

Towards Gender-Responsive Transitional Justice in Libya

Addressing Sexual and Gender-Based
Crimes against Women



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This briefing was made possible with the support of the Swiss Federal Department of Foreign Affairs. Assistance throughout the research and drafting process was provided by the Libyan Women's Platform for Peace.

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March 2022

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1. Introduction

1.1. Background and context

The Libyan transitional justice process has been stalled since 2013, when Law No. 29 was enacted.¹ While the series of armed conflicts that engulfed the country between 2014 and 2020 partly explains this state of affairs, the Libyan authorities have generally not implemented Law No. 29 of 2013, including by failing to establish the Fact-Finding and Reconciliation Commission (FFRC) envisaged under the Law. Systematic and widespread human rights violations and abuses committed during the regime of Muammar Gadhafi (1969–2011), and following the uprising that toppled it in 2011, however, have left Libyan society in desperate need of truth, justice, reparation and rule of law reform.

The necessity of embarking on a transitional justice process in Libya has resurfaced in the context of the renewed political negotiations that have taken place since the beginning of 2020, and that are still ongoing. In this respect, the participants in the Berlin I Conference on Libya, held on 19 January 2020, called on the Libyan authorities to “proceed with strengthening transitional justice.”² The UN Support Mission in Libya (UNSMIL) was also mandated to assist the Libyan authorities in seeking transitional justice and “national reconciliation.”³

At the national level, the Roadmap for the Preparatory Phase of a Comprehensive Solution, elaborated by the Libyan Political Dialogue

1 Law No. 29 on Transitional Justice (2 December 2013).

2 Berlin Conference Conclusions (19 January 2020), available at <https://www.bundesregierung.de/breg-de/aktuelles/the-berlin-conference-on-libya-1713868>, para. 50. See also UNSMIL Operationalization of Berlin Process, UN Doc. S/2020/63 (22 January 2020), p. 11: “[t]ransitional justice mechanisms compliant with international standards can play an important role in securing sustainable peace, justice and reconciliation. The Berlin Group should support the establishment of a Fact-Finding and Reconciliation Commission; the establishment of a Commission for Missing Persons, including for tracing and identifying missing persons; the establishment of a comprehensive vetting programme; strengthen the capacity of national institutions to carry out community-wide transitional justice processes for Libyans, including bottom up reconciliation processes, and provide assistance for innovative truth-seeking and dialogue opportunities for Libyans.”

3 UNSMIL Operationalization of Berlin Process, UN Doc. S/2020/63 (22 January 2020), p. 11; UN Security Council (UNSC) Resolution 2144, UN Doc. S/RES/2144 (14 March 2014), preambular para. 13 and operative para. 6(b); Resolution 2542, UN Doc. S/RES/2542 (15 September 2020), preambular para. 7 and operative para. 8.

Forum (LPDF)⁴ in November 2020, set the launch of “a comprehensive national reconciliation process based on the principles of transitional justice and promoting the culture of amnesty and tolerance in parallel with truth-seeking and reparation” as one of its objectives.⁵ In this context, the LPDF entrusted the executive authorities established under the Roadmap with initiating a “process of national and social reconciliation” to address, among others, enforced disappearances, arbitrary detentions, the return of internally displaced persons and reparations.⁶ The Presidency Council, one such authority, was specifically tasked to “[I]aunch the national reconciliation process and form a High Commission on Reconciliation” to implement it.⁷ The Presidency Council established the High Commission on National Reconciliation in April 2021.⁸ Yet, it remains unclear what its precise mandate is, whether it has taken any concrete steps in the discharge of its functions, and what its relationship with the FFRC is, if any.

Subsequent international efforts have further highlighted both transitional justice and “national reconciliation” as elements of a successful political process in Libya. For example, participants in the Berlin II Conference on Libya, held on 23 June 2021, affirmed that:

... a process of inclusive, comprehensive and rights-based national reconciliation and transitional justice needs to begin. ... We acknowledge the first steps of the interim Presidency Council and interim Government of National Unity towards launching an inclusive, comprehensive and rights-based national reconciliation process, and encourage the Libyan authorities to build and strengthen transitional justice institutions, as appropriate, such as the domestic Fact-Finding and Reconciliation Commission (FFRC) and the recently established High Commission on

4 The LPDF is a “fully inclusive intra-Libyan political dialogue established by the Berlin Conference Outcomes, which were endorsed by Security Council resolutions 2510 (2020) and 2542 (2020). Invited participants in the LPDF are drawn from different constituencies, based on the principles of inclusivity, fair geographic, ethnic, political, tribal, and social representation. ... The overall objective of the LPDF will be to generate consensus on a unified governance framework and arrangements that will lead to holding national elections in the shortest possible timeframe in order to restore Libya’s sovereignty and the democratic legitimacy of Libyan institutions.” See Acting Special Representative of the Secretary-General for Libya Stephanie Williams Announces the Launch of the Libyan Political Dialogue Forum Process (25 October 2020), at <https://unsmil.unmissions.org/acting-special-representative-secretary-general-libya-stephanie-williams-announces-launch-libyan>.

5 LPDF, Roadmap for the Preparatory Phase of a Comprehensive Solution, art. 1(2.9), at https://unsmil.unmissions.org/sites/default/files/lpdf_-_roadmap_final_eng_0.pdf.

6 Ibid., art. 6(2).

7 LPDF, Chapter on Unified Executive Authority, art. 2(1.6), at https://unsmil.unmissions.org/sites/default/files/lpdf_-_prerogatives_final_eng_0.pdf.

8 Libya Observer, Libya’s Presidential Council forms High National Reconciliation Commission (5 April 2021), at <https://www.libyaobserver.ly/news/libyas-presidential-council-forms-high-national-reconciliation-commission>.

National Reconciliation.⁹

Moreover, participants in the Paris International Conference for Libya, held on 12 November 2021, in turn, stressed "... the need for a comprehensive and inclusive national reconciliation process, based on the principle of transitional justice and respect for human rights", highlighting that "accountability ... should ... form part of the national reconciliation process."¹⁰

UN Human Rights Council Resolution 48/25 calls upon "the Government of National Unity and the international community to support victim-centred transitional justice efforts."¹¹ In the preamble of the Resolution, the Human Rights Council also affirms to be "looking forward to a future for Libya based on justice, national reconciliation, respect for human rights and the rule of law", commending "the establishment by the Presidential Council of the High Commission for National Reconciliation on 6 April 2021 in response to the urgent need to launch a comprehensive national reconciliation initiative to promote unity and social cohesion."¹²

In this context, an emphasis on "national reconciliation" has increasingly emerged. This may be explained by the necessity to bridge the deep political and institutional divide between the West and the East that has characterized Libya since 2014. However, in a context where impunity is entrenched, there is a risk that "national reconciliation" may be pursued at the expense of transitional justice, particularly insofar as accountability for past human rights violations and abuses is concerned.

Some signals already exist that "national reconciliation" may overshadow transitional justice in Libya. First, the LPDF Roadmap includes rather confusing language in respect of transitional justice, as it puts in the same basket "national reconciliation", "transitional justice", a "culture of amnesty and tolerance in parallel", as well as "truth-seeking and reparation",¹³ while omitting any reference to

9 The Second Berlin Conference on Libya (23 June 2021), paras. 5 and 55, at <https://www.auswaertiges-amt.de/en/newsroom/news/berlin-2-conclusions/2467750>. See also Statement on International Human Rights Day by Co-Chairs (Netherlands, Switzerland And UNSMIL) of International Humanitarian Law and Human Rights Working Group of International Follow-Up Committee on Libya (10 December 2021), at <https://unsmil.unmissions.org/statement-international-human-rights-day-co-chairs-netherlands-switzerland-and-unsmil-international>.

10 Declaration of the Paris International Conference for Libya (12 November 2021), paras. 7 and 24, at <https://www.elysee.fr/en/emmanuel-macron/2021/11/12/declaration-of-the-paris-international-conference-for-libya>.

11 UN Doc. A/HRC/RES/48/25 (13 October 2021), operative para. 30.

12 Ibid., preambular paras. 5 and 11.

13 LPDF, Roadmap for the Preparatory Phase of a Comprehensive Solution, art. 1(2.9).

accountability.¹⁴ Second, the Presidency Council has been tasked to launch a “national reconciliation process”, while its mandate fails to mention transitional justice.¹⁵ Third, it is particularly concerning that UNSMIL’s mandate, as established under UN Security Council (UNSC) Resolution 2542, mentions “national reconciliation”, while it omits any references to transitional justice.¹⁶

As two Libyan legal experts have highlighted, “[t]he notion of national reconciliation in the Libyan mindset is generally understood as turning the page and enabling forgiveness. Promoting ‘reconciliation’ may thus open the door for a continuation of impunity and a delay in justice.”¹⁷ The amnesty laws that were adopted in 2012 and 2015, whose provisions aimed to provide immunity for crimes under international law committed during and after the 2011 uprising and the ensuing armed conflict,¹⁸ exemplify the abovementioned Libyan experts’ concern in this respect.

The UN Committee on the Elimination of Discrimination against Women (CEDAW Committee) has observed that, while reconciliation processes may serve as an opportunity for victims and survivors to deal with their past, “they should never be used as a substitute for investigations into and prosecutions of perpetrators [of] human rights violations.”¹⁹ In this respect, Libya must “[e]nsure that support for reconciliation processes do not result in blanket amnesties for any human rights violations, especially sexual violence against women and girls and ensure that such processes reinforce its efforts to combat impunity for such crimes.”²⁰

To achieve enduring peace, justice and stability in Libya, transitional justice must be an essential component of any political settlement; the full realization of all its elements – including accountability for crimes under international law, integrating a gender-responsive approach, the

14 It is notable that transitional justice was not mentioned in the Key Principles for a Rights-based Roadmap Towards Sustainable Peace in Libya elaborated by Libyan civil society organizations in preparation of the LPDF. However, such a document places a strong emphasis on some of the components of transitional justice, including redress for the victims of serious human rights violations, the need to counter impunity and women’s rights. See Working Group on International Humanitarian Law and Human Rights, Key Principles for a Rights-based Roadmap Towards Sustainable Peace in Libya (6 November 2020), principles II-IV, at https://unsmil.unmissions.org/sites/default/files/civil_society_principles_doc_for_lpdf_eng_-_7_nov_2020.pdf.

15 LPDF, Chapter on Unified Executive Authority, art. 2(1.6).

16 Resolution 2542, UN Doc. S/RES/2542 (15 September 2020), preambular para. 7 and operative para. 8.

17 Azza Maghur and Salah Al Marghani, *Transitional Justice Evolutions, Challenges and Way Forward in Libya*, American Bar Association Rule of Law Initiative (February 2021), p. 40.

18 For an analysis of these laws, see ICJ, *Accountability for Serious Crimes under International Law in Libya: an Assessment of the Criminal Justice System* (July 2019), pp. 55-58, at <https://www.icj.org/wp-content/uploads/2019/07/Libya-Accountability-serious-crimes-Publications-Reports-Thematic-reports-2019-ENG.pdf>.

19 General Recommendation No. 30 on Women in Conflict Prevention, Conflict and Post-Conflict Situations, UN Doc. CEDAW/C/GC/30 (1 November 2013), para. 78.

20 *Ibid.*, para. 81(c).

right to truth and adequate reparations for victims²¹ – is essential. As the participants in the Paris International Conference for Libya stressed,²² transitional justice is instrumental to attain “national reconciliation”²³ and cannot be replaced by the latter.

1.2. The need for gender-responsive transitional justice in Libya

To comply with international law and standards, the transitional justice process in Libya must be gender-responsive.²⁴ The UN Human Rights Council has emphasized that a gender perspective must be fully integrated in all activities concerning transitional justice.²⁵ Moreover, the UN Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence has affirmed that States have an obligation to “adopt gender-responsive transitional justice mechanisms.”²⁶ In this context, “the strong engagement of women and solid understanding of how and when violations have affected men and women differently” are required.²⁷

Transitional justice in Libya must be gender-responsive also because violence against women is an endemic phenomenon, ranging from online violence²⁸ to physical threats, kidnapping and murder, particularly

21 Report of the Independent Fact-Finding Mission on Libya, UN Doc. A/HRC/48/83 (1 October 2021), paras. 5 and 89(o); Twenty-Second Report of the Prosecutor of the International Criminal Court to the United Nations Security Council pursuant to Resolution 1970 (2011) (23 November 2021), paras. 31-32.

22

23 UN Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence, Accountability: Prosecuting and Punishing Gross Violations of Human Rights and Serious Violations of International Humanitarian Law in the Context of Transitional Justice Processes, UN Doc. A/HRC/48/60 (9 July 2021), paras. 22 and 96: “... reconciliation entails rebuilding trust among the members of society and, above all, their trust in the State. If they are to achieve effective, lasting reconciliation, States in transition need to embrace a holistic process for upholding the five pillars of transitional justice – truth, justice, reparation, guarantees of non-repetition and memorialization – in full consultation with the victims and with civil society.”

24 UN Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence, The Gender Perspective in Transitional Justice Processes, UN Doc. A/75/174 (17 July 2020).

25 Resolution 21/15, Human Rights and Transitional Justice, UN Doc. A/HRC/RES/21/15 (11 October 2012), preambular para. 12.

26 The Gender Perspective in Transitional Justice Processes, para. 92.

27 International Center for Transitional Justice, Gender and Transitional Justice: A Training Module Series, at <https://www.ictj.org/multimedia/interactive/gender-and-transitional-justice-training-module-series>.

