

# Tackling impunity for crimes under international law in Libya

International accountability mechanisms' prospects and challenges



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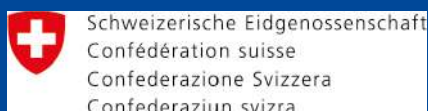
® Tackling impunity for crimes under international law in Libya: International accountability mechanisms' prospects and challenges

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## 1. Introduction: a context of impunity

United Nations and non-governmental organizations (NGO) reports continue to depict a bleak picture with regard to the human rights situation in Libya. Serious violations and abuses of international human rights law and international humanitarian law (IHL) – including, arbitrary detentions, extrajudicial killings, enforced disappearances, torture and other forms of ill-treatment, such as sexual and other forms of gender-based violence, and unlawful attacks against civilians and civilian objects – have continued to be committed on a widespread basis since 2011, when Muammar Gadhafi's regime was toppled.<sup>1</sup> Notably, in October 2021 the UN Independent Fact-Finding Mission on Libya (FFM) found that crimes committed against both Libyans and foreign nationals deprived of their liberty may amount to crimes against humanity.<sup>2</sup> Notwithstanding this, impunity in Libya remains total.<sup>3</sup>

At the domestic level, there is both a lack of political will of the Libyan authorities and an inability of the Libyan judiciary to effectively hold to account alleged perpetrators of crimes under international law. Significant flaws in the country's criminal justice system, the impossibility for courts to operate regularly due to recurrent armed hostilities and prevalent insecurity, and attacks on Libyan justice actors are among the causes for the persistent lack of accountability for serious violations and abuses of international human rights law and IHL.<sup>4</sup> With respect to this, the International Criminal Court (ICC) Office of the Prosecutor (OTP) has also noted the "limited action taken at the national level to deliver accountability."<sup>5</sup>

Given the accountability gap characterizing the Libyan domestic context, since 2011 the international community has established a number of international accountability mechanisms

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<sup>1</sup> *Report of the Independent Fact-Finding Mission on Libya*, UN Doc. A/HRC/48/83 (1 October 2021), para. 35 ff.; *Report of the Independent Fact-Finding Mission on Libya*, UN Doc. A/HRC/49/4 (23 March 2022), para. 26 ff.; *Report of the Independent Fact-Finding Mission on Libya*, UN Doc. A/HRC/50/63 (27 June 2022), para. 26 ff.; United Nations Support Mission in Libya (UNSMIL), *Report of the Secretary-General*, UN Doc. S/2022/409 (20 May 2022), paras 65 ff; Defender Center for Human Rights, *A Year of Missed Opportunities: A Briefing of the Human Rights Situation in Libya in 2021* (December 2021), at <https://www.defendercenter.org/5615>.

<sup>2</sup> *Report of the Independent Fact-Finding Mission on Libya*, UN Doc. A/HRC/48/83 (1 October 2021), paras 58 and 70. Similar allegations have been made in NGO submissions to the International Criminal Court (ICC). See European Center for Constitutional and Human Rights (ECCHR), LFJL, and the International Federation for Human Rights (FIDH), *Situation in Libya – Article 15 Communication on the Commission of Crimes against Migrants and Refugees in Libya (Executive Summary)* (23 November 2021), at [https://uploads-ssl.webflow.com/5a0d8805f2f99e00014b1414/619b93e924661967febf4b73\\_Executive%20Summary\\_Libya\\_IC\\_C\\_LFJL-migration.pdf](https://uploads-ssl.webflow.com/5a0d8805f2f99e00014b1414/619b93e924661967febf4b73_Executive%20Summary_Libya_IC_C_LFJL-migration.pdf); Adala for All, Strali, and UpRights, *Article 15 Communication on War Crimes and Crimes Against Humanity Committed Against Migrants and Asylum Seekers in Libya* (18 January 2022), at <https://static1.squarespace.com/static/5eccc1ca80c0dd25fddf363f/t/62700396ce98e81f5eaf7824/1651508122395/Public+Circulation+Article+15+Communication+on+War+Crimes+and+Crimes+Against+Humanity+Committed+Against+Migrants+and+Asylum+Seekers+in+Libya.pdf>.

<sup>3</sup> ICJ, *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>; Lawyers for Justice in Libya (LFJL) and Saferworld, *Enshrining Impunity: A Decade of International Engagement in Libya* (17 February 2022), at <https://www.libyanjustice.org/news/enshrining-impunity-a-decade-of-international-engagement-in-libya-lfjl>.

<sup>4</sup> The FFM, for example, has denounced "a pattern of attacks against members of the legal community, public prosecution offices, and courthouses", which hampers "the ability for the judiciary to administer and adjudicate the law in a manner that is fair, independent, accessible, and efficient." See *Report of the Independent Fact-Finding Mission on Libya*, UN Doc. A/HRC/49/4 (23 March 2022), paras 66–69; *Report of the Independent Fact-Finding Mission on Libya*, UN Doc. A/HRC/50/63 (27 June 2022), paras 105–106.

<sup>5</sup> *Twenty-Third Report of the Prosecutor of the International Criminal Court to the United Nations Security Council Pursuant to Resolution 1970 (2011)* (21 April 2022), para. 44.

for Libya, including a Commission of Inquiry in 2011,<sup>6</sup> a mission of the Office of the High Commissioner for Human Rights (OHCHR) in 2015,<sup>7</sup> and the FFM in 2020.<sup>8</sup> Moreover, soon after the uprising began in February 2011, the UN Security Council referred the situation in Libya to the ICC.<sup>9</sup> The Panel of Experts supporting the UN Security Council Sanction Committee on Libya<sup>10</sup> has also conducted investigations into serious violations and abuses of international human rights law and IHL.<sup>11</sup>

For present purposes, the phrase “international accountability mechanisms” refers to any mechanism with a mandate that includes at least one accountability function, such as:

- (i) fact-finding and collection of evidence of serious human rights violations (whether using criminal investigatory or classic human rights methodologies);
- (ii) the identification of perpetrators;
- (iii) the preparation of casefiles for use in future legal proceedings; or
- (iv) the prosecution of persons allegedly responsible for crimes under international law.

In the present legal briefing, the International Commission of Jurists (ICJ) analyzes existing international accountability mechanisms with regard to Libya, namely, the FFM (section 2.1) and the ICC (section 3.1), examining the practical difficulties these bodies have experienced in conducting their investigations. The briefing also explores the paramount considerations informing the possible establishment of new, *ad hoc* international accountability mechanisms, particularly an international investigative mechanism for Libya (section 2.3.2) and a special tribunal<sup>12</sup> for Libya (section 3.2).

To increase the effectiveness of international accountability mechanisms with regard to Libya, the briefing makes two main recommendations to States, namely:

- To establish – through a UN Human Rights Council or General Assembly mandate – a Standing Independent Investigative Mechanism (SIIM) or similar mechanism to be activated when necessary to investigate serious violations and abuses of international human rights law and IHL, including in respect of Libya (section 2.3.1); and

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<sup>6</sup> Human Rights Council Resolution S-15/1, *Situation of human rights in the Libyan Arab Jamahiriya*, UN Doc. A/HRC/RES/S-15/1 (3 March 2011), para. 11. See *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); *Report of the International Commission of Inquiry on Libya*, UN Doc. A/HRC/19/68 (28 January 2014).

<sup>7</sup> Human Rights Council Resolution 28/30, UN Doc. A/HRC/RES/28/30 (7 April 2015), para. 18. See *Investigation by the Office of the United Nations High Commissioner for Human Rights on Libya*, UN Doc. A/HRC/31/47 (15 February 2016).

<sup>8</sup> Human Rights Council Resolution 43/39, UN Doc. A/HRC/RES/43/39 (6 July 2020), para. 43.

<sup>9</sup> Security Council Resolution 1970, UN Doc. S/RES/1970 (26 February 2011), paras 4-8.

<sup>10</sup> Security Council Resolution 1970, UN Doc. S/RES/1970 (26 February 2011), para. 24; Security Council Resolution 1973, UN Doc. S/RES/1973 (17 March 2011), para. 24.

<sup>11</sup> Among others, see *Final report of the Panel of Experts on Libya established pursuant to Security Council resolution 1973 (2011)*, UN Doc. S/2021/229 (8 March 2021), paras 32–55; *Final Report of the Panel of Experts Established Pursuant to Resolution 1973 (2011) concerning Libya*, UN Doc. S/2022/427 (27 May 2022), paras 36–55.

<sup>12</sup> For present purposes, the phrase “special tribunal” refers to any *ad hoc* criminal court, which is created to try and adjudicate crimes under international law in relation to a specific country situation, irrespective of whether it follows a hybrid model (e.g., the Special Court for Sierra Leone) or a purely international model (e.g., the International Tribunal or the former Yugoslavia).

- To prioritize support for the ICC investigations in Libya, and promote the initiation of criminal proceedings under universal<sup>13</sup> and other extraterritorial jurisdiction (section 3.3).

In the ICJ's view, instead of creating new, *ad hoc* international accountability mechanisms for Libya, international advocacy efforts should be geared towards implementing the two recommendations set out above. The ICJ considers these to be more effective avenues to advance accountability in Libya.

## 2. Accountability through international investigations

Around the world, combatting impunity for serious human rights violations and abuses amounting to crimes under international law remains a significant challenge. While the international legal framework is well established, and there exists robust laws to address impunity in many national jurisdictions, where national responses are absent or ineffective there remains an enforcement gap at the international level. As a result, there have been increasingly frequent calls for UN bodies, chiefly the General Assembly and the Human Rights Council, to establish new and innovative UN-mandated investigations whose functions go beyond "customary" human rights documentation and reporting to include accountability functions, such as the identification of perpetrators and the collection of evidence for use in criminal proceedings.

All UN-mandated investigations with at least one accountability function share certain common features and thus belong to the same "family." They exist along a spectrum, with certain mandates that weigh more towards "customary" human rights investigations and reporting at one end, and UN investigative mechanisms that focus essentially on establishing the evidentiary basis for criminal prosecutions at the other, such as the International, Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Persons Responsible for the Most Serious Crimes under International Law Committed in the Syrian Arab Republic since March 2011 (IIIM), the Independent Investigative Mechanism for Myanmar (IIMM) and the Investigative Team to Promote Accountability for Crimes Committed by Da'esh/ISIL (UNITAD).

Most accountability mandates established by the UN, such as the Libya FFM, now operate in the middle of the above-mentioned spectrum where there are increasingly "blended" or "mixed" mandates requiring both human rights and criminal investigative capacity. Moreover, all these accountability mandates address, to some extent, aspects of both State responsibility and individual criminal responsibility, albeit they use different working methodologies in the gathering of information and evidence.

The present section will consider the critical aspects of the FFM mandate and the practical difficulties that have hindered its investigation. It will then consider the models of the IIIM, IIMM and UNITAD, on the one hand, and the "blended" or "mixed" mandates of certain commissions of inquiry, specifically on Palestine/Israel and Ukraine.

The briefing will make the case for the establishment of a SIIM or similar mechanism by the UN Human Rights Council or the General Assembly. The ICJ considers that this option should

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<sup>13</sup> Universal jurisdiction allows, and in certain circumstances requires, a State to prosecute crimes under international law – such as war crimes, crimes against humanity, and the crimes of torture and enforced disappearance – committed anywhere in the world, whenever the alleged perpetrator is present on such State's territory or is otherwise under its jurisdiction. See International Justice resource Centre, *Universal Jurisdiction*, at <https://ijrcenter.org/cases-before-national-courts/domestic-exercise-of-universal-jurisdiction/>.

be prioritized over the creation of *ad hoc* international investigative mechanisms, including with respect to Libya.

## 2.1. The UN Independent Fact-Finding Mission on Libya

The FFM was established on 22 June 2020 by UN Human Rights Council Resolution 43/39 for a period of one year.<sup>14</sup> Its mandate has been renewed twice, first by Resolution 48/25 for a period of nine months,<sup>15</sup> and a second time by Resolution 50/23, for another “non-extendable” nine-month term.<sup>16</sup> The FFM’s mandate is therefore set to expire definitively in March 2023.

The FFM has been tasked with investigating violations and abuses of international human rights law and IHL committed by all parties in Libya, i.e., both State and non-State actors, since the beginning of 2016.<sup>17</sup> In particular, it has been mandated to:

- Establish facts and circumstances of the human rights situation throughout Libya;
- Collect and review relevant information;
- Document alleged violations and abuses of international human rights law and IHL, including any gendered dimensions of such violations and abuses;
- Preserve evidence with a view to ensuring that perpetrators be held accountable;
- Draft a comprehensive final report presenting specific recommendations on:
  - “Achieving transitional justice and national reconciliation”;
  - “Strengthening the national human rights institutions and national action plan for human rights to follow up on the Fact-Finding Mission investigation, Treaty Body and UPR [Universal Periodic Review] recommendations”; and
  - “Strengthening the rule of law including supporting judicial processes and law enforcement.”<sup>18</sup>

While the FFM cannot prosecute individuals, its mandate allows it to collect and preserve evidence of violations and abuses of international human rights law and IHL with a view to ensuring future prosecutions in national or international jurisdictions.<sup>19</sup> In this respect, it is

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<sup>14</sup> Resolution 43/39, Doc. A/HRC/RES/43/39 (6 July 2020), para. 43. Due to the UN liquidity crisis and the COVID-19 pandemic, the Human Rights Council decided to postpone the implementation of the FFM mandate, among others, which effectively started in October 2020. See Decision 45/113, *Postponement of the implementation of certain activities mandated by the Human Rights Council*, UN Doc. A/HRC/DEC/45/113 (12 October 2020), p. 4.

