendum on the text of a new Constitution before the national elections scheduled on 24 December 2021,³ Libya's constitutional reform process lies in limbo.⁴ The legal committee of the Libyan Political Dialogue Forum (LPDF) has proposed to postpone the referendum to decide whether to adopt or reject the new constitutional settlement and, instead, to delegate the constitutional reform to the next elected Parliament.⁵ In light of such developments, and given the ensuing delay in the eventual adoption of a new Constitution, there is an opportunity to address the gaps in the protection of women's human rights present in the 2017 Draft Constitution.

In the present paper, the International Commission of Jurists (ICJ) analyzes a number of concerns about the status of women's human rights in Libya, taking into consideration domestic legislation already in force. The ICJ has examined certain provisions of the 2017 Draft Constitution in light of Libya's obligations under international human rights law, particularly those pertaining to:

- Women's right to equal participation in public and political life (section 3);
- *Sharia* as a source of law and its potential impact on women's human rights (section 4.1);
- Equality, non-discrimination and equal protection of the law (section 4.2);
- Women's right to nationality and to transmit nationality on equal terms with men (section 4.3); and
- Women's protection from sexual and gender-based violence (section 4.4).

1. *Proposal of a Consolidated Draft Constitution* (29 July 2017), at <https://security-legislation.ly/node/35174>. On 29 July 2017, the 2017 Consolidated Draft Constitution was eventually adopted by the Constitution Drafting Assembly (CDA), with only two thirds of the CDA's members voting for its approval.

2. See section 2 below for further discussion on this point.

3. The date for parliamentary and presidential elections was announced at the conclusion of the Libyan Political Dialogue Forum (LPDF). See UNSMIL, *Statement by Acting Special Representative of the Secretary-General for Libya Stephanie Williams on the first round of the Libyan Political Dialogue Forum* (16 November 2020), at <https://unsmil.unmissions.org/statement-acting-special-representative-secretary-general-libya-stephanie-williams-first-round>. However, efforts to establish the legislative and constitutional framework of these elections by the LPDF are still ongoing. See UNSMIL, *UN Secretary-General's Special Envoy transmits the LC Proposal for the elections' constitutional basis to the LPDF Plenary* (4 May 2021), at <https://unsmil.unmissions.org/un-secretary-general%E2%80%99s-special-envoy-transmits-lc-proposal-elections%E2%80%99-constitutional-basis-lpdf>.

4. LPDF, *Roadmap for the Preparatory Phase of a Comprehensive Solution*, art. 3(2), at https://unsmil.unmissions.org/sites/default/files/lpdf_-_roadmap_final_eng_0.pdf.

5. Some experts have also proposed to reinstate the 1951 Constitution, as modified in 1963, in force between 1951 and 1969. See Marsad, *Discussing the path to a viable constitution for Libya at the NCUSLR conference* (22 May 2017), at <https://www.marsad.ly/en/2017/05/22/discussing-path-viable-constitution-libya-ncuslr-conference/>.

The aim of this paper is to highlight the gaps present in the 2017 Draft Constitution, as well as certain flaws in domestic laws, and make recommendations with a view to enhancing the respect, protection and promotion of women's human rights in the constitutional settlement that will eventually be adopted.

2. Background: exclusion of women from Libya's political and institutional life, including from the Constitution drafting process

Women have constantly been excluded from participating in the constitutional reform process in Libya, including through threats and the use of violence.⁶ Civil society, particularly women's rights groups, have expressed grave concern about their exclusion and marginalization by the Constitution Drafting Assembly (CDA),⁷ as well as the inconsistent and limited level of outreach by the CDA towards women and women's groups. Within the CDA, for instance, only six seats out of 60 were reserved to women,⁸ despite protests against their inadequate representation.⁹ The CDA also failed to take into account the recommendations and proposals made by women's groups on the previous drafts it had prepared.¹⁰ As a result, the Draft Constitutions of 2016 and 2017 (examined in greater detail below) contain several deficiencies, and fail to guarantee women's human rights, including by not effectively addressing discrimination and violence against women.

Women's representation in the political and constitutional process in Libya could not be taken for granted: constant pressure had been necessary throughout the transitional process in the years preceding the establishment of the CDA. With respect to the constitutional drafting process, Libyan women sternly rejected attempts to depict them as beneficiaries of rights that State institutions, including the CDA, "granted" to them. In this context, their rejection is grounded on the fact that women spearheaded the 2011 uprising, which led to the fall of Muammar Gadhafi's regime, and have been at the forefront of the efforts to achieve political change and an inclusive transition to democracy in its aftermath. Hence, Libyan women have constantly strived for a constitutional process that acknowledges that human rights are owed to them, based on their conviction that being considered as mere "grantees" of human rights would perpetuate their marginalization in public life.¹¹

Accordingly, women have also strived for securing a seat within the LPDF, in order to ensure their full participation in Libya's political decision-making process. The LPDF included 18 women out of the selected 75 members, ensuring the representation of various professional, regional and political backgrounds. This, for example, played an important role in securing the inclusion, within the LPDF Roadmap, of a commit-

6. Historically, women were excluded from Libya's political and institutional life under the regime of Muammar Gadhafi, which provided no space to women for participation in public life. For background, see Zahra' Langhi, *Gender and State-building in Libya: Towards a Politics of Inclusion*, The Journal Of North African Studies (2014).

7. The CDA was elected in 2014, tasked with drafting the new Constitution of Libya in accordance with the 2011 Constitutional Declaration. This body has seen its share of controversy, with a divide emerging between conservative and more liberal minded members, who have clashed with one another over key articles, such as those relating to the role of *Sharia* in the legal framework and the rights of women. These rifts in part reflect the current political divisions in the country. In addition, the Amazigh community has boycotted the CDA, since the beginning of its work, and the Tuareg and Tebu communities at different point in time have also boycotted it because of their belief that the process was not adequately representing their communities. According to article 51 of the Libyan Political Agreement of 17 December 2015, the CDA is also expected to "take the opinion of the House of Representatives and the State Council on the draft constitution upon the completion of the final draft and before it is sent for referendum. The remarks of such bodies must be sent in writing to the Assembly within one month of them receiving the draft constitution."

8. Law No. 17 of 2013 on the election of the Constituent Assembly in Charge of Drafting the Constitution, art. 6.

9. Libyan Women's Platform for Peace (LWPP), *Libya after Seven Years of Impasse: Prospects for The Transitional Period and The Roadmap*, May 2018. This document was shared internally from LWPP with the US Institute of Peace.

10. ICJ, *The Draft Libyan Constitution: Procedural Deficiencies, Substantive Flaws* (December 2015), p. 20.

11. Zahra' Langhi, *Gender and State-building in Libya: Towards a Politics of Inclusion*.

ment to guarantee 30 percent of ministerial positions to women.¹² Despite Prime Minister Abdulhamid Dabaiba's willful failure to implement this quota, continuous advocacy by women members of the LPDF has led to women holding 14 percent of cabinet positions within the Government of National Unity (GNU),¹³ including the Ministry of Foreign Affairs, the Ministry of Justice, the Ministry of Social Affairs, the Ministry of Culture and the Ministry of Women's Affairs.¹⁴

Due to persistent patriarchal stereotypes within Libyan society, however, women's adequate political and institutional representation remains a challenge, including with respect to appointments to senior State positions, including posts within the higher echelons of the judiciary. For instance, as the ICJ has previously documented,¹⁵ Law No. 8 of 1989, which had granted women the right to "hold judicial posts, and posts in the Public Prosecution, and the Litigation Administration, under the same conditions as men", was challenged in the Supreme Court in two separate cases.¹⁶ These challenges, which are still pending, claim that according to *Sharia* women may not authorize or terminate a marriage, and that they cannot be judges because they are emotional and "lack reason." The challenges also claim that men should not be judged by women because the Quran considers that "men are protectors and maintainers of women", and because being judged by a woman is degrading to a man's honour. Other arguments in the challenges also refer to an interpretation of *Sharia* that prevents women from moving freely without a *mahram* (male guardian), which, among other things, would negatively impact on their ability to work as a prosecutor.¹⁷ On the other hand, the Supreme Judicial Council continues to include female judges in its current composition. Female judges have also been appointed to the specialized courts tasked with trying cases of violence against women and children, which have been established in Tripoli and Benghazi.¹⁸

In addition to the issue of representation in senior positions, women in Libya also face obstacles in law and in practice to their exercise and enjoyment of human rights. Several laws and decisions have been issued that restrict women's human rights, particularly in matters of marriage, inheritance and divorce. For instance, the General National Congress (GNC) issued Law No. 14 of 2015,¹⁹ amending article 14 of Law 10 of 1984, so as to deprive women of their right to be witnesses to a marriage contract.²⁰ The same law also annulled the provision requiring a court approval for polygamy after assessing the man's social, health and financial ability.²¹ Further, Law No. 14 of 2015 placed on the woman alone the burden of "caring for [her husband's] comfort and moral and emotional stability", "supervising the marital home, organizing its affairs and caring for it", "caring for her children and protecting them", and require not to "caus[e] any material

12. LPDF, *Roadmap for the Preparatory Phase of a Comprehensive Solution*, art. 5(6). This commitment was reiterated in the Second Berlin Conference Conclusions. See The Second Berlin Conference on Libya, *Conference Conclusions* (23 June 2021), para. 21, at <https://www.auswaertiges-amt.de/en/newsroom/news/berlin-2-conclusions/2467750>.

13. The GNU was formed as part of the LPDF process; it is supposed to act as an interim government tasked with leading Libya to the 24 December 2021 parliamentary and presidential elections. In March 2021, the GNU was sworn in after having received the endorsement of the House of Representatives. See *Libya: UN envoy hails new national government after years of "paralysis and internal divisions"* (24 March 2021), <https://news.un.org/en/story/2021/03/1088192>.

14. The Africa Report, *Libya: Who are the five influential women ministers in the new government?* (17 March 2021), at <https://www.theafricareport.com/72773/libya-who-are-the-five-influential-women-ministers-in-the-new-government/>.

15. ICJ, *The Draft Libyan Constitution*, p. 41.

16. Constitutional Challenge No. 10/60 (judicial year) of 2012; Constitutional Challenge No.14/60 (judicial year) of 2013.

17. Menna Omar, *Libya's Judiciary: The Gender Ceiling (II)*, Legal Agenda (10 December 2013), at <https://english.legal-agenda.com/libyas-judiciary-the-gender-ceiling-ii/>.

18. UNSMIL Welcomes Appointment of Five Women Judges (13 October 2020), at <https://unsmil.unmissions.org/unsmil-welcomes-appointment-five-women-judges>.

19. It is worth mentioning that this law is the subject of controversy, as it was issued by the GNC after its mandate was terminated in August 2014, following the election of the House of Representatives. The scope of application of this law is therefore unclear.

20. Jazia Gebril, *Women's Rights in Libya: Preserving Past Gains, Fearing for the Future*, Legal Agenda (18 December 2015), at <https://english.legal-agenda.com/womens-rights-in-libya-preserving-past-gains-fearing-for-the-future/>.