28 Lawyers for Justice in Libya, “We will not be silenced:” Online Violence Against Women in Libya (April 2021) at <https://www.libyanjustice.org/news/urgent-action-needed-to-address-shocking-levels-of-online-violence-against-libyan-women>.

against women activists and human rights defenders.²⁹ Sexual and gender-based (SGB) crimes, in particular, are committed on a large scale against women, albeit not exclusively, especially in the context of armed conflict and deprivation of liberty.³⁰ As highlighted by the CEDAW Committee, “[t]he failure to prevent, investigate and punish all forms of gender-based violence [...] can also lead to further violence against women in post-conflict periods.”³¹

The Libyan transitional justice process must take gender³² into account, and be inclusive of those persons who have historically been discriminated against based on their sex,³³ gender, gender identity³⁴ and/or sexual orientation,³⁵ including women.³⁶ For the Libyan transitional justice process to be gender-responsive, women must participate in its design, planning and implementation.³⁷ Women should not be considered as mere “beneficiaries” or simply as “victims/survivors” within Libya’s transitional justice process, but as active agents entitled

29 Investigation by the Office of the United Nations High Commissioner for Human Rights on Libya: Detailed Findings, UN Doc. A/HRC/31/CRP.3 (15 February 2016), paras 177-181; ICJ, Cairo Institute for Human Rights Studies (CIHRS), Defender Center for Human Rights (DCHR), Lawyers for Justice in Libya (LFJL) and Libyan Women’s Platform for Peace (LWPP), Libya Must End Systematic Impunity and Investigate the Killing of Lawyer and Political Activist Hanan al-Barassi (12 November 2020), at <https://www.icj.org/libya-must-end-systematic-impunity-and-investigate-the-killing-of-lawyer-and-political-activist-hanan-al-barassi/>; CEDAW Committee, *Magdulein Abaida v. Libya*, UN Doc. CEDAW/C/78/D/130/2018 (16 April 2021).

30 Report of the International Commission of Inquiry to investigate all alleged violations of international human rights law in the Libyan Arab Jamahiriya, UN Doc. A/HRC/17/44 (12 January 2012), paras. 202-209; Investigation by the Office of the United Nations High Commissioner for Human Rights on Libya: Detailed Findings, UN Doc. A/HRC/31/CRP.3 (15 February 2016), paras. 182-186; Report of the Independent Fact-Finding Mission on Libya, UN Doc. A/HRC/48/83 (1 October 2021), paras. 55 and 61-62; Azza Maghur and Salah Al Marghani, *Transitional Justice Evolutions, Challenges and Way Forward in Libya*, pp. 18-19.

31 General Recommendation No. 30, para. 35. See also EDVAW Platform, To “silence the guns”, end violence against women before, during and after conflict (12 February 2020), at <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25544&LangID=E>.

32 UN Office of the High Commissioner for Human Rights (OHCHR), *Integrating a Gender Perspective into Human Rights Investigations. Guidance and Practice* (2018), p. 7: “[g]ender refers to the socially constructed identities, attributes and roles of persons in relation to their sex and the social and cultural meanings attached to biological differences based on sex.”

33 *Ibid.*, p. 8: “Sex is the sum of biological and physiological characteristics that typically define men and women, such as reproductive organs, hormonal make-up, chromosomal patterns, hair-growth patterns, distribution of muscle and fat, body shape and skeletal structure.”

34 *Ibid.*: “Gender identity refers to a person’s deeply felt and experienced sense of their own gender, which may or may not correspond with the sex they were assigned at birth. It includes the personal sense of the body and other expressions of gender, such as clothing, speech and mannerisms. Everyone has a gender identity.”

35 *Ibid.*, p. 9: “Sexual orientation refers to a person’s physical, romantic and/or emotional attraction towards other people. Everyone has a sexual orientation.”

36 Other categories of persons facing discrimination and exclusion in this respect are lesbian, gay, bisexual, transgender, intersex and other gender non-conforming individuals (LGBTI+).

37 See section 2 below.

to have their perspectives reflected and addressed.³⁸

Since accountability for serious human rights violations and abuses, effective remedies and reparations for victims, and the right to truth are the main purposes of transitional justice with a view to fostering national reconciliation, gender-sensitive transitional justice processes must include a focus on SGB crimes. These crimes are acts of violence, of a sexual nature³⁹ or not,⁴⁰ which are criminalized under international or domestic law, and that are committed against a person because of their sex, socially constructed gender roles, gender identity and/or sexual orientation. As such, they can be committed by persons of all genders, including women, against women and girls, men and boys, and LGBTI+ people. For present purposes, persons that have been the target of SGB crimes will be referred to as “victims” and “survivors.”⁴¹

Against this background, the present briefing focuses on integrating a gender perspective within Libya’s transitional justice process, focusing specifically on women.⁴² The publication discusses, in particular, the need to:

- (i) guarantee women’s participation in the process; and
- (ii) address SGB crimes against women.

This briefing should be read in conjunction with ICJ’s previous analysis

38 Henri Myrntinen and Nicola Popovic, “We Were Like Caged Birds, This Gave Us Wings to Fly”: A Review of UN Women Programming on Gender-sensitive Transitional Justice, UN Women (June 2019), p. 12, at <https://www.unwomen.org/sites/default/files/Headquarters/Attachments/Sections/Library/Publications/2019/A-review-of-UN-Women-programming-on-gender-sensitive-transitional-justice-en.pdf>.

39 Ibid.: “Sexual violence is a form of gender-based violence. It encompasses acts of a sexual nature against one or more persons or that cause such person or persons to engage in an act of a sexual nature by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or persons or another person, or by taking advantage of a coercive environment or such person’s or persons’ incapacity to give genuine consent.”

40 Office of the Prosecutor of the International Criminal Court (ICC OPT), Policy Paper on Sexual and Gender-Based Crimes (June 2014), p. 4: “Gender-based crimes- are those committed against persons, whether male or female, because of their sex and/or socially constructed gender roles. Gender-based crimes are not always manifested as a form of sexual violence. They may include non-sexual attacks on women and girls, and men and boys, because of their gender.”

41 ICJ, Women’s Access to Justice for Gender-Based Violence – Practitioners’ Guide No. 12 (February 2016), at <https://www.icj.org/wp-content/uploads/2016/03/Universal-Womens-access-to-justice-Publications-Practitioners-Guide-Series-2016-ENG.pdf>, pp. 3–4: “[i]ndividuals whose rights have been abused or violated are normally described as ‘victims’ of human rights violations or crimes. ... Women human rights defenders tend to use the term ‘survivor’ instead of ‘victim’ as a way of reflecting the agency, resilience and courage of women and girls subjected to violence. ... However, sometimes both terms are seen as appropriate – ‘survivor’ celebrates the individual, but ‘victim’ recognises the enormity of the system of gender-based discrimination that women and girls face.”

42 Throughout this briefing, unless otherwise indicated, the terms “women” and “woman” are to be understood as encompassing “girls” and “girl”, respectively.

of the Libyan transitional justice and criminal law framework.⁴³

While the present publication's focus is on women's participation in the Libyan transitional justice process and the need to address SGB crimes, the ICJ acknowledges that existing, entrenched economic and social inequalities between women and men in Libya are among the root causes of the perpetration of SGB crimes against women on a large scale. For this reason, transitional justice in Libya also needs to strive to achieve substantive equality between women and men:

[m]aintaining a gender focus at the time of implementation requires a review of gender inequalities and discrimination and also a comprehensive understanding of the gender structure of society and how that affects the socioeconomic and political status of women in everyday life and their access to social programmes.⁴⁴

Addressing economic and social inequalities that predominantly or disproportionately affect women in Libya is fundamental to bringing about the real societal change that can contribute to achieving peace and stability in the country. To that end, the realization of women's economic, social and cultural rights must also be part of the transitional justice process,⁴⁵ which, in turn, requires that the Libyan authorities implement legal and institutional reforms to counter inequality between women and men in all realms, civil and political, as well as economic, social and cultural.⁴⁶ For instance, Libya has an obligation to give effect to the principle of equality between women and men and streamline it throughout its legal system by modifying or repealing all laws, regulations, policies and practices that discriminate against women, including in relation to civil and family law, employment, education, and healthcare and reproductive rights.⁴⁷

More generally, Libya must "integrate a gender perspective in [its]

43 Impunity No More: A Roadmap to Strengthening Transitional Justice in Libya (July 2020), at <https://www.icj.org/wp-content/uploads/2020/07/Libya-Transitional-justice-Publications-Reports-thematic-report-2020-ENG.pdf>; Accountability for Serious Crimes under International Law in Libya: An Assessment of the Criminal Justice System (July 2019), at <https://www.icj.org/wp-content/uploads/2019/07/Libya-Accountability-serious-crimes-Publications-Reports-Thematic-reports-2019-ENG.pdf>; Women's Human Rights in the Libyan Draft Constitution: Ensuring Equality, Overcoming Discrimination (October 2021), at <https://www.icj.org/wp-content/uploads/2021/10/Libya-Women-in-Constitution-publications-legal-briefings-2021-ENG.pdf>.

44 UN Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence, The Gender Perspective in Transitional Justice Processes, para. 41.

45 CEDAW Committee, General Recommendation No. 30, para. 76; OHCHR, Transitional Justice and Economic, Social and Cultural Rights, Doc. HR/PUB/13/5 (2014).

46 Henri Myrtilinen and Nicola Popovic, A Review of UN Women Programming on Gender-sensitive Transitional Justice, p. 12.

47 Convention on the Elimination of All Forms of Discrimination against Women, 1249 UNTS 13 (18 December 1979) (CEDAW) (Libya acceded on 16 May 1989), arts. 2(f), 3, 5, 10-14; Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol) (11 July 2003) (Libya acceded on 23 May 2004), arts. 1, 6-7, 12-17, 20-21, 23-24. See also ICJ, Women's Human Rights in the Libyan Draft Constitution, pp. 12-15.

policy decisions, legislation, development plans, programmes and activities and in all other spheres of life.”⁴⁸ To that effect, the Libyan transitional justice process should have “a transformative component towards greater gender equality, in addition to responding to individual human rights violations in a gender-sensitive manner.”⁴⁹

Recommendations

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

- i. Amend Law No. 29 of 2013, or enact a new law, to ensure that the transitional justice process comply with international law and standards,⁵⁰ and start implementing such a process without further delay;**
- ii. Ensure that a gender-responsive approach be streamlined throughout the transitional justice process; and**
- iii. Ensure that transitional justice in Libya address structural economic and social inequalities between women and men by integrating a gender-responsive approach in the process, including with respect to economic, social and cultural rights.**

2. Women’s participation in the transitional justice process in Libya

Inclusivity and women’s right to participate in public and political life and at all levels of decision-making is guaranteed by article 25 of the International Covenant on Civil and Political Rights (ICCPR), article 7 of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), 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 Charter on Human Rights (Arab Charter).⁵¹ The CEDAW Committee has affirmed that both

48 Maputo Protocol, art. 2(c).

49 Henri Myrtilinen and Nicola Popovic, *A Review of UN Women Programming on Gender-sensitive Transitional Justice*, p. 14. See also, CEDAW Committee, General Recommendation No. 30, para. 77.

50 For detailed recommendations in this respect, see ICJ, *Impunity No More: A Roadmap to Strengthening Transitional Justice in Libya*.

51 In addition to the CEDAW and the Maputo Protocol, Libya is party to: International Covenant on Civil and Political Rights, 999 UNTS 171 (16 December 1966) (ICCPR) (Libya acceded on 15 May 1970), arts. 2(1), 3, 4(1) and 26; African Charter on Human and Peoples’ Rights, 1520 UNTS 217 (27 June 1981) (ACHPR) (Libya ratified on 19 July 1986), art. 3; Arab Charter on Human Rights, League of Arab States (22 May 2004) (Arab Charter) (Libya ratified on 7 August 2006).

de jure and *de facto* barriers to women's equal participation in public and political life must be removed.⁵²

Libya has a general obligation to ensure "the increased participation of women ... in all aspects of planning, formulation and implementation of post-conflict reconstruction and rehabilitation."⁵³ Women's right to participate in transitional justice processes is an aspect of their right to participate in public and political life, and places on Libya an obligation to respect, protect and fulfil such a right.⁵⁴ The CEDAW Committee has pointed out that States should "[e]nsure that women are involved in the design, operation and monitoring of transitional justice mechanisms at all levels so as to guarantee that their experience of the conflict is included, their particular needs and priorities are met and all violations suffered are addressed; and ensure their participation in the design of all reparations programmes."⁵⁵

The African Union (AU) Transitional Justice Policy indicates that "States emerging from conflicts or authoritarian repression should ensure women's representation and participation at all stages of [transitional justice] processes."⁵⁶ To do so, they ought to take the necessary measures to undertake political and institutional reforms that encourage "women's participation into peace agreements and [transitional justice] laws and policies."⁵⁷ The AU Transitional Justice Policy further emphasizes the importance of addressing patterns of discrimination and inequality that enhance the risks of certain human rights violations for women,⁵⁸ including SGB crimes. In particular, gender-responsive transitional justice should "reveal patterns of gender abuse, improve access to justice for women, inform institutional reform to promote gender justice and create a space for women to inform sustainable peacebuilding."⁵⁹ To that end, it is paramount to guarantee women's participation in the design, planning and implementation of transitional justice processes.

The UNSC's resolutions establishing the Women, Peace and Security (WPS) agenda have emphasized the importance of adopting a gender-responsive approach to transitional justice and ensuring women's

52 General Recommendation No. 23 on Political and Public Life, UN Doc. A/52/38 (1997), para. 15.

53 Maputo Protocol, art. 10(2)(e).

54 CEDAW, General Recommendation No. 30, paras. 42 and 46(a).

55 Ibid., para. 81(e); Concluding Observations: Indonesia, UN Doc. CEDAW/C/IDN/CO/6-7 (7 August 2012), para. 28(f).

56 African Union, Transitional Justice Policy (February 2019), para. 102, at https://au.int/sites/default/files/documents/36541-doc-au_tj_policy_eng_web.pdf.

