

Libya: An opportunity for accountability and justice

A commentary on Libya's Draft Reconciliation Law



International
Commission
of Jurists

Composed of 60 eminent judges and lawyers from all regions of the world, the International Commission of Jurists (ICJ) promotes and protects human rights through the Rule of Law, by using its unique legal expertise to develop and strengthen national and international justice systems. Established in 1952 and active on the five continents, the ICJ aims to ensure the progressive development and effective implementation of international human rights and international humanitarian law; secure the realization of civil, cultural, economic, political and social rights; safeguard the separation of powers; and guarantee the independence of the judiciary and legal profession.

® Libya: An opportunity for accountability and justice

A commentary on Libya's Draft Reconciliation Law

© Copyright International Commission of Jurists, June 2024

The International Commission of Jurists (ICJ) permits free reproduction of extracts from any of its publications provided that due acknowledgment is given and a copy of the publication carrying the extract is sent to their headquarters at the following address:

International Commission of Jurists
P.o. Box 1270
Rue des Buis 3
1211 Geneva 1
Switzerland

This briefing paper was made possible with the support of the Ministry of Foreign Affairs of the Netherlands and the Swiss Federal Department of Foreign Affairs.



Ministry of Foreign Affairs of the
Netherlands



Schweizerische Eidgenossenschaft
Confédération suisse
Confederazione Svizzera
Confederaziun svizra

Libya: An opportunity for accountability and justice

A commentary on Libya's Draft Reconciliation Law

June 2024

Table of contents

1. Introduction.....	6
2. The bodies to be established under the Draft Reconciliation Law.....	9
2.1. The Chambers on Transitional Justice Cases.....	9
2.2. The Reconciliation Commission.....	10
2.2.1. The Reconciliation Commission's structure.....	10
2.2.1.1. Composition.....	11
2.2.1.2. Independence and impartiality.....	12
2.2.1.3. Competence.....	13
2.2.1.4. Vetting.....	14
2.2.2. The powers of the Reconciliation Commission.....	15
2.2.2.1. Investigative powers.....	15
2.2.2.2. Referral powers.....	16
2.2.2.3. Sanction powers.....	16
2.2.2.4. Interaction with civil society organizations.....	17
2.3. Temporal mandate of the mechanisms (ratione temporis jurisdiction).....	17
3. The right to truth.....	19
3.1. The role of victims.....	19
3.1.1. Victims' participation.....	19
3.1.2. Victims' protection.....	19
3.2. The role of the public.....	21
3.2.1. Participation of the public.....	21
3.2.2. Publication of the Reconciliation Commission's findings.....	21
3.3. Guarantees for alleged perpetrators.....	22
4. Accountability for crimes under international law.....	23
4.1. The right to a fair trial.....	23
4.2. Crimes under international law.....	23
4.2.1. Definitions of the crimes.....	23
4.2.2. Penalties for the crimes.....	25
4.3. Individual criminal liability.....	26
4.3.1. Superior responsibility.....	26
4.3.2. Amnesties and pardons.....	27
4.3.3. Statutes of limitation.....	28
5. The victims' right to an effective remedy and reparation.....	30
5.1. Compensation.....	30
5.2. Restitution.....	31
5.2.1. Restoration of citizenship.....	31
5.2.2. Other forms of restitution.....	31
5.3. Satisfaction.....	32
5.4. Rehabilitation.....	33
5.5. Procedure relating to the granting of reparations.....	33
6. Guarantees of non-repetition.....	34

Acronyms

ACHPR	African Charter on Human and Peoples' Rights
ACommHPR	African Commission on Human and Peoples' Rights
CEDAW	Committee on the Elimination of All Forms of Discrimination Against Women
CSO	civil society organization
ECCC	Extraordinary Chambers in the Courts of Cambodia
FFM	Fact-Finding Mission on Libya
FFRC	Fact-Finding and Reconciliation Commission
GNA	Government of National Accord
GNU	Government of National Unity
HoR	House of Representatives
HRC	Human Rights Council
HRComm	Human Rights Committee
IACtHR	Inter-American Court on Human Rights
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Commission of Jurists
ICRC	International Committee of the Red Cross
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
LNA	Libyan National Army
LPDF	Libyan Political Dialogue Forum
LPA	Libyan Political Agreement
NGO	non-governmental organization
OHCHR	Office of the High Commissioner for Human Rights
PC	Presidential Council
SCSL	Special Court for Sierra Leone
UNSMIL	United Nations Support Mission to Libya
WGEID	Working Group on Enforced or Involuntary Disappearances

1. Introduction

Following the ouster of Libya's former head of State, Muammar Gadhafi, in 2011, the General National Congress, Libya's first post-revolution legislative body, adopted Law No. 29 of 2013 on Transitional Justice, thereby expressing its commitment to delivering justice for the gross human rights violations perpetrated by the Gadhafi regime and to establishing the rule of law in the country.

The International Commission of Jurists (ICJ) analyzed Law No. 29 of 2013 in its report, *Impunity No More: A Roadmap to Strengthening Transitional Justice in Libya*, issued in 2020.¹ At that time, the human rights organization assessed that the law was deeply flawed and failed to meet international law and standards. In any event, the Fact-Finding and Reconciliation Commission (FFRC), the main body created by Law No. 29 of 2013, was never established, and, despite the 2015 Libyan Political Agreement's (LPA)² commitment to "work towards the implementation of Law No. 29 of 2013",³ the truth and reconciliation process was not initiated.

The end of Muammar Gadhafi's rule and the adoption of Law No. 29 of 2013 did not put an end to the perpetration of crimes under international law, however. After Muammar Gadhafi's ousting, Libya experienced a significant split between two rival administrations based in the West and the East of the country, respectively.⁴ In 2014, as Libyans were electing the members of the House of Representatives (HoR), the then-newly established legislature, the above-mentioned divide worsened. The HoR settled in Tobruk, in the East, with the support of the Libyan National Army (LNA), a coalition of militias led by Field Marshall Khalifa Haftar. The internationally recognized, Tripoli-based, Government of National Accord (GNA), which later became the Government of National Unity (GNU), stayed in the West. This split led to a prolonged armed conflict, which intensified in 2014 and, more recently, in 2019, when Khalifa Haftar's LNA attempted to march on Tripoli. GNA-aligned militias, with Türkiye's support, pushed back the LNA's attack and kept control of Libya's capital.

Notwithstanding the agreement of a ceasefire between the two camps on 23 October 2020, tensions between the West and the East have since remained. Throughout the above-mentioned period, and to this day, State and non-State actors have continued to commit gross human rights violations and abuses and serious violations of international humanitarian law with impunity.⁵

Moreover, since the resurgence of violence in 2014, Libyan and international actors have been prioritizing a political agreement and national reconciliation at the expense of accountability for crimes under international law, including in respect of transitional justice. For instance, the 2020 Libyan Political Dialogue Forum (LPDF)⁶ called on the Presidential Council (PC), a three-person body sharing the executive authority with the GNU,⁷ to launch a "national reconciliation process" but omitted any explicit reference to accountability.⁸ In the same vein, in its operative

1. ICJ, *Impunity No More: A Roadmap to Strengthening Transitional Justice in Libya*, July 2020.

2. The 2015 LPA is a UN-brokered accord that aims to "build a democratic civil state through national consensus", by establishing a unified government, the Government of National Accord, following the 2014 split of Libya between the western and eastern authorities. *Libyan Political Agreement*, 17 December 2015, introduction.

3. LPA, art. 26(5).

4. During the Ottoman Empire and under Italian colonial rule, Libya was divided into three provinces: Tripolitania (the West, capital Tripoli), Cyrenaica (the East, capital Benghazi), and Fezzan (the South, capital Sabha). King Idris, Libya's first post-colonial ruler, and subsequently Muammar Gadhafi, unified Libya under one central government. Since Muammar Gadhafi's fall, however, there has been a resurgence of local and regional identities, reflecting the three historical provinces.

5. See FFM, *Report of the Independent Fact-Finding Mission on Libya*, UN Doc. A/HRC/52/83, 3 March 2023.

6. The 2020 LPDF was a UN-led conference bringing together around 70 Libyan stakeholders, aimed at "resolv[ing] the current political deadlock by resuming the political process aiming at holding presidential and parliamentary elections as soon as possible." LPDF, *Roadmap "For the Preparatory Phase of a Comprehensive Solution"*, 2020, preamble.

7. The Presidential Council was created by the 2015 LPA. Its composition was changed to three members, a president and two deputies "in accordance with the geographical balance/three regions" by the 2020 LPDF. LPDF, *Roadmap "For the Preparatory Phase of a Comprehensive Solution"*, art. 5.