21. Law No. 14 of 2015 removing Article 13 of Law No. 10 of 1984.

or moral harm to [her husband].”²²

In February 2017, the Governor of Derna issued Decision No. 6 of 2017 forbidding women under the age of 60 from traveling abroad without a *mahram* (male guardian).²³ The decision was later repealed and replaced with an equally restrictive decision imposing a travel ban on citizens from ages 18 to 45 without a security clearance from the intelligence services, hence giving ample discretion to forbid travel for reasons of “public interest.” While this decision is limited in temporal and geographical scope, it reflects an alarming tendency towards imposing restrictions on women’s human rights and fundamental freedoms under a religious pretext.²⁴

In addition, since the start of the political transition in 2011, women human rights defenders have been under constant attack, including on their lives. The most prominent examples are the assassination of Salwa Bugaighis, a former member of the Libyan Transitional Council and vice-president of the preparatory body for the National Dialogue Conference, and of General National Congress member Fariha Al-Barakawi in 2014; of human rights activists Entisar El Hassaeri in 2015 and Hanan al-Barassi in 2020;²⁵ and the kidnapping of the House of Representatives’ member Seham Sergiwa in 2019.²⁶

In light of the above, it is paramount that any future Constitution eventually emerging from the ongoing constitutional reform process adequately guarantees, protects, respects and fulfils women’s human rights in line with Libya’s international human rights law obligations.

3. Women’s right to equal participation in public and political life

Women must enjoy the right to participate in political and public life on an equal footing with men. Article 7 of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW),²⁷ among other things, provides:

States Parties shall take all appropriate measures to eliminate discrimination against women in the political and public life of the country and, in particular, shall ensure to women, on equal terms with men, the right:

(a) To vote in all elections and public referenda and to be eligible for election to all publicly elected bodies.

Inclusivity and women’s right to participate in public and political life and at all levels of decision-making is also guaranteed by article 25 of the International Covenant on Civil and Political Rights (ICCPR), article 13 of the African Charter on Human and Peoples’ Rights (ACHPR), article 9 of the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa (Maputo Protocol), and article 24 of the Arab

22. Law No. 14 of 2015, art. 18.

23. *Restricting Travel by Libyan Women: Interpretations and Repercussions*, Legal Agenda (24 May 2017), at <https://english.legal-agenda.com/restricting-travel-by-libyan-women-interpretations-and-repercussions/>. The territorial application of this decision was limited to the city of Derna in the east to the city of Ben Jawad in the west.

24. Ibid: “The *Fatwa* Office issued more than 35 *fatwas* from 2013 to 2015, all of which restrict women’s rights. Some of them bar women from traveling without being accompanied by a male. Although these *fatwas* are in practice non-binding, they are influential in Libyan society.”

25. HRW, *The Law is Failing the Women of Libya* (18 June 2014), at <https://www.hrw.org/news/2014/06/18/law-failing-women-libya>; Amnesty International, *Libya: Women human rights defenders still under attack, four years after activist’s assassination* (25 June 2018), at <https://www.amnesty.org/en/latest/news/2018/06/libya-women-human-rights-defenders-still-under-attack-four-years-after-activists-assassination/>; Amnesty International, *Human Rights Abuses Continue as Country Descends into Chaos* (May 2015), p. 6, at <https://www.amnesty.org/download/Documents/MDE1900032015ENGLISH.pdf>.

26. Lawyers for Justice in Libya, *Silencing speech: the abduction of lawmaker Seham Sergewa is the latest attack on free speech in Libya* (19 July 2019), at <https://www.libyanjustice.org/news/silencing-speech-the-abduction-of-lawmaker-seham-sergawa-is-the-latest-attack-on-free-speech-in-libya>.

27. The CEDAW is binding on Libya since its ratification in 1989.

Charter on Human Rights (Arab Charter), treaties by which Libya is bound as a State party.²⁸

The CEDAW Committee has affirmed that, “while removal of *de jure* barriers is necessary, it is not sufficient”,²⁹ meaning States must also eliminate *de facto* barriers to women’s equal participation in public and political life. This includes “financially assisting and training women candidates, amending electoral procedures, developing campaigns directed at equal participation, setting numerical goals and quotas and targeting women for appointment to public positions such as the judiciary or other professional groups that play an essential part in the everyday life of all societies.”³⁰

In 2009, the CEDAW Committee expressed concern about the fact that Libyan “women continue to be under-represented in political and public life, particularly in decision-making bodies”, and urged the State to “take all appropriate measures, including temporary special measures under article 4, paragraph 1, of the Convention, and in accordance with the Committee’s general recommendations Nos. 23 and 25, and to establish concrete goals to accelerate the increase of women’s representation in the executive branch of Government, Parliament and the diplomatic corps.”³¹ Twelve years later, in 2021, the CEDAW Committee further called on Libya to:

Take concrete, specific and effective legislative and other measures to enable, protect and promote women’s participation, on equal terms with men, in women’s rights organizations, non-governmental organizations and associations concerned with the public and political life of the country, including peace negotiation and electoral processes with a view to a sustainable and peaceful national reconstruction, and take effective measures to ensure that women are not intimidated into ceasing their participation in the public and political life of the country.³²

The necessity to “encourage the full, effective and meaningful participation of women ... in all activities relating to Libya’s democratic transition, conflict resolution and peacebuilding” was highlighted by the participants to the two Berlin Conferences on Libya held in January 2020 and June 2021, respectively.³³ UN Security Council Resolutions 2542 (2020) and 2570 (2021) reiterated this recommendation, including with specific reference to and in view of the forthcoming elections on the 24 December 2021.³⁴ In addition, Libyan civil society organizations specifically urged the LPDF to ensure that “[e]qual and meaningful participation of women ... be guaranteed in all fora aimed at laying the foundations for Libya’s transition to peace, stability and devel-

28. Libya is party to numerous international and regional human rights treaties, including: the CEDAW and its Optional Protocol; the ICCPR and its First optional Protocol; the ACHPR and the Maputo Protocol; the Arab Charter; the International Covenant on Economic, Social and Cultural Rights (ICESCR), the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), the Convention on the Rights of the Child (CRC), the International Convention on the Elimination of All Forms of Racial Discrimination (CERD), the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW), and the Convention on the Rights of Persons with Disabilities (CRPD). With specific reference to women’s human rights, beside the CEDAW and the Maputo Protocol, Libya is party to: the Convention on the Political Rights of Women; the Convention on the Nationality of Married Women; and three International Labour Organization’s (ILO) conventions relevant to the rights of working women, including the Maternity Protection Convention (Nos. 3, 183), the Discrimination (Employment and Occupation) Convention (No. 111), and the Equal Remuneration Convention (No. 100).

29. Committee on the Elimination of Discrimination Against Women (CEDAW Committee), *General Recommendation No. 23: Political and Public Life*, UN Doc. A/52/38 (1997), para. 15.

30. Ibid.

31. *Concluding Observations: Libyan Arab Jamahiriya*, UN Doc. CEDAW/C/LBY/CO/5, 6 February 2009, paras. 29-30.

32. *Magdulein Abaida v. Libya*, UN Doc. CEDAW/C/78/D/130/2018, 16 April 2021, para. 8(xii).

33. The Berlin Conference on Libya, *Conference Conclusions* (19 January 2020), para. 27, at <https://www.diplomatie.gouv.fr/en/country-files/libya/news/2020/article/the-berlin-conference-on-libya-conference-conclusions-19-jan-2020>; The Second Berlin Conference on Libya, *Conference Conclusions*, para. 21.

34. Security Council Resolution 2542, UN Doc. S/RES/2542 (15 September 2020), preambular para. 9; Security Council Resolution 2570, UN Doc. S/RES/2570 (2021), 16 April 2021, operative para. 2. See also Security Council Resolution 1325, UN Doc. S/RES/1325 (31 October 2000), preambular para. 5: “Reaffirming the important role of women in the prevention and resolution of conflicts and in peace-building, and stressing the importance of their equal participation and full involvement in all efforts for the maintenance and promotion of peace and security, and the need to increase their role in decision-making with regard to conflict prevention and resolution.”

opment.”³⁵ The Second Berlin Conference on Libya, held on 23 June 2021, specifically called on “the House of Representatives, the interim Presidency Council, the interim Government of National Unity and relevant authorities and institutions ... to ensure the full, equal and meaningful participation of women” in the 24 December 2021 elections.³⁶

Article 184 of the 2017 Draft Constitution provides that “[a]ny electoral system shall guarantee a quota for women of twenty-five percent of the total seats in the House of Representatives and local councils for two electoral terms.”³⁷ However, this provision is featured in the “transitional provisions” chapter, giving rise to the legitimate concern that the quota for women be a temporary measure, with no guarantees of continuity beyond the transitional period of two electoral terms. Further, article 184 does not clarify whether the 25 percent quota is a maximum or a minimum threshold, and whether minimum quotas for women shall also apply with regard to electoral lists.

The 2017 Draft Constitution lacks any strategy aimed at engaging the State in removing the *de facto* barriers to women’s right to equal participation in public and political life. Also, it does not adequately guarantee women’s representation in senior judicial institutions and in other senior State positions,³⁸ as required under article 25 of the ICCPR and article 7 of the CEDAW. Including provisions to this effect in the Constitution would help, to some extent, to guard against the views of those wishing to limit women’s right to participation in public and political life and, more generally, to circumscribe women’s roles in society; it would also prevent situations similar to the ongoing attempts to challenge laws that provide for the representation of women in senior posts, as mentioned above.³⁹

In light of the above, the ICJ urges the Libyan authorities to:

- **Ensure women’s equal and effective participation in public and political life by removing all existing *de jure* and *de facto* barriers, including by implementing the following recommendations expressly accepted by Libya during its third UPR cycle in March 2021:**
 - **“promoting greater representation in parliament”, also “through the establishment of quotas”;**
 - **“Ensure access for women to participate in political, constitutional and transitional justice processes”, as well as “conflict resolution and decision-making”;**⁴⁰
- **Amend article 184 of the 2017 Draft Constitution to:**
 - **Raise the 25 percent quota to 50 percent as a minimum threshold;**
 - **Remove the limitation of two electoral terms for the application of a quota for women;**
 - **Make it a permanent provision within the Constitution, instead of a “transitional provision”;**
- **Apply a quota for women, ideally of 50 percent as a minimum threshold, in any national or local election before the 2017 Draft Constitution is subjected to referendum, including in the general**

35. Working Group on International Humanitarian Law and Human Rights, *Key Principles for a Rights-based Roadmap Towards Sustainable Peace in Libya* (6 November 2020), principle IV, at https://unsmil.unmissions.org/sites/default/files/civil_society_principles_doc_for_lpdf_eng_-_7_nov_2020.pdf.

36. The Second Berlin Conference on Libya, *Conference Conclusions*, para. 15.

37. This article is an improvement compared to the 2016 Draft Constitution, which provided for a similar quota only in local councils, and which omitted to make provisions on women’s right to run as candidates in general elections.

38. For example, see article 115 of the Moroccan Constitution of 2011: “[a] representation of [women] magistrates must be assured, from among the ten members elected [in the Superior Council of the Judicial Power], in proportion to their presence in the corps of the magistrature.”

39. For example, see Constitutional Challenge No. 10/60 (judicial year) of 2012; Constitutional Challenge No.14/60 (judicial year) of 2013.