<sup>15</sup> Human Right Council Resolution 48/25, *Technical assistance and capacity-building to improve human rights in Libya*, Doc. A/HRC/RES/48/25 (13 October 2021), para. 40.

<sup>16</sup> Human Right Council Resolution 50/23, *Technical assistance and capacity-building to improve human rights in Libya*, Doc. A/HRC/50/23 (8 July 2022), para. 1.

<sup>17</sup> On the role, mandate and functions of the FFM, see ICJ, *The Independent Fact-Finding Mission on Libya: Questions and Answers* (March 2021), at <https://www.icj.org/wp-content/uploads/2021/03/Libya-QA-FFM-2021-ENG.pdf>.

<sup>18</sup> Human Right Council Resolution 43/39, para. 43; Resolution 48/25, para. 41; Resolution 50/23, para. 2. In interpreting its mandate, the FFM has clarified that, beside international human rights law and IHL, it considered international criminal law as an applicable legal frame in the context of its investigation. With regard to the temporal scope, the FFM understood the mandate as encompassing “continuing violations and abuses that commenced before 2016”, e.g., enforced disappearances; in terms of geographical scope, the FFM affirmed that “its mandate also extended to the documentation of acts that commenced beyond Libyan borders but continued inside Libyan territory.” See *Report of the Independent Fact-Finding Mission on Libya*, UN Doc. A/HRC/48/83 (1 October 2021), p. 26.

<sup>19</sup> Report of the Independent Fact-Finding Mission on Libya, UN Doc. A/HRC/48/83 (1 October 2021), p. 26.



important that, towards the end of the FFM's mandate, following the submission of its final report, sufficient time be allocated to enable proper preservation, safekeeping, storing, identification, labelling and archiving of evidence for use in future legal proceedings, including criminal prosecutions, and for sharing such evidence within the UN system, where appropriate.<sup>20</sup>

With the prior and informed consent of relevant sources, such evidence may be transmitted to domestic, regional and international human rights and accountability mechanisms, including the ICC, for them to exercise their criminal jurisdiction or otherwise deliver other forms of accountability. However, it is unclear how such evidence-sharing is to take place. While the resolution establishing the FFM does not contain any explicit conditions for the sharing of evidence, it is the ICJ's view that, when determining whether to share evidence with States, international accountability mechanisms, including the FFM, look beyond their fair trial rights record as a prerequisite, and consider the rule of law situation in each country, respectively, more generally.<sup>21</sup>

More specifically, the ICJ considers that the following principles should be taken into account when determining whether international accountability mechanisms should share evidence:

- i. when sharing with States, there needs to be certain "due process" baselines, including fair trial rights guarantees in place – and assurances that the evidence would not be used in cases as a result of which persons subject to investigation would be at real risk of serious human rights violations, including the death penalty;
- ii. information should not be shared with authorities where there is a real risk that it will be used for improper, corrupt or politically motivated purposes, rather than legitimate justice purposes in accordance with international law and standards;
- iii. proceedings in which evidence may be used should not be limited to criminal proceedings but also legal proceedings more generally, as long as "due process" guarantees are in place and respected. Other legal proceedings may include sanctions proceedings where there is a nexus to the crimes under investigation or proceedings before the International Court of Justice; and
- iv. a process for sharing evidence within the UN system should also be left open, for example with the OHCHR, UN Special Procedures and Independent Experts, where appropriate, in compliance with the requirement to obtain the prior and informed consent of the source.<sup>22</sup>

In implementing its mandate, the FFM has faced multiple challenges, including the mandate's limited duration, staff shortages, delays caused by the COVID-19 pandemic, lack of full cooperation by the Libyan authorities, as well as security issues. Such challenges, in turn, have hindered the FFM's ability to carry out its investigation effectively.

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<sup>20</sup> ICJ, *The Future of Accountability Mechanisms: Twenty Recommendations* (December 2021), p. 5, at <https://www.icj.org/wp-content/uploads/2021/12/GLOBAL-Report-The-Future-of-Accountability-Mechanisms-ENG-2021.pdf>.

<sup>21</sup> Ibid., pp. 11–12: "[w]hile a State may comply with fair trial obligations, other factors of concern may exist including relevant domestic laws which are inconsistent with international human rights laws and standards and/or patterns of violations, including suppression of fundamental freedoms or persecution of, and retaliation against, human rights defenders. Accountability mechanisms may also consider matters such as victims' rights to participation, victims and witness protection and the appropriate treatment of sensitive victims including children and victims of SGBV."

<sup>22</sup> ICJ, *Options for the Establishment of a Standing Independent Investigative Mechanism* (June 2022, not yet published), p. 11. Such principles should apply also in the context of evidence and information sharing by the proposed SIIM. See below section 2.3.1.

A first obstacle concerns the duration of the FFM's mandate. The one-year mandate initially provided to the FFM was in itself of an insufficient duration to effectively investigate a vast array of violations and abuses, particularly when considering that these have happened over the course of a prolonged period of time, and where multiple armed conflicts involving a variety of different parties have taken place. Moreover, the FFM was granted only two consecutive extensions of nine months each, with the express specification that the July 2022 renewal was "non-extendable."<sup>23</sup>

This limitation, in turn, has intertwined with practical challenges that hampered the beginning of the FFM investigation. While the mandate officially ran as of October 2020, the FFM's Secretariat became fully operational only in June 2021, mainly due to the UN regular budget liquidity crisis and the consequent recruitment freeze. The deployment of the staff to Tunis, where the Secretariat is based, was further delayed owing to the COVID-19 pandemic. Thus, in practice, the FFM had only three months to compile its report before the September 2021 deadline.<sup>24</sup> This situation has repeated itself after the extension of the mandate in October 2021.<sup>25</sup> With the report deadline set for June 2022, the FFM found itself once again with only a few months to carry out its investigation. Moreover, budgetary issues, lack of accommodation in UN facilities, and the UN General Assembly's decision to cut the position of security coordinator have prevented the FFM from basing its staff in Libya or from conducting more on-site visits.<sup>26</sup> As the FFM itself put it, "[m]ore could have been and can be achieved if the Mission operated at full capacity."<sup>27</sup>

The difficulties experienced by the FFM in establishing a Secretariat and commencing its investigation exemplify why States should consider longer initial mandates: in fact, it is paramount to ensure that adequate time be allocated at the start of a mandate, with a view to obtaining the required resources and staff, while leaving sufficient time to fulfill the substantive terms of the mandate.<sup>28</sup> This consideration also provides one of the rationales for the ICJ's recommendation to establish a SIIM.<sup>29</sup>

The FFM has experienced a certain lack of cooperation on the part of the Libyan authorities, despite the Human Rights Council having urged national authorities "to grant the fact-finding mission and its members unhindered access to all Libyan territory without delay and to allow them to visit sites, and to meet and speak freely and privately, when they so request, with whomever they wish to meet or speak."<sup>30</sup> In its October 2021 report, the FFM affirmed that, while it had been able to visit Libya twice in July and August 2021:

... significant delays were experienced in obtaining the required visas, which interfered with planning and delayed the arrival of the Mission. ... Special authorization procedures applicable to international organizations working in Libya impeded the Mission's interactions with the authorities and also interfered with the Mission's site visits.

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<sup>23</sup> Human Rights Council Resolution 50/23, para. 1.

<sup>24</sup> *Report of the Independent Fact-Finding Mission on Libya*, UN Doc. A/HRC/48/83 (1 October 2021), para. 12.

<sup>25</sup> *Report of the Independent Fact-Finding Mission on Libya*, UN Doc. A/HRC/49/4 (23 March 2022), para. 14: "[w]hile the Mission should have had 18 staff members, it functioned from November 2021 to mid-February 2022 with only six, and with key roles vacant, including those of the Coordinator, Investigation Team Leader and Reporting Officer."

<sup>26</sup> *Ibid.*, para. 15.

<sup>27</sup> *Ibid.*, para. 16.

<sup>28</sup> ICJ, *The Future of Accountability Mechanisms: Twenty Recommendations*, p. 5.

<sup>29</sup> See below section 2.3.1.

<sup>30</sup> Resolution 43/39, para. 44; Resolution 48/25, para. 42.

Furthermore, some requests to visit sites, in particular prisons and detention centres for migrants, remained unanswered.<sup>31</sup>

In its March 2022 report, the FFM recounted that the Libyan authorities had improved their cooperation by “facilitating visa issuance and access to the western and eastern parts of Libya”, especially with respect to a field mission to Benghazi.<sup>32</sup> On the other hand, in its June 2022 report the FFM stated that it “continues to await access to prisons ... The Mission expresses its regret for not receiving the necessary security clearance and permission for road movements from Tripoli to Sebha, which prevented it from conducting an important mission to southern Libya in May 2022, despite having finalized all logistic and security arrangements.”<sup>33</sup>

In addition, security issues have impeded the FFM from meeting victims and witnesses. The FFM has reported that the provisions of Decree No. 296 of 2019,<sup>34</sup> which require Libyan NGOs to notify the authorities about their intention to meet the FFM, have instilled in many individuals the fear of retaliation; hence, pursuant to the “do-no-harm” principle, the FFM has decided not to meet them.<sup>35</sup> Worried of possible reprisals, many people declined to meet the FFM even when secure communication channels had been put in place; certain victims, on the other hand, did not want to be interviewed to avoid re-traumatization. Furthermore, the FFM has expressed concern that “the security measures accompanying the Mission’s movements increased the investigators’ visibility on the ground and discouraged some witnesses to come forward.”<sup>36</sup> Thus, “restrictions imposed on civil society organizations and fear of retaliation pose grave obstacles to interactions between the Mission and civil society organizations based in Libya.”<sup>37</sup>

The above shows that the challenges faced by the FFM in discharging its mandate originate from a mix of structural reasons<sup>38</sup> and external factors.<sup>39</sup> However, impediments arising out of the circumstances on the ground are also one of the factors that have hindered investigations by the ICC OTP.<sup>40</sup> This highlights the difficulty and limitations of conducting field investigations in armed conflict settings, which affect all accountability mechanisms, whether domestic or international.

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<sup>31</sup> *Report of the Independent Fact-Finding Mission on Libya*, UN Doc. A/HRC/48/83 (1 October 2021), para. 9.

<sup>32</sup> *Report of the Independent Fact-Finding Mission on Libya*, UN Doc. A/HRC/49/4 (23 March 2022), paras 11–12.

<sup>33</sup> *Report of the Independent Fact-Finding Mission on Libya*, UN Doc. A/HRC/50/63 (27 June 2022), paras 4 and 12. For the specific challenges concerning the investigation of crimes related to the discovery of mass graves in the city of Tarhouna, see *Detailed Findings on the Situation in Tarhouna: Conference Room Paper of the Independent Fact-Finding Mission on Libya*, UN Doc. A/HRC/50/CRP.3 (1 July 2022), paras 15–25.

<sup>34</sup> Libyan and international civil society organizations have criticized the restrictions on freedom of association and assembly imposed by this decree; at the time of writing, a legal challenge before the Tripoli Administrative Court awaits a ruling. See Cairo Institute for Human Rights Studies, *Libya: CIHRS supports Adala for All in its legal action against oppressive Decree 286 and urges respect for freedom of association ahead of elections* (5 October 2021), at <https://cihrs.org/libya-cihrs-supports-adala-for-all-in-its-legal-action-against-oppressive-decree-286-and-urges-respect-for-freedom-of-association-ahead-of-elections/?lang=en>.

<sup>35</sup> *Report of the Independent Fact-Finding Mission on Libya*, UN Doc. A/HRC/48/83 (1 October 2021), para. 10.

<sup>36</sup> *Ibid.*, para. 13.

<sup>37</sup> *Report of the Independent Fact-Finding Mission on Libya*, UN Doc. A/HRC/49/4 (23 March 2022), para. 13; *Report of the Independent Fact-Finding Mission on Libya*, UN Doc. A/HRC/50/63 (27 June 2022), para. 13.

<sup>38</sup> In particular, the short duration of the mandate, which owes to States’ unwillingness to support a longer one and to dedicate sufficient resources to the FFM, as well as the lack of agility of the UN administration to allow fast deployments.

<sup>39</sup> Including the UN budget liquidity crisis, the COVID-19 pandemic, and the security and political context in Libya.

<sup>40</sup> See below section 3.1.