8. LPDF, *Chapter on Unified Executive*, art. 2.1.6. The LPDF's *Roadmap "For the Preparatory Phase of a Comprehensive Solution"* defines the national reconciliation process as being based on "transitional justice and promot[ion] of the culture of amnesty and tolerance in parallel with truth-seeking and reparation." See LPDF, *Roadmap "For the Preparatory Phase of a Comprehensive Solution"*, art. 1.2.9.

paragraphs, the October 2023 UN Security Council's resolution 2702, renewing the United Nations Support Mission to Libya's (UNSMIL) mandate, expounded on the importance of reconciliation and the holding of elections but did not address accountability and mentioned transitional justice only as a principle to be applied to the country's "national dialogue and victim-centered reconciliation."⁹

The PC's Draft Reconciliation Law ("Draft Reconciliation Law" or "Draft Law"), analyzed in this report, itself seems to suggest that the Libyan authorities should postpone the establishment of transitional justice bodies once the political crisis has been solved. The latest version of the Draft Law grants a number of powers to the "Presidency of the State."¹⁰ However, the "Presidency of the State" does not exist in Libya today, therefore suggesting that the Draft Law would only be enforced once such a body is established, in the aftermath of western and eastern authorities having agreed to a new unified government.

However, such a prioritization of a political agreement over accountability for serious crimes under international law has actually undermined the chances of securing either. Transitional justice, which entails securing accountability for such crimes, is in fact crucial for a lasting peace and reconciliation.

In its 2004 report on *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, the UN Secretary-General defined transitional justice as:

*[T]he full range of processes and mechanisms associated with a society's attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation.*¹¹

The UN Human Rights Council (HRC) mandated Fact-Finding Mission on Libya (FFM), which operated from June 2020 to April 2023, repeatedly called on the Libyan authorities to "develop a comprehensive, inclusive, victim-centered and detailed road map on transitional justice and accountability for Libya."¹²

Against this backdrop, the ICJ welcomes the fact that a legal committee appointed by the PC drafted a Reconciliation Law in late 2022, intended to replace Law No. 29 of 2013.¹³ This Draft Law, if adopted in its current formulation, would bring about significant progress compared to Law No. 29 of 2013. However, the ICJ is concerned by the fact that, in January 2024, the HoR drafted an alternative Law on National Reconciliation. If adopted, this alternative draft legislation could render the efforts of the PC's legal committee vain and the Draft Reconciliation Law obsolete. Although, as further discussed in this paper, the Draft Reconciliation Law still falls short of international human rights law and standards in certain respects, the PC's legal committee made an effort to address each component of transitional justice in detail, creating specific bodies focusing on criminal accountability, the right to truth, the right to reparation and institutional reform, expressly prohibiting "amnesties" or "pardons"¹⁴ for war crimes and crimes against humanity, and aligning the definition of victims to the one enshrined in the UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (hereinafter "UN Basic Principles and Guidelines").¹⁵

9. UN Security Council, *Resolution 2702* (2023), UN Doc. S/RES/2702 (2023), 30 October 2023, para. 7.

10. See below, section 2.2.1.2.

11. UN Secretary-General, *The rule of law and transitional justice in conflict and post-conflict societies*, UN Doc. S/2004/616, 23 August 2004, para. 8. See also UN Secretary-General, *Transitional Justice A Strategic Tool for People, Prevention and Peace*, 11 October 2023, p. 2.

12. FFM, *Report of the Independent Fact-Finding Mission on Libya*, 3 March 2023, para. 102(p)(iii); FFM, *Report of the Independent Fact-Finding Mission on Libya*, UN Doc. A/HRC/50/63, 27 June 2022, para. 111(b). See also HRC, *Technical assistance and capacity-building to improve human rights in Libya*, UN Doc. A/HRC/RES/52/41, 11 April 2023, para. 1.

13. Draft Reconciliation Law, art. 53, unofficial translation by UNSMIL.

14. The word used in the original Arabic version, "عفو" could be translated into English as both "amnesty" and "pardon."

15. UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, UN Doc. A/RES/60/147, 16 December 2005.

In contrast, the HoR's Draft Law on National Reconciliation is a five-page text that falls short of elaborating a comprehensive process for transitional justice. The stated objective of the HoR's Draft Law on National Reconciliation, namely, to "foster understanding and consensus among the nation's citizens through tolerance, reparations, and the eradication of lingering effects from the past",¹⁶ is vague and fails to mention accountability. Its article 1, which outlines how the law aims to "strengthen social civil peace" and mentions that it intends to "persuad[e] [individuals] that justice is not only present but also effective", fails to mention individual criminal liability for serious crimes under international law,¹⁷ and only refers to the "responsibilities of State organs in cases of human rights violations."

In May 2024, UNSMIL brought together 22 legislators, legal experts and civil society actors to "work on [a] draft reconciliation legislation for the country" by "combin[ing] two draft legislations that have been separately developed", namely the PC's and the HoR's drafts. The Mission announced that, by the end of the workshop, participants had agreed to a "single comprehensive draft law, which will now be submitted to the House of Representatives' Justice and Reconciliation Committee before going to the House of Representatives for a plenary vote."¹⁸ The ICJ commends these harmonization efforts, and hopes that the latest version of the Draft Law, which has not been made public at time of writing, will have addressed the organization's concerns, including those outlined in this report.

In this report, the ICJ focuses its analysis on the PC's Draft Reconciliation Law, including its improvements compared to Law No. 29 of 2013, and its remaining shortcomings, and formulates recommendations intended to enable the Libyan authorities and other stakeholders to create an effective transitional justice framework, in compliance with international human rights law and standards.

This commentary focuses on the third version of the PC's Draft Reconciliation Law and is intended to feed into the public debate ahead of its adoption. It assesses the mechanisms to be established under the Draft Reconciliation Law (section 2), as well as the elements on which transitional justice should be grounded under international law, namely: the right to truth (section 3), accountability for crimes under international law (section 4), the right to an effective remedy and reparation (section 5) and guarantees of non-recurrence (section 6).¹⁹

16. Draft National Reconciliation Law, art. 2. Unofficial translation by the ICJ.

17. The only implicit provision for individual criminal responsibility is that the General Authority for National Reconciliation can "[refer] individuals or pertinent facts to the appropriate legal authorities or competent courts for further consideration and resolution." See Draft Law on National Reconciliation, art. 5(3).

18. UNSMIL, *With UNSMIL Facilitation, Legislators and Legal Experts Come Together to Unify Approach to Drafting a Reconciliation Law*, 2 May 2024.

19. Reparations and guarantees of non-recurrence are dealt separately here to follow the Draft Law's structure (chapter five deals with reparations and chapter six with institutional reform). See also Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence (hereinafter "SR on transitional justice") and Special Adviser to the Secretary-General on the Prevention of Genocide, *Joint study on the contribution of transitional justice to the prevention of gross violations and abuses of human rights and serious violations of international humanitarian law, including genocide, war crimes, ethnic cleansing and crimes against humanity, and their recurrence*, UN Doc. A/HRC/37/65, 6 June 2018, paras 12-15; SR on transitional justice, *International legal standards underpinning the pillars of transitional justice*, UN Doc. A/HRC/54/24, 10 July 2023; UN Secretary-General, *Transitional Justice A Strategic Tool for People, Prevention and Peace*, p. 2.

2. The bodies to be established under the Draft Reconciliation Law

The Draft Law, if enacted as presently formulated, would establish Chambers on Transitional Justice Cases (hereinafter “the Chambers”), which would be presiding over criminal prosecutions and trials (2.1), and a Reconciliation Commission (hereinafter “the Commission”), which “shall have jurisdiction to hear cases of transitional justice”²⁰ (2.2). Both the Chambers and the Commission would have jurisdiction (*ratione temporis* jurisdiction) over “the violations that have taken place since 1 September 1969 [the beginning of Muammar Gadhafi’s rule] until the entry into force of [the Draft Reconciliation Law]”²¹ (2.3).

Article 1 sets out the human rights violations that would fall within the scope of the law, delineating both the Commission’s and the Chambers’ material jurisdiction (*ratione materiae*), as including:

Any transgression that constitutes a grave or systematic breach of international human rights law or international humanitarian law and national law, including economic, social and cultural rights as well as specifically gender-based violations, under the treaties ratified by Libya, perpetrated by State bodies, groups or individuals who acted in the name or with the protection of the State or with its knowledge while not having the capacity or authority to do so. It also includes any serious and systematic assault perpetrated by an organized group against any human right.²²

The Draft Law further specifies that its scope encompasses, in particular, “arbitrary deprivation of the right to liberty, the right to life, enforced disappearance, torture, rape, slavery, extrajudicial executions or executions following violations of the right to a fair trial, forced displacement and unlawful seizure of funds.”²³

2.1 The Chambers on Transitional Justice Cases

The Draft Law, if adopted in its current formulation, would create the Chambers and a Prosecution Office on Transitional Justice Cases (hereinafter “the Prosecution Office”), to be established within each Court of Appeal.²⁴ The Prosecution Office would be tasked with the criminal investigation and the “filing of cases”²⁵ arising from crimes falling within the scope of the law,²⁶ while the Chambers would try perpetrators and grant “amnesties” or “pardons”,²⁷ if certain conditions were met.²⁸

The Draft Law provides limited information about the structure of either the Prosecution Office or the Chambers. As presently formulated, it merely states that the Chambers would be presided over by judges selected by the general assemblies of the respective Court of Appeals,²⁹ without specifying the number of judges or the pool of judges from which the general assembly would select them. The Draft Law further provides that the Attorney General, who heads Libya’s prosecution authorities, would select the members of the Prosecution Office from within the Attorney General’s office, again without specifying how many prosecutors would compose the Office. The Draft Law states that judges and prosecutors must be specifically qualified in the field of transitional justice, but it does not detail the required qualifications to be considered “qualified” in the first place.³⁰

20. Draft Reconciliation Law, art. 6, unofficial translation by UNSMIL.

21. Draft Reconciliation Law, art. 5, unofficial translation by UNSMIL.

22. Unofficial translation by UNSMIL, adapted by the ICJ.

23. Draft Reconciliation Law, art. 4, unofficial translation by UNSMIL, adapted by the ICJ.

24. Draft Reconciliation Law, arts 6 and 33. There are ten courts of Appeal in Libya.

25. Literal translation from Arabic, unofficial translation by UNSMIL, adapted by the ICJ.

26. Draft Reconciliation Law, art. 34.

27. The word used in the original Arabic version, “عفو” could be translated into English as both “amnesty” and “pardon.” However, the legislature and the head of State normally grant amnesties and pardons respectively, whereas in the present case the judiciary would grant such “amnesties” or “pardons.”