40. *Report of the Working Group on the Universal Periodic Review: Libya*, UN Doc. A/HRC/46/17 (5 January 2021); UN Doc. A/HRC/46/17/Add.1 (8 March 2021), paras. 148.218, 148.220, 148.221, 148.225, 148.227, 148.238, 148.243.

elections due to be held on 24 December 2021;

- **Include in the Constitution provisions regarding women's representation in the judiciary as a whole and in specific judicial offices, including the High Judicial Council.⁴¹**

4. The 2017 Draft Constitution

4.1. *Sharia* as a source of law

The rule of law and the separation of powers can be most clearly secured by explicitly specifying within the Constitution that its provisions take precedence over all other aspects of domestic law. The supremacy of the Constitution helps prevent abuses of power within and between different branches of the State by binding the legislature, the executive and the judiciary, and by providing an interpretative framework for the courts. Moreover, the primacy of international law within the Constitutional framework should be proclaimed unequivocally.⁴² While domestic law must fully comply with binding human rights law,⁴³ it may provide for greater protection of the human rights guaranteed under applicable treaties, a course that, naturally, is advisable and to be commended.

The 2017 Draft Constitution, however, gives rise to concerns with regard to the status of *Sharia* within the Constitution, and the possible primacy that *Sharia* might be accorded over international human rights law. Article 6 provides that "Islamic *Sharia* shall be the source of legislation." The 2017 Draft represents an improvement compared to the 2016 Draft, which affirmed that "Islamic *Sharia* shall be the source of legislation in accordance with the recognized doctrines and interpretations without being bound to a particular jurisprudential opinion on discretionary matters. The provisions of the Constitution shall be interpreted and bound in accordance with this." The wide variety of sources of interpretation and doctrines envisaged by the 2016 Draft would have created disputes on the interpretation of *Sharia*, leading to the possibility that extreme interpretations would have prevailed, as well as a violation of the principle of legality, given the resulting ambiguity.

Despite the improvement in the 2017 Draft Constitution, however, article 6 considers *Sharia* as "the" source of legislation, risking to make *Sharia* superior to the Constitution and failing to address situations where the interpretation of *Sharia* does not comply with Libya's international human rights obligations. In this respect, for example, article 13 of the 2017 Draft Constitution states that:

Ratified international treaties and conventions shall supersede the law but shall be subordinate to the Constitution. The State shall take the necessary measures to enforce such treaties and conventions so as not to conflict with the provisions of this Constitution.

The primacy provided to applicable international treaties over domestic law is a positive step; however, the Constitution should also be subordinate to binding international law. Article 13 further fails to include a reference to customary international law, which binds Libya irrespective of which treaty the country is bound by.

A combined reading of article 6 and 13 give rise to a genuine concern with respect to the possible primacy of *Sharia* over international human rights law. In fact, if *Sharia* and its interpretations take precedence over the Constitution, and if ratified human rights treaties are subordinated to the Constitution, then there is a risk that *Sharia* overrides Libya's international human rights law obligations. In this connection, as the ICJ has previously observed, making human rights guaranteed by international treaties subject to any potentially conflicting interpretations of *Sharia* or other religious laws is incompatible with the object and purpose of such

^{41.} ICJ, *Challenges for the Libyan Judiciary: Ensuring Independence, Accountability and Gender Equality* (July 2016), pp. 26-29, 36-38, 42-45.

^{42.} *Vienna Convention on the Law of Treaties* (23 May 1969) (VCLT), art. 27.

^{43.} Human Rights Committee, *General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN Doc. CCPR/C/21/Rev.1/Add. 13 (26 May 2004), para. 13.

treaties,⁴⁴ as well as with universally recognized rules of international law codified by the Vienna Convention on the Law of Treaties (VCLT), namely, the principle of *pacta sunt servanda*, and the principles of free consent and good faith.⁴⁵ The UN Human Rights Committee, for instance, has expressed concern in relation to those countries where there is a “lack of clarity on the primacy of the [ICCPR] over conflicting or contradictory national legislation, including both *Sharia* law and matters not based in *Sharia* law”;⁴⁶ or when “reference is made in the State party’s system to certain religious tenets as primary norms.”⁴⁷

Moreover, the 2017 Draft Constitution fails to indicate the body in charge of issuing interpretations of *Sharia* (*fatwas*) and the scope of this body’s jurisdiction, a problem the ICJ already highlighted in a previous report.⁴⁸ For instance, the 2017 Draft Constitution lacks a clear definition of the role of the *Sharia* Research Council under article 162.⁴⁹ This gives rise to concern that the opinions, recommendations and *fatwas* of such a body will not be bound by Libya’s international obligations. The UN Working Group on Discrimination against Women in Law and in Practice expressed similar concern regarding the role of Al-Azhar in Egypt, an “independent institution” described under article 7 of the Egyptian Constitution as “the main authority for religious sciences, and Islamic affairs”; in light of its concern, the Working Group urged the Egyptian authorities to “clarify that measures will be taken to ensure that interpretations provided by this body to the executive, legislature and judiciary will be brought into line with the legally binding international instruments Egypt has ratified, including on women’s human rights.”⁵⁰

It is worth recalling that, in relation to *Sharia*, Libya entered a “reservation” to the CEDAW, according to which:

1. Article 2 of the Convention shall be implemented with due regard for the peremptory norms of the Islamic *Sharia* relating to determination of the inheritance portions of the estate of a deceased person, whether female or male. The implementation of paragraph 16 (c) and (d) of the Convention shall be without prejudice to any of the rights guaranteed to women by the Islamic *Sharia*.⁵¹

Under article 28(2) of the CEDAW, “[a] reservation incompatible with the object and purpose of the present Convention shall not be permitted.” In this respect, the CEDAW Committee affirmed that “reservations to article 2 or to subparagraphs of article 2 [are], in principle, incompatible with the object and purpose of the Convention and thus impermissible under article 28, paragraph 2.”⁵² In light of this, on its face, Libya’s reservation to article 2 is not permitted. It follows that any measures concerning inheritance or marriage based on *Sharia* or its interpretations, which discriminate against women, violate the CEDAW and other applicable

44. ICJ, *The Draft Libyan Constitution*, pp. 26-27; *Challenges for the Libyan Judiciary*, pp. 14-15.

45. VCLT, preamble, and art. 26. The principle of good faith is further noted in other provisions of the VCLT.

46. Human Rights Committee, *Concluding Observations: Kuwait*, UN Doc. CCPR/C/KWT/CO/2 (18 November 2011), para 6.

47. Human Rights Committee, *Concluding Observations: the Islamic Republic of Iran*, UN Doc. CCPR/C/IRN/CO/3 (29 November 2011), para. 5.

48. ICJ, *The Draft Libyan Constitution*, p. 26.

49. “1. The *Sharia* Research Council shall assume the following duties: (i) Express an opinion on the matters referred thereto by State authorities to research and form opinions thereon based on *Sharia* evidence. (ii) Conduct specialized *Sharia* research to address various current and general religious issues with the assistance of specialists in all fields and issue recommendations thereon. (iii) Issue individual *fatwas* on beliefs, acts of worship, and personal interactions. 2. The Council shall comprise fifteen members specialized in Islamic *Sharia* and selected by the legislative authority for a six-year term renewable once. There shall be a chairman and deputy therefor from among the members for a three-year term. The Council shall also have a number of specialists in various fields. Geographic distribution shall be taken into consideration when selecting the members of the Council and the latter shall have branches. All of the above shall be as regulated by law.”

50. UN Expert Group Encourages Review Of Egypt’s Draft Constitution Concerning Equality And Women’s Human Rights (14 December 2012), at <https://www.ecoi.net/en/document/1312374.html>.

51. C.N.132.1989.TREATIES-7 of 10 July 1989, as modified on 5 July 1995, at <https://treaties.un.org/doc/Publication/CN/1995/CN.250.1995-Eng.pdf>.

52. CEDAW Committee, *General Recommendation No. 28: The core obligations of States parties under article 2 of the Convention on the Elimination of All Forms of Discrimination against Women*, UN Doc. CEDAW/C/GC/28 (16 December 2010), para. 41.

human rights standards, irrespective of Libya's purported "reservation."

In their concluding recommendations, both the UN Human Rights Committee and the CEDAW Committee have highlighted the systematic discrimination suffered by women in Libya, particularly in relation to nationality, marriage, divorce and inheritance.⁵³ It is therefore paramount that no room be left for interpretations of *Sharia* that may negatively affect women's enjoyment and exercise of their human rights as guaranteed under both the 2017 Draft Constitution and international human rights law binding on Libya. Similar concerns have been raised by the Human Rights Committee in relation to domestic judgments that contradict the provisions of the ICCPR.⁵⁴

In light of the above, the ICJ urges the Libyan authorities to:

- **Amend article 6 of the 2017 Draft Constitution to ensure the primacy of the Constitution over *Sharia*;**
- **Amend article 13 of the 2017 Draft Constitution to ensure the subordination of the Constitution to international law binding on the country, both treaty and customary, as well as to ensure compliance of any process of adoption, implementation or interpretation of national laws with Libya's international obligations, including under international human rights law;**
- **Remove Libya's purported "reservation" to the CEDAW in order to prevent interpretations of *Sharia* that may lead to discrimination against women.**⁵⁵

4.2. Equality, non-discrimination and equal protection of the law without discrimination

All Constitutions should guarantee women's right to equality, their right to freedom from discrimination in the enjoyment and exercise of their human rights, including, critically, gender-based discrimination and women's right to equal protection of the law without discrimination, as prescribed by international human rights law.⁵⁶ In this respect, article 2 of the CEDAW imposes a comprehensive set of obligations on States, including to:

... condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake:

- (a) To embody the principle of the equality of men and women in their national constitutions or other appropriate legislation if not yet incorporated therein and to ensure, through law and other appropriate means, the practical realization of this principle;
- (b) To adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting all discrimination against women;

^{53.} Human Rights Committee, *Concluding Observations: Libyan Arab Jamahiriya*, UN Doc. CCPR/C/LBY/CO/4 (15 November 2007), para. 11: "[t]he State party should review its laws in order to ensure equality between men and women in matters of personal status, in particular regarding divorce and inheritance. The State party should furthermore guarantee that equality is ensured in law and in practice"; CEDAW Committee, *Concluding Observations: Libyan Arab Jamahiriya*, UN Doc. CEDAW/C/LBY/CO/5 (6 February 2009), para. 18: "[t]he Committee further calls upon the State party to intensify its efforts to amend its legislation governing child custody expeditiously, in order to ensure that women have the same right as men to travel with their children abroad. The Committee recommends that the State party introduce legislative reforms to provide women with equal rights in marriage, divorce and inheritance. It calls upon the State party to end the practice of polygamy in accordance with the Committee's general recommendation No. 21, on equality in marriage and family relations."

^{54.} Human Rights Committee, *Concluding Observations: Iran*, UN Doc. CCPR/C/IRN/CO/3 (29 November 2011), para. 22: "[t]he Committee is also concerned that judges have used *Sharia* law and *fatwas* to reach a verdict that was in contravention to the rights and principles as laid down in the Covenant (art. 14). [...] The State party should also ensure that judges, in interpreting legislation as well as in relying on religious principles, do not reach verdicts that are in contravention to the rights and principles as laid down in the Covenant."

^{55.} ICJ, *The Draft Libyan Constitution*, p. 27.