57 Ibid.

58 Ibid., para. 94. See also CEDAW, General Recommendation No. 30, para. 70.

59 African Union, Transitional Justice Policy, para. 54.

participation in such processes.⁶⁰ In Resolution 2467 (2019), for instance, the UNSC:

Encourage[d] concerned Member States to ensure the opportunity for the full and meaningful participation of survivors of sexual and gender-based violence at all stages of transitional justice processes, including in decision-making roles, recognize[d] that women’s leadership and participation will increase the likelihood that transitional justice outcomes will constitute effective redress as defined by victims and will respond to important contextual factors.⁶¹

The UN Human Rights Council has specifically recognized the fundamental role played by “[w]omen’s organizations in the design, establishment and implementation of transitional justice mechanisms, so as to ensure that women are represented in their structures and that a gender perspective is reflected in their mandates and work.”⁶²

Historically, transitional justice processes have failed to sufficiently address the experience of women, including victims and survivors of SGB crimes;⁶³ so far, Libya is no exception to this trend. However, the success of transitional justice in Libya, as seen from the foregoing, is strictly dependant on to the full inclusion and participation of women in the process.⁶⁴ An important element in this respect is “to avoid classifying women’s experience exclusively as victims of sexual violence and reducing them to sexual beings.”⁶⁵ In fact, as pointed out by the CEDAW Committee:

[w]omen are not a homogenous group and their experiences of conflict and specific needs in post-conflict contexts are diverse. Women are not passive bystanders or only victims or targets. They

60 UNSC Resolution 1325, which initiated the WPS agenda, requires parties to a conflict to prevent violations of women’s rights, to support women’s participation in peace negotiations and post-conflict reconstruction, and to protect women and girls from conflict-related sexual violence. See UN Doc. S/RES/1325 (31 October 2000).

61 UN Doc. S/RES/2467 (23 April 2019), operative para. 16(d). See also, among others, Resolution 1325, UN Doc. S/RES/1325 (31 October 2000), operative para. 11; Resolution 1820, UN Doc. S/RES/1820 (19 June 2008), operative para. 4; Resolution 2122, UN Doc. S/RES/2122 (18 October 2013), preambular para. 7.

62 Resolution 21/15, Human Rights and Transitional Justice, UN Doc. A/HRC/RES/21/15 (11 October 2012), para. 16.

63 International Center for Transitional Justice, Gender and Transitional Justice: A Training Module Series, at <https://www.ictj.org/multimedia/interactive/gender-and-transitional-justice-training-module-series>.

64 CEDAW Committee, General Recommendation No. 33 on Women’s Access to Justice, UN Doc. CEDAW/C/GC/33 (3 August 2015), para. 56(d); UN Special Representative of the Secretary-General on Sexual Violence in Conflict, Model Legislative Provisions and Guidance on Investigation and Prosecution of Conflict-Related Sexual Violence (June 2021), art. 66(8)(h), p. 35, at <https://www.un.org/sexualviolenceinconflict/wp-content/uploads/2021/06/report/autodraft/OSRSG-SVC-Model-Legislative-Provisions-ENG.pdf>.

65 UN Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence, The Gender Perspective in Transitional Justice Processes, para. 17.

have historically and continue to have a role as combatants, as part of organized civil society, human rights defenders, members of resistance movements and as active agents in both formal and informal peacebuilding and recovery processes.⁶⁶

In Libya, women took a leading role in the 2011 protests that toppled the Gadhafi regime and have since strived to be active participants in the transitional justice process. The post-2011 legal and political landscape in Libya features a complex mix of transitional authorities, laws, peace agreements and successive political roadmaps. Within this highly politicized context and despite prevailing harmful gender stereotypes and patriarchal norms, women have consistently asserted their role through proactive advocacy, networking and sheer pressure. However, notwithstanding these sustained efforts, their meaningful and effective inclusion in the transitional justice process is far from assured. Cultural norms and harmful gender stereotypes in Libya serve to exclude women from decision-making fora.⁶⁷ Their exclusion is compounded by the legacy of women's limited role in the political and economic sphere during the Gadhafi era.⁶⁸ Women's side-lining in Libyan society had already led the CEDAW Committee in 2009 to express concern about the fact that "women continue to be underrepresented in political and public life, particularly in decision-making bodies."⁶⁹

Neglect for women's participation in the political life of Libya is further evidenced by the fact that the Libyan authorities have not yet developed a National Action Plan pursuant to the WPS agenda.⁷⁰ According to UN Women, "[a]n Action Plan is a critical and practical document that details the actions a government takes to translate its WPS commitments into concrete policies and programmes to enhance women's participation in peace, security and reconstruction efforts."⁷¹ UN Women has provided technical expertise to the Ministry of Women's Affairs of the

66 CEDAW Committee, General Recommendation No. 30, para. 6.

67 For analysis on the exclusion of women from the Constitution drafting process, see ICJ, Women's Human Rights in the Libyan Draft Constitution, pp. 5–7.

68 Zahra' Langhi, Gender and State-Building in Libya: Towards a Politics of Inclusion, *The Journal of North African Studies* (2014). While negotiations and agreements that have emerged post-2011 include broad commitments to equality, gender analysis of transitional documents between 2011 and 2018 has demonstrated persistent oversights and missed opportunities with respect to women's participation in political processes. See Robert Forster, *A Gender Analysis of Peace Agreements and Transitional Documents in Libya, 2011-2018*, Global Justice Academy, University of Edinburgh (2019).

69 Concluding Observations: Libyan Arab Jamahiriya, UN Doc. CEDAW/C/LBY/CO/5 (6 February 2009), paras. 29–30. See also *Magdulein Abaida v. Libya*, UN Doc. CEDAW/C/78/D/130/2018 (16 April 2021), para. 8(xii).

70 Moosa Elayah, Wafa Al-Daily, Maryam Alkubati, *The Women, Peace, and Security (WPS) Agenda between Rhetoric and Action in the MENA Region: A Case Study of Yemen and Libya*, in A.A. Karim, R. Khalil, A. Moustafa (eds.) *Female Pioneers from Ancient Egypt and the Middle East* (Springer 2021).

71 Libya's Ministry of Women's Affairs and UN Women Agree to Collaborate on a National Action Plan on Women, Peace and Security (21 June 2021), at <https://arabstates.unwomen.org/en/news/stories/2021/06/libya-ministry-of-womens-affairs-and-un-women-agree-to-collaborate-wps>.

Government of National Unity (GNU) to assist in preparing a roadmap to a National Action Plan to implement UNSC Resolution 1325 in Libya.⁷² A National Action Plan would be a valuable tool for Libya to implement its commitments under the WPS agenda, including strengthening women's participation in political life and decision-making fora, and for civil society to monitor and hold the Libyan authorities accountable for any failure in this regard.⁷³

On 18 October 2021, however, the Prime Minister of the GNU, Abdul Hamid Dabaiba, decided to form a commission to open an administrative inquiry against the Minister of Women's Affairs, Huria Termal, for signing a Memorandum of Understanding (MoU) with UN Women to support the development of a Libyan WPS National Action Plan.⁷⁴ Pressured to justify the signing of the MoU in a meeting with the Supreme Council of the State, Minister Termal stated that "the signing was made on the condition that it did not prejudice the Libyan national laws, and Libya's previous reservations about CEDAW."⁷⁵ With respect to this, the Libyan Supreme Court had previously clarified that international treaties binding on Libya, including human rights treaties, such as the CEDAW and the Maputo Protocol, have primacy over national legislation and are directly applicable by Libyan courts.⁷⁶

The Conclusions to the Berlin I and II Conferences, as well as the UNSC Resolutions that endorsed them, have urged the Libyan authorities to ensure "the full, effective and meaningful participation of women ... in all activities relating to Libya's democratic transition, conflict resolution and peacebuilding",⁷⁷ thus encompassing the ongoing transitional justice process. This commitment to women's meaningful and effective

72 Ibid. The CEDAW Committee has recommended States parties to "[e]nsure that national action plans and strategies to implement Security Council resolution 1325 (2000) and subsequent resolutions are compliant with the Convention [CEDAW]." See General Recommendation No. 30, para. 28(a).

73 The CEDAW Committee has recommended Libya to adopt a national action plan, among other things, "to ensure a safe and favourable environment to women's human rights defenders and female activists and address the current state of impunity, including with respect to non-state actors." See *Magdulein Abaida v. Libya*, UN Doc. CEDAW/C/78/D/130/2018 (16 April 2021), para. 8(b)(v).

74 Zahra' Langhi, *Women, Peace And Security Is a Duty - Not a Crime!* (20 October 2021), at <https://www.elkara.ma/news/wps-is-not-a-crime>. For a copy of the official decision, see <https://twitter.com/zlanghi/status/1450567318073921536?s=20>.

75 The Media Office of the Supreme Council of State, a Facebook statement, at <https://www.facebook.com/TheHighCouncilOfState/posts/986207728604391>; Defender Center for Human Rights, *A Year of Missed Opportunities: A Briefing of the Human Rights Situation in Libya in 2021* (December 2021), p. 30, at <https://www.defendercenter.org/5615>.

76 ICJ, *Accountability for Serious Crimes under International Law in Libya*, p. 24.

77 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; UNSC Resolution 2542, UN Doc. S/RES/2542 (15 September 2020), preambular para. 9; Resolution 2570, UN Doc. S/RES/2570 (2021), 16 April 2021, operative para. 2. See also *Declaration of the Paris International Conference for Libya* (12 November 2021), para. 7.

participation has been reflected in UNSMIL's mandate.⁷⁸ Libyan civil society organizations have also 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 development."⁷⁹

Recommendations

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

- i. Ensure women's equal, meaningful and effective participation in public and political life by removing all existing *de jure* and *de facto* barriers in line with Libya's international human rights law obligations, including under the CEDAW and the Maputo Protocol;**
- ii. Develop gender sensitive legal frameworks, policies and programmes ensuring the human rights of women in conflict prevention, conflict and post-conflict situations;**
- iii. Adopt prevention and protection measures, including laws, policies and programmes, ensuring equal rights for all, without discrimination;**
- iv. Take into consideration the full spectrum of the Security Council's WPS Agenda in the establishment of all peace initiatives, including transitional justice policies;**
- v. Ensure women's right to equal, effective and meaningful participation in the design, planning and implementation of the transitional justice process in Libya as active participants, including through capacity-building, and refrain from relegating them exclusively to the roles of "beneficiaries" of such a process and/or merely as "victims/survivors" of SGB crimes; and**
- vi. Adopt a National Action Plan to implement the WPS agenda under UNSC Resolution 1325 and subsequent resolutions in full compliance with Libya's obligations under applicable international human rights law and standards, including the CEDAW.**

78 UNSC Resolution 2542, UN Doc. S/RES/2542 (15 September 2020), operative para. 8.

79 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.

3. Mandate, composition and expertise of the Fact-Finding and Reconciliation Commission

Law No. 29 of 2013 provides that the FFRC is to be established by the Libyan legislature as an “independent commission” enjoying “legal personality and financial independence.”⁸⁰ The ICJ has previously observed that the Law does not adequately guarantee the independence, impartiality and competence of the FFRC,⁸¹ as required under international law and standards.⁸² In addition, the establishing legislation fails to integrate a gender perspective into the FFRC’s mandate, composition and expertise.⁸³

As further explained in section 5.1 below, the FFRC’s role is to conduct fact-finding investigations not of a criminal in nature into serious human rights violations. However, Law No. 29 of 2013 does not specifically refer to SGB crimes as part of the serious human rights violations that fall within the scope of the FFRC’s **mandate**.⁸⁴ To be gender-responsive, the FFRC’s mandate needs to “give particular attention to sexual and gender-based violence as well as to patterns of gender inequality in the society that enable gender-based violence.”⁸⁵ With specific regard to SGB crimes, “[i]t must be part of the mandate of [the FFRC] to research and establish the truth regarding acts of sexual violence, their motives and the circumstances under which they were committed, as well as measures of justice and reparation for the victims of these acts.”⁸⁶

With regard to the FFRC’s composition, **gender parity or balance**

80 Law No. 29 of 2013, arts. 7 and 13..

81 ICJ, Impunity No More: A Roadmap to Strengthening Transitional Justice in Libya, pp. 10-12.

82 Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity, UN Doc. E/CN.4/2005/102/Add.1 (8 February 2005), principles 7 and 11.

83 For further analysis of this topic, see International Center for Transitional Justice, Truth Commissions and Gender: Principles, Policies and Procedures (July 2006), at https://www.ictj.org/sites/default/files/ICTJ-Global-Commissions-Gender-2006-English_0.pdf.

84 By way of example, UN Human Rights Council’s Resolution 43/39 required the Independent Fact-Finding Mission on Libya to considered “any gendered dimensions” of the violations and abuses of international human rights law and international humanitarian law that are part of its investigation. See UN Doc. A/HRC/RES/43/39 (6 July 2020), para. 43(a).

85 African Union, Transitional Justice Policy, para. 39. See also Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity, principle 8(d); UN Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence, The Gender Perspective in Transitional Justice Processes, para. 10.

86 African Commission on Human and Peoples’ Rights (AComHPR), Guidelines on Combating Sexual Violence and its Consequences in Africa, 60th Ordinary Session (8-22 May 2017), guideline 52(3).

between women and men must be ensured.⁸⁷ The participation of women as members of the FFRC is an aspect of the broader principle of women's right to participate in the transitional justice process.⁸⁸ In that sense, gender parity or balance "(a) brings greater visibility to the political decision to include a gender perspective in commission work, (b) ensures the presence of women at the highest decision-making levels of commissions; and (c) brings commissions closer to women victims."⁸⁹

Gender parity or balance must be ensured in the selection of FFRC's members and at all levels of recruitment, including when hiring staff and experts. Integrating gender-based criteria in the selection and recruitment process further requires to evaluate other necessary qualifications of potential commissioners and staff; the approach of such persons to gender issues must also be ascertained in order to assess their gender sensitivities.⁹⁰

It is paramount that FFRC members and staff have specific **gender expertise**. A special gender unit should be established and gender specialists should be allocated to all teams.⁹¹ More generally, FFRC's members and staff "should have sufficient knowledge of gender issues and receive ongoing training to raise awareness about gender, sexual violence ... and overcome[e] biases."⁹² Those conducting interviews should be specifically trained in identifying and recording the experience of victims and survivors of SGB crimes in a safe, confidential and sensitive manner.⁹³ Training should include: a) a specific focus on gendered patterns of human rights violations; b) gender sensitivities to be deployed during the taking of statements and with respect to other forms of data collection; c) hearings with women witnesses; and d) gender-sensitive report writing. Such measures are imperative to ensure that the FFRC's members and staff be adequately gender-sensitive, and to enable them to comprehensively understand the gender dimension of SGB crimes. Furthermore, such training is instrumental to create a favourable environment for victims and survivors to share their personal experiences, and useful for the FFRC to analyze gendered

87 Ibid., guideline 52(6); Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity, principle 7(c).

88 See above section 2.

89 UN Special Rapporteur on UN Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence, *The Gender Perspective in Transitional Justice Processes*, para. 14.