28. Draft Reconciliation Law, arts 6 and 32. See below, section 4.3.2.

29. General assemblies of Courts of Appeal comprise all the Court’s judges and are responsible for overseeing the administration and functioning of the court.

30. Draft Reconciliation Law, arts 33-34, unofficial translation by UNSMIL, adapted by the ICJ.

While selecting Chambers and Prosecution Office members from ordinary judges and prosecutors is a positive development, international human rights standards require that those chosen be independent from the executive and the legislature, as well as impartial and competent,³¹ and that they be identified through fair and transparent procedures, and objective criteria for their selection, including expertise and legal qualifications, integrity, competence and relevant experience. The selection process should exclude any political considerations.³²

In light of the above, Libyan legislators should amend the Draft Law to:

- **Clarify the structure of the Chambers and the Prosecution Office, including the number of judges and prosecutors, and the pool from which judges will be selected;**
- **Ensure that the members of the Chambers and Prosecution Office be independent from the executive and the legislature, impartial and competent;**
- **Set out fair and transparent procedures, and objective criteria for the selection of the members of the Chambers and Prosecution Office, including expertise and legal qualifications, integrity, competence and relevant experience, excluding any political considerations.**

2.2 The Reconciliation Commission

2.2.1 The Reconciliation Commission's structure

The Draft Law, if enacted as presently formulated, would also establish a Reconciliation Commission that "shall have jurisdiction to hear cases of transitional justice" and "address the grievances" resulting from human rights violations.³³

The Commission would be based in Sabha, in the South of the country³⁴ and the Board of Directors³⁵ could establish branches and offices in other cities "as needed".³⁶ In light of Libya's fragmentation, the establishment of such branches would be particularly beneficial, to ensure accessibility to the Commission and enhance perception of independence.

Earlier versions of the Draft Law named the Commission the "Truth and Reconciliation Commission", but the draft legislation's latest version omits the word "truth". Albeit the latest formulation of the Draft Law does not modify the Commission's competences³⁷ and powers,³⁸ the ICJ regrets the removal of the word "truth" from the Commission's name, especially considering the above-mentioned context where, since 2014, the Libyan authorities have been prioritizing national reconciliation at the expense of transitional justice and accountability. As developed below,³⁹ victims of grave human rights violations and abuses have an inalienable right to know the truth about these violations and abuses.⁴⁰

The Commission would have the following competences:

- "1. Unveil the truth behind arbitrary deprivation of the right to liberty, the right to life, enforced disappearance, torture, rape, slavery, extrajudicial executions or executions following violations of the right to a fair trial, forced displacement and unlawful seizure of funds. To

31. International Covenant on Civil and Political Rights (ICCPR), 16 December 1966, Libya ratified on 15 May 1970, art. 14; Arab Charter on Human Rights, 22 May 2004, art. 13; African Charter on Human and Peoples' Rights (ACHPR), 27 June 1981, Libya ratified on 26 March 1987, art. 7; European Convention on Human Rights, 4 November 1950, art. 6; American Convention on Human Rights, 22 November 1969, art. 8.

32. See further recommendations on the statute of the judiciary: ICJ, *Challenges for the Libyan Judiciary: Ensuring Independence, Accountability and Gender Equality*, July 2016, pp. 87-88.

33. Draft Reconciliation Law, arts 4 and 6, unofficial translation by UNSMIL.

34. Draft Reconciliation Law, art. 7. In previous versions, the Commission would have been based in Tripoli, and then in Sirt, Aljufra or Ghadames. Draft Reconciliation Law, first version, art. 6 and second version, art. 7.

35. See below for a description of the Board of Directors, section 2.2.1.1.

36. Draft Reconciliation Law, art. 7.

37. See below, section 2.2.1.3.

38. See below, section 2.2.2.

39. See section 3.

40. *UN Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity*, UN Doc. E/CN.4/2005/102/Add.1, 8 February 2005, principles 2 and 4.

this effect, it may hear and document the testimonies of the victims and develop a database that includes a consolidated record of the victims;

2. Transmit the violations, where unveiling the truth compels criminal proceedings, to the Prosecution Office and follow up on the actions taken by the latter;
3. Design and implement a full-scale program for individual or collective reparations for victims. The program shall be based on an acknowledgement of the violations inflicted, and building on the previously implemented decisions, administrative or judicial actions and reconciliation reports to redress these violations, within the limits of the resources of the State;
4. Review the file of the missing persons and detainees, verify their fates and take adequate measures in their regard;
5. Examine the situation of displaced persons, in the country and abroad, and propose the necessary measures to ensure their return and grant reparation for the damage they suffered;
6. Conduct a comprehensive historical analysis of the policies, causes and conflicts in a manner that enables understanding of the reasons as to why they happened and how to avert their recurrence, and incorporate the findings into a consolidated final and comprehensive report;
7. Implement reconciliation bodies in a manner that bolsters national unity according to an appropriate vision and national strategy that hinge on the principles of human rights and the rule of law;
8. Organize broad and inclusive national consultations, especially with victims and their families, marginalized groups of women, young people, people with disabilities, displaced persons and refugees;
9. Conduct research and studies and organize symposia, conferences, seminars, and workshops and develop media programs for public outreach pertaining to reconciliation;
10. Propose the necessary legislation for a successful path to national reconciliation, in particular to ensure fair distribution of wealth and participation in local governance;
11. Publish international agreements and legislations related to human rights awareness."⁴¹

2.2.1.1 Composition

The Commission would be composed of five different bodies, namely a Board of Directors, a Truth Revealing Committee (hereinafter the "Truth Committee"), a Reparations Committee, an Institutional Reform Committee and a Compensation Fund for Victims.

The Board of Directors, consisting of nine members selected by the "Presidency of the State", would manage the Commission. The members of the Board of Directors would have to be Libyan citizens, "renowned for their impartiality, integrity and efficiency", not have a criminal record nor have been dismissed due to disciplinary proceedings and be physically fit.⁴² The Board would be tasked with "establishing the policies of the Commission, its *modus operandi* and implementation modalities."⁴³

In addition to the Board, the Commission would comprise three committees: the Truth Committee, the Institutional Reform Committee and the Reparations Committee.⁴⁴ The Truth Committee would draft reports on each incident it has examined. The Draft Law, as presently formulated, does not specify the composition of the Truth Committee.⁴⁵ The Institutional Reform Committee would be composed of one chairperson and four members, selected by the Board of Directors, recognized for their independence, integrity, transparency and expertise.⁴⁶ Its primary task would be to draft a report discussing "practical proposals"⁴⁷ for reform of the institutions responsible for corruption and human rights violations.⁴⁸ The Reparation Committee would be composed of a judge and four other members. Its main task would be to refer recommendations for reparations to the Board,⁴⁹ as detailed below.⁵⁰

41. Draft Reconciliation Law, art. 8, unofficial translation by UNSMIL, adapted by the ICJ.

42. Draft Reconciliation Law, art. 10, unofficial translation by UNSMIL.

43. Draft Reconciliation Law, art. 12.

44. Draft Reconciliation Law, art. 25.

45. Draft Reconciliation Law, art. 29.

46. Draft Reconciliation Law, art. 46.

47. Litteral translation from Arabic, unofficial translation by UNSMIL.

48. Draft Reconciliation Law, art. 49.

49. Draft Reconciliation Law, art. 40.

50. Section 5.5.

Lastly, the Draft Law, if enacted in its current formulation, would provide for the appointment by the Board of Directors of a Tripoli-based Compensation Fund for Victims. The Draft Law is however silent on the Fund's membership. Rather, the Draft Law states that, "a decision issued by the Board of Directors of the Commission" would regulate the Fund. The Fund would receive allocations from the general State budget, donations, funds collected in accordance with the Draft Law⁵¹ or other funds as decided by the Council of Ministers.⁵²

Uncertainties therefore remain on the Commission's membership, namely who would sit in the Truth Committee, the Reparations Committee,⁵³ and the Compensation Fund for Victims.