^{56.} ICCPR, arts. 2(1), 3, 4(1) and 26; International Covenant on Economic, Social and Cultural Rights, arts 2(1), 3 and 7; ACHPR, art. 3; Arab Charter, art. 3(2); CRC, art. 2.

- (c) To establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination;
- (d) To refrain from engaging in any act or practice of discrimination against women and to ensure that public authorities and institutions shall act in conformity with this obligation;
- (e) To take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise;
- (f) To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women;
- (g) To repeal all national penal provisions which constitute discrimination against women.⁵⁷

The 2017 Draft Constitution contains some provisions pertaining to women's right to equality before the law, equal protection of the law and to be free from discrimination.⁵⁸ Article 7 provides that:

Male and female citizens shall be equal in and before the law. There shall be no discrimination between them. All forms of discrimination for any reason, such as ethnicity, colour, language, gender, birth, political opinion, disability, origin, or geographical affiliation, shall be prohibited in accordance with the provisions of this Constitution.

Article 16 guarantees "equal opportunity [between] male and female citizens", requiring the State to "take the necessary measures to achieve" this goal. Article 50 in turn provides that:

The State shall support and care for women, enact laws that ensure their protection, promote their status in society, eradicate negative culture and social customs that detract from their dignity, prohibit discrimination against them, ensure their right to representation in general elections, and open opportunities to them in all fields. The State shall also take the necessary measures to support the acquired rights of women.⁵⁹

The inclusion of general non-discrimination and equality clauses, specifically recommended by the ICJ in its previous report,⁶⁰ and by Libyan civil society organizations,⁶¹ is an improvement compared to the 2016 Draft Constitution. However, a number of shortcomings remain. Articles 7 and 16 of the 2017 Draft Constitution grant the right to equality before the law, equal protection of the law and to be free from discrimination to "citizens", by implication excluding non-citizens from their scope of application. Such an exclusion would be contrary to Libya's obligations under international human rights law. In this respect, the Human Rights Committee clarified that "the enjoyment of Covenant rights is not limited to citizens of States Parties but must also be available to all individuals, regardless of nationality or statelessness, such as asylum seekers, refugees, migrant workers and other persons, who may find themselves in the territory or subject to the jurisdiction of the State Party."⁶² Moreover, as explained in section 4.4 below, the ICJ regrets the removal of provisions explicitly committing the State to preventing all forms of violence against women, which are a form of gender-based discrimination. The 2017 Draft Constitution is also deficient, as outlined in section 4.3 below, in the context of women's right to nationality and the passing of

⁵⁷. See also Maputo Protocol, arts. 2, 8; ICCPR, art. 3; ACHPR, art. 18(3); Arab Charter, art. 3(3).

⁵⁸. Articles 9, 21, 33 and 59(3) of the 2016 Draft covered topics similar to the 2017 Draft. Article 9 lacked specific examples of discrimination, and article 33 contained a provision on the reconciliation between a woman's "obligations" and her work.

⁵⁹. CEDAW, art. 2; Maputo Protocol, arts. 2, 8; ICCPR, art. 3; ACHPR, art. 18(3); Arab Charter, art. 3(3).

⁶⁰. ICJ, *The Draft Libyan Constitution*, pp. 37-38.

⁶¹. Working Group on International Humanitarian Law and Human Rights, *Key Principles for a Rights-based Roadmap Towards Sustainable Peace in Libya* (6 November 2020), principle IV, at https://unsmil.unmissions.org/sites/default/files/civil_society_principles_doc_for_lpdf_eng_-_7_nov_2020.pdf.

⁶². *General Comment No. 31*, para. 10.

nationality to their children and spouses on equal terms with men.

Other provisions of the 2017 Draft Constitution give rise to concern in terms of women's right to equality. For instance, article 27 on the family states:

The family formed by legal marriage between a man and a woman shall be the foundation of society, being based upon religion, ethics, complementarity of roles between its members, affection, and mercy. The State shall ensure its protection, sponsor and encourage marriage, and protect motherhood and childhood.

Furthermore, article 51(3) of the 2017 Draft Constitution aims to guarantee "... a decent life for those in need, including ... widows, female divorcees, those who do not marry at an early age, and those who have lost support." These provisions fail to address the historical inequality between women and men in Libyan society and, in particular, in the context of Libyan families. On the contrary, they perpetuate harmful gender stereotypes on women, relegating them to their traditional roles as wives, carers and mothers, providing protection only to women on the grounds of such roles. With respect to this, the 2017 Draft Constitution fails to meet the CEDAW Committee's recommendations about equal sharing of family responsibilities between women and men, and Libya's responsibility to change "the widely accepted stereotypical roles of women and men."⁶³

With regard to national human rights institutions monitoring women's human rights and addressing discrimination against women in Libya, article 160 of the 2017 Draft Constitution provides for the creation of the National Council for Human Rights (NCHR) mandated, among other things, to "[s]upport women in obtaining their rights established by the Constitution and the law and ensure non-discrimination against them."⁶⁴ While article 155 of the 2017 Draft Constitution states that the NCHR "enjoy[s] legal personality and administrative, financial, and technical independence", under article 157 it remains "subject to the oversight of the House of Representatives." As previously noted by the ICJ, this may undermine the independence of the NCHR.⁶⁵ While the NCHR is competent to "be consulted on draft laws related to [its] area of expertise" (article 155), it is not entrusted with the ability to challenge the constitutionality of legislation and rules of procedure concerning human rights, including women's human rights, or to hear individual complaints relating to human rights violations. Such a limited mandate considerably reduces the NCHR's effectiveness in ensuring that State institutions comply with Libya's obligations under international human rights law. Moreover, the 2017 Draft Constitution fails to envisage the establishment of a "national machinery for the advancement of women", as recommended by the CEDAW Committee.⁶⁶

In light of the above, the ICJ urges the Libyan authorities to:

- **Amend articles 7 and 16 of the 2017 Draft Constitution to remove any references to "citizenship" as a basis to benefit from the right to equality, non-discrimination and equal protection of the law without discrimination, and ensure that all the rights and protections under the Constitution are granted to all individuals who may find themselves subject to the jurisdiction of the State, including asylum seekers, refugees, migrants and other persons;**⁶⁷
- **Amend articles 27 and 51(3) of the 2017 Draft Constitution to eradicate stereotypical roles attributed to women, to promote the equal sharing between men and women of family responsibilities, including with respect to maternity and child-care, and to guarantee that conditions for paid employment accommodate family responsibilities in a manner that ensures that men and women have equal access to paid employment;**⁶⁸

^{63.} CEDAW Committee, *Concluding Observations: Libyan Arab Jamahiriya*, UN Doc. CEDAW/C/LBY/CO/5 (6 February 2009), para. 22.

^{64.} *Ibid.*, para. 40.

^{65.} ICJ, *The Draft Libyan Constitution*, p. 34.

^{66.} *Concluding Observations: Libyan Arab Jamahiriya*, UN Doc. CEDAW/C/LBY/CO/5 (6 February 2009), paras. 15-16.

^{67.} See also Human Rights Committee, *General Comment No. 36: Article 6 (The Right to Life)*, UN Doc. CCPR/C/GC/36 (30 October 2018), para. 63.

^{68.} ICJ, *The Draft Libyan Constitution*, p. 42.

- **Strengthen the role and mandate of the National Council for Human Rights by:**
 - **Guaranteeing its independence from the legislative authority;**
 - **Ensuring that it is established in accordance with the Paris Principles;⁶⁹**
 - **Including a quasi-judicial competence to hear individual complaints relating to human rights violations; and**
 - **Empowering it to challenge the constitutionality of legislation and rules of procedure concerning human rights, including women's human rights.⁷⁰**
- **Implement the CEDAW Committee's recommendation on the establishment of a "national machinery for the advancement of women", particularly to:**
 - **"[P]ut in place an institutional mechanism that recognizes the specificity of discrimination against women and is exclusively responsible to promote *de jure* and *de facto* equality and to monitor the practical realization of the principle of substantive equality of women and men, with a view to promoting women's human rights and gender equality at all levels"; and**
 - **"[E]ndow at the highest political level such a mechanism with the necessary authority and human and financial resources to promote effectively the implementation of the Convention and the enjoyment by women of their human rights across all fields",⁷¹ in line with the Beijing Platform for Action.⁷²**

4.3. Women's right to nationality and to transmit nationality on equal terms with men

Several international and regional instruments provide for a clear right to equality between women and men concerning the acquisition, change, retention or passing of nationality. With regard to the transmission of nationality, article 9(2) of the CEDAW requires "States Parties [to] grant women equal rights with men with respect to the nationality of their children." The CEDAW Committee has emphasized that failure to comply with this obligation may render a child stateless, particularly if the father's country of origin does not permit him to pass nationality to his child, if the father is unknown or not married to the mother, or if the father is unable or unwilling to fulfill administrative steps in order to pass the nationality to his child.⁷³

Article 6(g-h) of the Maputo Protocol provides that "a woman shall have the right to retain her nationality or to acquire the nationality of her husband"; and that "a woman and a man shall have equal rights, with respect to the nationality of their children except where this is contrary to a provision in national legislation or is contrary to national security interests."

In a similar vein, and from the child's perspective, article 2(1) of the Convention on the Rights of the Child (CRC) prescribes that States shall ensure equality for all children irrespective of their parent's sex; article 7(1) further provides for the children's right to acquire a nationality.

The right to nationality, and to transmit nationality to children, without discrimination is also guaranteed under article 29 of the Arab Charter. The Arab Declaration on Belonging and Legal Identity further called upon States to:

... put an end to all forms of discrimination in the area of nationality and to take concrete steps to amend laws and legislation relating to nationality in order to grant women and men equal rights in

^{69.} *Principles relating to the Status of National Institutions (The Paris Principles)*, Adopted by General Assembly Resolution 48/134 (20 December 1993).

^{70.} ICJ, *The Draft Libyan Constitution*, p. 34.

^{71.} *Concluding Observations: Libyan Arab Jamahiriya*, UN Doc. CEDAW/C/LBY/CO/5(6 February 2009), para. 16.

^{72.} *Beijing Declaration and Platform for Action* (15 September 1995), paras. 196-203.

^{73.} *General Recommendation No. 32: The Gender-Related Dimensions of Refugee Status, Asylum, Nationality and Statelessness of Women*, UN Doc. CEDAW/C/GC/32 (14 November 2014), para. 61.

conferring nationality to children and spouses and to acquire, change or retain nationality in conformity with international standards and not contrary to national interests.⁷⁴

Importantly, paragraph 10 of the same Declaration called upon States to “[p]romote the lifting of reservations to the [CEDAW] in relation to provisions which protect the equal rights of women and men to acquire, retain or change their nationality and confer it to children.”