## 2.2. Models of UN-mandated investigations

### 2.2.1. The IIIM, IIMM and UNITAD

On 21 December 2016, the UN General Assembly established the IIIM for Syria with the mandate to:

... collect, consolidate, preserve and analyse evidence of violations of international humanitarian law and human rights violations and abuses and to prepare files in order to facilitate and expedite fair and independent criminal proceedings, in accordance with international law standards, in national, regional or international courts or tribunals that have or may in the future have jurisdiction over these crimes, in accordance with international law.<sup>41</sup>

On 21 September 2017, the UN Security Council established UNITAD, which has been mandated to:

... collecting, preserving, and storing evidence in Iraq of acts that may amount to war crimes, crimes against humanity and genocide committed by the terrorist group ISIL (Da'esh) in Iraq, to the highest possible standards ..., to ensure the broadest possible use before national courts, and complementing investigations being carried out by the Iraqi authorities, or investigations carried out by authorities in third countries at their request.<sup>42</sup>

Furthermore, on 27 September 2018, the Human Rights Council created the IIMM, whose mandate substantially replicates that of the IIIM.<sup>43</sup>

The essential focus of the IIIM, the IIMM and UNITAD is on individual criminal responsibility for crimes under international law. According to the IIIM and the IIMM's Terms of Reference (ToR), these mechanisms:

... seek to establish the connection between crime-based evidence and the persons responsible, directly or indirectly, for such alleged crimes, focusing in particular on linkage evidence. It focuses on evidence pertaining to *mens rea* and to specific modes of criminal liability, including under the principle of command or superior responsibility established under international criminal law.<sup>44</sup>

The task of the IIIM and the IIMM is threefold: (i) to collect, consolidate, preserve and analyze evidence; (ii) to prepare files to facilitate and expedite fair and independent criminal proceedings; and (iii) to share such evidence and files with international and domestic jurisdictions.

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<sup>41</sup> General Assembly Resolution 71/248, UN Doc. A/RES/71/248 (11 January 2017), operative para. 4.

<sup>42</sup> Security Council Resolution 2379 (2017), UN Doc. S/RES/2379 (21 September 2017), operative para. 2.

<sup>43</sup> Human Rights Council Resolution 39/2, UN Doc. A/HRC/RES/39/2 (3 October 2018), operative para. 22.

<sup>44</sup> *Terms of reference of the International, Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Persons Responsible for the Most Serious Crimes under International Law Committed in the Syrian Arab Republic since March 2011*, UN Doc. A/71/755 (19 January 2017), Annex (IIIM ToR), para. 6; *Independent Investigative Mechanism for Myanmar: Terms of reference*, UN Doc. A/73/716 (21 January 2019), Annex (IIMM ToR), para. 17.

UNITAD is mandated to collect, preserve and store evidence in Iraq, and share it with Iraqi authorities and other States. However, unlike the IIIM and the IIMM, it is not tasked to prepare files to facilitate and expedite fair and independent criminal proceedings.

The IIIM and the IIMM may **collect** information, documentation and evidence from other accountability mechanisms, including the UN Commission of Inquiry on Syria and the now defunct UN Fact-Finding Mission on Myanmar,<sup>45</sup> respectively, as well as from other States, international or regional organizations, UN agencies, NGOs and individuals. They can also collect additional information and evidence through “interviews, witness testimony, documentation and forensic material.”<sup>46</sup> UNITAD collects evidence by “conducting interviews, taking witness testimony, receiving information and documentation and acquiring forensic material.”<sup>47</sup>

The **consolidation and analysis** of the evidence by the IIIM, the IIMM and UNITAD is done through the systematic organization of “all the information, documentation and evidence” collected.<sup>48</sup> The mechanisms then evaluate their reliability and probative value, identify any gaps, and consider the need to gather further information to fill any existing lacunae.<sup>49</sup>

The IIIM, the IIMM and UNITAD are tasked to **preserve** all the information, documentation and evidence by systematically recording, organizing and storing them in accordance with international criminal law standards and best known and applicable practices, including by securing an uninterrupted chain of custody.<sup>50</sup> The goal is to maximize the possibility of the admissibility and use of the evidence collected in international and/or domestic criminal proceedings.<sup>51</sup> The IIMM Terms of Reference (ToR) specify that one of its functions is to “ensure appropriate organization, possession and archiving of all its material, whether in physical or electronic form, including through the development of appropriate procedures for the long-term storage of, and regulation of access to, its archives following the completion of its mandate.”<sup>52</sup>

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<sup>45</sup> General Assembly Resolution 71/248, UN Doc. A/RES/71/248 (11 January 2017), operative paras 4 and 7; Human Rights Council Resolution 39/2, UN Doc. A/HRC/RES/39/2 (3 October 2018), operative para. 23(a).

<sup>46</sup> IIIM ToR, para. 5(a–b); IIMM ToR, para. 8(c): “[the Mechanism] shall further collect, as appropriate, additional information, documentation and evidence, including by conducting interviews with or taking statements from victims, witnesses or other individuals likely to provide relevant information, documentation or evidence; by receiving, procuring or obtaining physical evidence, photographic, video or other audiovisual imagery or material, digital or other electronic items and forensic material; and by bringing into its possession such other tangible or intangible material likely to be of assistance in the discharge of its mandate.”

<sup>47</sup> *Terms of reference of the Investigative Team to support domestic efforts to hold Islamic State in Iraq and the Levant (Da‘esh) accountable for acts that may amount to war crimes, crimes against humanity and genocide committed in Iraq, established pursuant to Security Council resolution 2379 (2017)*, UN Doc. S/2018/11 (14 February 2018) (UNITAD ToR), paras 5–6.

<sup>48</sup> IIIM ToR, para. 7; UNITAD ToR, para. 7.

<sup>49</sup> IIIM ToR, para. 8; IIMM ToR, para. 9; UNITAD ToR, para. 6.

<sup>50</sup> *The Minnesota Protocol on the Investigation of Potentially Unlawful Death (2016): The Revised United Nations Manual on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions* (OHCHR, 2017), para. 65: “[c]hain of custody is a legal, evidentiary concept requiring that any prospective item of evidence be conclusively documented in order to be eligible for admission as evidence in a legal proceeding. This includes the identity and sequence of all persons who possessed that item from the time of its acquisition by officials to its presentation in court. Any gaps in that chain of possession or custody can prevent the introduction of the item as evidence against a criminal defendant.”

<sup>51</sup> IIIM ToR, para. 23; IIMM ToR, paras 10–13. Beside international criminal law standards, UNITAD also needs “taking into account Iraqi criminal and procedure laws”, as Iraqi judicial authorities are the “primary intended recipient” of UNITAD’s investigations. See UNITAD ToR, paras 7 and 27.

<sup>52</sup> IIMM ToR, para. 14.



A specific feature of the IIIM and IIMM's mandates is to **prepare files** focusing on the criminal conduct of the persons who are the most responsible for the serious violations and abuses of international human rights law and IHL under consideration. Such files shall include all relevant information, documentation and evidence collected and analyzed, "both inculpatory and exculpatory, pertaining to the imputable crimes and to the mode or modes of criminal liability recognized under international law, including command or superior responsibility."<sup>53</sup>

Pursuant to a request or on their own initiative, the IIIM and the IIMM may **share** the information, documentation and evidence collected with domestic, regional or international jurisdictions "in order to facilitate and expedite fair and independent criminal proceedings, in accordance with international law standards."<sup>54</sup> Both the IIIM and IIMM have interpreted their mandates as not being limited to sharing evidence for exclusive use in criminal proceedings. For example, the IIMM has shared information with the parties to the *Gambia v Myanmar* case before the International Court of Justice. UNITAD is specifically tasked to share the evidence collected with competent Iraqi authorities "to ensure the broadest possible use before national courts, and complementing [their] investigations", as well as with third States, upon request.<sup>55</sup>

Evidence-sharing by the IIIM, IIMM and UNITAD is contingent upon the concerned jurisdictions fully complying with international human rights law, including with respect to fair trial standards, and not imposing, let alone carrying out, capital punishment as a sentence upon conviction for the crimes under consideration.<sup>56</sup> As mentioned in section 2.1 above, the assessment of international accountability mechanisms in this regard should consider not only the respect for the right to a fair trial in the concerned jurisdiction, but also the country's rule of law situation in general.<sup>57</sup> The IIIM has specified that it "will generally not share information in circumstances in which a trial may be held in absentia on the basis of universal jurisdiction",<sup>58</sup> and that it "does not provide support to investigations and prosecutions that relate solely to terrorism offences or concern immigration proceedings."<sup>59</sup> Moreover, the IIMM has clarified that it "shall, among other factors, consider the confidentiality of the information, documentation or evidence, the consent expressed by sources and any protection concerns that may arise from the use of such information", and that "information, documentation and evidence may be shared only with authorities, bodies and organizations ... with the capacity to ensure appropriate victim and witness protection."<sup>60</sup> The IIMM's mandate also prescribes close collaboration with the ICC's investigation in the situation in Bangladesh/Myanmar.<sup>61</sup>

In the ICJ's view, once an international accountability mechanism has shared evidence pursuant to certain conditions, it should, to the extent possible, monitor compliance with those conditions. For this reason, international accountability mechanisms should have protocols in place to react to a situation where conditions are not adhered to by the party with whom the

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<sup>53</sup> IIIM ToR, para. 12; IIMM ToR, paras 15–16.

<sup>54</sup> Security Council Resolution 2379 (2017), UN Doc. S/RES/2379 (21 September 2017), operative para. 2.

<sup>55</sup> IIIM ToR, paras 13–15; IIMM ToR, para. 18.

<sup>56</sup> IIIM ToR, para. 14; IIMM ToR, para. 20; UNITAD ToR, paras 26–28.

<sup>57</sup> See ICJ, *The Future of Accountability Mechanisms: Twenty Recommendations*, pp. 11–12.

<sup>58</sup> *Report of the Secretary-General*, UN Doc. A/71/755 (19 January 2017), para. 20.

<sup>59</sup> *Report of the International, Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Persons Responsible for the Most Serious Crimes under International Law Committed in the Syrian Arab Republic since March 2011*, UN Doc. A/76/690 (11 February 2022), para. 35.

<sup>60</sup> IIMM ToR, para. 20.

<sup>61</sup> Human Rights Council Resolution 39/2, UN Doc. A/HRC/RES/39/2 (3 October 2018), operative para. 24. Since 14 November 2019, the ICC OTP is investigating alleged crimes within the ICC jurisdiction committed against the Rohingya population, particularly the crimes against humanity of deportation across the Myanmar-Bangladesh border, and of persecution on grounds of ethnicity and/or religion. For more information, see ICC, *Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar*, at <https://www.icc-cpi.int/bangladesh-myanmar>.

evidence has been shared. Moreover, such mechanisms should – capacity permitting – continue to support national prosecutions after evidence has been shared, including, for example, by providing technical assistance, case file review, advice on the theory of the case and charging, and assistance with specialized areas of the prosecution, such as the contextual elements of crimes under international law or the specificities of crimes of sexual and gender-based violence.<sup>62</sup>

The IIIM has reported that, as of January 2022, it had “received 173 requests for assistance from 13 jurisdictions and assisted 91 distinct national investigations. The Mechanism has also proactively shared information, data sets, evidentiary modules and analytical products with national war crimes units to support them in their work.”<sup>63</sup> The ability of the IIIM to assist domestic accountability efforts is due to the increased number of countries, including Austria, Belgium, Germany, the Netherlands, Sweden and Switzerland, that have initiated criminal proceedings for crimes under international law committed in Syria pursuant to the universal jurisdiction principle. For instance, the IIIM has provided effective support to prosecuting authorities in Germany<sup>64</sup> in connection with proceedings that resulted in the first-ever convictions of former Syrian regimes officials for crimes against humanity.<sup>65</sup> The IIIM has also cooperated with international bodies, particularly the UN Commission of Inquiry on Syria and the Organization for the Prohibition of Chemical Weapons (OPCW), from which it has received relevant material.<sup>66</sup> The IIMM, for its part, has reported on its continued cooperation with the ICC and the International Court of Justice, in accordance with its mandate.<sup>67</sup> As of 26 May 2022, UNITAD had received 15 requests for assistance by States and had “provided support for several investigations that are expected to lead to judicial proceedings”; further, it has assisted Swedish authorities in proceedings that have led to the conviction of a woman, who had joined Da’esh, for war crimes related to the conscription and use of child soldiers.<sup>68</sup>

## 2.2.2. “Blended” or “mixed” mandates

In recent years, some commissions of inquiry (COI) and fact-finding missions, including the Libya FFM, have been provided with “blended” or “mixed” mandates requiring both human rights and criminal investigative capacity.<sup>69</sup> Specifically, such international accountability mechanisms have been tasked to collect and preserve evidence with a view to its use in future international or domestic criminal proceedings.<sup>70</sup> A similar mandate has also been assigned to

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<sup>62</sup> ICJ, *The Future of Accountability Mechanisms: Twenty Recommendations*, p. 12.

<sup>63</sup> *Report of the International, Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Persons Responsible for the Most Serious Crimes under International Law Committed in the Syrian Arab Republic since March 2011*, UN Doc. A/76/690 (11 February 2022), para. 5.

<sup>64</sup> *Ibid.*, para. 6.

<sup>65</sup> ICJ, *Syria: Landmark decision in the fight against impunity* (25 February 2021), at <https://www.icj.org/syria-landmark-decision-in-the-fight-against-impunity/>; ICJ, *Syria: German court’s decision a momentous step in the fight against impunity* (13 January 2022), at <https://www.icj.org/syria-qerman-courts-decision-a-momentous-step-in-the-fight-against-impunity/>.

<sup>66</sup> *Report of the International, Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Persons Responsible for the Most Serious Crimes under International Law Committed in the Syrian Arab Republic since March 2011*, UN Doc. A/76/690 (11 February 2022), paras 14–15.

<sup>67</sup> *Report of the Independent Investigative Mechanism for Myanmar*, UN Doc. A/HRC/48/18 (5 July 2021), para. 26.