2.2.1.2. Independence and impartiality

According to principle 7 of the UN Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity (hereinafter the "UN Impunity Principles"),⁵⁴ "commissions of inquiry, including truth commissions, must be established through procedures that ensure their independence [and] impartiality."⁵⁵ In addition, in the context of violations of the right to life, the Minnesota Protocol on the Investigation of Potentially Unlawful Death states that investigations, even by transitional justice mechanisms, must be prompt, effective and thorough, independent, impartial and transparent.⁵⁶

According to the UN Impunity Principles, specific safeguards to effectively ensure truth commissions' independence and impartiality include:

- (a) The inclusion of criteria making clear to the public the impartiality of their members;
- (b) The inclusion of conditions ensuring their independence, in particular by the irremovability of members during their terms of office except on grounds of incapacity or behaviour rendering them unfit to discharge their duties and only when removal is pursuant to procedures ensuring fair, impartial and independent determinations;
- (c) The granting of privileges and immunities necessary for the protection of the commission's members, including in the period following their mission, especially in respect of any defamation proceedings or other civil or criminal action brought against them based on facts or opinions contained in the commissions' reports.⁵⁷

The Draft Law, in its current formulation, provides for the independence, including financial independence, of the Commission as a whole and the Compensation Fund for Victims, and for the independence of the members of the Institutional Reform Committee.⁵⁸ However, it does not provide concrete safeguards to ensure the independence of these bodies.

The need for concrete safeguards to guarantee the independence of the Commission has become even more acute since under the third version of the Draft Law, the Commission has become even more prone to political pressure. Indeed, the Draft Law, in its current formulation, provides that the "Presidency of the State", a body which does not exist in Libya today but which could be the country's head of State, would: select the members of the Board of Directors who would take their oath to "work faithfully, truthfully and with integrity and to respect the

51. Funds retrieved from perpetrators for sums disbursed for victims by the Compensation Fund for Victims. Draft Reconciliation Law, arts 43-44.

52. Draft Reconciliation Law, arts 41-42.

53. The Draft Law only mentions that the President would be a judge.

54. *UN Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity*, UN Doc. E/CN.4/2005/102/Add.1, 8 February 2005.

55. *UN Impunity Principles*, principle 7. See also African Union, *Transitional Justice Policy*, February 2019, para. 53(i); OHCHR, *Rule-of-law tools for post-conflict states: Truth commissions*, UN Doc. HR/PUB/06/1, 2006, p. 6; Economic and Social Council, *Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions*, resolution 1989/65, 24 May 1989, para. 11; SR on transitional justice, International legal standards underpinning the pillars of transitional justice, para. 28; UN Secretary-General, *Transitional Justice A Strategic Tool for People, Prevention and Peace*, p. 15.

56. See *Minnesota Protocol on the Investigation of Potentially Unlawful Death: The Revised United Nations Manual on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions*, UN Doc. HR/PUB/17/4, 1 January 2016, para. 39.

57. See *UN Impunity Principles*, principle 7. See also SR on transitional justice, *International legal standards underpinning the pillars of transitional justice*, paras 28-29.

58. Draft Reconciliation Law, arts 7, 41 and 46-47.

law”⁵⁹ before it; determine their remuneration; select the members of the Committee in charge of institutional reform of the judiciary; approve the Commission’s budget; renew its mandate from four to eight years; and “establish the rules and regulations governing the work of the Commission, its departments, and affiliated committees.”⁶⁰ This would give the executive wide powers to influence the composition and functioning of the Commission, thus undermining its institutional independence.

Regarding impartiality, the Draft Law, as presently formulated, specifies that the members of the Board of Directors shall be “renowned for their impartiality” and work full-time for the Board, without the possibility of taking on another job.⁶¹ Its article 22 also states:

Chairperson and members of Board of Directors of the Commission as well as Heads and members of committees shall commit to impartiality and shall step down from cases where they, or a relative of theirs up to the third degree, have a direct interest.

Persons concerned may submit a reasoned request to preclude the person responsible from considering any of the matters within the jurisdiction of the Commission. The Board of Directors of the Commission shall decide on the request by a final decision within ten (10) days from the date of submission. The person concerned by such a reasoned request shall not participate in the deliberations.⁶²

The ICJ welcomes those provisions, as they constitute sufficient guarantees to ensure that the Commission is impartial, in compliance with international standards.

2.2.1.3 Competence

In addition to providing for the need for truth commissions to be established through procedures that ensure their independence and impartiality, principle 7 of the UN Impunity Principles states that such procedures should ensure the competence of truth commission members.⁶³ To do so, the following specific safeguards must be put in place:

- (a) The inclusion of criteria making clear to the public the competence of their members, including expertise within their membership in the field of human rights and, if relevant, of humanitarian law;
- (b) The adequate representation of women, as well as other appropriate groups whose members have been especially vulnerable to human rights violations.⁶⁴

As a quasi-judicial body with significant investigative powers,⁶⁵ the requirement that the Commission fulfill these criteria is all the more critical.

The ICJ thus welcomes the addition, since the second version of the Draft Reconciliation Law, of selection criteria for the Board of Directors members, which include specialization, “age, and gender”⁶⁶, but falls short of imposing gender parity⁶⁷ or include the necessary representation of

59. Draft Reconciliation Law, art. 14, unofficial translation by UNSMIL.

60. Draft Reconciliation Law, arts 9, 10, 13-15, 25 and 47.

61. Draft Reconciliation Law, arts 10 and 16, unofficial translation by UNSMIL.

62. Unofficial translation by UNSMIL, adapted by the ICJ.

63. See also *Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions*, para. 11; SR on transitional justice, *International legal standards underpinning the pillars of transitional justice*, para. 28.

64. See also SR on transitional justice, *International legal standards underpinning the pillars of transitional justice*, para. 28.

65. See below, section 2.2.2.1.

66. Draft Reconciliation Law, art. 10.

67. *UN Impunity Principles*, principle 7(c); African Union, *Transitional Justice Policy*, paras 39 and 102; ACommHPR, *Guidelines on Combating Sexual Violence and its Consequences in Africa*, 5 November 2017, guideline 52(6); SR on transitional justice, *The Gender Perspective in Transitional Justice Processes*, UN Doc. A/75/174, 17 July 20, para. 14; OHCHR, *Rule-of-law tools for post-conflict states: Truth commissions*, p. 13; UN Secretary-General, *Transitional Justice A Strategic Tool for People, Prevention and Peace*, p. 10. For more, see ICJ, *Towards Gender-Responsive Transitional Justice in Libya: Addressing Sexual and Gender-Based Crimes against Women*, March 2022, pp. 12-21.

minority groups such as the Amazighs, Tebus and Tuaregs.⁶⁸ Furthermore, the ICJ regrets that the criteria of specialization is not further defined to include specific topics of specialization, including international human rights law, international humanitarian law, international criminal law, investigations of crimes according to international law principles, gender competence in the context of accountability for international crimes, health, forensics and military expertise, including chain of command and weapons.⁶⁹

2.2.1.4. Vetting

The Draft Law, in its present formulation, does not provide for prior vetting of the Commission's members to ensure that persons allegedly responsible for violations and abuses of international human rights law and international humanitarian law are barred from office. In its *Rule-Of-Law Tools for Post-Conflict States – Vetting: An Operational Framework* report, the Office of the UN High Commissioner for Human Rights (OHCHR) defined vetting as "assessing integrity to determine suitability for public employment. Integrity refers to an employee's adherence to international standards of human rights and professional conduct, including a person's financial propriety."⁷⁰ The OHCHR further considered that vetting is important because "[p]ublic employees who are personally responsible for gross violations of human rights or serious crimes under international law revealed a basic lack of integrity and breached the trust of the citizens they were meant to serve."⁷¹

In light of the above, Libyan legislators should amend the Draft Law to:

- **Revert to naming the Reconciliation Commission a "Truth and Reconciliation Commission";**
- **Expressly provide for the independence of the Commission and all its organs and specify that Commission members are irremovable except on grounds of incapacity or behaviour rendering them unfit to discharge their duties and only when removal is pursuant to a fair, independent and impartial procedure, awarding them immunity from criminal and civil suits for carrying out their activities, and granting the Commission control over its own budget;**
- **Clarify who would sit in the Truth Committee, the Reparations Committee and the Compensation Fund for Victims;**
- **Ensure that the Commission be effectively competent, independent and impartial by setting out fair and transparent procedures, and objective criteria for the selection of its members, including by requiring that they have the necessary expertise in international human rights law, international humanitarian law, health, gender competence in the context of accountability for international crimes and other relevant areas, and by excluding any political considerations;**
- **Impose gender parity in the Commission's membership and a quota for members**

68. *UN Impunity Principles*, principle 7(c); OHCHR, *Rule-of-law tools for post-conflict states: Truth commissions*, p. 13. On representation of persons belonging to racial and ethnic groups in the justice system, see Committee on the Elimination of Racial Discrimination, *General Recommendation XXXI on the prevention of racial discrimination in the administration and functioning of the criminal justice system*, UN Doc. A/60/18, 2005, para. 5(d). On the importance of including members of Indigenous groups, see American Bar Association's Rule of Law Initiative, *In Legal limbo: An Assessment of Laws and Practices Affecting Amazigh, Tebu and Tuareg in Libya*, 2020, pp. 53-57.