With regard to the right to transmit Libyan nationality, discrimination against women is entrenched in domestic law. Articles 3 and 4 of Law No. 24 of 2010 grant solely to men the exclusive right to pass nationality automatically to their children; women can pass Libyan nationality only when married to a man of unknown nationality, or with no nationality.⁷⁵ In this respect, Libya disregarded previous specific recommendations made by the CEDAW Committee to ensure full equality between men and women in relation to the transmission of nationality, and to bring domestic law in line with article 9 of the CEDAW.⁷⁶ Libyan civil society organizations have made similar calls in addressing the LPDF.⁷⁷ Regrettably, Libya did not accept, but just took note, of the UPR recommendations made by Cyprus and Ecuador in March 2021 to amend domestic legislation to allow Libyan women to transmit nationality to their children.⁷⁸

Article 11 of Law No. 24 of 2010 provides that “[t]he children of Libyan women married to non-Libyans may be granted Libyan nationality” in accordance with the procedure set in Regulation No. 594 of 2010. According to articles 6 and 7 of this Regulation, the child of a Libyan mother and foreign father cannot be granted nationality until they reach the age of majority, except when the father is deceased or is legally deemed missing. Once a child becomes an adult, they may apply for Libyan nationality, yet this may be granted only “after approval is obtained from the parents [to file the application], and from the body with competence over social affairs for the [parent’s] marriage.”⁷⁹ Furthermore, Regulation No. 594 does not allow the children of a Libyan woman married to a Palestinian to apply for Libyan nationality.⁸⁰ Such limitations may lead to situations where the child of a Libyan woman, even if born and raised in Libya, cannot fully enjoy the rights connected to citizenship due to having a foreign father. By posing different and more onerous conditions on women than on men to transmit Libyan nationality to their children, and on the latter to obtain Libyan nationality, Law No. 24 and Regulation No. 594 give rise to a prohibited discrimination under, among others, articles 2(1) and 24(3) of the ICCPR, articles 2(f) and 9(2) of the CEDAW, and articles 2(1) and 7(1) of the CRC.

As shown by recent case studies, many families continue to suffer various forms of societal exclusion due to nationality laws discriminating against women, including deprivation of the right to affordable education, public healthcare and work.⁸¹ Field studies have documented several instances where Libyan mothers married to non-Libyans have been arbitrarily denied the right to transmit nationality to their children, despite their eligibility and the lengthy bureaucratic procedure they had gone through, in violation of Libya’s obligations under international human rights law, including the CEDAW. Discriminatory nationality laws have

74. League of Arab States, *Arab Declaration on Belonging and Legal Identity*, endorsed at the Arab League Ministerial Conference on Belonging and Identity (28 February 2018), para. 9; see also League of Arab States, *The First Arab Conference on Good Practices & Regional Opportunities to Strengthen Women’s Nationality Rights* League of Arab States Secretariat General: Final Declaration (2 October 2017), paras. 5-6.

75. Law No. 24 of 2010, art. 3: “The following persons shall be considered Libyan: 1. Anyone who was born in Libya to a Libyan father, if his father’s nationality was acquired by virtue of birth or naturalization. 2. Anyone who was born outside Libya to a Libyan father. ... 3. Anyone born in Libya to a Libyan mother and father of unknown nationality or with no nationality, or if both parents are unknown.”

76. *Concluding Observations: Libyan Arab Jamahiriya*, UN Doc.CEDAW/C/LBY/CO/5 (6 February 2009), paras. 17-18.

77. Working Group on International Humanitarian Law and Human Rights, *Key Principles for a Rights-based Roadmap Towards Sustainable Peace in Libya* (6 November 2020), principle IV, at https://unsmil.unmissions.org/sites/default/files/civil_society_principles_doc_for_lpdf_eng_-_7_nov_2020.pdf.

78. *Report of the Working Group on the Universal Periodic Review: Libya*, UN Doc. A/HRC/46/17 (5 January 2021); UN Doc. A/HRC/46/17/Add.1 (8 March 2021), paras. 148.105, 148.106.

79. Jazia Djibril, *The Children of Libyan Women Married to Foreigners: Lost Identity and Rights*, Legal Agenda (8 July 2016), at <https://english.legal-agenda.com/the-children-of-libyan-women-married-to-foreigners-lost-identity-and-rights/>.

80. Ibid.

81. Khulud Al-Fallah, *Libyan women married to foreigners: “the Law punishes us for our life choices”* (4 December 2020), at <https://bit.ly/3g27hhi>.

also prevented other women from obtaining funding for education, State subsidies, or necessary official documents.⁸² The CEDAW Committee affirmed that “[n]ationality is critical to full participation in society”, otherwise individuals who are deprived of the right to nationality or to pass nationality are also “denied access to public benefits and a choice of residence.”⁸³

Law No. 24 of 2010 is also discriminatory towards Libyan women in relation to their right to transmit nationality to their foreign spouses. Article 10 provides that Libyan nationality may be granted to “[f]oreign women who are married to Libyan men”, and to “[w]idows and divorcees of Libyan citizens.” Article 9 further provides that “citizenship may not be granted to Palestinians except for Palestinian women who are married to Libyans.” Law No. 24 of 2010 does not grant an equivalent right to women to transmit nationality to their husbands; therefore, it discriminates against Libyan women based on sex, as they cannot transmit nationality to their spouses on equal terms with men, in violation of international law and standards.⁸⁴

Article 10 of the 2017 Draft Constitution stipulates that:

[a] law shall regulate the provisions of Libyan nationality and how it is conferred and withdrawn. The law shall take into consideration the national interest, preservation of the demographic composition, and ease of integration into the Libyan society. Libyan nationality may not be revoked for any reason whatsoever.

This provision is a step forward compared to the 2016 Draft Constitution, which openly discriminated women with respect to the passing of Libyan nationality to their children.⁸⁵ However, article 10 of the 2017 Draft Constitution fails to expressly mention that women and men should enjoy full equality with regard to their right to nationality, including transmission thereof to their children and spouses. While any discrimination against women in this respect would be prohibited in light of articles 7, 16 and 50 of the 2017 Draft Constitution,⁸⁶ article 10 fails to protect Libyan women from the historical discrimination they have suffered,⁸⁷ and which is entrenched in Law No. 24 of 2010 in relation to the right to transmit nationality to their children and spouses. Regrettably, during its third UPR Cycle in March 2021, Libya did not accept the recommendations made by Spain to “[r]epeal the provisions of the Personal Status Act that are discriminatory against women regarding marriage, divorce, inheritance and transmission of nationality”, or by Portugal to “protect, respect and fulfil women’s rights and combat discrimination”, or by Finland to “protect [women from] discrimination and amend the legislative framework to promote gender equality.”⁸⁸

In light of the above, the ICJ urges the Libyan authorities to:

- **Amend article 10 of the 2017 Draft Constitution to include a specific clause that ensures equality between men and women in relation to the acquisition, change, retention and transmission of nationality, and prohibits any form of discrimination against women in this respect;**
- **Amend articles 3, 4, 9, 10 and 11 of Law No. 24 of 2010, as well as articles 6 and 7 of Regulation No. 594 of 2010, to ensure that women can transmit Libyan nationality to their children and spouses under the same conditions as men.**

^{82.} *Fasanea shed lights on the suffering of Libyan women married to non-Libyans* (9 September 2016), at <https://fasanea.org/?p=4049>.

^{83.} *General Recommendation No. 21: Equality in Marriage and Family Relations*, UN Doc. A/49/38 (1994), para. 6.

^{84.} ICCPR, art. 2(1); CEDAW, art. 2; Arab Charter, art. 3(1).

^{85.} Article 12 of the 2016 Draft Constitution envisaged the grant of nationality to persons born to a Libyan father and those acquiring citizenship in accordance with the 1951 Constitution and corresponding laws. Article 13 regulates acquisition of nationality and adds the provision that “the law shall define preferential stipulations for children of Libyan women.”

^{86.} See section 4.2 above.

^{87.} Human Rights Committee, *Concluding Observations: Libyan Arab Jamahiriya*, UN Doc. CCPR/C/LBY/CO/4 (15 November 2007), para. 11; CEDAW Committee, *Concluding Observations: Libyan Arab Jamahiriya*, UN Doc. CEDAW/C/LBY/CO/5 (6 February 2009), para. 18.

^{88.} *Report of the Working Group on the Universal Periodic Review: Libya*, UN Doc. A/HRC/46/17 (5 January 2021); UN Doc. A/HRC/46/17/Add.1 (8 March 2021), paras. 148.222, 148.244, 148.248.

4.4. Protection from sexual and gender-based violence

Gender-based violence, defined by the CEDAW Committee as “violence that is directed against a woman because she is a woman or that affects women disproportionately”,⁸⁹ incorporates multiple forms, acts, omissions and manifestations “that inflict physical, mental or sexual harm or suffering, threats of such acts, coercion or other deprivations of liberty.”⁹⁰

Sexual violence against women and girls is, as such, a manifestation of gender-based violence. The CEDAW Committee has also held that gender-based violence against women constitutes discrimination within the meaning of article 1 of the CEDAW, seriously inhibiting “women’s ability to enjoy rights and freedoms on a basis of equality with men.”⁹¹ The prohibition on gender-based violence against women is now recognized as a principle of customary international law,⁹² which is binding on all States, irrespective of whether or not they are parties to international treaties codifying the prohibition in binding instruments. The term SGBV is used to emphasize sexual violence from acts that are not of sexual nature, which are also included in the broader term gender-based violence.⁹³

Numerous international authorities, including courts and tribunals, have confirmed that rape constitutes a form of torture under the ICCPR and the Convention Against Torture (CAT) when committed by, or at the instigation of, or with the consent or acquiescence of public officials, because it causes serious physical and mental suffering not only when it might be inflicted to obtain information or a confession, or to punish or intimidate the victim, but also because its perpetration is rooted in gender discrimination.⁹⁴ International authorities have also found that forms of sexual assault may constitute torture or other forms of cruel, inhuman or degrading treatment (ill-treatment).⁹⁵

The CEDAW Committee affirmed that States are under “a due diligence obligation to prevent, investigate, prosecute and punish [...] acts of gender-based violence”,⁹⁶ including when perpetrated by non-State actors.⁹⁷ As prescribed by articles 3 and 4 of the Maputo Protocol, women must be protected from all forms of violence, in particular sexual and verbal violence and unwanted or forced sex, whether the violence takes place in private or in public. States must not only adopt or enact necessary legislation, but also implement and enforce mechanisms to fulfill these obligations.⁹⁸

The 2017 Draft Constitution fails to include provisions on the protection of women from SGBV; it only includes general provisions aimed to “prevent all types of violence”,⁹⁹ including certain crimes under in-

89. *General Recommendation No. 35: Gender-based violence against women, updating general recommendation No. 19*, UN Doc. CEDAW/C/GC/35 (26 July 2017), para. 1.

90. *Ibid.*, para. 14.

91. CEDAW Committee, *General Recommendation No. 19: Violence against Women*, UN Doc. A/47/38 (1992), para. 1.

92. CEDAW Committee, *General Recommendation No. 35*, para. 2.

93. Office of the High Commissioner for Human Rights (OHCHR), *Integrating a Gender Perspective into Human Rights Investigations: Guidance and Practice* (New York/Geneva 2018), p. 9.

94. *Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, UN Doc. A/HRC/7/3 (2008), paras. 34-36; International Criminal Tribunal for the former Yugoslavia (ICTY), *Prosecutor v. Brđanin*, Case No. IT-99-36-T, Trial Chamber, Judgment (1 September 2004), para. 523; *Prosecutor v. Stanišić & Zupljanin*, Case No. IT-08-91-T, Trial Chamber, Judgment (27 March 2013), paras. 633, 682, 698 (Vol. 1).