<sup>68</sup> *Eighth report of the Special Adviser and Head of the United Nations Investigative Team to Promote Accountability for Crimes Committed by Da’esh/Islamic State in Iraq and the Levant*, UN Doc. S/2022/434 (26 May 2022), paras 101–102.

<sup>69</sup> ICJ, *Options for the Establishment of a Standing Independent Investigative Mechanism* (June 2022, not yet published), p. 3. See also section 2 above.

<sup>70</sup> Among others, see Human Rights Council Resolution 46/23, *Situation of Human Rights in South Sudan*, UN Doc. A/HRC/RES/46/23 (30 March 2021), para. 25(b); Human Rights Council Resolution S-33/1, *Situation of*

the OCHCR with respect to the UN-mandated investigations into the situations in Belarus and Sri Lanka.<sup>71</sup> Such a focus on individual criminal responsibility for crimes under international law has been added to the more “customary” human rights fact-finding functions, whose focus ordinarily is on State responsibility under international human rights law for serious human rights violations.

Remarkably, the Palestine/Israel and Ukraine COIs, respectively established in May 2021 and March 2022, have been given a particularly broad mandate. The mandate of the Ukraine COI includes:

... (b) To collect, consolidate and analyse evidence of such violations and abuses, including their gender dimension, and to systematically record and preserve all information, documentation and evidence, including interviews, witness testimony and forensic material, consistent with international law standards, in view of any future legal proceedings.

(c) To document and verify relevant information and evidence, including through field engagement, and to cooperate with judicial and other entities, as appropriate.<sup>72</sup>

The mandate of the Palestine/Israel COI presents almost identical language.<sup>73</sup>

It is worth noting that, while the Libya FFM has been tasked to “collect and review relevant information” and “preserve evidence”, the Palestine/Israel and Ukraine COIs are also requested to “consolidate” evidence, “systematically record and preserve all information, documentation and evidence”, and “document and verify relevant information and evidence.” This language closely resembles that included in the ToR of the IIIM and the IIMM.

The mandates of the Palestine/Israel and Ukraine COIs present a stronger criminal accountability prong when compared to other mechanisms established by the Human Rights Council, including the Libya FFM, which moves them closer to the IIIM, IIMM and UNITAD end of the spectrum – save for the additional task to “prepare files”, which they have not been given.<sup>74</sup> In this respect, the Palestine/Israel COI clarified the following:

[w]hile acknowledging the COI as a human rights investigation, and the distinct and complementary role of judicial investigative processes, in line with its mandate the Commission will also develop methodologies and standard operating procedures aimed at ensuring that information and evidence collected and preserved will be done so in a manner which maximises the possibility of its admissibility in legal proceedings. It will undertake first hand interviews with witnesses and victims of violations of international humanitarian law and violations and abuses of international human rights law. It will also collect information and documentation relevant to its inquiries from all states, relevant bodies and agencies of the United Nations system, civil society, the media, and other relevant stakeholders. The Commission will develop an information and evidence repository along with standard operating procedures to ensure that information or

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*Human Rights in Ethiopia*, UN Doc. A/HRC/RES/S-33/1 (21 December 2021), para. 9(b); Human Rights Council Resolution 49/3, *Promotion and Protection of Human Rights in Nicaragua*, UN Doc. A/HRC/RES/49/3 (7 April 2022), para. 14(b).

<sup>71</sup> Human Rights Council Resolution 46/1, UN Doc. A/HRC/RES/46/1 (26 March 2021), operative para. 6; Human Rights Council Resolution 46/20, UN Doc. A/HRC/RES/46/20 (29 March 2021), operative para. 13(a).

<sup>72</sup> Human Rights Council Resolution 49/1, UN Doc. A/HRC/RES/49/1 (4 March 2022), operative para. 9.

<sup>73</sup> Human Rights Council Resolution S-30/1, UN Doc. A/HRC/RES/S-30/1 (28 May 2021), operative para. 2.

<sup>74</sup> See section 2.2.1 above.

evidence collected or received is stored in a manner which meets international standards for evidence preservation.<sup>75</sup>

The Palestine/Israel and Ukraine COIs mandates also retain broad human rights fact-finding and public reporting functions, which are absent in the mandates of the IIIM and the IIMM. As mentioned, the latter mechanisms have an essential focus on individual criminal responsibility for crimes under international law.

One question, in this respect, is whether incorporating human rights fact-finding/public reporting functions and investigative functions with a criminal accountability focus – which, in turn, require confidentiality and follow more exacting standards of proof – is the most appropriate approach to advance accountability through international mechanisms. In fact, conflict might arise between the need for public reporting and the confidentiality surrounding the collection, preservation and analysis of evidence, to the extent that the former could negatively affect the latter.<sup>76</sup> Moreover, given the disparity of standards of proof and skillsets involved, there is a risk that both functions may be compromised. The challenge, in this respect, is to find a way to advance both the human rights fact-finding/public reporting and criminal accountability functions of international accountability mechanisms, without one function displacing or hampering the other.<sup>77</sup>

### 2.3. Enhancing the criminal accountability focus of international investigations with respect to Libya

To enhance prospects of criminal accountability for crimes committed in Libya through international investigations, at least two possibilities exist: (i) establishing a SIIM or similar mechanism, which could then be deployed with respect to Libya; or (ii) creating an *ad hoc* international investigative mechanism for Libya.

As further explained in this section, it is the ICJ's view that advocacy efforts should focus on the first of those two options, namely, on establishing a SIIM or similar mechanism.

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<sup>75</sup> Independent International Commission of Inquiry on the Occupied Palestinian Territory, including East Jerusalem, and Israel, *Terms of Reference*, p. 5, at [https://www.ohchr.org/sites/default/files/2022-01/TORs-UN-Independent ICI Occupied Palestinian Territories.pdf](https://www.ohchr.org/sites/default/files/2022-01/TORs-UN-Independent%20ICI%20Occupied%20Palestinian%20Territories.pdf). See also *Report of the Independent International Commission of Inquiry on the Occupied Palestinian Territory, including East Jerusalem, and Israel*, UN Doc. A/HRC/50/21 (9 May 2022), para. 12: "[i]n accordance with its mandate, the Commission has developed an information and evidence repository that, once fully operational, will be used to systematically record and preserve all information and evidence collected, in accordance with international law standards and with a view to assisting future accountability efforts."

<sup>76</sup> ICJ, *Options for the Establishment of a Standing Independent Investigative Mechanism* (June 2022, not yet published), p. 12.

<sup>77</sup> Ibid., p. 5; Federica D'Alessandra, Ambassador Stephen J. Rapp, Kirsty Sutherland and Sareta Ashraph, *Anchoring Accountability for Mass Atrocities: The Permanent Support Needed to Fulfil UN Investigative Mandates*, Oxford Institute for Ethics, Law, and Armed Conflict (May 2022), p. 95, at <https://www.bsg.ox.ac.uk/sites/default/files/2022-05/Anchoring%20Accountability%20for%20Mass%20Atrocities%20Report.pdf>: "... if investment is necessary in bolstering the capacity of UN investigations to better and more directly support judicial accountability, including of the criminal nature, the crucial 'public facing' reporting and advocacy function that is core to UN human rights investigations cannot be extinguished, for it goes to the heart of the functioning of the UN system. Criminally focused investigations require confidentiality and are often at odds with such reporting. An exclusive focus on such investigations, without preserving the public reporting of traditional human rights investigations, would thus be detrimental to the global fight against impunity and the international rule of law. This is, admittedly, one of the hardest challenges any proposals of reform face. And yet, ways must be found to ensure that both of these functions can be performed and accommodated by the UN human rights system, for impunity would be the alternative." For considerations in this respect relating to the proposed establishment of SIIM, see below footnote 81.

### 2.3.1. A SIIM or similar mechanism

There is general consensus that while the various international accountability mechanisms fulfill an important role in the human rights and international criminal justice architecture, there is a need for improving the process of their establishment and operation. Against this background, two studies, carried out by the ICJ<sup>78</sup> and Oxford University,<sup>79</sup> respectively, concluded independently that the best way to bolster benefits and minimize challenges is to establish a **SIIM** or similar mechanism.

A SIIM would have both a “primary” and a “secondary” function. The primary function would be to conduct investigations with a view to gathering information and evidence for potential use in criminal and other legal and administrative proceedings. The secondary function would be to use its capacity to act as a specialist service provider to existing and future UN body-created international accountability mechanisms, including relevant fact-finding missions and commissions of inquiry.<sup>80</sup> In terms of subject-matter jurisdiction, the SIIM should be activated to investigate crimes under international law and related crimes committed on a widespread or systematic scale, or reaching a certain level of gravity.

Importantly, the idea is not to impose substantial additional costs on top of the existing resources allocated to the creation of international accountability mechanisms, but rather to make the system more efficient and cost-effective overall by allocating resources in a different way, namely, by providing for a standing capacity that could take on investigations referred to a SIIM and, in addition, by supporting the work of other international accountability mechanisms already established.

Efficiency and cost-effectiveness would be gained through the fact the SIIM would have a standing capacity of staff, support and other services. This would enable it to become operational in response to a new situation in a timely fashion, without the need for a full, new, start-up phase with all the attendant costs and other challenges faced by novel mandates. As showed in section 2.1 above, the Libya FFM experienced precisely all these issues, which have ultimately hampered its ability to fulfill its mandate. To avoid such situation, a SIIM could be established and activated with respect to Libya. Efficiency and cost-effectiveness would also be gained through the secondary function of the SIIM, in that it would also deploy its standing support services to other international accountability mechanisms, as and when requested. For example, in circumstances where special challenges arise, such as the need to support complex investigations, including into armed conflict-related sexual violence or crimes against or involving children. Again, if a SIIM were already in place, the Libya FFM could have benefitted from its expertise.

Furthermore, a SIIM or similar mechanism would not compete with or undermine the existing international human rights and criminal justice architecture, including the ICC. Rather, it would support and complement it. Nor would it obviate the need for fact-finding missions and

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<sup>78</sup> ICJ, *Options for the Establishment of a Standing Independent Investigative Mechanism* (June 2022, not yet published), pp. 5 ff. See also Kingsley Abbot and Saman Zia-Zarifi, *Is It Time to Create a Standing Independent Investigative Mechanism (SIIM)? Part I*, *Opinio Juris* (10 April 2019), at <https://opiniojuris.org/2019/04/10/is-it-time-to-create-a-standing-independent-investigative-mechanism-siim/>; *Is It Time to Create a Standing Independent Investigative Mechanism (SIIM)? Part II*, *Opinio Juris* (11 April 2019), at <https://opiniojuris.org/2019/04/11/is-it-time-to-create-a-standing-independent-investigative-mechanism-siim-part-ii/>.

<sup>79</sup> D'Alessandra, Rapp, Sutherland and Ashraph, *Anchoring Accountability for Mass Atrocities*, p. 95, pp. 28–29.

<sup>80</sup> For further elaboration on the SIIM's functions, see ICJ, *Options for the Establishment of a Standing Independent Investigative Mechanism* (June 2022, not yet published), pp. 5–6.



commissions of inquiry to be created in appropriate cases.<sup>81</sup> Instead, it would complement their work. Moreover, when appropriate, a SIIM should have the possibility of proactively identifying relevant fora where legal proceedings could take place and evidence utilized, e.g., national or international jurisdictions. As further elaborated in section 3.3, a SIIM could support, by acting in synergy with, both ICC investigations and any national prosecution of crimes under international law committed in Libya, based on universal and other extraterritorial jurisdiction.

The SIIM should be independent of OHCHR or UN agencies but linked to them in a consultative and operational capacity – and reliant on them for certain services – in the same way as the IIIM, the IIMM and UNITAD.

The SIIM or other similar mechanism should be established and activated by either the UN Human Rights Council, possibly with the endorsement of the General Assembly, or directly by the General Assembly. The Human Rights Council has established most of the existing international accountability mechanisms, and remains best placed to do so, by reason of its organic mandate focused on strengthening the promotion and protection of human rights worldwide and on addressing situations of human rights violations. The General Assembly could also establish the SIIM mandate, in situations where the Human Rights Council has not itself acted.<sup>82</sup>

An investigation by a SIIM should be triggered on principled and established criteria. In particular, a referral to a SIIM should be made by one of the following methods, with both being possible:

- a. By an independent, specialized, collective, and “collegial” panel made up of recognized experts in the field and with cross-regional representation tasked with monitoring situations; and/or
- b. By intergovernmental bodies such as the Human Rights Council, the General Assembly or the Security Council (however, neither the General Assembly nor the Security Council should have exclusive competence in this regard – it would be important that the Human Rights Council, as the premiere human rights authority, be given at least concurrent competence).

The budget for a SIIM should cater adequately for both its primary and secondary function, which would require two different budget lines. It is also critical that the allocated budget be sufficient to allow the efficient and effective functioning of the SIIM, which should be funded

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<sup>81</sup> ICJ, *Options for the Establishment of a Standing Independent Investigative Mechanism* (June 2022, not yet published), pp. 12–13: “[the] SIIM would not, and should not, infringe on the necessary and traditional role of UN mandated investigations such as fact-finding missions and commissions of inquiry in investigating state responsibility, including for example identifying root causes to a conflict and making periodic reports to UN bodies with recommendations. As such, the traditional ‘reporting function’ of UN mandated investigations should continue unimpeded. [With regard to whether the SIIM should] carry out a public reporting function in addition to conducting investigations into essentially individual criminal responsibility. There are three possibilities: (i) the question be left to the discretion of the triggering mechanism, on a case-by-case basis; and/or (ii) include a human rights reporting function, in addition to a mandate to conduct investigations into essentially individual criminal responsibility and leave it to the SIIM to decide how to coordinate the two functions without compromising the integrity of either; or (iii) do not give the SIIM a human rights public reporting function but ensure that a UN mandated investigation always works in parallel on the relevant situation which would fulfill this function, in the same manner as the Syria situation.” See also D’Alessandra, Rapp, Sutherland, and Ashraph, *Anchoring Accountability for Mass Atrocities*, p. 95.