90 ICJ, *Nepal: Transitional Justice Mechanisms with a Gender Perspective* (May 2021), pp. 7-8, at <https://www.icj.org/wp-content/uploads/2021/05/Nepal-Transitional-Justice-Gender-Advocacy-Analysis-Brief-2021-ENG.pdf>.

91 UN Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence, *The Gender Perspective in Transitional Justice Processes*, para. 13.

92 Ibid., para. 14.

93 Ibid., para. 15. See also OHCHR, *Integrating a Gender Perspective into Human Rights Investigations*, p. 32.

patterns of SGB crimes.⁹⁴

Finally, gender must be mainstreamed in the FFRC's **final report**.⁹⁵ Women's views and perspectives on the FFRC's findings and recommendations, and on transitional justice more generally, must be included.⁹⁶ This should prevent stereotypical representations of women, which assign them the role of "victims/survivors" or "vulnerable" individuals. While there is a need for the FFRC's final report to be public,⁹⁷ information regarding victims and survivors must be disclosed only to the extent they have provided specific and informed consent for that purpose.

Recommendations

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

i. Integrate a gender perspective into the mandate of the FFRC, and in particular:

o Expressly include SGB crimes within the scope of its investigation and work; and

o Require it to consider patterns and root causes of societal gender inequality between women and men that contribute to the commission of SGB crimes;

ii. Guarantee gender parity or balance in the selection of FFRC's members and at all levels of staff recruitment;

iii. Ensure gender expertise within the FFRC by:

o Establishing a special gender unit and allocate gender specialists to all teams; and

o Undertake adequate and continuous training of all FFRC's members and staff;

iv. Ensure that the FFRC's final report:

o Includes women's views and perspectives; and

o Adequately addresses SGB crimes and analyzes

94 ICJ, Nepal: Transitional Justice Mechanisms with a Gender Perspective, p. 13. See also UN Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence, The Gender Perspective in Transitional Justice Processes, para. 53.

95 Ibid., paras. 25-26.

96 Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity, principle 12.

97 ICJ, Impunity No More: A Roadmap to Strengthening Transitional Justice in Libya, p. 21.

the gender dimension of the commission of serious human rights violations in Libya.

4. Criminalization of sexual and gender-based crimes

Libya has an obligation to “adopt and implement appropriate measures to ensure the protection of every woman’s right to respect for her”, and ensure protection “from all forms of violence, particularly sexual and verbal violence.”⁹⁸ This obligation requires that SGB crimes, including rape and other forms of sexual assault, be adequately criminalized under domestic law as autonomous crimes.⁹⁹ Depending on the circumstances, SGB crimes may also constitute torture or other cruel, inhuman or degrading treatment (ill-treatment), war crimes and crimes against humanity, and should be criminalized accordingly.¹⁰⁰

However, Libyan law fails to criminalize SGB crimes such as rape, including marital rape, and other forms of sexual assault in accordance with international law and standards.¹⁰¹ Rape and other serious forms of sexual assault constituting war crimes and crimes against humanity are also not penalized in domestic law.¹⁰² Law No. 29 of 2013 on transitional justice has failed to remedy this gap. Its article 2, which defines the type of serious human rights violations that fall under the material scope of the Law,¹⁰³ does not generally comply with Libya’s

98 Maputo Protocol, art. 3(4); CEDAW, art. 2(b); CEDAW Committee, General Recommendation No. 35 on Gender-Based Violence against Women, Updating General Recommendation No. 19, UN Doc. CEDAW/C/GC/35 (26 July 2017), para. 29(a).

99 CEDAW, art. 2(b); CEDAW Committee, General Recommendation No. 30, paras. 23 and 38(a); General Recommendation No. 33, para. 51(a); Maputo Protocol, arts. 2(1)(b), 4(2)(a-b); AComHPR, Guidelines on Combating Sexual Violence and its Consequences in Africa, guideline 39.

100 CEDAW Committee, General Recommendation No. 30, para. 23; Report of the Special Rapporteur on Torture, UN Doc. E/CN.4/1986/15 (19 February 1986), para. 119; Convention relative to the Protection of Civilian Persons in Time of War, 75 UNTS 287 (12 August 1949) (Libya acceded on 15 May 1956), arts. 27(2), 76(1) and 147; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, 1125 UNTS 3 (8 June 1977) (Libya acceded on 7 June 1978), arts. 75(2)(b) and 85(2); Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of Non-International Armed Conflicts, 1125 UNTS 610 (8 June 1977) (Libya acceded on 7 June 1978), art. 4(2)(e); Rome Statute of the International Criminal Court, 2187 UNTS 3 (17 July 1998), arts. 7(1)(g), 8(2)(b)(xxii) and 8(2)(e)(vi).

101 ICJ, Women’s Human Rights in the Libyan Draft Constitution, pp. 19–22.

102 Ibid., p. 24. Libya lacks legislation criminalizing war crimes and crimes against humanity in general. See ICJ, Accountability for Serious Crimes under International Law in Libya, pp. 45–47.

103 Law No. 29 of 2013, art. 2: “[a] grave and systematic violation is a violation of human rights through killing, abduction, physical torture, or the confiscation or destruction of funds, if committed as the result of an order issued by a person acting with a political motive, as well as breaches of fundamental rights that result in severe physical or moral repercussions.”

obligations under international law,¹⁰⁴ and fails to address SGB crimes specifically.

Law No. 29 of 2013, therefore, lacks a gender lens with regard to the serious human rights violations and crimes under international law that should be the focus of the transitional justice process in Libya. As a result of the failure to criminalize adequately, or at all, SGB crimes, and/or of their inadequate definition under Libyan law and the transitional justice framework, perpetrators of such crimes may escape criminal accountability. This, in turn, contributes to fostering a culture of impunity for SGB crimes that was prevalent in Libya during the Gadhafi era and that has endured in the aftermath of the 2011 uprising.

Recommendations

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

- i. Criminalize SGB crimes, including rape, marital rape and other forms of sexual assault, in line with international law and standards;¹⁰⁵**
- ii. Adopt legislation to criminalize rape and other serious forms of sexual assault as war crimes and crimes against humanity;**
- iii. Ensure the inclusion of SGB crimes within the scope of the transitional justice law.**

5. Investigation and prosecution of sexual and gender-based crimes

Under international law, Libya has an obligation to investigate, prosecute and punish, as warranted by the evidence, SGB crimes, including when committed by non-State armed groups and provide redress to victims (see also section 7 below).¹⁰⁶ Nevertheless, SGB crimes remain widely underreported in Libya.¹⁰⁷ Such underreporting is directly linked to the social stigma victims and survivors may face within their families and communities, and to the criminalization of adultery and consensual

104 ICJ, *Impunity No More: A Roadmap to Strengthening Transitional Justice in Libya*, pp. 5-6.

105 For detailed recommendations, see ICJ, *Women's Human Rights in the Libyan Draft Constitution*, p. 26.

106 Maputo Protocol, art. 4(a-b, e-f); AComHPR, *Guidelines on Combating Sexual Violence and its Consequences in Africa*, guideline 9; CEDAW Committee, *General Recommendation No. 30*, paras. 17(d) and 38(b); *General Recommendation No. 35*, para. 24(b); *Concluding Observations: Indonesia*, UN Doc. CEDAW/C/IDN/CO/6-7 (7 August 2012), para. 28(a); *Magdulein Abaida v. Libya*, UN Doc. CEDAW/C/78/D/130/2018 (16 April 2021), para. 8(b)(vii).

107 UNSMIL, *Report of the Secretary-General*, UN Doc. S/2021/62 (19 January 2021), para. 64.

sexual relations outside marriage, which, in turn, can result in victims and survivors of SGB crimes being prosecuted for such “offences.”¹⁰⁸

To the ICJ’s knowledge, no information is available on the number of investigations and prosecutions of SGB crimes. This situation requires that criminal justice and transitional justice actors in Libya pay specific attention to SGB crimes, and that a gender perspective be integrated into their investigation and prosecution.

5.1. Relationship between the FFRC and criminal justice actors

Under international law and standards, a State may establish transitional justice mechanisms with specialized competencies, such as a truth commission, to conduct fact-finding investigations into serious violations and abuses of international human right law and international humanitarian law.¹⁰⁹ Transitional justice mechanisms must comply with international standards governing the conduct of investigations, which must be prompt, effective, thorough, independent, impartial, transparent, and must comply with other fair trial requirements under international law and standards.¹¹⁰

However, as the Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity (the UN Impunity Principles) clarify, truth commissions cannot replace judicial authorities, particularly criminal courts, which should be the sole State organs tasked with establishing the criminal liability of an individual in a manner consistent with the right to a fair trial under international human rights law.¹¹¹

It follows that the FFRC’s investigations into the serious human rights violations falling under its mandate, including SGB crimes, cannot be criminal in nature, and may complement but not substitute the role of the Libyan judiciary in establishing individual criminal liability. Under the Libyan criminal justice framework, investigating judges, prosecutors and judicial police acting under their authority are responsible for

108 ICJ, Women’s Human Rights in the Libyan Draft Constitution, pp. 24–25. See also below section 5.3.

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

110 Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions, principle 11; The Minnesota Protocol on the Investigation of Potentially Unlawful Death (2016), Office of the High Commissioner for Human Rights, New York/Geneva (2017), paras. 38–40.

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

conducting investigations.¹¹²

Under Law No. 29 of 2013, the FFRC is competent to “[c]onduct fact-finding regarding the events related to grave and systematic violations of human rights, and determine the identities of those involved in these violations; ... [c]ollect and publish the perspectives of the victims; [and] [d]ocument the verbal accounts of the victims.”¹¹³ The FFRC is also tasked to create specialized departments, the role of which is to conduct “fact-finding” into specific issues.¹¹⁴ To fulfil such fact-finding mandate, Law No. 29 of 2013 entrusts the FFRC with basic investigative powers equivalent to those of the judicial police.¹¹⁵

Law No. 29 of 2013 makes several references to the FFRC’s power to refer cases to “competent national entities”,¹¹⁶ “criminal courts”¹¹⁷ and for “prosecution”,¹¹⁸ stating that the FFRC’s report may include recommendations with respect to “measures or procedures for referring individuals or incidents to the competent body.”¹¹⁹

However, the role of the FFRC in complementing the conduct of investigations by competent authorities – the judicial police, the prosecutor and/or the investigating judge – is unclear. Law No. 29 of 2013 seems to grant the FFRC the power to conduct fact-finding investigations, document and collect evidence, which, per se, would not be tantamount to criminal investigations. The fact that the FFRC’s is provided investigative powers akin to those of the judicial police

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

113 Law No. 29 of 2013, art. 7.

114 Law No. 29 of 2013, art. 8: “The FFRC shall establish specialized departments according to the components of transitional justice designated in this law, as follows: ... 2. A department to conduct fact-finding into human rights violations of a public and collective nature committed in the era of the former regime, and to present the results of these investigations in a comprehensive report that includes evidence, applications, affected persons, and recommendations; this report shall be widely published in the media. 3. A department to conduct fact-finding into individual violations, and to disclose violations committed against individuals. 4. A department to conduct fact-finding into human rights violations committed following the fall of the Gaddafi regime; the FFRC shall dedicate a specific bureau to fact-finding concerning the events that accompanied the 17 February Revolution and work to record information in a manner that preserves the rights of all.”

115 Law No. 29 of 2013, art. 16: “1. The FFRC shall have the power to order individuals, inspect locations, seize and seal documents and evidence, and visit locations relevant to the subjects under investigation. The individuals designated in a decision issued by the president of the FFRC’s Administrative Board shall have judicial police powers in this regard. 2. The FFRC may seek the assistance of members of the police and other local administration officials. 3. The FFRC and its affiliated committees may ask any person to reveal information, documents, or materials related to a matter being examined by the FFRC, and they may interrogate any witness and administer the prescribed legal oath to him. 4. The FFRC may seek to receive information in another country. The Ministry of Foreign Affairs shall work to obtain the approval of the country in question.”

116 Law No. 29 of 2013, art. 4(6).

117 Law No. 29 of 2013, art. 20.

118 Law No. 29 of 2013, art. 26.

119 Law No. 29 of 2013, art. 17.

also does not, in itself, make its investigations criminal in nature. However, to ensure that such powers comply with international law and standards, Law No. 29 of 2013 should: (i) specify, in express terms, that the FFRC's investigations are not criminal in nature, and that they cannot prejudice the work and prerogatives of prosecuting and judicial authorities;¹²⁰ and (ii) detail the procedure whereby the FFRC can refer a case to the relevant authorities.

The necessity to clarify the relationship between the FFRC and the criminal justice system is even more important after the establishment of two criminal courts, located in Tripoli and Benghazi, with jurisdiction to adjudicate cases of violence against women, including SGB crimes.¹²¹ While at the time of writing these two courts are not yet operational, in the future they may adjudicate SGB crimes falling under the scope of the transitional justice process. It is thus necessary that the transitional justice law clarify and regulate the FFRC's relationship with the criminal justice system, including the two courts in Tripoli and Benghazi, detailing the procedure to refer SGB crimes to them.