95. The UN Special Rapporteur on torture had already noted in 1986 that sexual abuse is one of the various methods of physical torture. See, *Report of the Special Rapporteur on Torture*, UN Doc. E/CN.4/1986/15 (19 February 1986), para. 119. See also CEDAW Committee, *General Recommendation No. 19*, para. 7.

96. *General Recommendation No. 28: The Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women*, UN Doc. CEDAW/C/GC/28 (19 October 2010).

97. *General Recommendation No. 35*, para. 21; *Magdulein Abaida v. Libya*, UN Doc. CEDAW/C/78/D/130/2018 (16 April 2021), para. 6.3.

98. CEDAW Committee, *Magdulein Abaida v. Libya*, UN Doc. CEDAW/C/78/D/130/2018 (16 April 2021), para. 8(b)(ii-iii).

99. Article 35: “[t]he State shall protect human dignity, prevent all types of violence, and disavow torture and cruel, humiliating and inhumane treatment, forced disappearance, and all forms of slavery, involuntary servitude, forced labor, and human trafficking. Such crimes shall not be subject to the statute of limitations.”

ternational law.¹⁰⁰ Article 50 only provides that “[t]he State shall ... enact laws that ensure [women’s] protection.” This is insufficient to guarantee the adequate criminalization, investigation, prosecution and punishment of all forms of SGBV against women. The ICJ regrets the removal of language in previous Drafts explicitly prescribing that “[t]he State shall also take all necessary measures to prevent all forms of violence against [women].”¹⁰¹ It also constitutes another failure, on the part of the 2017 Draft Constitution, to protect women from discrimination, as illustrated in sections 4.2 and 4.3 above in relation to the provisions concerning equality, non-discrimination, equal protection of the law, and the right to transmit nationality to one’s children.

As the following sub-sections will show, and as previously found by the ICJ, Libyan law fails to criminalize SGBV in line with international law and standards.¹⁰²

4.4.1. Domestic violence and violence against women

Libya has not yet adopted comprehensive legislation on violence against women, including provisions criminalizing domestic violence and marital rape,¹⁰³ despite recommendations to this effect made by the

Human Rights Committee and the CEDAW Committee.¹⁰⁴ This is especially concerning also in light of the fact that “sexual and gender-based violence remain underreported in Libya owing to fear of reprisal, intimidation and misplaced stigma related to underlying discriminatory gender norms.”¹⁰⁵

Article 17 of Law No. 10 of 1984 states that “a woman has the right to expect her husband to ... refrain from causing her physical or psychological harm”; however, such a provision does not constitute a criminalization of all forms of domestic violence. In addition, the 2017 Draft Constitution fails to include provisions on the protection of women from SGBV; it only includes general provisions aimed to “prevent all types of violence”,¹⁰⁶ including certain crimes under international law.¹⁰⁷

Article 50 only provides that “[t]he State shall ... enact laws that ensure [women’s] protection.” This would be insufficient to ensure the adequate criminalization, investigation, prosecution and punishment of all forms of violence against women. The ICJ regrets the removal of language in previous Drafts of the Constitution explicitly prescribing that “[t]he State shall also take all necessary measures to prevent all forms of violence against [women].”¹⁰⁸

100. Article 37: “[a]ll forms of behavior that constitute crimes against humanity, war crimes, genocide, and terrorism shall be prohibited, shall not be subject to the statute of limitations, and shall not be pardoned, in so far as this does not contradict the provisions of the Constitution.”

101. ICJ, *The Draft Libyan Constitution*, p. 40.

102. ICJ, *Accountability for Serious Crimes under International Law in Libya: An Assessment of the Criminal Justice System* (July 2019), pp. 40-43.

103. Draft legislation on violence against women is currently being discussed in Libya; see UNSMIL, *Facilitated by the UN, National Experts Adopt Draft Law on Combatting Violence against Women in Libya* (19 June 2021), at <https://unsmil.unmissions.org/facilitated-un-national-experts-adopt-draft-law-combatting-violence-against-women-libya>.

104. *Concluding Observations: Libyan Arab Jamahiriya*, UN Doc. CCPR/C/LBY/CO/4 (15 November 2007), para. 10; *Concluding Observations: Libyan Arab Jamahiriya*, UN Doc. CEDAW/C/LBY/CO/5 (6 February 2009), paras. 23-24; *Magdulein Abaida v. Libya*, UN Doc. CEDAW/C/78/D/130/2018 (16 April 2021), para. 8(b)(i-iii).

105. United Nations Support Mission in Libya (UNSMIL), *Report of the Secretary-General*, UN Doc. S/2021/62 (19 January 2021), para. 64.

106. Article 35: “The State shall protect human dignity, prevent all types of violence, and disavow torture and cruel, humiliating and inhumane treatment, forced disappearance, and all forms of slavery, involuntary servitude, forced labor, and human trafficking. Such crimes shall not be subject to the statute of limitations.”

107. Article 37: “All forms of behavior that constitute crimes against humanity, war crimes, genocide, and terrorism shall be prohibited, shall not be subject to the statute of limitations, and shall not be pardoned, in so far as this does not contradict the provisions of the Constitution.”

108. ICJ, *The Draft Libyan Constitution: Procedural Deficiencies, Substantive Flaws* (December 2015), p. 40, at <https://www.icj.org/wp-content/uploads/2016/07/Libya-Draft-Constitution-Flaws-Deficiencies-Publications-Reports-2015-ENG.pdf>.

4.4.2. Criminalization of rape

Article 407 of the Libyan Penal Code provides:

1. Anyone who has sexual intercourse with another by force, threat, or deceit shall be punished with a penalty of imprisonment not exceeding ten years.

Article 407 seems to encompass acts usually associated with the crime of rape; yet, a number of elements of this provision appear to fall short of international law and standards.

First, article 407 does not define what “sexual intercourse” means. It appears that article 407 is generally interpreted in a restrictive way, meaning that only vaginal and anal penetrations with the penis are usually considered as conduct amounting to “sexual intercourse” for purposes of rape as a criminal offence.¹⁰⁹ Oral penetration with the penis, or the use of objects or other body parts to penetrate the vagina or anus of the victim, on the other hand, are not deemed to amount to “sexual intercourse” under article 407, and are qualified, instead, as conduct constitutive of the crime of “indecent assault” under article 408 of the Penal Code (analyzed below).¹¹⁰ Such a restrictive interpretation of the types of penetrative sexual conduct characterizing the crime of rape in Libyan domestic criminal law falls short of the constitutive elements of the criminal offence of rape under international law and standards. In line with international criminal tribunals’ jurisprudence,¹¹¹ the International Criminal Court’s Elements of Crimes define rape as a non-consensual:

[invasion of] the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body.¹¹²

When applied by Libyan justice actors, the definition of rape under article 407 of the Penal Code should conform to the international definition of the crime of rape. As illustrated by the Libyan case, restrictive understandings tend to omit various other forms of conduct that logically must constitute rape, such as: partial penetration of the vagina or the anus with the penis; oral penile penetration; vaginal or anal penetration of the victim with another body part, such as fingers or fists; or penetration of the victim’s anus or vagina with an object.¹¹³

To be consistent with international law and standards, the definition of the crime of rape under domestic law must also encompass rape against men and boys. In this respect, article 407 of the Libyan Penal Code conforms to international law and standards. By referring to “[a]nyone who has sexual intercourse with *another*” (*emphasis added*), this provision proscribes acts of rape committed against men and boys, as confirmed by domestic jurisprudence in Libya.¹¹⁴ However, it remains unclear whether article 407 also applies with respect to rape perpetrated against transgender persons; if not, the provision would, also in this respect, not comport with international law and standards.

109. Abubakar Ahmad al-Ansari, *Sharh Qanun Al-Oqubaat Al-Libi (Explaining the Libyan Penal Code) (Private section), First Title, Crimes of assault against individuals*, First Edition, 2013, Tripoli, Libya, p. 397-398 (only available in Arabic).

110. Ibid.

111. *Inter alia*, see *Prosecutor v. Jean-Paul Akayesu*, ICTR, ICTR-96-4, Trial Chamber, Judgment, 2 September 1998, para. 688; *Prosecutor v. Kunarac, Kovač and Vuković*, ICTY, IT-96-23 & IT-96-23/1-A, Appeals Chamber, Judgment, 12 June 2002, para. 460.

112. ICC Elements of Crimes, relating to article 7(1)(g)-1, article 8(2)(b)(xxii)-1 and article 8(2)(e)(vi)-1. See also *Prosecutor v. Bemba Gombo*, Doc. ICC-01/05-01/08-3343, Trial Chamber III, Judgement (21 March 2016), paras. 99-101.

113. For further discussion, see ICJ, *Women’s Access to Justice for Gender-Based Violence*, Practitioners’ Guide No. 12 (2016), pp. 203-204.

114. Supreme Court, Year 2, No. 1, 7 December 1955, p. 183: “Libyan law defines the crime of sexual intercourse in a manner that applies on either of the sexes, without distinction between male or female. Therefore, intercourse, as provided in the text, includes intercourse by male towards a female, or a male towards a male.”

Moreover, article 407 does not proscribe as rape all instances of penetrative sexual acts performed without the victim's consent. By mentioning only "force, threat, or deceit", this provision is not sufficiently broad to capture all situations in which consent is absent,¹¹⁵ without necessarily involving force, or the fact that the crime took place in the context of "coercive circumstances", which, in turn, would negate any consent on the victim's part.¹¹⁶ Defining the crime of rape or other types of sexual assault offences in terms that require force or coercion or physical signs of violence against the victim falls short of international legal standards. All non-consensual sexual assaults must be effectively investigated, prosecuted and punished even without evidence of physical resistance by the victim/survivor.

Defining rape and other types of sexual assault offences short of rape in terms that require proof that the perpetrator used or threatened violence or force – rather than on the victim's lack of consent to the sexual act in question – perpetuates harmful gender stereotypes and leads to impunity for these offences.¹¹⁷

4.4.3. Criminalization of sexual assault short of rape

Article 408 of the Libyan Penal Code provides:

1. Anyone who, by any of the means mentioned in the previous article [i.e., by force, threat, or deceit], commits indecent assault on another shall be punished by imprisonment not exceeding five years.

This provision gives rise to a number of concerns in terms of its adherence to international law and standards. First, by being premised on force, threat or deceit, article 408 does not appear to proscribe all forms of sexual assault short of rape. By explicitly referring to "the means" set out in article 407, article 408 therefore proscribes only instances where sexual assault is committed with "force, threat, or deceit." Similarly to what was stated above in relation to the crime of rape, the definition of the crime of sexual assault other than rape must encompass all circumstances in which the victim is unable, for whatever reason, including the existence of any kind of "coercive circumstances", to provide free consent at all times. Albeit in the context of determining whether acts of sexual violence constituted crimes against humanity, in the *Akayesu* case the International Criminal Tribunal for Rwanda (ICTR) defined sexual violence as "any act of a sexual nature which is committed on a person under circumstances which are coercive",¹¹⁸ adding that it "is not limited to a physical invasion of the human body and may include acts which do not involve penetration or even physical contact."¹¹⁹ International authorities have found that other forms of sexual assault, short of rape, may constitute torture or other ill-treatment,¹²⁰ including: the touching of sexual organs and threats of rape;¹²¹ being forced to watch sexual

115. ICJ, *Sexual and Gender-based Violence Offences in Lebanon: Principles and Recommended Practices on Evidence* (February 2021), pp. 34-35, at <https://www.icj.org/wp-content/uploads/2021/02/Lebanon-GBV-Memorandum-2021-ENG.pdf>.