<sup>82</sup> The UN Security Council can already refer a situation to the ICC or demand further investigation. Further, international accountability mechanisms have often been established in situations where the UN Security Council cannot agree on such a response, or when one of the Permanent Five members have misused the veto power to block accountability initiatives on grounds which are sometimes unprincipled.

by the regular UN budget, but also maintain the option of receiving additional voluntary contributions. Funding should explicitly cater for the need to establish and maintain an enduring archive that would store evidence and enable tracking of issues of consent and other conditions attached to evidence that was shared with the SIIM. Any budget should also take into account where the office(s) of the SIIM would be located. Importantly, consideration should be given to establishing offices closer to relevant situations and victims, where appropriate and possible. A SIIM should have a Head at the UN Assistant-Secretary General (ASG) level with a direct reporting line to the UN Secretary-General with appropriate deputies and sufficient senior staff.

In alternative to a SIIM, another option could be to create a **stand-alone investigation support service provider**, independent of OHCHR or UN agencies but linked to them and reliant on them for certain services.<sup>83</sup> Unlike a SIIM, such a model would not conduct its own investigations. Rather, it would simply establish a standing specialized capacity that could be drawn upon when a criminal or other complex investigation is undertaken by existing and future international accountability mechanisms.<sup>84</sup>

On the other hand, a stand-alone investigation support service provider would not be endowed with the authority to conduct its own investigations, meaning that *ad hoc* international accountability mechanisms would still need to be established. This, in turn, carries certain political costs, including the challenge of “selectivity” that may arise with respect to the circumstances according to which such mechanisms should be created, and what their mandates should look like. It would also incur many of the same costs of the SIIM, without many of the benefits, as international accountability mechanisms would still need to be created for every appropriate situation and, whenever they were to be given “blended” or “mixed” mandates, they would have to carry out their own investigations (albeit with greater support), for example.

In alternative to creating a self-standing body, another possibility could be to establish a **standing investigation support service provider inside the OHCHR**.<sup>85</sup> However, such an arrangement would also likely impose encumbrances for both the standing investigation service provider and the OHCHR itself. This is because a standing investigation support service provider must have the capacity to support essentially criminal and other complex investigations into legal liability.

This is a narrower and more focused set of services than those that the OHCHR’s mandate traditionally encompasses, such as monitoring and documenting human rights violations. It may also be more vulnerable to the bureaucratic constraints that all UN agencies face. If the standing investigation support service provider were to come under the OHCHR, it would have to be a functionally autonomous specialized unit, albeit many of the support services could be shared.

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<sup>83</sup> ICJ, *Options for the Establishment of a Standing Independent Investigative Mechanism* (June 2022, not yet published), p. 8.

<sup>84</sup> Upon request, fact-finding missions and COIs, as well as UN Special Procedures and treaty bodies, could draw upon such expertise. Similarly to the SIIM’s secondary function, specialist assistance could include specialized digital storage capacity and expertise, witness and victim protection infrastructure and expertise, expertise on forensics and military matters, and expertise in international criminal law, including on conflict-related sexual violence.

<sup>85</sup> ICJ, *Options for the Establishment of a Standing Independent Investigative Mechanism* (June 2022, not yet published), p. 8–9; D’Alessandra, Rapp, Sutherland and Ashraph, *Anchoring Accountability for Mass Atrocities*, pp. 13–14.

### 2.3.2. An international investigative mechanism for Libya

In order to bolster the pursuit of criminal accountability once the mandate of the Libya FFM terminates in March 2023, one option could be to create an international investigative mechanism for Libya designed along the lines of the IIIM and the IIMM. Such a mechanism would essentially focus on individual criminal responsibility for crimes under international law, including by building files for future national or international prosecutions.

However, establishing an international investigative mechanism for Libya would face the several challenges the creation of any such mechanism recurrently faces, including:

- a. Political challenges inside the Human Rights Council or other UN bodies, including garnering necessary support to establish and renew its mandate;
- b. Financial challenges, including at the budget allocation stage;
- c. Administrative challenges, relating to the start-up phase of operations, including the need to secure adequate staffing with the appropriate substantive expertise and resources to effectively fulfill the mandate;
- d. System challenges, such as recording, storing, analyzing and preserving large amounts of digital evidence securely; and
- e. The development of policies, procedures and protocols to ensure the mechanism fulfils its functions effectively, efficiently and without doing harm to victims and witnesses.<sup>86</sup>

An international investigative mechanism for Libya would face the same limitations and constraints with regard to access to the territory and victims/witnesses that both the Libya FFM and the ICC have faced throughout their respective investigations.<sup>87</sup>

In light of the above, it is the ICJ's view that advocacy efforts should rather be directed at creating a SIIM, and then activating it with respect to the situation of Libya. However, if a UN body decided to create an international investigative mechanism for Libya, the following factors should be taken into account:

- i. it should be funded from UN regular budget;
- ii. appropriate staffing, resources and technology infrastructure should be available;
- iii. clear and effective policies for engaging with victims and witnesses should be in place;
- iv. requirements and protocols regarding the sharing of evidence, e.g. for use in criminal proceedings, should be developed;
- v. cooperation with NGOs and victims groups, UN agencies, as well as other international accountability mechanisms, e.g. the FFM, should be ensured.<sup>88</sup>

Creating an international investigative mechanism for Libya without considering the above-mentioned factors would risk impeding the effective fulfillment of its mandate, and negatively affect the goal of supporting future criminal proceedings. The challenges that establishing an

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<sup>86</sup> ICJ, *Options for the Establishment of a Standing Independent Investigative Mechanism* (June 2022, not yet published), p. 4.

<sup>87</sup> See section 2.1 above and section 3.1 below.

<sup>88</sup> For further elaboration and recommendations on these points, see ICJ, *The Future of Accountability Mechanisms: Twenty Recommendations*, pp. 3–12; D'Alessandra, Rapp, Sutherland and Ashraph, *Anchoring Accountability for Mass Atrocities*, pp. 97–104.

international investigative mechanism for Libya capable of fulfilling its mandate would face show that creating a SIIM would be a more effective option.

## Recommendations

**In light of the above, the ICJ makes the following recommendations:**

- **Establish a SIIM or similar mechanism to be activated when necessary to investigate serious violations and abuses of international human rights law and IHL, and provide support and advice to other UN accountability mechanisms, including commissions of inquiry and fact-finding missions;**
- **Once established, activate the SIIM or other mechanism with respect to Libya;**
- **If an international investigative mechanism for Libya was to be created, ensure it complies with the requirements set in section 2.3.2 above.<sup>89</sup>**

## 3. Accountability through international prosecutions

The present section provides an overview of the ICC's investigation in Libya and the various challenges it has faced to date. It then discusses proposals for the creation of a special tribunal for Libya, considering both the challenges and opportunities of this option.

In light of these challenges and opportunities, from the outset, the ICJ wishes to make clear that, in its view, instead of establishing a special tribunal for Libya, the international community should prioritize support to ongoing ICC investigations, particularly by increasing the budget of the OTP. Furthermore, other States should consider exercising universal and other extraterritorial jurisdiction with respect to crimes under international law committed in Libya.

### 3.1. The International Criminal Court

On 26 February 2011, the UN Security Council referred the situation in Libya since 15 February 2011 to the ICC OTP.<sup>90</sup> Accordingly, the ICC has jurisdiction to try and adjudicate crimes under the Rome Statute,<sup>91</sup> including war crimes and crimes against humanity, that have been committed in Libya since 2011.

On 27 June 2011, the ICC's Pre-Trial Chamber I issued warrants of arrest against Muammar Gadhafi, Saif al-Islam Gadhafi (Muammar Gadhafi's son) and Abdullah Al-Senussi (former head of Libya's Military Intelligence) for crimes against humanity committed during the 2011 uprising in Libya.<sup>92</sup> Additional arrest warrants were issued against Al-Tuhamy Mohamed Khaled (former head of the Libyan Internal Security Agency) on 18 April 2013 for crimes against humanity and

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<sup>89</sup> (i) It should be funded from UN regular budget; (ii) appropriate staffing, resources and technology infrastructure should be available; (iii) clear and effective policies for engaging with victims and witnesses should be in place; (iv) requirements and protocols regarding the sharing of evidence, e.g. for use in criminal proceedings, should be developed; and (v) cooperation with NGOs and victims groups, UN agencies, as well as other international accountability mechanisms, e.g. the FFM, should be ensured.

<sup>90</sup> Security Council Resolution 1970 (2011), UN Doc. S/RES/1970 (26 February 2011), paras 4–8.

<sup>91</sup> *Rome Statute of the International Criminal Court*, 2187 UNTS 3 (17 July 1998).

<sup>92</sup> ICC, Situation in the Libyan Arab Jamahiriya, Pre-Trial Chamber I, *Warrant of Arrest for Muammar Mohammed Abu Minyar Gaddafi*, Doc. ICC-01/11-13 (27 June 2011); *Warrant of Arrest for Saif Al-Islam Gaddafi*, Doc. ICC-01/11-14 (27 June 2011); *Warrant of Arrest for Abdullah Al-Senussi*, Doc. ICC-01/11-15 (27 June 2011).

war crimes,<sup>93</sup> and against Mahmoud Mustafa Busayf Al-Werfalli (commander in the Al-Saiqa Brigade in the Libyan National Army, presently known as the Libyan Arab Armed Forces, LAAF) on 15 August 2017 and 4 July 2018 for war crimes.<sup>94</sup> The case against Muammar Gadhafi terminated on 22 November 2011 due to his death.<sup>95</sup> In its April 2022 report, the OTP indicated that it was verifying the reported deaths of Al-Werfalli (allegedly killed by unknown individuals in Benghazi, Libya) and Al-Tuhamy (allegedly passed away in Cairo, Egypt) in early 2021.<sup>96</sup>

In 2013, following the Libyan authorities' admissibility challenges in the *Gadhafi* and *Al-Senussi* cases,<sup>97</sup> Pre-Trial Chamber I declared the case against Saif Al-Islam Gadhafi admissible,<sup>98</sup> and the case against Abdullah Al-Senussi inadmissible.<sup>99</sup> In 2014, the Appeals Chamber upheld both decisions.<sup>100</sup> Saif Al-Islam Gadhafi subsequently filed an admissibility challenge on 6 June 2018, which the Pre-Trial Chamber I dismissed on 5 April 2019; on 9 March 2020, the Appeals Chamber upheld the dismissal,<sup>101</sup> thus confirming that the case against Saif Al-Islam Gadhafi remains admissible.

Among other reasons, the ICC declared Al-Senussi's case inadmissible because of existing domestic proceedings against him and other former regime officials, including Saif Al-Islam Gadhafi, in Libya.<sup>102</sup> Al-Senussi was eventually convicted and sentenced to death by the Tripoli Court of Assize on 27 July 2015, in proceedings that, for the most part, have violated

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<sup>93</sup> ICC, Situation in Libya, *The Prosecutor v. Al-Tuhamy Mohamed Khaled*, Pre-Trial Chamber I, *Warrant of Arrest for Al-Tuhamy Mohamed Khaled*, Doc. ICC-01/11-01/13-1 (18 April 2013). The warrant of arrest was initially classified as under seal *ex parte*, and later reclassified as public to foster States' cooperation for the arrest and surrender of the suspect. See ICC, Situation in Libya, *The Prosecutor v. Al-Tuhamy Mohamed Khaled*, Pre-Trial Chamber I, *Decision on Reclassification of the Warrant of Arrest*, Doc. ICC-01/11-01/13-18 (24 April 2017).

<sup>94</sup> ICC, Situation in Libya, *The Prosecutor v. Mahmoud Mustafa Busayf Al-Werfalli*, Pre-Trial Chamber I, *Warrant of Arrest*, Doc. ICC-01/11-01/17-2 (15 August 2017), para. 10; *Second Warrant of Arrest*, Doc. ICC-01/11-01/17-13 (4 July 2018).

<sup>95</sup> ICC, Situation in Libya, *The Prosecutor v. Muammar Mohammed Abu Minyar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, Pre-Trial Chamber I, *Decision to Terminate the Case Against Muammar Mohammed Abu Minyar Gaddafi*, Doc. ICC-01/11-01/11-28 (22 November 2011).

<sup>96</sup> *Twenty-Third Report of the Prosecutor of the International Criminal Court to the United Nations Security Council Pursuant to Resolution 1970 (2011)* (21 April 2022), para. 8.

<sup>97</sup> Admissibility challenges have not been filed in the *Al-Tuhamy* or *Al-Werfalli* cases.

<sup>98</sup> ICC, Situation in Libya, *The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, Case No. ICC-01/11-01/11 Pre-Trial Chamber I, *Decision on the admissibility of the case against Saif Al-Islam Gaddafi* (31 May 2013).