69. See SR on transitional justice, *The Gender Perspective in Transitional Justice Processes*, UN Doc. A/75/174, 17 July 2020, para. 13.

70. OHCHR, *Rule-Of-Law Tools for Post-Conflict States – Vetting: An Operational Framework*, UN Doc. HR/PUB/06/5, 2006, p. 4.

71. OHCHR, *Rule-Of-Law Tools for Post-Conflict States – Vetting: An Operational Framework*, p. 4. See also United States Institute of Peace, *Conclusions of USIP Roundtable on Lessons Learned from Prior Vetting Processes*, 24 January 2003, p. 109: "[v]etting is necessary in order to: 1. Sanction those who have committed abuses and remove them from positions in which they could continue to do so. 2. Instill public confidence in the reformed and cleansed institutions of government. The vetting process can serve as a means of inculcating new social norms, promoting government legitimacy, and building a new sense of civic responsibility and national identity. This emphasis is increasingly preferred under international standards to the ... focus on patently punitive vetting. 3. Render the handling of past abuse more manageable. Even if prosecutions occur for abuses of the ousted regime, there will be very few trials relative to the number of potential cases. 4. Contribute to public order. A hesitant, arbitrary or incomplete vetting process can likewise result in personal vengeance, festering grievances, and lack of public trust in government." Cited in ICJ, *Entrenching the rule of Law in Libya Security sector's accountability through civilian control and oversight*, July 2022, p. 2.

from minority groups;

- **Ensure that Commission members did not commit or were complicit in human rights violations in the past, including through the establishment and operationalization of an independent and adequate prior vetting process.**

2.2.2 The powers of the Reconciliation Commission

If the Draft Law was adopted as currently formulated, the Commission's powers would be as follows:

1. Receive complaints and communications concerning violations covered by the Draft Law.
2. Carry out fact-finding on violations covered by the Draft Law through various appropriate means and mechanisms while ensuring that the right to a defence is observed. It may summon any person whose testimony or statement it deems useful.
3. Access the national archives, no matter who maintains them.
4. Require judicial and administrative authorities and other public institutions as well as natural and legal persons to provide it with documents and information in their possession.
5. Access case files before courts as well as relevant verdicts and orders.
6. Request information from foreign official bodies or foreign non-governmental organizations in accordance with the international agreements and treaties concluded in this regard, and collect any information from victims, witnesses, employees, or from others in other countries in coordination with the Ministry of Foreign Affairs.
7. Facilitate the granting of amnesties/pardons⁷² to those who fully disclose the facts associated with the violations subject to the Draft Law.⁷³
8. Inspect and search public and private premises relevant to the investigation of the truth and seize and secure documents and evidence. In this regard, the Commission shall enjoy the power of judicial officers.
9. Follow amicable methods and good offices to resolve disputes, including mediation and arbitration. It may engage persons known for their effective role in resolving civil disputes by customary means.⁷⁴

2.2.2.1 Investigative powers

As noted above, the Commission would have investigative powers, including the power to summon any person whose testimony could be relevant; access national archives; require public institutions and persons to disclose documents; provide access to case files; request information from foreign entities and non-governmental organizations (NGOs); inspect, search public and private premises and secure documents and evidence. The extent of the Commission's powers, including those normally reserved to law enforcement authorities, would make it a quasi-judicial investigative body.

The OHCHR's *"Rule-of-law tools for post-conflict states: Truth commissions"* states that truth commissions should generally be able to interview anyone who can provide relevant information, receive the cooperation of public authorities and carry out any on-site visits.⁷⁵ However, as noted in the UN Impunity Principles, transitional justice mechanisms, such as truth commissions, cannot act as "substitutes for the civil, administrative or criminal courts."⁷⁶ Therefore, truth-seeking mechanisms should not act as criminal justice actors. The UN Impunity Principles further suggest that such mechanisms may "seek the assistance of law enforcement authorities, if required, including for the purpose ... of calling for testimonies; to inspect any places concerned in its investigations; and/or to call for the delivery of relevant documents."⁷⁷

As presently formulated, the Draft Law would grant "the power of judicial officers" to the

72. The word used in the original Arabic version, "عفو" could be translated to both amnesty and pardon.

73. For the ICJ's concern about amnesties and pardons in this context, see below, section 4.3.2.

74. Draft Reconciliation Law, art. 23, unofficial translation by UNSMIL, adapted by the ICJ.

75. OHCHR, *Rule-of-law tools for post-conflict states: Truth commissions*, p. 10.

76. *UN Impunity Principles*, principle 8; SR on transitional justice, *International legal standards underpinning the pillars of transitional justice*, para. 26; *The Minnesota Protocol on the Investigation of Potentially Unlawful Death*, para. 40.

77. *UN Impunity Principles*, principle 8(a); SR on transitional justice, *International legal standards underpinning the pillars of transitional justice*, para. 28.

Commission when inspecting and searching public and private premises and seizing evidence and would allow it to summon witnesses and to call for the delivery of relevant evidence.⁷⁸ Yet, especially, as noted above,⁷⁹ in light of the absence of information on the composition and membership of the Commission, it is unclear whether the Commission will be able to inspect and search premises or to seize evidence in compliance with criminal procedure admissibility requirements. If it were law enforcement officials who were responsible for carrying out such acts in accordance with criminal procedure or if, at minimum, there were involved in the inspection and search of public and private premises and the collection of evidence, then the actions of the Commission would be immunized against procedural challenges, and it would ensure that investigations be conducted in a manner consistent with the law.

2.2.2.2 Referral powers

The Draft Law, if adopted in its current formulation, would provide the Commission with the power to “transmit the violations, where unveiling the truth requires criminal proceedings, to the competent authorities [the Prosecution Office]”,⁸⁰ thereby granting wide discretion to the Commission to decide whether a case should be prosecuted. The Commission would thus de facto be entrusted with determining the prosecution strategy of crimes subjected to the Draft Law, apparently based solely on its understanding of what unveiling the truth requires.

States have the obligations to: (i) provide remedy and reparations to victims of gross violations of international human rights law and serious violations of humanitarian law;⁸¹ (ii) investigate, and, when evidence so warrants, (iii) prosecute, try and duly sanction perpetrators of crimes under international law⁸² in proceedings consistent with international human rights law and standards guaranteeing the right to a fair trial, and excluding the death penalty. Referrals for prosecution should thus be determined based on transparent and objective criteria with a view to giving effect to these obligations. Moreover, to protect prosecutorial independence, the Prosecution Office should have the power to *proprio motu* instigate prosecutions of crimes following within the purview of the Draft Law. Indeed, the Prosecution Office should be able to decide to prosecute based on whether there is sufficient evidence to secure a conviction in a properly constituted court of law and if prosecutions serve the public interest, and not merely upon referral by the Commission.

2.2.2.3 Sanction powers

Under article 52 of the Draft Law, if enacted as presently formulated, anyone “hindering the Commission’s access to any evidence or documents in their possession, or refusing to appear before the Commission to testify or deliberately obstructing its work” may be punished with six months’ imprisonment or a fine of 5,000 LYB (about 1,000 USD). The Draft Law should specify that the Commission should refer cases of obstruction to the Chamber on Transitional Justice Cases or another judicial body which would be competent to ensure that cases of obstruction are independently adjudicated.

In addition, while the ICJ welcomes that the Draft Law aims to sanction obstruction of the Commission’s work, the punishment for one’s refusal to testify would be in contradiction with international standards. Indeed, principle 10(a) of the UN Impunity Principles provides that victims and witnesses testifying on their behalf before commission of inquiry, including truth commissions, should testify “only on a strictly voluntary basis.” Moreover, the Commission should not compel people to testify when they would risk incriminating themselves, as this would be contrary to the right not to be compelled to incriminate oneself or to confess guilt in accordance with the presumption of innocence.⁸³

78. Draft Reconciliation Law, art. 23, unofficial translation by UNSMIL.

79. See section 2.2.1.1.

80. Draft Reconciliation Law, art. 8(2), unofficial translation by UNSMIL.

81. See below, section 5.

82. See below, section 4.

83. ICCPR, art. 14(2) and 14(3), Arab Charter on Human Rights, art. 16(6).

2.2.2.4. Interaction with civil society organizations

If the Draft Law were adopted in its present formulation, the Commission would be able to “request information from ... foreign non-governmental organizations in accordance with the international agreements and treaties concluded in this regard.”⁸⁴ However, there is no corresponding provision in the Draft Law addressing the Commission’s collaboration with domestic NGOs. Considering the western and eastern authorities’ recent restrictions of Libyan civil society organizations’ (CSOs) work,⁸⁵ the ICJ is concerned that such restrictions would exclude Libyan CSOs from the transitional justice process.