116. The CEDAW Committee affirmed that legislation defining sexual assault must require either "the existence of 'unequivocal and voluntary agreement' and requiring proof by the accused of steps taken to ascertain whether the complainant/survivor was consenting; or ... that the act take place in 'coercive circumstances' and includes a broad range of coercive circumstances"; see CEDAW Committee, *Vertido v. The Philippines*, UN Doc. CEDAW/C/46/D/18/2008, 22 September 2010, para. 8.9(b)(ii).

117. ICJ, *Sexual and Gender-based Violence Offences in Lebanon*, p. 32; ICJ, *Women's Access to Justice for Gender-Based Violence – Practitioner's Guide No. 12* (February 2016), pp. 198-201, at <https://www.icj.org/wp-content/uploads/2016/03/Universal-Womens-access-to-justice-Publications-Practitioners-Guide-Series-2016-ENG.pdf>.

118. *Prosecutor v. Jean-Paul Akayesu*, ICTR, ICTR-96-4, Trial Chamber, Judgment, 2 September 1998, para. 598.

119. *Ibid.*, para. 688. See also *Prosecutor v. Alfred Musema*, ICTR, ICTR-96-13, Trial Chamber, Judgment, 27 January 2000, para. 965; *Prosecutor v. Rukundo*, ICTR, ICTR-2001-70-T, Trial Chamber, Judgment, 27 February 2009, paras. 379-380.

120. See Report of the Special Rapporteur on Torture, UN Doc. E/CN.4/1986/15, 19 February 1986, para. 119. See also CEDAW Committee, General Recommendation No. 19: Violence against Women, UN Doc. A/47/38, 1992, para. 7.

121. *Prosecutor v. Kvočka et al.*, ICTY, ICTY-98-30/1-T, Trial Chamber, Judgment, 2 November 2001, paras. 560- 561.

violence committed against an acquaintance or relative;¹²² forced mutual masturbation;¹²³ kicking a (male) prisoner in the genitals;¹²⁴ and forced nudity.¹²⁵

Second, the term “indecent” is problematic because it seems to refer to the “honour” of the victim/survivor, their family and society. Conceiving and criminalizing sexual offences along these lines diminish their seriousness and are irreconcilable with international standards,¹²⁶ infringing on a person’s human rights, including their right to security of person, bodily and sexual autonomy, the right to mental and physical integrity, the right to be free from torture and other prohibited ill-treatment, and to be free from discrimination on the basis of sex/gender, and the right to access to justice and effective remedies.¹²⁷

However, article 408 appears to be consistent with international law and standards insofar as it refers to “[a]nyone who ... commits indecent assault on *another*” (emphasis added), and thus would seem to proscribe sexual assault other than rape committed against men and boys. This provision should also apply in respect of sexual assault perpetrated against transgender persons. It is unclear if this is the case in practice; if not, in this respect article 408 would fall short of international law and standards.

4.4.4. Circumstances precluding the prosecution of rape and other forms of sexual assault

Article 424 of the Penal Code provides:

If the offender marries the woman against whom the offense is committed, the offense and penalty shall be extinguished and the penal effects thereof shall cease.

This provision runs counter to Libya’s obligations under international law and standards.¹²⁸ First, article 424 is non-compliant with Libya’s obligation to investigate, prosecute and punish the crimes under international law of rape and other forms of sexual assault. In fact, marrying a woman victim of rape or other sexual assault cannot under any circumstances extinguish the crime or bar prosecution: it would in effect amount to a legitimization *ex post* of the crime and shield offenders of sexual offences from accountability, entrenching impunity and subjecting women to secondary victimization and discrimination.¹²⁹

Second, article 424 constitutes gender-based discrimination against women for the following reasons: (i) it excludes women victims of rape, who are later married by the perpetrator, from obtaining redress for the harm suffered; (ii) it breaches their right to access to justice and effective remedies, including judicial remedies for serious crimes; and (iii) it subjects women to further psychological, and possibly physical, violence by obliging them to live together with the perpetrator of the crime of which they have been victims. Under certain circumstances, the latter situation may amount to the crime of sexual slavery.¹³⁰

122. *Prosecutor v. Furundžija*, ICTY, IT-95-17/1-T, Trial Chamber, Judgment, 10 December 1998, paras. 267-268; *Prosecutor v. Kvočka et al.*, ICTY, ICTY-98-30/1-T, Trial Chamber, Judgment, 2 November 2001, para. 149; *Prosecutor v. Stanišić & Župljanin*, ICTY, IT-08-91-T, Trial Chamber, Judgment, 27 March 2013, paras. 1214, 1235, 1246 (Vol. 1).

123. *Prosecutor v. Martić*, ICTY, IT-95-110T, Trial Chamber, Judgment, 12 June 2007, paras. 288, 413, footnote 899.

124. *Prosecutor v. Brđanin*, ICTY, IT-99-36-T, Trial Chamber, Judgment, 1 September 2004, paras. 498, 500. See also *Prosecutor v. Stanišić & Župljanin*, ICTY, IT-08-91-T, Trial Chamber, Judgment, 27 March 2013, paras. 613, 698 (Vol. 1).

125. *Valasinas v. Lithuania*, ECtHR, Application No. 44558/98, Judgment of 24 July 2001, paras. 117-118; Judgment of 25 November 2016, IACtHR, *Miguel Castro-Castro Prison v. Peru*, Series C No. 160, paras. 306, 308.

126. International Covenant on Civil and Political Rights, arts. 2(1) and 26; African Charter on Human and Peoples’ Rights, art. 2; Arab Charter on Human Rights, art. 3; CEDAW, arts. 1, 2, 15.

127. ICJ, *Sexual and Gender-based Violence Offences in Lebanon*, p. 8.

128. CEDAW, arts. 1, 2, 3, 5(a), 15.

129. ICJ, *Sexual and Gender-based Violence Offences in Lebanon*, p. 8.

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

The CEDAW Committee has criticized article 424 of the Penal Code, reiterating that perpetrators must always be duly prosecuted and punished.¹³¹ The ICJ has previously called on the Libyan authorities to repeal this provision.¹³²

4.4.5. Statutory limitations

Article 107 of the Penal Code provides as follows:

1. Felonies shall be extinguished once 10 years have passed from the day of the commission of the offence; ...
2. The validity of the time period after which offenses are extinguished shall not be suspended for any reason.

The application of statutory limitations as provided for under article 107 of the Penal Code may also serve as a barrier to holding perpetrators of rape and other serious sexual assault offences to account.

While article 1 of Law No. 11 of 1997 removed statutory limitations for crimes and criminal proceedings,¹³³ a Supreme Court decision has affirmed that the 10-year statutory limitation for felonies provided by article 107 of the Penal Code still applies.¹³⁴ The Tripoli Appeals Court applied such a statutory limitation on 15 December 2019, terminating on this basis the criminal proceedings against some of the defendants in the *Abu Salim* case.¹³⁵

Such practices run counter to Libya's obligations under international law, which prohibits statutory limitations for crimes under international law.¹³⁶ Principle 23 of the UN Impunity Principles 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."¹³⁷ As the UN Special Rapporteur on violence against women, its causes and consequences recommended, "[t]here should be no statute of limitation for initiating legal proceedings on rape, whether committed during conflict or in peacetime. Where statutes of limitation do exist, they should be prolonged to allow for the healing of victims/survivors and should never preclude access to justice. In the case of child victims, statutes of limitation should at a minimum allow for the initiation of proceedings after the victim has reached the age of majority."¹³⁸

131. *Concluding Observations: Libyan Arab Jamahiriya*, UN Doc. CEDAW/C/LBY/CO/5 (6 February 2009), paras. 23-24. See also Special Rapporteur on violence against women, its causes and consequences, *Rape as a grave, systematic and widespread human rights violation, a crime and a manifestation of gender-based violence against women and girls, and its prevention*, UN Doc. A/HRC/47/26 (19 April 2021), para. 90(c).

132. ICJ, *Accountability for Serious Crimes under International Law in Libya*, p. 43.

133. 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. Moreover, article 27 of Law No. 29 of 2013 on transitional justice 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."

134. Cited in American Bar Association Rule of Law Initiative, *Transitional Justice in Libya: Assessment of the Legal Framework* (2018), p. 31.

135. 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."

136. Human Rights Committee, General Comment No. 31, para. 18; *Concluding Observations: Argentina*, UN Doc. CCPR/CO/70/ARG (15 November 2000), para. 11; ICJ, *International Law and the Fight against Impunity*, Practitioners' Guide No. 7 (January 2015), pp. 363-372, 374, 378-384.

137. See also Human Rights Committee, *Concluding Observations: Argentina*, UN Doc. CCPR/CO/70/ARG (15 November 2000), para. 9.

138. *Rape as a grave, systematic and widespread human rights violation, a crime and a manifestation of gender-based violence against women and girls, and its prevention*, UN Doc. A/HRC/47/26 (19 April 2021), para. 107(a).

4.4.6. Rape and other serious forms of sexual assault as war crimes and crimes against humanity

Libya lacks legislation criminalizing war crimes and crimes against humanity, including rape and other serious sexual assault offences, as required under international law and standards.¹³⁹ For instance, the Rome Statute considers “rape, sexual slavery, enforced prostitution, forced pregnancy ..., enforced sterilization, or any other form of sexual violence” as war crimes both in international and non-international armed conflicts.¹⁴⁰ The same conduct amounts to crimes against humanity “when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.”¹⁴¹

The criminalization of rape and other serious sexual assault offences as war crimes and as crimes against humanity, whenever the relevant contextual elements are present, is critical to guaranteeing the provision of adequate penalties commensurate with their gravity.¹⁴² The absence of legislation in this respect is particularly concerning in light of the extensive perpetration of conflict-related sexual violence in the country.¹⁴³

4.4.7. Criminalization of certain consensual sexual relations

The criminalization of certain consensual sexual relations between persons of any sex or gender identity pursuant to Libyan domestic law violates international human rights law in several respects.¹⁴⁴

Law No. 70 of 1973 on the *had* (a crime under Islamic law) for *zina* (adultery, fornication) provides for corporal punishment for acts including extra-marital sex between consenting adults. The criminalization of adultery violates international human rights law,¹⁴⁵ including because it amounts to sex discrimination.¹⁴⁶ According to the CEDAW Committee, this provision should be repealed.¹⁴⁷ Similarly, the UN Working Group on discrimination against women in law and in practice has called on “... [g]overnments, which retain criminalization of adultery or which allow the imposition of fines, imprisonment, flogging, death by stoning or hanging for adultery, to repeal any such provisions.”¹⁴⁸

Consensual sexual conduct outside marriage is also criminalized under article 407(4) of the Penal Code, which provides:

If anyone has sexual intercourse with a person with that person’s consent, both he and his partner shall be punished by imprisonment for a period not exceeding five years.

This provision criminalizes not only consensual sexual relations between men and women, but also between

^{139.} ICJ, *Accountability for Serious Crimes under International Law in Libya*, p. 45-47.