<sup>99</sup> ICC, Situation in Libya, *The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, Case No. ICC-01/11-01/11, Pre-Trial Chamber I, *Decision on the admissibility of the case against Abdullah Al-Senussi*, 11 October 2013.

<sup>100</sup> *The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, Case No. ICC-01/11-01/11 OA4, Appeals Chamber, *Judgment on the appeal of Libya against the decision of Pre-Trial Chamber I of 31 May 2013 entitled "Decision on the admissibility of the case against Saif Al-Islam Gaddafi"* (21 May 2014); *The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, Case No. ICC-01/11-01/11 OA6, Appeals Chamber, *Judgment on the appeal of Mr Abdullah Al-Senussi against the decision of Pre-Trial Chamber I of 11 October 2013 entitled "Decision on the admissibility of the case against Abdullah Al-Senussi"* (24 July 2014).

<sup>101</sup> ICC, Situation in Libya, *The Prosecutor v. Saif Al-Islam Gaddafi*, Case No. ICC-01/11-01/11, Pre-Trial Chamber I, *Decision on the "Admissibility Challenge by Dr. Saif Al-Islam Gaddafi pursuant to Articles 17(1)(c), 19 and 20(3) of the Rome Statute"* (5 April 2019); *The Prosecutor v. Saif Al-Islam Gaddafi*, Case No. ICC-01/11-01/11 OA8, Appeals Chamber, *Judgment on the appeal of Mr Saif Al-Islam Gaddafi against the decision of Pre-Trial Chamber I entitled "Decision on the 'Admissibility Challenge by Dr. Saif Al-Islam Gaddafi pursuant to Articles 17(1)(c), 19 and 20(3) of the Rome Statute'"* of 5 April 2019 (9 March 2020).

<sup>102</sup> ICC, Situation in Libya, *The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, Case No. ICC-01/11-01/11, Pre-Trial Chamber I, *Decision on the admissibility of the case against Abdullah Al-Senussi* (11 October 2013), para. 311. For analysis, see ICJ, *Libyan Proceedings and the International Criminal Court: Assessment of Complementarity Challenges* (March 2020), at <https://www.icj.org/wp-content/uploads/2020/04/Libya-ICC-assessment-Advocacy-Analysis-Brief-2020-ENG.pdf>.



international fair trial standards.<sup>103</sup> On 27 May 2021, the Libyan Supreme Court annulled the judgment and ordered a re-trial.<sup>104</sup> No public information is currently available on the status of the domestic proceedings against Al-Senussi.

A constant feature of the ICC proceedings relating to Libya has been the challenge in effecting the arrest and transfer of the suspects to the ICC. Since the issuance of the warrant for his arrest in 2011, Saif al-Islam Gadhafi has avoided transfer to the ICC and today remains at large. He was arrested by a militia and subsequently detained in the city of Zintan until he was reportedly released in 2017.<sup>105</sup> Despite the outstanding ICC arrest warrant and calls by the ICC for his surrender,<sup>106</sup> Gadhafi registered as a candidate in the presidential elections planned for 24 December 2021, which ultimately did not take place.<sup>107</sup> The Libyan authorities appear, so far, to have been both unable and unwilling to secure his apprehension and transfer to the ICC.

Authorities in the West of Libya have also been unable to arrest Al-Werfalli, mainly due to the lack of control over the East of the country, where he was based. Authorities in the East, in turn, have failed to transfer him to the ICC or, instead, to genuinely investigate and prosecute him.<sup>108</sup> On 17 August 2017, the LAAF reportedly announced it was investigating the alleged killings committed by Al-Werfalli.<sup>109</sup> Yet, according to subsequent accounts, in January 2019 the Benghazi Court Martial revoked a domestic arrest warrant against him.<sup>110</sup> Al-Werfalli was subsequently promoted in rank within the LAAF,<sup>111</sup> until he was reportedly killed in Benghazi on 24 March 2021. In turn, Al-Tuhamy has resided in Cairo until his reported death in 2021. The Egyptian authorities have repeatedly failed to hand him over to the ICC.<sup>112</sup>

It thus appears that the challenges the ICC has faced in obtaining custody of those against whom it had issued arrest warrants owe either to Libya's material inability to arrest Saif al-Islam Gadhafi (while he was held by a militia in Zintan until 2017) and Al-Werfalli; or to the unwillingness of the Libyan authorities to hand over Saif al-Islam Gadhafi to the ICC after his

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<sup>103</sup> UNSMIL and OHCHR, *Report on the Trial of 37 Former Members of the Qadhafi Regime (Case 630/2012)* (February 2017), at [https://www.ohchr.org/Documents/Countries/LY/Trial37FormerMembersQadhafiRegime\\_EN.pdf](https://www.ohchr.org/Documents/Countries/LY/Trial37FormerMembersQadhafiRegime_EN.pdf); ICJ, *Accountability for Serious Crimes under International Law in Libya*, pp. 60 ff.

<sup>104</sup> UNSMIL, *Report of the Secretary-General*, UN Doc. S/2021/752 (25 August 2021), para. 62.

<sup>105</sup> Al Jazeera, *Saif al-Islam Gaddafi Freed from Prison in Zintan* (11 June 2017), at <https://www.aljazeera.com/news/2017/6/11/saif-al-islam-gaddafi-freed-from-prison-in-zintan>.

<sup>106</sup> Libya Alahrar, *ICC Urges State Cooperation to Surrender Saif Gaddafi* (13 December 2021), at <https://libyaalahrar.net/icc-urges-state-cooperation-to-surrender-saif-gaddafi/>.

<sup>107</sup> Washington Post, *Gaddafi's Son to Run for President of Libya as December Election Looms* (14 November 2021), at [https://www.washingtonpost.com/world/gaddafi-son-libya-election/2021/11/14/183674ac-453a-11ec-beca-3cc7103bd814\\_story.html](https://www.washingtonpost.com/world/gaddafi-son-libya-election/2021/11/14/183674ac-453a-11ec-beca-3cc7103bd814_story.html).

<sup>108</sup> *Statement of the ICC Prosecutor to the United Nations Security Council on the Situation in Libya, pursuant to UNSCR 1970 (2011)* (17 May 2021), para. 31, at <https://www.icc-cpi.int/Pages/item.aspx?name=210517-otp-statement-unscl-libya>.

<sup>109</sup> US Embassy, *ICC Arrest Warrant for Major Mahmoud al-Werfalli in Libya: Joint Statement by the Governments of France, the United Kingdom, and the United States* (18 August 2017), at <https://ly.usembassy.gov/icc-arrest-warrant-major-mahmoud-al-werfalli-libya-joint-statement-governments-france-united-kingdom-united-states/>.

<sup>110</sup> Libyan Express, *Libya's Benghazi Court Removes Arrest Warrant of Al-Werfalli* (7 January 2019), at <https://www.libyaobserver.ly/news/benghazis-court-martial-removes-arrest-warrant-serial-killer-al-werfalli>.

<sup>111</sup> Middle East Eye, *Libya's Haftar Promotes Accused War Criminal Wanted by International Court* (9 July 2019), at <https://www.middleeasteye.net/news/libyas-haftar-promotes-accused-war-criminal-wanted-international-court>.

<sup>112</sup> *Statement of the ICC Prosecutor to the United Nations Security Council on the Situation in Libya, pursuant to UNSCR 1970 (2011)* (17 May 2021), para. 31, at <https://www.icc-cpi.int/Pages/item.aspx?name=210517-otp-statement-unscl-libya>.

release in 2017; or to the lack of cooperation on the part of the Egyptian authorities in the apprehension of Al-Tuhamy.<sup>113</sup>

Moreover, obstacles to the ICC investigations have been posed by both the security situation in Libya, where armed hostilities have routinely resurged since 2014; and by the divisive domestic political context where rival authorities continue their attempts to assert control over the country.<sup>114</sup> In November 2021, the OTP affirmed that “[t]he ongoing instability in Libya precludes the Office from having regular access and conducting investigations on Libyan territory, and hampers the Office’s ability to gather evidence through *in situ* investigations.”<sup>115</sup> Similar conclusions were reiterated in April 2022, although the OTP also declared that its renewed investigative strategy “will allow it to adapt its approaches based on developing political and security dynamics.”<sup>116</sup>

The OTP has emphasized that the lack of adequate financial and human resources constituted a further obstacle to its investigations in Libya. As part of its renewed strategy, the OTP has reportedly allocated additional resources to the Libya investigation team, allowing for the recruitment of new specialized staff and advanced data analysis tools, with a view to ensuring that the current lines of inquiry may be followed up effectively.<sup>117</sup>

It has been reported that, since 2011, victims have faced significant challenges in accessing the ICC, primarily because of limited outreach on the part of the OTP.<sup>118</sup> It should be highlighted that, by its very design, and owing to staff and funding limitations, the ICC can try and adjudicate only a handful of cases per situation, particularly with reference to those persons that are responsible for “the most serious crimes of international concern”,<sup>119</sup> meaning only a certain number of victims will be able to be involved in ICC proceedings. However, one survey stressed the insufficient OTP’s outreach in Libya given “90% of respondents ... were unfamiliar with the ICC’s work.”<sup>120</sup> Furthermore, as of June 2020, only nine victims had applied to participate in ICC proceedings.<sup>121</sup> Cited problems in this respect are the difficulties faced by victims to engage with the ICC due to a lack of physical presence on the part of the ICC in Libya or in neighbouring Tunisia, as well as the absence on the ICC website of relevant information in Arabic.<sup>122</sup> In this regard, the OTP has indicated that, in a time span of three to nine months, starting from April 2022, it would take “concrete steps to bring the work of the Office closer to survivors, witnesses and the families of victims”, by “establish[ing] an enhanced field presence, including the strengthening existing witness engagement facilities

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<sup>113</sup> ICC, Situation in Libya, *The Prosecutor v. Saif Al-Islam Gaddafi*, Case No. ICC-01/11-01/11, Pre-Trial Chamber, *Decision on the non-compliance by Libya with requests for cooperation by the Court and referring the matter to the United Nations Security Council*, Doc. ICC-01/11-01/11-577 (11 December 2014).

<sup>114</sup> International Crisis Group, *Reuniting Libya, Divided Once More* (25 May 2022), at <https://www.crisisgroup.org/middle-east-north-africa/north-africa/libya/reuniting-libya-divided-once-more>.

<sup>115</sup> *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), para. 12.

<sup>116</sup> *Twenty-Third Report of the Prosecutor of the International Criminal Court to the United Nations Security Council Pursuant to Resolution 1970 (2011)* (21 April 2022), paras 39–41.

<sup>117</sup> *Ibid.*, paras 46–48.

<sup>118</sup> LFJL, *Victims’ Voices: Participation at the International Criminal Court* (January 2022), pp. 8–9, at <https://www.libyanjustice.org/news/victims-voices-participation-at-the-international-criminal-court>.

<sup>119</sup> *Rome Statute of the International Criminal Court*, art. 1.

<sup>120</sup> LFJL and Saferworld, *Enshrining Impunity: A decade of international engagement in Libya*, p. 26.

<sup>121</sup> *Twenty-third Periodic Report of the Registry on Applications Received by the Victims Participation and Reparations Section in the Situation in Libya*, Doc. ICC-01/11-70 (21 October 2019), para. 5.

<sup>122</sup> International Federation for Human Rights (FIDH), *The victims’ mandate of the International Criminal Court: disappointments, concerns and options for the way forward* (June 2020), para. 86, at <https://www.fidh.org/IMG/pdf/cpiang752.pdf>. See also LFJL, *Victims’ Voices: Participation at the International Criminal Court*, p. 8.

within the region”, and by incorporating “the increased use of remote screenings and interviews.”<sup>123</sup>

The OTP has indicated that Libya is one of the priority situations of its investigation strategy.<sup>124</sup> Accordingly, in addition to the crimes under the Rome Statute committed in 2011, the OTP will focus its investigations on crimes related to: incidents that have occurred during the 2019-2020 military offensive on Tripoli; the discovery of mass graves in the city of Tarhuna; forced displacement, pillage and property destruction in Benghazi and its surroundings; crimes committed in detention facilities; and crimes perpetrated against migrants.<sup>125</sup> In this respect, the OTP has presented an updated investigative strategy, outlining immediate-term priorities as well as future milestones of its investigation.<sup>126</sup> With specific regard to crimes committed in detention facilities, the OTP has indicated that, “[u]nder appropriate operational and cooperation conditions, it is anticipated that this will lead to the collection of sufficient evidence for the Office to seek arrest warrants in at least one additional case within the next two years.”<sup>127</sup>

While the prioritization of and renewed investigative strategy for Libya are welcome steps, it is to be seen whether the OTP will be able to yield concrete results in terms of effective prosecutions of persons allegedly responsible for crimes under the Rome Statute. At the time of writing, there is no indication of near-future improvements with regard to the security and political situation in Libya, including with respect to the Libyan authorities’ willingness to cooperate with the ICC, which so far has constituted the main obstacle for the OTP to obtain custody of suspects and conduct on-site investigations. Additionally, the domestic authorities continue to shrink the civic space in Libya, narrowing the ability of civil society organizations and actors to engage with international accountability mechanisms, including the ICC, as already experienced by the Libya FFM.<sup>128</sup> For these reasons, the prospects that the ICC will be able to deliver justice in Libya remain uncertain.