5.2. Integrating a gender perspective into the investigation and prosecution of sexual and gender-based crimes

Criminal justice actors must integrate a gender perspective into investigations and prosecutions of SGB crimes. They need to understand the relevance of gender factors to their work in order to be able to accurately characterize SGB crimes,¹²² and to ensure that the full nature of the harm inflicted on, and the consequences borne by, the victim/survivor as a result of such offences be adequately recognized during:

- a) the investigation;
- b) in the selection of the crimes charged, which ought to reflect the gravity of the offending and the harm and consequences such offending has caused to the victim/survivor;
- c) in the prosecutorial efforts made to ensure that the evidence at trial truly accounts for the severity of the crimes charged;
- d) in the prosecution submissions about the appropriateness

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

121 UNSMIL, Report of the Secretary-General, UN Doc. S/2020/832 (25 August 2020), para. 72.

122 OHCHR, Integrating a Gender Perspective into Human Rights Investigations: Guidance and Practice (2018), pp. 26–29 and 32–35.

of sanctions warranted (i.e., commensurate to the offending's severity); and

e) in the sentence imposed by judges upon a conviction, which must reflect, on the one hand, the offence's gravity and its impact on the victim/survivor and, on the other hand, the existence or absence of both mitigating and aggravating circumstances, as well as the defendant's antecedents, if any.¹²³

Addressing these issues requires adopting and applying a gender analysis while investigating and prosecuting SGB crimes.¹²⁴ This analysis warrants "consideration of whether, and in what ways, crimes, including sexual and gender-based crimes, are related to gender norms and inequalities",¹²⁵ and how they might differently impact on women and men victims and survivors. Integrating a gender perspective into the investigation and prosecution of SGB crimes requires that the necessary gender expertise be at hand in all aspects of the work, from investigations, to the handling of victims/survivors and witnesses, to the prosecution and sentencing phases.¹²⁶ For instance, an investigation team should include trained specialists in investigating SGB crimes, as well as interpreters (where necessary), of all genders.¹²⁷

As a priority, when interacting with victims/survivors, witnesses or other individuals criminal justice actors should:

- a) adhere to the "do no harm" principle, which requires they ensure the safety and security of all those involved in the investigation;
- b) ensure that victims/survivors and witnesses have autonomy and can provide informed consent; and
- c) mitigate the harm they might cause in their interactions with a victim/survivor or witness, including through re-traumatization, and as a result of the use of inadequate investigation techniques,

123 For in-depth analysis of each of the listed requirements, see ICJ, Strengthening accountability through the Specialized Criminal Chambers in Tunisia: International standards for the investigation, prosecution and adjudication of sexual and gender-based crimes, pp. 26–37.

124 The Office of the Prosecutor of the ICC defines gender analysis as examining "the underlying differences and inequalities between women and men, and girls and boys, and the power relationships and other dynamics which determine and shape gender roles in a society, and give rise to assumptions and stereotypes." See Policy Paper on Sexual and Gender-Based Crimes (June 2014), p. 4.

125 Ibid., pp. 12–13.

126 Ibid., p. 25.

127 AComHPR, Guidelines on Combating Sexual Violence and its Consequences in Africa, pp. 31–33; International Protocol on the Documentation and Investigation of Sexual Violence in Conflict: Best Practice on the Documentation of Sexual Violence as a Crime or Violation of International Law (March 2017), pp. 135 and 166, at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/598335/International_Protocol_2017_2nd_Edition.pdf.

which may negatively impact the victim/survivor's ability to secure justice and reparations.¹²⁸

Criminal justice actors should also give due regard to the victim/survivor's right to privacy,¹²⁹ and minimize any adverse impact they may endure, including stigma arising from their interaction with the justice system.¹³⁰ Criminal justice actors must also conduct effective risk-assessment and management for victims/survivors of SGB crimes and, where applicable, their children, family and witnesses, consistently throughout the investigation, prosecution and trial phases, with a view to identifying eventual risks/dangers and acting to prevent reprisals and retaliatory acts by the offender or other actors.¹³¹ As will be discussed in section 6 below, Law No. 29 of 2013, however, provides for the adoption of protection measures only vis-à-vis witnesses.¹³²

On the other hand, any measures adopted throughout the investigation and prosecution must also be consistent with the principle of equality of arms and the accused's right to a fair trial, particularly the rights of the defence: to the presumption of innocence; to full disclosure of the prosecution case; to adequate time and facilities to prepare a defence; to examine and cross-examine witnesses; and to a public trial.¹³³

5.3. Removing legal obstacles to the prosecution of sexual and gender-based crimes

In Libyan law, certain domestic legal provisions may hinder the prosecution of SGB crimes. Statutory limitations, amnesties or other bars to prosecutions constitute obstacles to accountability within

128 OHCHR, Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Istanbul Protocol), Doc. 8/Rev.1 (2004), paras. 57-73 and 95-97; AComHPR, Guidelines on Combating Sexual Violence and its Consequences in Africa, pp. 18 and 33-34; OHCHR, Integrating a Gender Perspective into Human Rights Investigations, p. 25; ICC Office of the Prosecutor, Policy Paper on Sexual and Gender-Based Crimes, paras. 60-61; International Protocol on the Documentation and Investigation of Sexual Violence in Conflict, pp. 85-104.

129 CEDAW Committee, General Recommendation No. 33, para. 18(f); Istanbul Protocol, paras. 65, 68, 71 and 217; ICC Office of the Prosecutor, Policy Paper on Sexual and Gender-Based Crimes, para. 60.

130 CEDAW Committee, General Recommendation No. 33, para. 51(g); ICC Office of the Prosecutor, Policy Paper on Sexual and Gender-Based Crimes, para. 65.

131 CEDAW Committee, General Recommendation No. 33, para. 18(g); ICJ, Accountability for Sexual and Gender-Based Violence in Lebanon: Guidance and Recommendations for Criminal Justice Actors (October 2020), p. 66, at <https://www.icj.org/wp-content/uploads/2020/10/Lebanon-GBV-Guidance-Publications-Reports-Thematic-report-2020-ENG.pdf>.

132 Law No. 29 of 2013, art. 22.

133 For further analysis of the right of the accused to a fair trial see ICJ, Accountability Through the Specialized Criminal Chambers: The Investigation and Prosecution of Gross Human Rights Violations Under Tunisian and International Law (December 2020), pp. 26-44, at <https://www.icj.org/wp-content/uploads/2020/12/Tunisia-SSC-guide-series-no2-Publications-Reports-Thematic-reports-2020-ENG.pdf>.

the transitional justice process and contribute to impunity.¹³⁴ Libya's obligation to investigate and prosecute SGB crimes entail a duty to remove all legal obstacles to the prosecution of such crimes.¹³⁵

In principle, the **statutory limitations** provided for under the Libyan Penal Code¹³⁶ have been removed, including in relation to crimes falling under the scope of the transitional justice process.¹³⁷ This notwithstanding, a Supreme Court decision has affirmed that the 10-year statutory limitation for felonies set by the Penal Code is still in force,¹³⁸ and indeed this ruling has been applied leading to the acquittal of the defendants in the Abu Salim Massacre case.¹³⁹ Statutory limitations run counter to international law and standards to the extent they cover crimes under international law, including SGB crimes. Principle 23 of the UN Impunity Principles makes clear that "[p]rescription [i.e., a statute of limitation provision] shall not apply to crimes under international law that are by their nature imprescriptible."¹⁴⁰ Statutory limitations should not apply to SGB crimes,¹⁴¹ including when they constitute war crimes and crimes against humanity.¹⁴²

Amnesties may be granted under Law No. 29 of 2013. Article 5 states that transitional justice "shall be based on ... legislative amnesty and general amnesty." For this purpose, the FFRC is tasked to establish a "department of arbitration and reconciliation based on the call for consensual reconciliation and legislative and general amnesty."¹⁴³ The FFRC may also refer decisions to award compensation to "amnesty committees."¹⁴⁴ Law No. 29 of 2013 does not specify any criteria or

134 UN Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence, Accountability: Prosecuting and punishing gross violations of human rights and serious violations of international humanitarian law in the context of transitional justice processes, UN Doc. A/HRC/48/60 (9 July 2021), paras. 28 ff.

135 Human Rights Committee, General Comment No. 31: Nature of the General Legal Obligation on States Parties to the Covenant, UN Doc. CCPR/C/21/Rev.1/Add.13 (26 May 2004), para. 18; Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity, principles 22–24.

136 Penal Code, art. 107.

137 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 (1 January 1997), art. 1; Law No. 29 of 2013, art. 27.

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

139 UNSMIL, Report of the Secretary-General, UN Doc. A/HRC/43/75 (23 January 2020), para. 67.

140 See also Human Rights Committee, Concluding Observations: Argentina, UN Doc. CCPR/CO/70/ARG (3 November 2000), para. 9.

141 CEDAW Committee, General Recommendation No. 33, paras. 19(f) and 51(b); AComHPR, Guidelines on Combating Sexual Violence and its Consequences in Africa, guideline 43.2.

142 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, 754 UNTS 73 (26 November 1968) (Libya acceded on 16 May 1989), arts. 1 and 4.

143 Law No. 29 of 2013, art. 8(6).

144 Law No. 29 of 2013, art. 20.

procedure for the granting of amnesties, nor does it clarify whether the FFRC is itself empowered to bestow them or whether it is only entrusted to make recommendations concerning amnesties.

Earlier practice on the granting of amnesties in Libya is mixed. Law No. 38 of 2012, for instance, provided a blanket amnesty for the “necessities of the 17 February Revolution in terms of military, security or civil acts carried out by revolutionaries to save or protect the revolution”,¹⁴⁵ in contravention of Libya’s obligations under international law.¹⁴⁶ Law No. 35 of 2012 and Law No. 6 of 2015, on the other hand, excluded from the scope of amnesties, inter alia, “forced intercourse crimes” and “sexual crimes”, respectively.¹⁴⁷

To comply with international law and standards, the criteria for granting amnesties under the transitional justice process must be clearly defined in law. Amnesties may not be granted for crimes under international law, including SGB crimes,¹⁴⁸ and cannot prejudice the rights of victims and survivors and their families to truth and to an effective remedy and reparation.¹⁴⁹ The lack of any such criteria in Law No. 29 of 2013 leaves open the possibility that amnesties be awarded in violations of Libya’s obligation to investigate, prosecute and punish crimes under international law, including SGB crimes.

Furthermore, article 424 of the Penal Code may operate as another bar to the prosecution of SGB crimes because, whenever the perpetrators of rape or other forms of sexual assault **marry the victim/survivor**, then this provision operates so as to extinguish the offence, the penalty and its penal effects.¹⁵⁰ The CEDAW Committee has criticized article 424, reiterating that perpetrators must always be duly prosecuted and punished.¹⁵¹ The ICJ has previously observed that this provision of the Penal Code contravenes international law and standards,¹⁵² and has

145 Law No. 38 of 2012 on some Procedures concerning the Transitional Phase (2 May 2012), art. 4.

146 ICJ, *Accountability for Serious Crimes under International Law in Libya*, pp. 55–58.

147 Law No. 35 of 2012 on the Amnesty of Particular Crimes (2 May 2012), art. 1; Law No. 6 of 2015 on General Amnesty (7 September 2015), art. 1. For an analysis of these laws, see ICJ, *Accountability for Serious Crimes under International Law in Libya*, pp. 55–58.

148 CEDAW Committee, General Recommendation No. 30, para. 81(b); General Recommendation No. 33, para. 19(f); UNSC Resolution 2467, UN Doc. S/RES/2467 (23 April 2019), operative para. 30.

149 Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity, principle 24.

150 Penal Code, art. 424: “[i]f 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.”

151 Concluding Observations: Libyan Arab Jamahiriya, UN Doc. CEDAW/C/LBY/CO/5 (6 February 2009), paras. 23–24. See also UN 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).

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

called on the Libyan authorities to repeal it.¹⁵³

Law No. 29 of 2013 lacks clarity regarding the FFRC's powers of **mediation and arbitration**, including the role of **traditional and customary dispute resolution mechanisms**, and their possible operation as a bar to prosecution. Under the Law, the FFRC is to establish a "department of arbitration and reconciliation based on the call for consensual reconciliation ... This department shall have permanent contact with the reconciliation committees and with wise individuals in the regions to restore the national fabric and to achieve the conditions for reconciliation between these regions."¹⁵⁴ As part of its "fact-finding powers", the FFRC may "adopt amicable approaches and conduct goodwill efforts to resolve conflicts, including [through] mediation and arbitration. The FFRC may seek the assistance of elders and wise individuals known for their effective role in resolving civil conflicts through traditional methods." The FFRC may further "make referrals to ... arbitration [and] reconciliation ... committees."¹⁵⁵

The reference to the adoption of "amicable approaches and ... goodwill efforts" appears to be confined to "civil conflicts", thus excluding criminal matters. However, Law No. 29 of 2013 does not seem to preclude the FFRC from referring cases involving the perpetration of serious human rights violations falling within its mandate to mediation or arbitration, which, in turn, could prevent the instigation of criminal proceedings in those very instances. The use of mediation and arbitration to deal with crimes under international law, including SGB crimes, would run contrary to Libya's obligations under international law to investigate and, when warranted by the evidence, prosecute such crimes.¹⁵⁶

In light of the above, it is paramount that the transitional justice law expressly:

- (i) exclude the possibility that serious human rights violations, including those entailing SGB crimes, may be subject to mediation and arbitration, including through traditional and customary

153 ICJ, *Accountability for Serious Crimes under International Law in Libya*, p. 43; Women's Human Rights in the Libyan Draft Constitution, pp. 22-23.

154 Law No. 29 of 2013, art. 8(6).

155 Law No. 29 of 2013, art. 20.

156 CEDAW, art. 2(c) and 15; Maputo Protocol, arts. 4(2)(e), 8(a) and 25; CEDAW Committee, General Recommendation No. 30, paras. 80 and 81(l); General Recommendation No. 33, para. 58; General Recommendation No. 35, para. 32(b).

dispute resolution mechanisms;¹⁵⁷ and

(ii) clarify what matters may be subject to mediation and arbitration, taking into account that neither one nor the other may preclude women's access to formal justice mechanisms.¹⁵⁸

In addition, the ICJ is particularly concerned that the **criminalization of certain consensual sexual relations** pursuant to Law No. 70 of 1973 and articles 407(4) and 408(4) of the Penal Code may prevent women from reporting sexual violence for fear of exposing themselves to the risk of prosecution.¹⁵⁹ Under Law No. 70 of 1973, for example, married women, who are victims/survivors 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."¹⁶⁰ Women and girls who are not married may, in turn, be charged under articles 407(4) and 408(4) of the Penal Code criminalizing consensual sexual relations outside marriage.¹⁶¹ All these provisions, therefore, have adverse consequences on access to justice and effective remedies for women victims and survivors of SGB crimes, and thus constitute gender-based discrimination,¹⁶² and may impede the fulfilment of Libya's obligation to investigate, prosecute and punish such crimes.