^{140.} Rome Statute, arts. 8(2)(b)(xxii) and 8(2)(e)(vi).

^{141.} Rome Statute, art. 7(1)(g).

^{142.} Jazia Gebril, *Victims of Sexual Violence in Libya: Assessing Protection Mechanisms*, Legal Agenda (9 March 2016). See also Special Rapporteur on violence against women, its causes and consequences, *Rape as a grave, systematic and widespread human rights violation, a crime and a manifestation of gender-based violence against women and girls, and its prevention*, UN Doc. A/HRC/47/26 (19 April 2021), para. 90(a), at <https://english.legal-agenda.com/victims-of-sexual-violence-in-libya-assessing-protection-mechanisms/>.

^{143.} Zahra’ Langhi, Jazia Shiitir and Ragab Saad, *Research Studies on Marginalized Groups in Libya*, Defender Center for Human Rights (December 2020), pp. 57 ff, at <https://www.defendercenter.org/wp-content/uploads/2020/12/Research-web-EN-13-1-1.pdf>.

^{144.} Special Rapporteur on violence against women, its causes and consequences, *Rape as a grave, systematic and widespread human rights violation, a crime and a manifestation of gender-based violence against women and girls, and its prevention*, UN Doc. A/HRC/47/26 (19 April 2021), para. 114.

^{145.} Among others, CEDAW, arts. 1, 2, 15.

^{146.} CEDAW Committee, *General Recommendation No. 33: Women’s Access to Justice*, UN Doc. CEDAW/C/GC/33 (3 August 2015), para. 9.

^{147.} *Concluding Observations: Libyan Arab Jamahiriya*, UN Doc. CEDAW/C/LBY/CO/5 (6 February 2009), para. 24.

^{148.} UN Working Group on Discrimination against Women in Law and in Practice, *Adultery as a criminal offence violates women’s human rights* (18 October 2012), at <https://newsarchive.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=12672>.

persons of the same sex or other gender identity, amounting to a prohibited discrimination on the basis of sex, sexual orientation and/or gender identity or expression.¹⁴⁹

Article 408(4) provides for an equivalent crime of “consensual indecent assault”:

If anyone who commits indecent assault upon a person with that person’s consent, both he and his partner shall be punished by detention.

It is unclear how this provision conceives of an “assault”¹⁵⁰ that may have the victim’s consent. Possibly, the provision aims at criminalizing consensual acts of a sexual nature, not involving full sexual intercourse, between unmarried men and women, or consensual same-sex sexual relations or consensual sexual relations between transgender people or involving a transgender person. Like article 407(4), article 408(4) gives rise to prohibited discrimination based on sex, sexual orientation and/or gender identity or expression, in contravention to Libya’s international obligations.

4.4.8. Investigation and prosecution of SGBV

Under international law and standards, the Libyan authorities have an obligation to investigate, prosecute and punish, as necessary, all forms of SGBV.¹⁵¹

As mentioned above, however, cases of SGBV remain underreported in Libya.¹⁵² To the ICJ’s best knowledge, no information is available on the number of investigations and prosecutions of cases of SGBV.

The ICJ is particularly concerned about the fact that the criminalization of certain consensual sexual relations by means of Law No. 70 of 1973 and articles 407(4) and 408(4) of the Penal Code, as discussed in the previous section, may prevent victims from reporting sexual violence for fear of exposing themselves to the risk of prosecution.¹⁵³ For example, married women, who are victims of rape or other forms of sexual assault at the hands of a perpetrator who is not their husband, may be charged with the crime of adultery under Law No. 70 of 1973. Women and girls who are not married, as well as men and boys and transgender persons, may be charged under articles 407(4) and 408(4). All these provisions, therefore, have adverse consequences on SGBV victims’ access to justice, and may impede the fulfillment of Libya’s obligation to investigate, prosecute and punish SGBV offences.

On the other hand, a positive development in the direction of the prosecution and punishment of SGBV in Libya is the establishment of two courts, located in Benghazi and Tripoli, tasked with adjudicating cases of violence against women and children.¹⁵⁴ At the time of writing, these courts are not operational yet. It is important that Libyan authorities ensure the financial and operational durability of these institutions, as well as specialized training to judges and prosecutors. These courts must be made available and accessible to women.

149. International Covenant on Civil and Political Rights, art. 2(1); African Charter on Human and Peoples’ Rights, art. 2; Arab Charter on Human Rights, art. 3.

150. The Oxford Dictionary defines “assault” as “[a]n act that threatens physical harm to a person, whether or not actual harm is done”; see <https://www.lexico.com/definition/assault>.

151. The ICJ has developed relevant guidelines in the context of Morocco and Lebanon. See *Morocco: ensuring the effective investigation and prosecution of sexual and gender-based violence against women and girls* (December 2017), at <https://www.icj.org/morocco-ensure-effective-investigation-and-prosecution-of-sexual-and-gender-based-violence/>; *Accountability for Sexual and Gender-Based Violence in Lebanon: Guidance and Recommendations for Criminal Justice Actors* (October 2020), at <https://www.icj.org/lebanon-ensure-the-effective-investigation-prosecution-and-adjudication-of-sexual-and-gender-based-violence-new-icj-report/>.

152. United Nations Support Mission in Libya (UNSMIL), *Report of the Secretary-General*, UN Doc. S/2021/62 (19 January 2021), para. 64.

153. UNDP et al., *Gender Justice and the Law: Libya* (2018), p. 14, at <https://www2.unwomen.org/-/media/field-office-arab-states/attachments/publications/2018/gender-justices-and-the-law-in-the-arab-region/country-assessments/libya-country-assessment-english.pdf?la=en&vs=4403>.

154. United Nations Support Mission in Libya, *Report of the Secretary-General*, UN Doc. S/2020/832 (25 August 2020), para. 72.

4.4.9. Reparations for SGBV

Under Libyan law, there is a lack of effective remedies and adequate reparations for SGBV, and no comprehensive legal framework allowing redress for SGBV exists.

Libyan authorities have, so far, only adopted the councils of minister's Decree No. 119 of 2014 on "Addressing the Circumstances of Victims of Sexual Violence", and the minister of justice's Decree No. 904 of 2014, regulating the Fund for the Treatment of Situations of Sexual Violence.¹⁵⁵ It remains unclear whether and to what extent such decrees have been implemented in practice.

In light of the above, the ICJ urges the Libyan authorities to:

- **Include a provision in the 2017 Draft Constitution on the protection of women from violence, including SGBV, requiring State authorities to adopt necessary legislation to prevent, criminalize, investigate, prosecute and punish such acts;**
- **Amend articles 407 and 408 of the Penal Code to:**
 - **Bring the definitions of rape and other forms of sexual assault fully in line with international law and standards,¹⁵⁶ and specifically:**
 - **Ensure that all non-consensual acts of penetration of a sexual nature be proscribed;**
 - **Explicitly include lack of consent at the centre of all types of sexual assault offences, including rape, ensuring that their proscription be premised on lack of consent (i.e. the absence/lack of consent or impossibility to consent on the part of the victim/survivor of the sexual assault in question) as their central element;**
 - **Explicitly ensure that marital rape and other types of sexual assault short of rape perpetrated against one's spouse be criminalized;**
 - **Delete the term "indecent" in relation to sexual assault offences, and more generally desist from any reliance on concepts such as the "honour" of the victim/survivor of SGBV, their family and society;**
- **Criminalize rape and other serious forms of sexual assault as war crimes and crimes against humanity, and ensure that such crimes are duly investigated, prosecuted and punished;**
- **Repeal article 424 of the Penal Code to prevent, in relation to rape or other forms of sexual assault, the extinguishment of criminal liability, the penalty and/or its penal effects if the perpetrator marries the victim;**
- **Ensure that statute of limitations under article 107 of the Penal Code are not applicable to rape or other forms of sexual assault, particularly when such offences amount to war crimes or crimes against humanity;**
- **Repeal Law No. 70 of 1973, as well as articles 407(4) and 408(4) of the Penal Code, to:**
 - **Decriminalize adultery and consensual sexual conduct outside marriage between men and women;**
 - **Decriminalize consensual same-sex sexual conduct; and**
 - **Ensure that victims of SGBV have access to justice and effective remedies, instead of being**

^{155.} Jazia Gebril, *Victims of Sexual Violence in Libya: Assessing Protection Mechanisms*, Legal Agenda (9 March 2016), at <https://english.legal-agenda.com/victims-of-sexual-violence-in-libya-assessing-protection-mechanisms/>; Zahra' Langhi, Jazia Shiitir and Ragab Saad, *Research Studies on Marginalized Groups in Libya*, Defender Center for Human Rights (December 2020), p. 62, at <https://www.defendercenter.org/wp-content/uploads/2020/12/Research-web-EN-13-1-1.pdf>.

^{156.} In this respect, see the guidelines elaborated by the Special Rapporteur on violence against women, its causes and consequences: *A framework for legislation on rape (model rape law)*, UN Doc. A/HRC/47/26/Add.1 (15 June 2021).

- themselves charged and prosecuted for reporting such crimes;
- Create safe procedures for victims to report any form of SGBV to competent authorities;
- Develop robust guidelines on the investigation and prosecution of SGBV in line with international law and standards, and ensure full compliance with them by police officers, prosecutors and investigating authorities;¹⁵⁷
- Establish comprehensive redress and reparation schemes and mechanisms, including psycho-social support and rehabilitation, for victims of SGBV, including conflict-related SGBV;
- Implement the CEDAW's Committee recommendations to:
 - "Adopt comprehensive anti-discrimination legislation";
 - "Adopt and implement concrete and effective measures in the legislative, executive and judicial branches and at all levels of government in order to prevent and provide protection against gender-based violence against women in the public and private spheres including through a comprehensive legislation on gender-based violence against women";
 - "Design public policies, programmes, institutional frameworks and monitoring mechanisms to ensure that the competent authorities support and apply such legislation effectively and respond with due diligence to gender-based violence against women."¹⁵⁸
- Implement equivalent recommendations concerning the prevention, elimination, criminalization and punishment of SGBV expressly accepted by Libya during its third UPR cycle.¹⁵⁹

157. The ICJ has developed relevant guidelines in the context of Morocco and Lebanon. See *Morocco: ensuring the effective investigation and prosecution of sexual and gender-based violence against women and girls* (December 2017), at <https://www.icj.org/morocco-ensure-effective-investigation-and-prosecution-of-sexual-and-gender-based-violence/>; *Accountability for Sexual and Gender-Based Violence in Lebanon: Guidance and Recommendations for Criminal Justice Actors* (October 2020), at <https://www.icj.org/lebanon-ensure-the-effective-investigation-prosecution-and-adjudication-of-sexual-and-gender-based-violence-new-icj-report/>.

158. *Magdulein Abaida v. Libya*, UN Doc. CEDAW/C/78/D/130/2018 (16 April 2021), para. 8(b)(i-iii).

159. *Report of the Working Group on the Universal Periodic Review: Libya*, UN Doc. A/HRC/46/17 (5 January 2021); UN Doc. A/HRC/46/17/Add.1 (8 March 2021), paras. 148.223, 148.226, 148.228, 148.230, 148.232, 148.234-237, 148.239, 148.242.

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