The participation of CSOs in this process is crucial to ensure its inclusiveness and effectiveness, among other things. Furthermore, the Commission could benefit from collaborating with CSOs as they can provide information and contacts in the community.⁸⁶

In light of the above, Libyan legislators should amend the Draft Law to:

- **Provide that law enforcement officials are the ones carrying out inspections, searches of premises and evidence seizure in compliance with criminal procedure, or at minimum, that they be involved in the inspection and search of public and private premises, instead of conferring such powers to the Commission;**
- **Provide that the Prosecution Office be able to instigate prosecutions proprio motu based on whether there is sufficient evidence to secure a conviction in a properly constituted court of law and if prosecution serves the public interest, and not merely upon referral by the Commission;**
- **Provide that the Commission should refer cases of obstruction of its work to the Chamber on Transitional Justice Cases or another judicial body;**
- **Specify that victims’ and witnesses’ participation should only be on a strictly voluntary basis;**
- **Ensure that CSOs can fully participate in, and contribute to the transitional justice process, including the Commission’s work, without interference from the authorities.**

2.3. Temporal mandate of the mechanisms (*ratione temporis* jurisdiction)

The Draft Law, as currently formulated, would apply to “the violations that have taken place since 1 September 1969 [the beginning of Muammar Gadhafi’s rule] until the entry into force of [the Draft Law].”⁸⁷

The ICJ welcomes the addition of a fixed end date to the jurisdiction of the Reconciliation Commission and the Chambers. Indeed, although a flexible end date is not by itself contrary to international standards, according to the OHCHR, transitional justice should focus on the past rather than the present while national human rights commissions and domestic courts should investigate ongoing events,⁸⁸ in order to avoid politicization of truth mechanisms. Previous versions of the Draft Law featured as an end date the “election of the legislative council based on the permanent constitution.”⁸⁹ This was problematic because the Constitutional Declaration of

84. Draft Reconciliation Law, art. 23(6), unofficial translation by UNSMIL.

85. See ICJ, Q&A: *Repressive Frameworks; Continued Attacks, October 2023; Lawyers for Justice in Libya, Suppressed and marginalised: Systematic violence against civil society in Libya*, 25 March 2024. CSOs were prevented from interacting with the last mechanism mandated to investigate violations and abuses of international human rights law and international humanitarian law, the FFM on Libya. On 26 August 2021, the Government of National Unity issued Decree No. 10 of 2021, which limits CSOs’ ability to collaborate with the UN by obliging organizations to inform the Ministry of Foreign Affairs of any interview or visit request by a “foreign entity.” The FFM reported that “several Libyan-based NGOs were reluctant to interact with the [FFM] in view of the Presidential Council’s decree [No. 286] of 2019 regulating the work of NGOs in Libya”, fearing retaliation if they did. FFM, *Report of the Independent Fact-Finding Mission on Libya*, UN Doc. A/ HRC/48/83, 29 November 2021, para. 10; Special Rapporteur on the rights to freedom of peaceful assembly and of association, *Essential role of social movements in building back better*, UN Doc. A/77/171, 15 July 2022, para. 38.

86. OHCHR, *Rule-of-law tools for post-conflict states: Truth commissions*, pp. 33-34.

87. Draft Reconciliation Law, art. 5, unofficial translation by UNSMIL, adapted by the ICJ.

88. OHCHR, *Rule-of-law tools for post-conflict states: Truth commissions*, p. 8.

89. See also ICJ, *Impunity No More: A Roadmap to Strengthening Transitional Justice in Libya*, p. 9.

2011,⁹⁰ into force today, is temporary and only serves “as a basis for the exercise of power in the transitional stage until a permanent Constitution by popular referendum is adopted”.⁹¹ However, 13 years on, Libya still does not have a permanent Constitution, and it is unclear when one might be adopted since the rival political authorities in Libya and the international community seem to be prioritizing holding elections over drafting a new Constitution.⁹² Consequently, reference to “election of the legislative council based on the permanent constitution” generated uncertainty, as the Draft Law would have been applicable to crimes committed from 1969 and until an end date possibly several years into the future.

However, the proposed temporal scope is particularly expansive, as it would cover more than 50 years of human rights violations. If the Draft Law, when enacted, were to maintain such a broad temporal scope, the authorities would have to ensure that the Commission and the Chambers have the required means, expertise and human resources to effectively fulfill their mandates.⁹³ In this regard, the ICJ welcomes the fact that the latest versions of the draft specifies that the Commission will be responsible to “determine the priorities for the implementation of its task”⁹⁴ as it will have to elaborate a prioritization strategy to be able to achieve such a broad mandate.⁹⁵

Sections 4.2.1 and 4.3.3 below further examine the temporal scope of the Draft Law regarding the principle of non-retroactivity of criminal law and non-applicability of statutes of limitation for certain crimes, respectively, under international law.

In light of the above, Libyan legislators should amend the Draft Law to:

- **Ensure that the Commission, the Prosecution Office and the Chambers have the necessary means, expertise and human resources to effectively fulfill their mandates.**

90. The Constitutional Declaration was adopted by the National Transitional Council, Libya’s first government after the ouster of Muammar Gadhafi, in 2011.

91. 2011 Constitutional Declaration, 3 August 2011, preamble.

92. See UN Security Council, *Resolution 2656* (2022), UN Doc. S/RES/2656 (2022), 28 October 2022, para. 4.

93. The Draft Law provides that the mandate of the Commission is four years, extendable once for a period of four years. Draft Reconciliation Law, art. 9.

94. Draft Reconciliation Law, art. 4, unofficial translation by UNSMIL, adapted by the ICJ.

95. Principle 8(d) of the *UN Impunity Principles* provides that truth commissions’ investigations “should focus as a matter of priority on violations constituting serious crimes under international law, including in particular violations of the fundamental rights of women and of other vulnerable groups.” See also UN Secretary-General, *Transitional Justice A Strategic Tool for People, Prevention and Peace*, p. 16.

3. The right to truth

According to principle 2 of the UN Impunity Principles, “every people has the inalienable right to know the truth about past events concerning the perpetration of heinous crimes and about the circumstances and reasons that led, through massive or systematic violations, to the perpetration of those crimes.” Principle 4 further states that, “irrespective of any legal proceedings, victims and their families have the imprescriptible right to know the truth about the circumstances in which violations took place and, in the event of death or disappearance, the victims’ fate.”⁹⁶

The Draft Law, as presently formulated, lists “unveiling of the truth” as one of “its objectives and principles.”⁹⁷ Victims would be able to exercise their right to truth in front of the Reconciliation Commission. This section addresses the role of victims (3.1), the public (3.2) and the alleged perpetrators (3.3) in the Commission’s process.

3.1. The role of victims

3.1.1. Victims’ participation

The ICJ welcomes the victim-centered approach enshrined already in the second version of the Draft Law, which has aligned the definition of victims in article 1 to international standards, reproducing the definition provided in the UN Basic Principles and Guidelines,⁹⁸ and which the third and version of the Draft Law has retained.

The Draft now expressly recognizes victims’ rights, including the right to truth. Indeed, it dedicates an article to the rights of victims, which reads as follow:

Victims shall have the right to know the truth and to be heard in a public or confidential session by the Commission, its committees, and the authorities concerned with transitional justice issues in this law, while respecting their right to privacy. They also have the right to attend hearings, question suspects, and challenge decisions issued in their cases in accordance with the applicable procedural rules.⁹⁹

Because this article is in the “Truth Revealing” chapter, it seems that the possibility for victims to attend hearings, question suspects and challenge decisions would only apply to the proceedings in front of the Commission. Meanwhile, however, the rights victims do not appear to be addressed with respect to criminal proceedings before the Chambers.¹⁰⁰

If the Draft Law were enacted in its present formulation, victims would be entitled to submit cases to the Commission and participate in the truth-seeking process by attending national consultations organized by the Commission.¹⁰¹ However, the Draft Law would limit the possibility for victims to submit reports and requests for reparation to the first year of the Commission’s mandate.¹⁰² Although this time-limit has been extended to 12 months, compared to the six months initially provided in the first version of the Draft Law, the ICJ considers that, depending on the circumstances of each individual case, victims might need more than 12 months to make informed choices to come forward and make reparations requests, especially for victims of traumatic and highly stigmatized crimes, such as sexual and gender-based crimes.

3.1.2. Victims’ protection

Principle 10(d) of the UN Impunity Principles sets out ways to guarantee the protection of victims and witnesses testifying in front of truth commissions. It states:

96. See further ICJ, *The Right to a Remedy and to Reparation for Gross Human Rights Violations, Practitioners’ Guide No. 2*, Revised Edition, 2018, p. 130.

97. Draft Reconciliation Law, art. 2(1), unofficial translation by UNSMIL.

98. *UN Basic Principles and Guidelines*, para. 8.