Recommendations

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

i. Effectively investigate and, when the evidence so warrants,

¹⁵⁷ While traditional and customary dispute resolution mechanism may be envisaged as part of transitional justice processes, and traditional and customary forms of justice may complement the criminal justice system, they must respect international law and standards, particularly those governing the right to an effective remedy and the right to a fair trial, including women's access to justice. See CEDAW Committee, General Recommendation No. 33, paras. 57–58 and 63; Human Rights Committee, General Comment No. 32: Right to Equality before Courts and Tribunals and to a Fair Trial (Article 14), UN Doc. CCPR/C/GC/32 (23 August 2007), para. 24; ICJ, *Indigenous and Other Traditional or Customary Justice Systems-Selected International Sources* (November 2019), pp. 79–104 and 141–152, at www.icj.org/wp-content/uploads/2019/11/Universal-Trad-Custom-Justice-Compil-updated-Publications-2019-ENG.pdf.

¹⁵⁸ CEDAW Committee, General Recommendation No. 33, para. 58; General Recommendation No. 35, para. 32(b).

¹⁵⁹ UNFPA et al., *Gender Justice and the Law: Libya* (2018), p. 14, at https://libya.unfpa.org/sites/default/files/pub-pdf/Libya%20Country%20Assessment%20-%20English_0.pdf.

¹⁶⁰ The CEDAW Committee and the UN Working Group on the Issue of Discrimination against Women in Law and in Practice have called on Libya to repeal such legislation as it constitute a form of gender-based discrimination against women. See *Concluding Observations: Libyan Arab Jamahiriya*, UN Doc. CEDAW/C/LBY/CO/5 (6 February 2009), para. 24; UN Working Group on the Issue of Discrimination against Women in Law and in Practice, *Doc. OL LBY 5/2017* (17 November 2017), at <https://www.ohchr.org/Documents/Issues/Women/WG/Communications/32/OL-LBY-17-11-17.pdf>.

¹⁶¹ Penal Code, art. 407(4): "[i]f 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"; art. 408(4): "[i]f anyone who commits indecent assault upon a person with that person's consent, both he and his partner shall be punished by detention."

¹⁶² CEDAW Committee, General Recommendation No. 33, paras. 9 and 51(l).

prosecute and punish SGB crimes committed by both State actors and non-State armed groups;

ii. Clarify in the transitional justice law the procedure whereby the FFRC, as a result of its fact-finding work, may refer cases to competent judicial authorities for prosecutions, including cases of SGB crimes to the specialized courts mandated to adjudicate violence against women;

iii. Specify that the FFRC's investigation does not prejudice the work and prerogatives of prosecuting and judicial authorities;

iv. Ensure that the specialized courts mandated to adjudicate violence against women be operational as soon as possible;

v. Integrate a gender perspective and expertise into the investigation and prosecution of SGB crimes by:

o Providing adequate and continuous training to criminal justice actors to:

- Interpret and apply Libyan law in accordance with international law and standards so as to capture all conduct amounting to SGB crimes and bring appropriate criminal charges;

- Include appropriate gender analysis in all aspects of their work from the investigation to the prosecution, trial and sentencing phases;

o Developing robust guidelines on the investigation and prosecution of SGB crimes in line with international law and standards, and ensure full compliance with them by police officers, prosecutors and investigating authorities;¹⁶³

o Providing mandatory capacity-building programmes for judges, prosecutors, lawyers, law enforcement personnel and other relevant professionals on SGB

163 For relevant guidance developed by the ICJ, 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/>; Strengthening accountability through the Specialized Criminal Chambers in Tunisia: International standards for the investigation, prosecution and adjudication of sexual and gender-based crimes (July 2021), at <https://www.icj.org/wp-content/uploads/2021/07/Tunisia-SGB-crimes-Publications-Reports-Thematic-report-2021-ENG-1.pdf>.

crimes, on women's right to access to justice, and on the remedies available to women victims and survivors of SGB seeking to access justice;

o Conducting training and adopting gender-sensitive codes of conduct and protocols for law enforcement personnel;

o Providing appropriate training for health professionals on how to detect sexual violence and to treat its consequences;

vi. Ensure the protection of victims/survivors, witnesses, and their families from any threats or reprisals that may arise in connection with the reporting of SGB crimes to competent authorities; and

vii. Remove legal obstacles to the prosecution of SGB crimes by:

o Excluding the applicability of statutory limitations and amnesties to such crimes;

o Repealing article 424 of the Penal Code to prevent the extinguishment of criminal liability, the penalty and/or its penal effects if the perpetrator of an SGB crime marries the victim/survivor;

o Expressly excluding the possibility that SGB crimes may be subject to mediation or arbitration, including through traditional and customary dispute resolution mechanism; and

o Repealing Law No. 70 of 1973, as well as articles 407(4) and 408(4) of the Penal Code, so as to decriminalize "adultery" and consensual sexual conduct outside marriage, and ensure that victims and survivors of SGB crimes cannot be themselves charged and prosecuted for reporting such crimes.

6. Victim/survivor participation in the transitional justice process

The Libyan transitional justice process needs to be victim-centred and pay specific attention to women victims and survivors of SGB crimes. In terms of participation of victims and survivors in the transitional justice process, the FFRC must "take into consideration

[women's] specific needs, ensure that their voice is heard and seek to establish the impact of the events being considered on the victims of sexual violence, particularly women and girls."¹⁶⁴ More generally, "[o]rganisations that defend the rights of women, those specialized in combating sexual violence and its consequences, the victims of sexual violence and the affected communities must all be consulted at each phase of the [transitional justice] process and all must be guaranteed the opportunity to actively participate."¹⁶⁵ To this end, the FFRC should develop a specific outreach strategy addressed to women victims of SGB crimes.¹⁶⁶

Law No. 29 of 2013 provides that "[c]ivil society organisations concerned with human rights and victims of violations" can **refer cases to the FFRC** for fact-finding purposes.¹⁶⁷ The FFRC also has the express mandate to "[c]ollect and publish the perspectives of the victims" and "[d]ocument the verbal accounts of the victims."¹⁶⁸ The rights to equality before the law and equal protection of the law, to be free from gender-based discrimination, and to access to justice and effective remedies require that women be able to refer cases for fact-finding to the FFRC on an equal basis with man and without discrimination.¹⁶⁹ For instance, it must be ensured that the FFRC does not report women victims and survivors of SGB crimes to competent authorities for prosecution based on discriminatory legislation that criminalizes "adultery" and consensual sexual conduct outside marriage.¹⁷⁰

The UN Impunity Principles recommend that victims and witnesses be afforded the opportunity to participate in proceedings affecting them, on a strictly voluntary basis.¹⁷¹ While the FFRC needs to make sure that women have **access to and can participate in hearings**, including by being heard as victims/survivors and witnesses, it must take all necessary precautions to avoid re-traumatization.¹⁷² Consequently,

164 AComHPR, Guidelines on Combating Sexual Violence and its Consequences in Africa, guideline 52(5).

165 Ibid., guideline 52(10).

166 UN Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence, The Gender Perspective in Transitional Justice Processes, paras. 21-24.

167 Law No. 29 of 2013, art. 18(3).

168 Law No. 29 of 2013, art. 7(3-4).

169 ICCPR, arts. 2(1), 3, 4(1) and 26; ACHPR, art. 3; Arab Charter, art. 3(2); CEDAW, arts. 2(a, c) and 15(1); Maputo Protocol, arts. 2(1)(a) and 8.

170 Law No. 70 of 1973; Penal Code, arts. 407(4) and 408(4).

171 Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity, principles 10(a) and 19(2).

172 CEDAW Committee, General Recommendation No. 33, para. 51(c); UN Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence, The Gender Perspective in Transitional Justice Processes, para. 20: "[t]he risks of revictimization are high and must be taken into account when designing hearings. The informed consent of those who testify is essential. Psychosocial support must be guaranteed before, during and after the hearing. Those who testify must be in a decent and safe environment, have support to prepare their testimonies and anticipate questions, and have protection and security measures in place to prevent the social exposure of victims and avoid inflicting further damage on them once they return to their communities."

while FFRC's hearings should generally be public, the possibility must be envisaged to hold hearings "either behind closed doors, before a panel of commissioners or, where applicable, before a selected public that may be exclusively made up of women, all according to the wishes of the victims."¹⁷³ The UN Impunity Principles further indicate that "social workers and/or mental health-care practitioners should be authorized to assist victims, preferably in their own language, both during and after their testimony, especially in cases of sexual assault."¹⁷⁴

Law No. 29 of 2013 further fails to clarify how victims/survivors, witnesses and other persons who participate in FFRC processes can be adequately **protected from any threats to their life or safety**, including with regard to reprisals.¹⁷⁵ Article 22 of Law No. 29 of 2013 requires the FFRC to "work to take the necessary measures and procedures to protect witnesses and to encourage them to present their statements before the competent committees." Not only this provision omits to envisage specific protection mechanisms, but it also fails to include victims/survivors and their families as beneficiaries of such protection. This is particularly concerning given the general absence of relevant victim and witness protection legislation and programmes in Libya.¹⁷⁶ To ensure women's effective participation in the transitional justice process, protection programmes must be in place to safeguard the security of victims/survivors and witnesses of SGB crimes, who participate in FFRC procedures and in judicial proceedings.¹⁷⁷ This should include clear rules governing the disclosure of victim/survivor and witness information, as well as the opportunity to provide information to the FFRC anonymously,¹⁷⁸ in addition to specific measures to safeguard victims/survivors, witnesses and their families from reprisals, or threats thereof, that might pose a danger to their personal integrity.

173 AComHPR, Guidelines on Combating Sexual Violence and its Consequences in Africa, guideline 52(6).

174 Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity, principle 10(b).

175 CEDAW Committee, General Recommendation No. 33, para. 18(g); ICJ, Impunity No More: A Roadmap to Strengthening Transitional Justice in Libya, pp. 22-23.

176 ICJ, Accountability for Serious Crimes under International Law in Libya, pp. 9, 19-20, 22, 70 and 87.

177 UN Special Representative of the Secretary-General on Sexual Violence in Conflict, Model Legislative Provisions and Guidance on Investigation and Prosecution of Conflict-Related Sexual Violence (June 2021), pp. 27-35; UN Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence, The Gender Perspective in Transitional Justice Processes, paras. 59 and 61: "It is essential to design special programmes based on an appropriate gender-sensitive assessment of the specific threat situations that victims of sexual and gender-based violence may face in the investigation phase, during the court proceedings and after sentencing. ... All these measures should be accompanied by mechanisms to fully inform victims and witnesses about threats against them and the safeguards for their protection at all stages of the process, and by follow-up mechanisms to locate victims and witnesses after the conclusion of the trial. Ongoing medical assistance with a psychosocial approach should also be provided ..."

178 Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity, principle 10. See also Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence, UN Doc. A/HRC/34/62 (27 December 2016), paras. 67-69 and 99.

Recommendations

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

- i. Ensure the full participation of victims/survivors and witnesses of SGB crimes in the transitional justice process, including through a specific outreach strategy;**
- ii. Prioritize victim ownership and control of the process through partnering with and supporting local, community-based victim-led organizations that have existing relationships of trust with victims and survivors;**
- iii. Ensure that women victims/survivors of SGB crimes can refer cases to the FFRC safely;**
- iv. Ensure that women can freely participate in the FFRC's hearings as victims/survivors and witnesses on a strictly voluntary basis by:**
 - o Implementing necessary procedures to avoid re-traumatization, including women-only and closed-door hearings; and**
 - o Providing necessary and adequate social and psychological support to victims/survivors and witnesses;**
- v. Include specific provisions in the transitional justice law to safeguard victims/survivors and witnesses of SGB crimes and their families from any threats to their life or safety, including protection programmes aimed to prevent or respond to reprisals and threats thereof; and**
- vi. Enact necessary legislation for the protection of victims/survivors and witnesses, in particular of SGB crimes, during criminal proceedings, from the investigation phase, during court proceedings and after sentencing.**

7. The right to a remedy and reparation for sexual and gender-based crimes

Under international law, the right to an effective remedy obliges States to guarantee that victims of violations and their families have access to a competent body to file a claim and to adequate reparation for the

harm suffered.¹⁷⁹ As the CEDAW Committee clarified, States should also provide redress for the acts of private individuals or entities, including non-State armed groups, as part of their due diligence obligations.¹⁸⁰

Redress must include reparation, restitution, compensation, rehabilitation, satisfaction and guarantees of non-recurrence; those forms of redress should be proportional to the gravity of the violation and to the harm suffered by the victim, and be tailored to their needs, as appropriate.¹⁸¹

In light of the above, Libya has an obligation to ensure women's **access to justice and effective remedies** by removing all the *de jure* and *de facto* obstacles, including any discriminatory laws, policies or practices, that may prevent or hinder their right to an effective remedy and reparations for SGB crimes.¹⁸²

The right to an effective remedy and reparation is intertwined with the right to truth and the right to an investigation, particularly in relation to satisfaction as a form of reparation. International law accords victims, their families and the society as a whole the **right to truth**.¹⁸³ As Principle 4 of the UN Impunity Principles makes clear, "[i]rrespective of any legal proceedings, victims and their families have the imprescriptible right to know the truth about the circumstances in which violations took place and, in the event of death or disappearance, the victims' fate."¹⁸⁴

Principle 2 of the UN Impunity Principles states that: "[e]very people has the inalienable right to know the truth about past events concerning the perpetration of heinous crimes and about the circumstances and reasons that led, through massive or systematic violations, to the perpetration of those crimes. Full and effective exercise of the right to the truth provides a vital safeguard against the recurrence of violations."

179 ICCPR, art. 2(3); Arab Charter, arts. 12 and 23; ACHPR, art. 7(1)(a); CEDAW, art. 2(c); Maputo Protocol, art. 25.

180 CEDAW Committee, General Recommendation No. 30, para. 17(a); Magdulein Abaida v. Libya, UN Doc. CEDAW/C/78/D/130/2018 (16 April 2021), para. 8(b)(vii).

181 Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, UN Doc. A/RES/60/147 (16 December 2005), para. 18; Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity, principle 31.