Lastly, the ICC OTP’s criminal policy does not aim to ensure accountability for all crimes falling under its jurisdiction in a situation, nor does the ICC have the resources to do so. The OTP has made clear that it would “promote and support accountability efforts at the national level wherever possible, in line with the principle of complementarity”, and that it would establish “a proactive and accelerated policy of cooperation with third States, regional organisations and international partners so as to fully exploit all avenues for the use of information and evidence collected by the [OTP].”<sup>129</sup> Indeed, national proceedings, whereby crimes under international law committed in Libya may be tried and adjudicated through the exercise of universal and other extraterritorial jurisdiction, would complement the task of the ICC.

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<sup>123</sup> *Twenty-Third Report of the Prosecutor of the International Criminal Court to the United Nations Security Council Pursuant to Resolution 1970 (2011)* (21 April 2022), paras 58–60.

<sup>124</sup> *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), para. 3.

<sup>125</sup> *Ibid.*, paras 18–29; *Twenty-Third Report of the Prosecutor of the International Criminal Court to the United Nations Security Council Pursuant to Resolution 1970 (2011)* (21 April 2022), paras 15–32. The OTP can investigate such crimes because (i) the ICC temporal jurisdiction extends from 15 February 2011 (as specified in the Security Council’s referral) until today; and (ii) these can be characterized as Rome Statute crimes.

<sup>126</sup> *Twenty-Third Report of the Prosecutor of the International Criminal Court to the United Nations Security Council Pursuant to Resolution 1970 (2011)* (21 April 2022), paras 77–81.

<sup>127</sup> *Ibid.*, para. 77.

<sup>128</sup> See above section 2.1.

<sup>129</sup> *Twenty-Third Report of the Prosecutor of the International Criminal Court to the United Nations Security Council Pursuant to Resolution 1970 (2011)* (21 April 2022), pp. 2–3.

### 3.2. A special tribunal for Libya

As mentioned above, the ICC already has jurisdiction to investigate and prosecute certain crimes under international law in Libya, specifically crimes under the Rome Statute of the ICC. However, there have been arguments in favour of establishing a special tribunal for Libya, purportedly in an effort to address the paucity of the ICC's achievements in Libya since 2011, and the limited number of defendants it would be able to try in any event.<sup>130</sup> It has also been reported that some Libyan civil society groups see a "special hybrid court" based in Libya as the preferred way to conduct prosecutions of crimes under international law in the country.<sup>131</sup> In this regard, it should be noted that there is a precedent of a special tribunal co-existing with the ICC, namely the Special Criminal Court exercising its jurisdiction in Central African Republic,<sup>132</sup> which closely cooperates with the ICC.<sup>133</sup>

The ICJ does not recommend the creation of a special tribunal for Libya, as it would directly undermine the mandate of the ICC, and because there is little evidence, if any, that such a tribunal would be capable of overcoming the challenges that the ICC has faced with respect to its investigations in the country. Rather, the challenges that the ICC has been facing in respect of Libya, including the difficulty in executing arrest warrants, should be addressed through greater State support for, and cooperation with, the ICC. However, in light of the discussion that is already underway regarding the creation of the special tribunal for Libya, the possible modalities for its creation are outlined below.

A special tribunal for Libya could be established in three ways: (i) by agreement between an international organization, e.g., the UN, and the Libyan Government; (ii) by a UN Security Council resolution; or (iii) by third States pulling their extraterritorial criminal jurisdiction, particularly universal jurisdiction. However, several challenges would stand in the way of the creation of such a tribunal, namely: the procedure to establish it; funding and resources; and limitations with respect to access to territory, the accused, victims and witnesses, as well as the enforcement of arrest warrants and decisions.

Moreover, establishing a special tribunal for Libya, where the ICC already exercises jurisdiction, may be counterproductive as it may:

- i. undermine the ICC's authority and legitimacy with respect to the Libyan situation and beyond;
- ii. create possible competition and conflict over the same cases between the special tribunal for Libya and the ICC, to the detriment of the fight against impunity; and

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<sup>130</sup> Alison Cole, *A Hybrid Court Could Secure Justice in Libya*, The Guardian (27 October 2011), at <https://www.theguardian.com/law/2011/oct/27/hybrid-court-justice-libya>; Atlantic Council, *Transitional justice and accountability in Libya* (28 September 2021), at <https://www.atlanticcouncil.org/event/transitional-justice-and-accountability-in-libya/>; LFJL, *Libya Matters: Stephen Rapp on a Special Court for Libya* (27 July 2022), at <https://libyamatters.buzzsprout.com/450046/11022421>.

<sup>131</sup> LFJL, "Justice is the only way forward": Perceptions of justice in Libya ten years on (June 2022), pp. 27–28, at <https://www.libyanjustice.org/news/justice-is-the-only-way-forward-perceptions-of-justice-in-libya-ten-years-on>.

<sup>132</sup> *Organic Law No. 15-003 on the Creation, Organisation and Functioning of the Special Criminal Court* (3 June 2015).

<sup>133</sup> ICC Prosecutor underlines commitment to support the Special Criminal Court of the Central African Republic following address by Deputy Prosecutor, Mr Mame Mandiaye Niang at opening of first trial in Bangui (11 May 2022), at <https://www.icc-cpi.int/news/icc-prosecutor-underlines-commitment-support-special-criminal-court-central-african-republic>.

- iii. detract funding and resources that could instead be allocated to the OTP's budget, particularly in light of the OTP's renewed strategy for Libya.

As further discussed in section 3.3 below, enhancing support for ICC investigations and national proceedings under universal and other extraterritorial jurisdiction should be prioritized over the creation of a special tribunal for Libya.

### 3.2.1. Agreement with the Libyan Government

The first option for the creation of a special tribunal for Libya could follow the model of the Special Court for Sierra Leone,<sup>134</sup> with both international and national judges and prosecutors, and which applies both Libyan and international criminal law. Through the combination of domestic and international criminal law, a special tribunal for Libya could have jurisdiction over a broad set of crimes under international law. The applicability of international criminal law, subject to and within the boundaries of the principle of legality, could obviate the fact that Libyan domestic law fails to criminalize, either at all or in line with international law and standards, a number of crimes under international law.<sup>135</sup>

To maximize its impact at the local level, especially in terms of proximity to victims, witnesses and the national population more generally, the special tribunal should have its seat in Libya.<sup>136</sup> Alternatively, especially if the political and security context does not allow for this option, the special tribunal for Libya could have its seat in another country, as is the case of the Special Tribunal for Lebanon.

The option of creating a special tribunal for Libya would require Libya's consent for both establishing the tribunal and for its functioning throughout the duration of its mandate. Establishing such a tribunal by agreement may face a number of obstacles. First, given the political instability and institutional divisions that have marred Libya since 2014, and which have led to the existence of parallel, competing governments and institutions, including the legislative ones, it seems difficult to obtain and maintain the necessary domestic consent and to ensure the adoption of the required legislative acts. Moreover, some special tribunals have faced political obstruction when their prosecution policy stopped pleasing the government of the day or conflicted with peace negotiations,<sup>137</sup> and a special tribunal for Libya may not be immune from similar obstacles.

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<sup>134</sup> *Agreement between the United Nations and the Government of Sierra Leone on the Establishment of the Special Court for Sierra Leone* (16 January 2002). See also *Agreement between the United Nations and the Royal Government of Cambodia concerning the prosecution under Cambodian law of crimes committed during the period of Democratic Kampuchea* (6 June 2003).

<sup>135</sup> ICJ, *Accountability for Serious Crimes under International Law in Libya*, pp. 31 ff.

<sup>136</sup> The creation of hybrid tribunals having their seat in the concerned country "can be seen as a response to the need to make justice for atrocity crimes more responsive and accessible to local populations." See Kirsten Ainley and Mark Kersten, *Dakar Guidelines on the Establishment of Hybrid Courts* (2019), p. 2, at <https://hybridjustice.files.wordpress.com/2019/07/dakar-guidelines-final.pdf>. See also LFJL, *Perceptions of justice in Libya ten years on*, p. 27: "[t]he survey results show that 230 respondents (66 per cent) and most interviewees said that to be considered legitimate, trials [including before a hybrid court] should be conducted in Libya."

<sup>137</sup> See e.g., Maxence Helen, *Central African Republic: The Long Bumpy Road Towards the Special Criminal Court*, Justice Info (18 April 2022), at <https://www.justiceinfo.net/en/90870-central-african-republic-long-bumpy-road-towards-special-criminal-court.html>; Open Society Justice Initiative, *Performance and Perception: The Impact of the Extraordinary Chambers in the Courts of Cambodia* (2016), at <https://www.justiceinitiative.org/uploads/106d6a5a-c109-4952-a4e8-7097f8e0b452/performance-perception-eccc-20160211.pdf>.



Second, the pervasive insecurity and recurrent resurgence of hostilities that characterize the Libyan context to date could impede the special tribunal from sitting in Libya. While the seat could be placed in another State, this option may defeat entirely or to a large extent the purpose of creating an institution that is close to the victims and their families, witnesses, and the Libyan population as a whole.

Third, the Libyan legal and justice system is weak, and so is the rule of law, which contribute making the human rights situation in the country extremely perilous. While a special tribunal of a hybrid nature may provide an opportunity to build the capacity of the national justice system, it may be too difficult at this stage to overcome these challenges. For example, setting up a victim and witness protection programme, at present totally lacking in Libya,<sup>138</sup> may prove unviable in an environment where armed groups and State actors systematically carry out reprisals against human rights defenders, lawyers and activists.

### 3.2.2. UN Security Council resolution

The UN Security Council could establish a special tribunal for Libya by resorting to its prerogatives under Chapter VII of the UN Charter. Past examples are the International Criminal Tribunals for the former Yugoslavia (ICTY)<sup>139</sup> and for Rwanda (ICTR),<sup>140</sup> and the Special Tribunal for Lebanon (STL).<sup>141</sup> A special tribunal for Libya so created would have its seat in another country (the ICTY and STL were located in The Hague, the Netherlands, while the ICTR in Arusha, Tanzania), and it could be composed of all international (like the ICTY and the ICTR) or mixed staff (like the STL).

While a Security Council-mandated special tribunal for Libya would obviate the need for Libya's consent, it would require the buy-in of all the Security Council's permanent members, which hold a veto power. Several factors appear to run counter this option. First, the UN Security Council already referred the situation in Libya to the ICC in 2011.<sup>142</sup> It seems thus unlikely that it would create a new criminal accountability mechanism where it has already activated the ICC jurisdiction, particularly when the OTP has made Libya one of the priority situations within its investigation strategy.<sup>143</sup>

Second, there is an ongoing impasse within the Security Council regarding the renewal of the mandate of the UN Support Mission in Libya (UNSMIL) and the appointment of a Special Envoy for Libya, which has been going on since September 2021, and continues at the time of writing.<sup>144</sup> Such a situation signals that, at the moment, the proposal to create a special tribunal for Libya would probably have no support within the Security Council.

Third, in the absence of Libya's buy-in and of an international law enforcement power, it is likely that a Security Council-mandated special tribunal for Libya would hardly achieve better results than the ICC, and would be unable to hold trials other than *in absentia*, like the STL, which may fail to bring any sentiment of justice to the population of Libya.

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<sup>138</sup> ICJ, *Accountability for Serious Crimes under International Law in Libya*, pp. 9, 19–20, 22, 70 and 87.

<sup>139</sup> Security Council Resolution 827 (1993), UN Doc. S/RES/827 (25 May 1993).

<sup>140</sup> Security Council Resolution 955 (1994), UN Doc. S/RES/955 (8 November 1994).

<sup>141</sup> Security Council Resolution 1757 (2007), UN Doc. S/RES/1757 (30 May 2007), which ensured the entry into force of an Agreement between the Government of Lebanon and the United Nations.

<sup>142</sup> Security Council Resolution 1970 (2011), UN Doc. S/RES/1970 (26 February 2011), paras 4–8.

<sup>143</sup> See above section 3.1.

<sup>144</sup> Amanda Kladek, *At the UN, a Power Game Over Resolutions*, Newlines Magazine (2 February 2022), at <https://newlinesmag.com/argument/at-the-un-a-power-game-over-resolutions/>.

### 3.2.3. Third States pooling universal jurisdiction

In the absence of an agreement with the Libyan Government or a Security Council's resolution, other States with the necessary political will could enter into a treaty and establish a special tribunal for Libya by pooling their extraterritorial criminal jurisdiction, particularly under the principle of universal jurisdiction. Similar proposals have been put forward with respect to creating a special tribunal to try members of the Islamic State responsible for crimes under international law in Syria and Iraq,<sup>145</sup> or to prosecute individuals for the crime of aggression following the Russian Federation's invasion of Ukraine in March 2022.<sup>146</sup> At the time of writing, such initiatives have not yet materialized. In a situation where, at present, universal jurisdiction is one of the only avenues for judicial accountability available, this would present the advantage of sharing the responsibility and the concomitant resource burden to hold several trials.

However, even the option of creating a special tribunal for Libya based on pooled universal jurisdiction raises several thorny questions. First, such a tribunal would have to have its seat in a country other than Libya, like a UN Security Council-mandated special tribunal. A way to bring it closer to victims and witnesses would be for the tribunal to be located within North Africa, which, in turn, would require considerable efforts to obtain the necessary agreement from one of the relevant governments in the region. Such a special tribunal could also conduct outreach activities or even hold *in situ* hearings,<sup>147</sup> subject to Libya's agreement.