99. Draft Reconciliation Law, art. 28, unofficial translation by UNSMIL.

100. Victims also have a right to institute criminal proceedings. *UN Impunity Principles*, principle 19.

101. Draft Reconciliation Law, arts 8(8) and 24.

102. Draft Reconciliation Law, art. 24.

Information that might identify a witness who provided testimony pursuant to a promise of confidentiality must be protected from disclosure. Victims providing testimony and other witnesses should in any event be informed of rules that will govern disclosure of information provided by them to the commission. Requests to provide information to the commission anonymously should be given thoughtful consideration, especially in cases of sexual assault and the commission should establish procedures to guarantee anonymity in appropriate cases, while allowing corroboration of the information provided, as necessary.¹⁰³

The protection of victims and witnesses is particularly important in the context of Libya where there is no established protection mechanism in the domestic justice system¹⁰⁴ and attacks against victims, witnesses and justice system actors are prevalent.

The ICJ therefore welcomes the fact that, since its second version, the Draft Law provides for the creation of a witness protection mechanism that includes the following protection measures, including some particularly relevant to protect victims of sexual and gender-based violence:

1. Changing personal data while still storing the real identity of the witness;
2. Displaying testimonies or statements by electronic means, or by altering the voice, or concealing facial features, or otherwise;
3. Providing security for the person covered by the protection;
4. Providing temporary accommodation for the person concerned;
5. Concealing or changing the identity of the person in the case records;
6. Establishing an electronic platform to receive reports and complaints, while giving the informants the opportunity to track the report without disclosing their identity.¹⁰⁵

However, the Draft Law does not specify whether all victims, witnesses and experts participating in the Commission's process and the Chambers' proceedings would benefit from this protection and, if not, what the conditions for being eligible for such protection would be. Nor does the Draft Law provide which entity would oversee this mechanism and/or ensure that enough resources be allocated for it to be able to fulfill its mandate.

Finally, even if the Commission's proceedings are not criminal in nature, they should ensure respect for the right to due process, equality of arms and the rights of the defence, such as the right to challenge the probity and credibility of witness evidence, including its truthfulness and reliability, in particular when making findings about the involvement of individuals in grave human rights violations or abuses. The latter must ultimately be guaranteed the right to challenge the allegations against them.¹⁰⁶ In light of this, even when the Commission takes measures with the stated aim of protecting victims and witnesses, such measures should not undermine the above mentioned rights. Consistent with international human rights law and standards, including Principle 10 of the UN Impunity Principles,¹⁰⁷ anonymous witness evidence should not be the sole or decisive evidence retained by the Commission to find and publicly name individuals as perpetrators of grave human rights violations or abuses. Before making any such findings, the Commission ought to fairly and properly assess the reliability of that evidence, including through corroboration.

In light of the above, Libyan legislators should amend the Draft Law to:

103. See also SR on transitional justice, *International legal standards underpinning the pillars of transitional justice*, para. 32; *UN Basic Principles and Guidelines*, para. 12(b); *Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions*, principle 15; SR on transitional justice, *Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence*, UN Doc. A/HRC/34/62, 27 December 2016, para. 66.

104. Report of the Independent Fact-Finding Mission on Libya, 3 March 2023, para. 98.

105. Draft Reconciliation Law, art. 51, unofficial translation by UNSMIL, adapted by the ICJ.

106. *UN Impunity Principles*, principle 9, Guarantees for Persons Implicated, "Before a commission identifies perpetrators in its report, the individuals concerned shall be entitled to the following guarantees: (a) The commission must try to corroborate information implicating individuals before they are named publicly; (b) The individuals implicated shall be afforded an opportunity to provide a statement setting forth their version of the facts either at a hearing convened by the commission while conducting its investigation or through submission of a document equivalent to a right of reply for inclusion in the commission's file."

107. See page above for a full quote of Principle 10.

- **Address victims' rights in criminal proceedings in front of the Chambers, by providing for victims' right to be present, have access to documentation and evidence, question witnesses, question or challenge the evidence and witnesses presented by the defence, present evidence and witnesses, including expert witnesses, and challenge and appeal decisions;**¹⁰⁸
- **Ensure that victims be able to submit their case to the Commission within time-limits that take into account the individual circumstances of each case, especially for victims of traumatic and highly stigmatized crimes, such as sexual and gender-based crimes;**
- **Specify whether all victims, witnesses and experts participating in the Commission's process and the Chambers' proceedings would benefit from protection measures and, if not, what the conditions for being eligible to witness protection would be and provide which entity would oversee this mechanism and ensure that enough resources be allocated for it to be able to fulfill its mandate;**
- **Clarify that the reliance on anonymous witnesses should be limited, counterbalancing the safety and security of the witness with the rights and interests of the implicated individuals, and that such anonymous testimonies should not be the sole or decisive evidence retained to find and publicly name them as perpetrators of grave human rights violations or abuses.**

3.2. The role of the public

3.2.1. Participation of the public

The Draft Law, in its present formulation, commits to including the Libyan public in the Reconciliation Commission's process from the outset, as "societal participation" is listed as an objective and principle.¹⁰⁹ The hearings of the Commission could be public¹¹⁰ and, since its second version, the Draft Law provides that the Commission would organize "broad and inclusive national consultations especially with victims and their families, marginalized groups of women, young people, people with disabilities, displaced persons and refugees."¹¹¹

Article 27 of the Draft Law stipulates that the Committee can hold hearings in camera "according to circumstances." In order to abide by international standards, clear conditions for such exceptions to the principle of public hearings should be set. In particular, victims or witnesses should be offered the choice to testify, in whole or in part, in camera or before a selected audience when the crimes discussed are sexual crimes or when witness' protection so requires.¹¹² When the victim or witness is a child (i.e., under 18 years of age), the testimony should be heard in camera or before a selected audience. However, in other instances, the hearings should be public.¹¹³

3.2.2. Publication of the Reconciliation Commission's findings

According to principle 13 of the UN Impunity Principles, truth commissions' final reports, "shall be made public in full and shall be disseminated as widely as possible."¹¹⁴ As currently formulated, the Draft Law does not provide for the publication of the reports, including the historic report, the Truth Committee's report and the Institutional Reform Committee's report.¹¹⁵

108. See ICJ, *International Law and the Fight Against Impunity*, Practitioners' Guide No. 7, 2015, p. 122, see also pp. 117-123.

109. Draft Reconciliation Law, art. 2(9), unofficial translation by UNSMIL.

110. Draft Reconciliation Law, art. 27.

111. Draft Reconciliation Law, art. 8(8), unofficial translation by UNSMIL, adapted by the ICJ.

112. *Guidelines on Combating Sexual Violence and its Consequences in Africa*, guideline 52(6). See further ICJ, *Towards Gender-Responsive Transitional Justice in Libya: Addressing Sexual and Gender-Based Crimes against Women*, pp. 34-35.

113. ICCPR, art. 14(1); HRC, *General Comment No. 32 Article 14: Right to equality before courts and tribunals and to a fair trial*, UN Doc. CCPR/C/GC/32, 23 August 2007, para. 29.

114. See also SR on transitional justice, *International legal standards underpinning the pillars of transitional justice*, para. 36; African Union, *Transitional Justice Policy*, para. 53(iv); UN Secretary-General, *Transitional Justice A Strategic Tool for People, Prevention and Peace*, p. 15.

115. Draft Reconciliation Law, arts 8(6), 29 and 49.

Similarly, international standards require that the archives of truth commissions be preserved and easily accessible to the public.¹¹⁶ Such preservation is ensured by applying technical measures and penalties to “prevent any removal, destruction, concealment or falsification of archives, especially for the purpose of ensuring the impunity of perpetrators of violations of human rights and/or humanitarian law.”¹¹⁷ In addition, victims, their relatives and implicated individuals should, for the purpose of exercising their rights, be granted access to archives, as well as the public in general, subject to reasonable restrictions aimed at safeguarding the privacy and security of victims and other individuals.¹¹⁸

In light of the above, Libyan legislators should amend the Draft Law to:

- **Ensure that the reports, including the historic report, the Truth Committee’s report and the Institutional Reform Committee’s report, are made public and appropriately disseminated;**
- **Enshrine the principle that hearings should be public and specify the conditions for victims and witnesses to testify in camera;**
- **Ensure the preservation of the Commission’s archives.**

3.3. Guarantees for alleged perpetrators

Although the Commission’s process does not entail proceedings that are criminal in nature, it should ensure that any process involving an alleged perpetrator respects the latter’s rights, in particular the right to due process, including the core of elements of the right to a fair trial under international human rights law, such as respect for the presumption of innocence and the principle of equality of arms. Principle 9 of the UN Impunity Principles provides that truth commissions must corroborate information implicating individuals before publicly naming them and should afford them an opportunity to provide a statement detailing their version of the facts.¹¹⁹ Further, public reports should clearly indicate that their findings do not constitute legal findings of a person’s guilt in the criminal sense.¹²⁰

As mentioned above,¹²¹ the Draft Law, in its current formulation, does not specify whether the Commission’s reports, which may identify alleged perpetrators,¹²² are to be public, and merely provides that the Truth Committee shall respect the rights of alleged perpetrators without expanding on what these rights are.¹²³

In light of the above, Libyan legislators should amend the Draft Law to:

- **Ensure that, if the Commission’s reports are to be made public, the implicated individuals’ safety is not at risk, that they are given notice when acts they are accused of having committed are being discussed before the Truth Committee or other Commission’s bodies, offered an opportunity to participate and that any public naming be only done if evidence corroborates the findings according to, at least, the balance of probability standard, and with a clear indication that this does not constitute legal findings on the person’s criminal guilt.¹²⁴**

116. *UN Impunity Principles*, principle 14; SR on transitional justice, *International legal standards underpinning the pillars of transitional justice*, para. 33.