182 CEDAW, art. 2(c); Maputo Protocol, art. 25; CEDAW Committee, General recommendation No. 33, paras. 21–25. See also ICJ, Women's Access to Justice for Gender-Based Violence – Practitioners' Guide No. 12 (February 2016), at <https://www.icj.org/wp-content/uploads/2016/03/Universal-Womens-access-to-justice-Publications-Practitioners-Guide-Series-2016-ENG.pdf>.

183 Human Rights Committee, Concluding Observations: Guatemala, UN Doc. CCPR/C/79/Add.63, 3 April 1996, para. 25. See also Human Rights Council Resolution 42/17, UN Doc. A/HRC/RES/42/17, 26 September 2019; Resolution 21/7, UN Doc. A/HRC/RES/21/7, 27 September 2012; Resolution 9/11, UN Doc. A/HRC/RES/9/11, 18 September 2008; Resolution 12/12, UN Doc. A/HRC/RES/12/12, 1 October 2009.

184 See also Commission on Human Rights, Study on the Right to the Truth, UN Doc. E/CN.4/2006/91 (8 February 2006), para. 36.

Truth and other commissions, such as the FFRC, are key to giving effect to the right to truth; their mandate complements the State's obligation to investigate, prosecute and punish crimes under international law, without replacing it.¹⁸⁵

The **right to an investigation**, in turn, is a facet of the right to an effective remedy,¹⁸⁶ and can be a form of reparation, particularly satisfaction.¹⁸⁷ The right to an investigation is either enshrined in certain human rights treaties¹⁸⁸ or has been developed through the jurisprudence of human rights bodies.¹⁸⁹ For instance, the UN Human Rights Committee has affirmed that "both a criminal investigation and consequential prosecution are necessary remedies for violations of human rights such as those protected by article 6 [right to life]."¹⁹⁰ The obligation under international law to conduct an investigation into any potentially unlawful death arises from the interaction between the right to an effective remedy and the right to life.¹⁹¹

The right of victims of serious human rights violations and abuses to an investigation complements the State obligation to investigate effectively such serious violations and abuses, and requires that investigations be conducted in accordance with the international standards of promptness, thoroughness, independence, impartiality and transparency.¹⁹² In terms of content, the right to an investigation requires that: (i) the crime/s at stake be properly characterized in domestic law (e.g., rape as a discrete crime against a person's sexual autonomy); and (ii) the alleged perpetrator be prosecuted, if the evidence so warrants, in line with international fair trial standards.

Reparations for SGB crimes should be **holistic**, i.e., "be designed and

185 Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity, principles 5 and 8.

186 ICJ, The Right to a Remedy and to Reparation for Gross Human Rights Violations – Practitioners' Guide No. 2 (October 2018), pp. 84 ff., at <https://www.icj.org/wp-content/uploads/2018/11/Universal-Right-to-a-Remedy-Publications-Reports-Practitioners-Guides-2018-ENG.pdf>.

187 CEDAW Committee, Magdolein Abaida v. Libya, UN Doc. CEDAW/C/78/D/130/2018 (16 April 2021), para. 8(a)(i). See also section 7.3 below.

188 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1465 UNTS 85 (10 December 1984), art. 13; International Convention for the Protection of All Persons from Enforced Disappearance, 2716 UNTS 3 (20 December 2006), art. 12.

189 Human Rights Committee, General Comment No. 36: Article 6 (The Right to Life), UN Doc. CCPR/C/GC/36 (30 October 2018), para. 27; European Court of Human Rights, Aksoy v. Turkey, Appl. No. 21987/93 (18 December 1996), para. 98; Inter-American Court of Human Rights, Blake v. Guatemala, Series C No. 48 (22 January 1999), paras. 62-63; AComHPR, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, Doc. OS(XXX)247 (2003), principles M(7)(h) and P(e).

190 Felipe and Evelyn Pestaño v. The Philippines, UN Doc. CCPR/C/98/D/1619/2007 (23 March 2010), para. 7.2.

191 Human Rights Committee, General Comment No. 36, para. 27.

192 Ibid.; The Minnesota Protocol on the Investigation of Potentially Unlawful Death (2016).

implemented to meet the needs of victims arising from the acts of sexual violence and must take into consideration all forms of sexual violence and all consequences, including physical, psychological, material, financial, and social consequences, immediate or otherwise, suffered by the victims.”¹⁹³ According to a participatory approach, victims/survivors and civil society should be involved in “designing, creating, implementing, monitoring and evaluating all reparation programs.”¹⁹⁴ In this respect, “[p]riority should be given to the agency, wishes, decisions, safety, dignity and integrity of victims/survivors.”¹⁹⁵

Importantly, reparations should be **transformative**,¹⁹⁶ namely “aspire to subvert the pre-existing structural inequality that may have engendered the violence suffered by women.”¹⁹⁷ Therefore, “reparations must ... go beyond the immediate causes and consequences of the sexual violence and aim to remedy discrimination and structural and political inequality that negatively affect the lives of victims, especially women and girls.”¹⁹⁸

In order to fully guarantee the right to reparation of women victims and survivors of SGB crimes, particularly when committed in armed conflict, the FFRC should have the power to order **interim relief measures** addressing the immediate needs of victims/survivors and designed to avoid any irreparable harm.¹⁹⁹

Under Libyan law, there is a lack of effective remedies and adequate reparations for SGB crimes, and no comprehensive legal framework allowing redress for victims and survivors exists, in violation of international law and standards.²⁰⁰ So far, the Libyan authorities have only adopted the Council 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

193 AComHPR, Guidelines on Combating Sexual Violence and its Consequences in Africa, guideline 56.

194 Ibid., guideline 57; CEDAW Committee, General Recommendation No. 33, para. 19(g); Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity, principle 32.

195 CEDAW Committee, General Recommendation No. 35, para. 33(b).

196 CEDAW Committee, General Recommendation No. 30, para. 79; General Recommendation No. 35, para. 33(b); UN Secretary-General, Guidance Note on Reparations for Conflict-Related Sexual Violence (June 2014), pp. 8–9, at <https://www.ohchr.org/Documents/Press/GuidanceNoteReparationsJune-2014.pdf>.

197 UN Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence, The Gender Perspective in Transitional Justice Processes, para. 37.

198 AComHPR, Guidelines on Combating Sexual Violence and its Consequences in Africa, guideline 56; CEDAW Committee, General Recommendation No. 35, para. 33(b).

199 CEDAW Committee, Concluding Observations: Nepal, UN Doc. CEDAW/C/NPL/CO/6 (14 November 2018), para. 23; UN Secretary-General, Guidance Note on Reparations for Conflict-Related Sexual Violence, pp. 12–13.

200 Maputo Protocol, art. 4(2)(f); AComHPR, Guidelines on Combating Sexual Violence and its Consequences in Africa, guidelines 53–63.

for the Treatment of Situations of Sexual Violence.²⁰¹ Moreover, it remains unclear whether and to what extent such decrees have been implemented in practice.

With respect to the transitional justice process, article 23 of Law No. 29 of 2013 states that, subject to a binding decision by the FFRC,²⁰² “adequate” reparations must be provided to “[a]nyone who is subjected to grave and systematic human rights violations” by the State, in one or more of the following forms:

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

In light of this, Law No. 29 of 2013 did not fill the above-mentioned gaps. In addition, the ICJ has already commented on the several deficiencies of this provision, which does not guarantee the right to a remedy and reparations as required under international law.²⁰³ Furthermore, as set out below, the same criticism applies in respect of redress due to victims and survivors of SGB crimes.

7.1. Restitution

Law No. 29 of 2013 does not expressly envisage restitution as a form of reparation. According to the UN Principles on Remedy and Reparation, “[r]estitution should, whenever possible, restore the victim to the original situation”, and it should include, “as appropriate: restoration of liberty, enjoyment of human rights, identity, family life and citizenship, return to one’s place of residence, restoration of employment and return of property.”²⁰⁴

201 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>.

202 Law No. 29 of 2013, art. 7.

203 ICJ, *Impunity No More: A Roadmap to Strengthening Transitional Justice in Libya*, pp. 24 ff.

204 Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, para. 19(b).

With regard to SGB crimes, restitution:

... must only be attempted when it does not lead to replicating or perpetuating discrimination against women and girls, or discrimination based on sexual orientation or gender identity. In cases of sexual violence, restitution may include the following: the exercise and enjoyment of human rights, particularly the rights to dignity, security, and health, including sexual and reproductive rights; enjoyment of family life and return to employment and education.²⁰⁵

To comply with international law and standards, therefore, the Libyan transitional justice law must envisage restitution, also in the form of reinstatement,²⁰⁶ including, but not exclusively, with respect to the rights to dignity, security, health, including sexual and reproductive health, family life, employment and education.

7.2. Compensation

Article 23(1) of Law No. 29 of 2013 limits compensation to “material damages” resulting from acts committed with a “political motive.” Beside the fact that the motive underpinning the perpetration of SGB crimes is immaterial to the award of compensation, the UN Basic Principles on Remedy and Reparation indicate that compensation should account for: “(a) Physical or mental harm; (b) Lost opportunities, including employment, education and social benefits; (c) Material damages and loss of earnings, including loss of earning potential; (d) Moral damage; (e) Costs required for legal or expert assistance, medicine and medical services, and psychological and social services.”²⁰⁷

Limiting compensation to material damages violates international law and standards,²⁰⁸ and completely fails to account for “the complexity of the harm suffered and its consequences on the daily lives” of victims and survivors of SGB crimes,²⁰⁹ including but not limited to severe mental harm. Moreover, beside the immediate material and mental harm, SGB crimes may result in further violations and secondary effects.

205 AComHPR, Guidelines on Combating Sexual Violence and its Consequences in Africa, guideline 59.

206 CEDAW Committee, General Recommendation No. 28, para. 32; General Recommendation No. 33, para. 19.

207 Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, para. 20.

208 Committee against Torture, General Comment No. 2: Implementation of Article 2 by States Parties, UN Doc. CAT/C/GC/2 (24 January 2008), paras. 9–10; AComHPR, Guidelines on Combating Sexual Violence and its Consequences in Africa, guideline 60.

209 UN Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence, The Gender Perspective in Transitional Justice Processes, para. 31.

First, SGB crimes may result in the violation of reproductive rights. Rape, for instance, may result in “forced pregnancy, a sexually transmitted disease and the loss of reproductive capacity, among other consequences. A gender-sensitive approach should take into account the secondary violations and define additional measures to remedy them.”²¹⁰ Second, SGB crimes may “have secondary effects on the relationship of victims and survivors to their environments and in terms of their enjoyment of economic, social and cultural rights. For example, rejection by the husband, inability to marry or inherit and stigma within the family or community can lead to difficulties in accessing livelihoods and require effective responses, such as a regular pension.”²¹¹

The CEDAW Committee has also urged States to “[t]ake full account of the unremunerated domestic and caregiving activities of women in assessments of damages for the purposes of determining appropriate compensation for harm in all civil, criminal, administrative or other proceedings.”²¹²

Compensation under the Libyan transitional justice law, therefore, must be awarded to victims and survivors by accounting for all the consequences, immediate and/or in the short, medium or longer term, that result from the harm suffered as a result of SBG crimes.²¹³

Moreover, victims and survivors of SGB crimes must be able to claim compensation from both the perpetrator and the State. The UN Special Rapporteur on Violence against Women, its Causes and Consequences has clarified that:

States should provide compensation to victims of rape including but not limited to the following: (a) Victims should have the right to claim compensation from perpetrators; (b) Victims should have the right to claim compensation where relevant officials and institutions have failed to perform their obligations with due diligence; (c) State compensation should be awarded to victims having sustained bodily injury or impairment of physical or mental health, to the extent that the damage is not covered by the

210 Ibid., para. 33.

211 Ibid., para. 34.

212 CEDAW Committee, General Recommendation No. 33, para. 19(c).

213 Committee against Torture, General Comment No. 2, para. 11: “... compensation awarded to a victim should be sufficient to compensate for any economically assessable damage resulting from torture or ill-treatment, whether pecuniary or non-pecuniary. This may include: reimbursement of medical expenses paid and provision of funds to cover future medical or rehabilitative services needed by the victim to ensure as full rehabilitation as possible; pecuniary and non-pecuniary damage resulting from the physical and mental harm caused; loss of earnings and earning potential due to disabilities caused by the torture or ill-treatment; and lost opportunities such as employment and education. In addition, adequate compensation awarded by States parties to a victim of torture or ill-treatment should provide for legal or specialist assistance, and other costs associated with bringing a claim for redress.” See also AComHPR, Guidelines on Combating Sexual Violence and its Consequences in Africa, guideline 56.

perpetrator or other sources.²¹⁴

To guarantee adequate compensation to women victims and survivors of SGB crimes, “specific funds for reparations” and “administrative reparations schemes” may be established, “without prejudice to the rights of victims/survivors to seek judicial remedies”.²¹⁵

Law No. 29 of 2013 envisages the creation of a “Victims’ Compensation Fund” that “shall effect payment of due compensation in accordance with this law, following completion of the FFRC’s work”; “the fund may begin disbursement of expedited compensations in cases that the FFRC decides to expedite.”²¹⁶ The FFRC is responsible for awarding compensation and its decisions are binding.²¹⁷ To give effect to international law and standards,²¹⁸ Libya’s transitional justice law must provide for a right to appeal to or the opportunity to have the FFRC’s decision reviewed by a judicial authority. Moreover, women must be guaranteed access to the “Victims’ Compensation Fund” on equal terms with men.

7.3. Satisfaction

Under article 23(2), Law No. 29 of 2013 envisages memorialization as the only form of satisfaction. The UN Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence affirmed that memorialization:

... can play a key role in duly addressing the gender dimension of violations of human rights and international humanitarian law. The very culmination of the work of a truth commission, with its final report, is the development of a new story about the recent past, with a critical approach and recognition of the rights of victims. ... The field of memorialization must deepen its gender approach and focus beyond making women’s memories visible or thinking about women’s own ways of transmitting memories.²¹⁹

Memorialization should thus promote a narrative of violations that overcomes harmful gender stereotypes and patriarchal attitudes towards women in general, and victims and survivors of SGB crimes in particular. In schools, this can be implemented through the revision

214 A Framework for Legislation on Rape (Model Rape Law), UN Doc. A/HRC/47/26/Add.1 (15 June 2021), para. 32. See also CEDAW Committee, General Recommendation No. 33, para. 19(d).