Second, such a modality of creating a special tribunal for Libya would bring along a number of limitations in terms of jurisdiction.<sup>148</sup> States would need to pass necessary legislation to enable a harmonized exercise of universal jurisdiction over crimes under international law. This would allow the tribunal to assert jurisdiction over: (i) crimes under international law that can be tried and adjudicated in the courts of the States parties to the treaty setting up the tribunal, i.e., crimes codified in treaties that such States are party to, e.g., the UN Convention against Torture, or crimes that reflect customary international law at the time they were committed; and (ii) nationals of any State, including Libyans, accused of such crimes.<sup>149</sup> At present, only a limited number of States have adopted universal jurisdiction legislation,<sup>150</sup> and requirements

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<sup>145</sup> Emma Broches, *Accountability for Islamic State Fighters: What Are the Options?*, Lawfare (11 October 2019), at <https://www.lawfareblog.com/accountability-islamic-state-fighters-what-are-options>.

<sup>146</sup> *Calling for the Creation of a Special Tribunal for the Punishment of the Crime of Aggression Against Ukraine* (4 March 2022), at <https://gordonandsarahbrown.com/wp-content/uploads/2022/03/Combined-Statement-and-Declaration.pdf>; The Ukraine Task Force of the Global Accountability Network, *Considerations for the Setting up of The Special Tribunal for Ukraine on the Crime of Aggression* (June 2022), at [https://www.jurist.org/news/wp-content/uploads/sites/4/2022/07/The\\_Special\\_Tribunal\\_for\\_Ukraine\\_on\\_the\\_Crime\\_of\\_Aggression.pdf](https://www.jurist.org/news/wp-content/uploads/sites/4/2022/07/The_Special_Tribunal_for_Ukraine_on_the_Crime_of_Aggression.pdf).

<sup>147</sup> Following the example of a Finnish court exercising universal jurisdiction over a Liberian citizen for crimes under international law allegedly committed in Liberia. See Thierry Cruvellier, *Massaquoi Trial: Finnish Court Goes to Deepest Liberia*, Justice info (23 February 2021), at <https://www.justiceinfo.net/en/74128-massaquoi-trial-finnish-court-goes-to-deepest-liberia.html>.

<sup>148</sup> André Nollkaemper, *Advies Internationaal Tribunaal ISIS* (22 July 2019), at <https://www.tweedekamer.nl/downloads/document?id=1fab2bd8-52e1-41b5-bb6d-175092752290&title=Advies%20Internationaal%20Tribunaal%20ISIS.pdf> (Dutch only).

<sup>149</sup> In the absence of legislation that allows States to exercise universal jurisdiction as a form of extraterritorial jurisdiction, domestic courts can only prosecute individuals in accordance with the active personality principle (when the perpetrator is a national of the State, irrespective of the victim's nationality) or the passive personality principle (when the victims is a national of the State, irrespective of the perpetrator's nationality). However, a number of treaties, including the 1949 Geneva Conventions or the UN Convention against Torture, provide for the obligation to "either extradite or prosecute" with regard to certain crimes under international law. See *The Obligation to Extradite or Prosecute (Aut Dedere Aut Judicare)*, Report of the International Law Commission, Sixty-sixth Session (5 May–6 June and 7 July–8 August 2014), UN Doc. A/69/10 (14 August 2014), pp. 139–165.

<sup>150</sup> TRIAL, *Universal Jurisdiction Annual Review 2022* (4 April 2022), at [https://trialinternational.org/wp-content/uploads/2022/03/TRIAL\\_International\\_UJAR-2022.pdf](https://trialinternational.org/wp-content/uploads/2022/03/TRIAL_International_UJAR-2022.pdf).

for its exercise may vary from country to country, e.g., what crime can be adjudicated and whether it is possible to try a defendant *in absentia*. It is worth noting that, contrary to the ICC or a Security Council-mandated tribunal, immunities of State officials would still apply before a special tribunal for Libya based on pooled universal jurisdiction.<sup>151</sup>

Finally, obtaining custody of suspects, would be a major obstacle to the effectiveness of a special tribunal for Libya so created. Most of them would be based in Libya and, in the face of non-cooperation of the Libyan authorities, the chances of them being surrendered to the special tribunal would likely be limited to individuals travelling abroad to another States, which, in turn, has decided to arrest and transfer them. In relation to non-party States, agreements for cooperation in judicial matters, including the transfer of suspects to the special tribunal, would need to be put in place. Accordingly, it would be difficult to get hold of both Libyans and nationals of other countries, whenever States decided not to join the tribunal or refuse to cooperate with it. As a result, the prosecution policy of such a special tribunal is likely to be determined by the opportunities for arrests that arise when potential suspects travel or reside abroad.

### 3.2.4. Overarching challenges

In addition to the specific difficulties characterizing each of the three options discussed above, some overarching challenges exist. A special tribunal, particularly one not located in Libya, would face similar obstacles to those the ICC does in terms of arrest and transfer of suspects. Similar considerations arise with respect to the challenges that both the ICC and the Libya FFM have encountered with regard to access to the Libyan territory, victims and witnesses. This would be particularly true if Libya chose not to provide consent to the creation of the special tribunal and refused to cooperate with it. The special tribunal's effectiveness in countering impunity in Libya would thus be considerably diminished.

If the Libyan Government consented to establishing a special tribunal, the existing security issues would likely prevent its effective functioning in the same way they affect Libyan domestic courts. The rule of armed groups throughout the country, and the total lack of institutional frameworks and means to ensure the safety of justice actors serving in the special tribunal, as well as of victims and witnesses cooperating with it, would likely impede its regular functioning.

Moreover, there is a question of financial resources. Unless established under the auspices of, or in close cooperation with, an international organization, and even in that case, a special tribunal for Libya would need to rely on voluntary contributions by States. The financial viability of the special tribunal would have to be assured for a number of years, including if the investigations do not yield to immediate results in terms of arrest warrants and prosecutions. This, in turn, could further mean detracting funds from the ICC, whose effectiveness in Libya has also been hampered by a lack of funding and resources. In its April 2022 report, the ICC OTP indeed encouraged States parties to the Rome Statute to make voluntary additional contributions with a view to pooling more resources into the Libya investigation.<sup>152</sup>

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<sup>151</sup> For a brief overview of the issue of personal immunities, see Tom Dannenbaum, *Mechanisms for Criminal Prosecution of Russia's Aggression Against Ukraine*, *Just Security* (10 March 2022), at <https://www.justsecurity.org/80626/mechanisms-for-criminal-prosecution-of-russias-aggression-against-ukraine/>.

<sup>152</sup> *Twenty-Third Report of the Prosecutor of the International Criminal Court to the United Nations Security Council Pursuant to Resolution 1970 (2011)* (21 April 2022), paras 47–48.

### 3.3. Enhancing support for the ICC and universal and other extra-territorial jurisdiction proceedings

In the ICJ's view, the international community should prioritize criminal accountability in Libya through: (i) increasing its support for the ICC investigation in the country; and (ii) promoting the initiation of criminal proceedings by States under universal and other extraterritorial jurisdiction. These avenues should take precedence over the option of creating a special tribunal for Libya.

Despite the many challenges that have dogged the ICC investigation into the situation in Libya, States parties to the Rome Statute should prioritize their support to the ICC, particularly by increasing the OTP's budget.<sup>153</sup> In fact, boosting the ICC investigation should address the above-mentioned challenges that have characterized its action in Libya since 2011, particularly if strong, continuous and concrete support is provided to the implementation of the OTP's renewed investigative strategy for Libya.<sup>154</sup>

Moreover, as recommended by the Libya FFM and civil society organizations,<sup>155</sup> States should initiate, where relevant, criminal proceedings under universal and other extraterritorial jurisdiction against persons allegedly responsible for crimes under international law committed in Libya. It is to be noted that a number of countries in Europe have initiated universal jurisdiction proceedings against perpetrators of crimes under international law committed in Syria, some of which have led to successful convictions.<sup>156</sup> At present, it is reported that only two criminal complaints under the universal jurisdiction principle have been filed in France against Khalifa Haftar, the head of the LAAF.<sup>157</sup>

While the ICC can only focus on a limited number of cases, national proceedings under universal and other extraterritorial jurisdiction may allow for a higher number of prosecutions to be carried out, including of alleged perpetrators whose profile is lower than the ICC cases, as it is happening with respect to crimes under international law committed in Syria.<sup>158</sup> Such proceedings may indeed complement the ICC by increasing the overall number of prosecutions, hence obviating the need of establishing a special tribunal for Libya for that purpose.

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<sup>153</sup> In order to preserve the OTP's independence, funding and voluntary contributions should not be earmarked in respect of specific situations.

<sup>154</sup> See above section 3.1.

<sup>155</sup> *Report of the Independent Fact-Finding Mission on Libya*, UN Doc. A/HRC/49/4 (23 March 2022), para. 96(d); *Report of the Independent Fact-Finding Mission on Libya*, UN Doc. A/HRC/50/63 (27 June 2022), para. 112(d); *Detailed Findings on the Situation in Tarhuna: Conference Room Paper of the Independent Fact-Finding Mission on Libya*, UN Doc. A/HRC/50/CRP.3 (1 July 2022), para. 222 (b); ICJ, *Accountability for Serious Crimes under International Law in Libya*, p. 102; LFJL, *Perceptions of justice in Libya ten years on*, p. 39.

<sup>156</sup> Among others, see ICJ, *Syria: Landmark decision in the fight against impunity* (25 February 2021), at <https://www.icj.org/syria-landmark-decision-in-the-fight-against-impunity/>; *Syria: German court's decision a momentous step in the fight against impunity* (13 January 2022), at <https://www.icj.org/syria-german-courts-decision-a-momentous-step-in-the-fight-against-impunity/>.

<sup>157</sup> TRIAL, *Universal Jurisdiction Database: Khalifa Haftar* (6 June 2018), at <https://trialinternational.org/latest-post/khalifa-haftar/>. No information is available on the outcome of these complaints except that Haftar was reportedly able to leave France and return to Libya after they had been filed. Haftar is also facing civil liability proceedings in relation to crimes under international law in the United States of America, under the Torture Victim Protection Act of 1991. See Umar A Farooq, *US Court Finds Libya's Khalifa Haftar Liable for War Crimes*, Middle East Eye (29 July 2022), at <https://www.middleeasteye.net/news/us-court-finds-libyas-khalifa-haftar-liable-war-crimes>.

<sup>158</sup> TRIAL International, *Universal Jurisdiction Database*, at [https://trialinternational.org/resources/universal-jurisdiction-database/?keywords=&country=1457&topic=&resource\\_type=Trial+Watch&body=&orderBy=date&submitted=1](https://trialinternational.org/resources/universal-jurisdiction-database/?keywords=&country=1457&topic=&resource_type=Trial+Watch&body=&orderBy=date&submitted=1). See also TRIAL International, *Universal Jurisdiction Annual Review 2022* (April 2022), at [https://trialinternational.org/wp-content/uploads/2022/03/TRIAL\\_International\\_UJAR-2022.pdf](https://trialinternational.org/wp-content/uploads/2022/03/TRIAL_International_UJAR-2022.pdf).

Furthermore, ICC investigations and national proceedings under universal and other extraterritorial jurisdiction would be further enhanced if a SIIM or similar mechanism was created. In fact, a SIIM would be able to conduct an “advance” investigation, gathering and preserving evidence to the same standard as the ICC or national jurisdictions, which the ICC and national prosecution services would be able to use. As appropriate, the SIIM would share evidence with the ICC and national jurisdictions that may wish to access the SIIM’s repository of evidence. The end result may be a gain in effectiveness and efficiency across the international justice system overall. In other words, the SIIM would act as a “force multiplier” alongside the ICC and national jurisdictions in the international criminal justice architecture.<sup>159</sup>

## **Recommendations**

**In light of the above, the ICJ makes the following recommendations:**

- **The Libyan authorities should:**
  - **Fully cooperate with the ICC OPT, by granting the OTP’s staff unhindered access throughout Libya’s territory and to any victims, witnesses, civil society actors and other relevant sources;**
  - **Reverse Decree No. 296 of 2019, which restricts the ability of Libyan civil society organizations and individuals to interact with international accountability mechanisms,<sup>160</sup> including the ICC, and allow unfettered communications between such actors;**
- **The ICC Assembly of States Parties should increase the budget of the OTP to make available adequate resources and staff to conduct effective investigations and prosecutions in the situation in Libya;**
- **States should make unearmarked voluntary contributions to the budget of the OTP, second national experts, and fully cooperate with the ongoing investigations;**
- **States should consider exercising universal and other extraterritorial jurisdiction with a view to prosecuting or extraditing to other States for prosecution purposes alleged perpetrators of crimes under international law committed in Libya, who are present on their territory or otherwise under their jurisdiction;**
- **While the ICJ does not recommend it as an option, all relevant stakeholders should take into account the challenges and obstacles detailed in section 3.2 above should they consider establishing a special tribunal for Libya.**

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<sup>159</sup> ICJ, *Options for the Establishment of a Standing Independent Investigative Mechanism* (June 2022, not yet published), p. 7.

<sup>160</sup> See section 2.1 above.

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