215 CEDAW Committee, General Recommendation No. 35, para. 33(b).

216 Law No. 29 of 2013, art. 25.

217 Law No. 29 of 2013, arts. 7, 20 and 24.

218 Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, para. 12.

219 UN Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence, *The Gender Perspective in Transitional Justice Processes*, paras. 71 and 77.

of textbooks and curricula,²²⁰ the development of “innovative and participatory memory-based research projects, visits to remembrance sites and the collection of testimonies and oral histories”; furthermore, symbolic sites can be established, and cultural activities developed for the general public.²²¹ The publication of the FFRC’s findings and final report can also serve this purpose.²²²

Memorialization is also a dimension of the right to truth (see above section 7). Law No. 29 of 2013 includes references that can be referenced to this right, including truth as an aim of the Libyan transitional justice process,²²³ through, for example, the objective of “[e]xposing and documenting the suffering of Libyan citizens under the former regime”,²²⁴ and the “disclosure of facts of a public and collective nature.”²²⁵ To this end, the FFRC is mandated to “[p]rovide a full picture of the nature, causes, and extent of the grave human rights violations committed during the previous era[;] [c]ollect and publish the perspectives of the victims[;] and [d]ocument the verbal accounts of the victims.”²²⁶ Two departments of the FFRC are specifically tasked to “present the results of [their] investigations in a comprehensive report that includes evidence, applications, affected persons, and recommendations” and “work to record information in a manner that preserves the rights of all” in relation to the serious human rights violations committed both during the Gadhafi era and after the fall of the regime in 2011.²²⁷

With regard to SGB crimes, fulfilling the right to truth of women victims and survivors, including through memorialization, requires their full participation in truth-seeking activities, including the documentation of violations, the collection and recording of accounts and testimonies, and the drafting of reports and public documents. The preservation of and access to archives is also an important tool for achieving truth, including with reference to SGB crimes.²²⁸

Besides memorialization, the Libyan transitional justice law needs to

220 CEDAW, art. 10(c); CEDAW Committee, General Recommendation No. 33, para. 33(c); Maputo Protocol, art. 12(1)(b) (“eliminate all stereotypes in textbooks, syllabuses and the media, that perpetuate such discrimination”) and (e) (“integrate gender sensitisation and human rights education at all levels of education curricula including teacher training”).

221 UN Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence, *The Gender Perspective in Transitional Justice Processes*, paras. 72-75.

222 ICJ, *Impunity No More: A Roadmap to Strengthening Transitional Justice in Libya*, p. 21.

223 Law No. 29 of 2013, art. 1.

224 Law No. 29 of 2013, art. 4(10).

225 Law No. 29 of 2013, art. 5(2).

226 Law No. 29 of 2013, art. 7(2-4).

227 Law No. 29 of 2013, art. 8(2, 4).

228 Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity, principles 5 and 14-18.

make all forms of satisfaction²²⁹ available to victims, including women victims and survivors of SGB crimes. At the same time, forms of reparations such as public apologies or memorials must “not [be] used as substitutes for [the] investigations and prosecutions of perpetrators.”²³⁰ As mentioned above, the right to an investigation – as a facet of the right to an effective remedy and as a form of satisfaction – requires the establishment of the perpetrator’s criminal liability, including through the effective investigation, prosecution and adjudication of SGB crimes, and the perpetrator’s apology to the victims and survivors through “acknowledgement of the facts and acceptance of responsibility.”²³¹

7.4. Rehabilitation

With regard to rehabilitation, article 23(3) of Law No. 29 of 2013 provides for “[t]reatment, rehabilitation, and provision of social services.” To ensure compliance with international law and standards, rehabilitation must include medical, psychological legal and social care;²³² social services must seek the full inclusion and participation of victims in society.²³³ Rehabilitation measures must also encompass the victims’ family members.²³⁴

Rehabilitation for SGB crimes needs to include measures that ensure

229 Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, para. 22: “[s]atisfaction should include, where applicable, any or all of the following: (a) Effective measures aimed at the cessation of continuing violations; (b) Verification of the facts and full and public disclosure of the truth to the extent that such disclosure does not cause further harm or threaten the safety and interests of the victim, the victim’s relatives, witnesses, or persons who have intervened to assist the victim or prevent the occurrence of further violations; (c) The search for the whereabouts of the disappeared, for the identities of the children abducted, and for the bodies of those killed, and assistance in the recovery, identification and reburial of the bodies in accordance with the expressed or presumed wish of the victims, or the cultural practices of the families and communities; (d) An official declaration or a judicial decision restoring the dignity, the reputation and the rights of the victim and of persons closely connected with the victim; (e) Public apology, including acknowledgement of the facts and acceptance of responsibility; (f) Judicial and administrative sanctions against persons liable for the violations; (g) Commemorations and tributes to the victims; (h) Inclusion of an accurate account of the violations that occurred in international human rights law and international humanitarian law training and in educational material at all levels.”

230 CEDAW Committee, General Recommendation No. 33, para. 19(f).

231 CEDAW Committee, *Magdulein Abaida v. Libya*, UN Doc. CEDAW/C/78/D/130/2018 (16 April 2021), para. 8(a)(i); AComHPR, *Guidelines on Combating Sexual Violence and its Consequences in Africa*, guideline 62.

232 Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, para. 21; AComHPR, *Guidelines on Combating Sexual Violence and its Consequences in Africa*, guideline 61.

233 *Ibid.*, guidelines 28–33.

234 Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, para. 8; AComHPR, *Guidelines on Combating Sexual Violence and its Consequences in Africa*, guideline 3.2.

the right to sexual and reproductive health.²³⁵ This right is part and parcel of the right to health, which Libya has an obligation to respect, protect and fulfil.²³⁶ Libya has a duty to provide women victims and survivors of SGB crimes with the necessary medical and psychological care, including in relation to contraception, abortion, post-abortion care, maternal healthcare and prevention and treatment of sexually transmissible infections.²³⁷ The Maputo Protocol specifically includes an obligation to “protect the reproductive rights of women by authorizing medical abortion in cases of sexual assault [and] rape ...”²³⁸

7.5. Guarantees of non-recurrence

Law No. 29 of 2013 is silent on guarantees of non-recurrence as a form of reparation. Such measures should include, among other things, legal and institutional reform; vetting of and human rights training for law enforcement officials, security and military forces, the judiciary, and other public servants; and the establishment of mechanisms for the monitoring and prevention of SGB crimes.²³⁹ In order to be gender-responsive, “[g]uarantees of non-repetition must be based on a diagnosis of the relationship between pre-existing gender inequality and sexual and gender-based violence, with a view to their eradication.”²⁴⁰ With regard to legislative reform:

A comprehensive review of all regulatory provisions (constitutional, civil and criminal or administrative in nature, and the provisions of traditional regulatory systems) should be undertaken in order to identify and amend provisions that are discriminatory against women...; to ensure the effective exercise of their rights; and to review the ways in which issues of sexual and gender-based

235 UN 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), para. 33; UN Special Representative of the Secretary-General on Sexual Violence in Conflict, Model Legislative Provisions and Guidance on Investigation and Prosecution of Conflict-Related Sexual Violence, art. 66(6), p. 35.

236 International Covenant on Economic, Social and Cultural Rights, 993 UNTS 3 (16 December 1966) (ICESCR) (Libya acceded on 15 May 1970), art. 12; ACHPR, art. 16; Arab Charter, art. 39; CEDAW, art. 12; Maputo Protocol, art. 14; Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 22 (2016) on the Right to Sexual and Reproductive Health (article 12 of the International Covenant on Economic, Social and Cultural Rights), UN Doc. E/C.12/GC/22 (2 May 2016).

237 CEDAW, art. 12(2); Maputo Protocol, art. 12(2)(a-b); Committee against Torture, General Comment No. 3: Implementation of Article 14 by States Parties, UN Doc. CAT/C/GC/3, 13 December 2012, para. 11; AComHPR, Guidelines on Combating Sexual Violence and its Consequences in Africa, guideline 34.

238 Maputo Protocol, art. 14(2)(c). The CESCR indicated other obligations deriving from article 12 of the ICESCR. See General Comment No. 22, paras. 39 ff.

239 Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity, principles 35–38; Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, para. 23; AComHPR, Guidelines on Combating Sexual Violence and its Consequences in Africa, guideline 63.

240 UN Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence, The Gender Perspective in Transitional Justice Processes, paras. 63–64.

violence and violence based on sexual orientation and gender identity are addressed.²⁴¹

As previously observed by the ICJ,²⁴² Libyan law is deficient with regard to respecting women’s human rights insofar as: it does not adequately guarantee women’s participation in public and political life, including ensuring the safety of women human rights defenders;²⁴³ it lacks comprehensive legislation on violence against women; it criminalizes “adultery” and consensual sexual relations outside marriage; it has not established a “national machinery for the advancement of women”, as recommended by the CEDAW Committee;²⁴⁴ and it does not ensure the criminalization, investigation and prosecution of SGB crimes in line with international law and standards.²⁴⁵

The provisions of Law No. 29 of 2013 dealing with legislative and institutional reform²⁴⁶ do not integrate a gender perspective and fail to implement the changes that are necessary to fully respect and protect women’s human rights in line with Libya’s international obligations,²⁴⁷ including protection from SGB crimes. Libya should take advantage of the transitional justice process to implement its obligations under the Maputo Protocol to:

- ... c) identify the causes and consequences of violence against women and take appropriate measures to prevent and eliminate such violence;
- d) actively promote peace education through curricula and social communication to eradicate elements in traditional and cultural beliefs, practices and harmful gender stereotypes that legitimize and exacerbate the persistence and tolerance of violence against women.²⁴⁸

Law No. 29 of 2013 also fails to address the question of the vetting and exclusion from their posts of public servants, including judicial, law enforcement, military and security officials, who are responsible for

241 Ibid., paras. 63-64. See also Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity, principle 38.

242 ICJ, Women’s Human Rights in the Libyan Draft Constitution, pp. 7-10, 14-15 and 18-27.

243 Maputo Protocol, art. 9; CEDAW Committee, Magdolein Abaida v. Libya, UN Doc. CEDAW/C/78/D/130/2018 (16 April 2021), paras. 6.2-6.4 and 8(b)(vi).

244 Concluding Observations: Libyan Arab Jamahiriya, UN Doc. CEDAW/C/LBY/CO/5(6 February 2009), paras. 15-16. See also AComHPR, Guidelines on Combating Sexual Violence and its Consequences in Africa, guidelines 70-75.

245 See above sections 4-5.

246 Law No. 29 of 2013, arts. 4, 5, 6 and 8. Legislative and institutional reform is provided for in the Law’s objectives to repeal “unjust laws that violated human rights and allowed for tyranny in the country” and “reformation of state institutions”, and in the FFRC’s requirement to “... review legislation related to the issue of transitional justice” and “work to repeal unjust laws and restore proper legal life, in accordance with the constitution and with Sharia law.”

247 Maputo Protocol, art. 8(f).

248 Maputo Protocol, art. 4(2)(c-d).

serious human rights violations, including SGB crimes.²⁴⁹ International standards indicate that persons involved in SGB crimes should not continue to be part of State institutions,²⁵⁰ in order to prevent their recurrence in the future.

To comply with international law and standards, the Libyan transitional justice law must envisage guarantees of non-recurrence as a form of reparation, making sure these are designed and implemented in a gender-responsive manner.

Recommendations

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

- i. Guarantee the right to an effective remedy for victims and survivors of SGB crimes by removing all *de jure* and *de facto* obstacles to women's access to justice;**
- ii. Ensure that reparations for victims and survivors of SGB crimes be designed according to a participatory approach, and be holistic and transformative;**
- iii. Include restitution as a form of reparation under the transitional justice law, particularly, but not exclusively, with respect to the rights to dignity, security, health, including sexual and reproductive health, family life, employment and education;**
- iv. Award compensation to victims and survivors by taking into account all the consequences, material and psychological, immediate and secondary, resulting from the harm suffered in connection with SGB crimes;**
- v. Ensure that women have access to compensation funds on equal terms with men, and provide for a right to appeal to and review by judicial authorities of award decisions adopted by the transitional justice mechanisms;**
- vi. Include all forms of satisfaction under the reparation provisions of the transitional justice law, and ensure that memorialization addresses the gender dimension of SGB crimes and other serious human rights violations;**
- vii. Guarantee the right to truth of victims and survivors of**

249 UN Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence, *The Gender Perspective in Transitional Justice Processes*, para. 66.

250 Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity, principle 36; Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, para. 23(b, c, f).

SGB crimes;

viii. Ensure, as a form of reparation to victims and survivors of SGB crimes, that perpetrators be brought to justice in proceedings guaranteeing their right to a fair trial, through effective investigations and prosecutions, when the evidence so warrants;

ix. Ensure that rehabilitation for women victims and survivors of SGB crimes include medical, psychological, legal and social care, and adequately guarantee the right to sexual and reproductive health;

x. Include guarantees of non-recurrence as a form of reparation and integrate a gender perspective into their design and implementation by:

o Reforming discriminatory laws against women and adopting comprehensive legislation on violence against women in order to tackle the root causes of SGB crimes;

o Conducting proper vetting of public servants, including judicial, law enforcement, military and security officials, who are responsible for SGB crimes, and excluding them from holding public posts; and

o Establishing a “national machinery for the advancement of women”²⁵¹ with a clear mandate to ensure the examination of the gendered impacts of serious human rights violations, including SGB crimes. Such mechanism must have adequate decision-making power and human and financial resources to discharge its mandate effectively, in order to promote women’s human rights and foster gender-responsive policies and programmes, in line with the Beijing Declaration and Platform for Action.²⁵²

251 CEDAW Committee, Concluding Observations: Libyan Arab Jamahiriya, UN Doc. CEDAW/C/LBY/CO/5(6 February 2009), paras. 15-16.

252 Beijing Declaration and Platform for Action (15 September 1995), paras. 196-203.

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