117. *UN Impunity Principles*, principles 14.

118. *UN Impunity Principles*, principle 15.

119. See also SR on transitional justice, *International legal standards underpinning the pillars of transitional justice*, para. 31; OHCHR, *Rule-of-law tools for post-conflict states: Truth commissions*, pp. 21-22.

120. OHCHR, *Rule-of-law tools for post-conflict states: Truth commissions*, pp. 21-22.

121. See section 3.2.2.

122. Draft Reconciliation Law, arts 26 and 29(2).

123. Draft Reconciliation Law, art. 26.

124. On the use of anonymous witnesses, see above, section 3.1.2.

4. Accountability for crimes under international law

If enacted as presently formulated, the Draft Law would fall short of international human rights law and standards because it does not adequately provide for the right to a fair trial (4.1), and does not reference crimes (4.2) and individual criminal responsibility in a manner that complies with international human rights and criminal law (4.3).

4.1 The right to a fair trial

The Draft Law, as currently formulated, is silent on the applicability of specific criminal law provisions but refers to the Penal Code and the Code of Criminal Procedure in its preamble. The Libyan criminal justice system falls short of international human rights law and standards, including with respect to the right to a fair trial. Those shortcomings are further detailed in two previous ICJ reports,¹²⁵ which remain relevant today. By way of example, the criminal procedure legal framework¹²⁶ does not ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made.¹²⁷

In light of the above, Libyan legislators should:

- **Overhaul the criminal procedure legal framework, including the Code of criminal procedure, with a view to establishing safeguards to guarantee compliance with international human rights law, before the Chambers start operating.¹²⁸**

4.2. Crimes under international law

4.2.1 Definitions of the crimes

The Draft Law, if enacted in its present formulation, would be an improvement compared to Law No. 29 of 2013 on Transitional Justice, for example, because it uses the internationally recognized terminology of “arbitrary deprivation of the right to life, enforced disappearance and torture”,¹²⁹ thereby seemingly referencing these crimes according to international law. However, conversely, the Draft Law’s preamble still refers to Law No. 10 of 2013 on the Prohibition of Torture, Forced Disappearance and Discrimination,¹³⁰ therefore, implicitly linking the crimes of torture and enforced disappearance to their definitions under domestic law. As previously concluded by the ICJ in its report *Accountability for Serious Crimes under International Law in Libya*, domestic definitions of torture and “forced disappearance” do not comply with international standards.¹³¹

The Draft Law, in its current version, explicitly includes rape and “gender-based violations” as crimes falling under the jurisdiction of the Chambers. However, as noted in ICJ’s above-mentioned report, the domestic definition of rape does not comply with international standards.¹³² The Draft Law also fails to expressly mention forms of sexual violence other than rape.¹³³ Libya

125. ICJ, *Accountability for Serious Crimes under International Law in Libya*, July 2019; ICJ, *Challenges for the Libyan Judiciary: Ensuring Independence, Accountability and Gender Equality*.

126. See ICJ, *Accountability for Serious Crimes under International Law in Libya*, pp. 87-88.

127. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, Libya acceded on 16 May 1989, art. 15.

128. See further ICJ, *Accountability for Serious Crimes under International Law in Libya*, pp. 60-92.

129. Draft Reconciliation Law, art. 4, unofficial translation by UNSMIL, adapted by the ICJ.

130. Law No. 10 of 2013 concerning the Criminalization of Torture, Forced Disappearance and Discrimination, 28 May 2013.

131. ICJ, *Accountability for Serious Crimes under International Law in Libya*, pp. 31-35. The ICJ has called on the Libyan authorities to amend Law No. 10 of 2013 to bring the definitions of torture and “forced disappearances” in line with international law, p. 98.

132. ICJ, *Accountability for Serious Crimes under International Law in Libya*, pp. 40-43. The ICJ has previously also called on the Libyan authorities to amend the Penal Code, especially article 407, to criminalize acts of rape where the lack of consent owes to the existence of a coercive environment, p. 98.

133. Article 4(2) of the Draft Law provides for the Reconciliation Commission’s to address, among others, “violations of sexual violence during armed conflict”, but there is no similar reference to sexual violence more generally for the Chambers on Transitional Justice Cases. Unofficial translation by UNSMIL.

has an obligation to “enact and enforce laws to prohibit all forms of violence against women”,¹³⁴ including all forms of gender-based violence, in particular sexual violence.¹³⁵ It is all the more critical to preventing any impunity gap in this regard since sexual crimes are prevalent in Libya, especially in the context of deprivation of liberty.¹³⁶

To ensure that the crimes that would fall within the jurisdiction of the Chambers would comply with international law, the Draft Law should explicitly reference and list crimes under international law, including customary international law,¹³⁷ by which Libya is bound. Explicitly referencing crimes according to international law, including customary international law, would enable the Chambers to consider their relevance with respect to facts that occurred before the entry into force of the Reconciliation Law and before the entry into force of Law No. 10 of 2013, while abiding by the principle of legality and non-retroactivity of the criminal law. According to this principle, no one may be held criminally liable for any act or omission that did not constitute a criminal offence, under national or international law, at the time when such conduct occurred.¹³⁸

134. Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, 11 July 2003, art. 4(2)(a), see also 2(1)(b). See also Convention on the Elimination of All Forms of Discrimination Against Women, 18 December 1979, Libya acceded on 16 May 1989, art. 2(b).

135. CEDAW, *General Recommendation No. 30 on women in conflict and post-conflict situations*, UN Doc. CEDAW/C/GC/30, 1 November 2013, paras 23 and 38(a). See also CEDAW, *General Recommendation No. 33 on women's access to justice*, UN Doc. CEDAW/C/GC/33, 3 August 2015, para. 51(a); AComHPR, *Guidelines on Combating Sexual Violence and its Consequences in Africa*, guideline 39. The ICJ has previously also called on the Libyan authorities to amend article 408 of the Penal Code to include all forms of sexual and gender-based violence other than rape, ICJ, *Accountability for Serious Crimes under International Law in Libya*, p. 98.

136. See for example: FFM, *Report of the Independent Fact-Finding Mission on Libya*, 29 November 2021, paras 46 and 51-53; FFM, *Report of the Independent Fact-Finding Mission on Libya*, UN Doc. A/HRC/49/4, 23 March 2022, paras 37-44; FFM, *Report of the Independent Fact-Finding Mission on Libya*, 27 June 2022, paras 50-59; FFM, *Report of the Independent Fact-Finding Mission on Libya*, 3 March 2023, paras 50-52 and 82-86.

137. The Statute of the International Court of Justice defines customary international law as a “general practice accepted as law.” Statute of the International Court of Justice, 26 June 1945, art. 38. It generally binds all States, regardless of whether the State is party to any particular treaty. For war crimes, a compilation of customary international humanitarian law rules by the International Committee of the Red Cross (ICRC) is available at <https://ihl-databases.icrc.org/en/customary-ihl>. For crimes against humanity, the chapeau elements that the crimes have to be committed “as part of a widespread or systematic attack against any civilian population” have attained customary international law status as numerous enactments establishing international criminal tribunals and courts since World War II refer to these chapeau elements (Charter of the Nuremberg International Military Tribunal of 1945, Statutes establishing the International Criminal Tribunal for the former Yugoslavia, the International Criminal Tribunal for Rwanda and other courts of a hybrid or special nature to prosecute international crimes such as the Special Court for Sierra Leone and the Extraordinary Chambers in the Courts of Cambodia). Those enactments have recognized the following conducts as constituting crimes against humanity reflective of customary international law: murder, extermination, enslavement, deportation, imprisonment, torture, rape, persecution on political, racial, religious or other such grounds, and other inhumane acts. See, ICJ, *Accountability Through the Specialized Criminal Chambers: The Adjudication of Crimes Under Tunisian and International Law*, Practical Guide 1, 2019, pp. 79-80. For the crime of torture, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment’s definition of torture has been recognized as reflective of customary international law at least by 1975. See e.g., ICTY, *Prosecutor v. Brđanin et al.*, IT-99-36-A, Appeals Chamber, Judgment, 3 April 2007, para. 246; ECCC, *Kaing Guek Eav alias Duch*, Case File No. 001/18-07-2007/ECCC/TC, Trial Judgment, 26 July 2010, para. 353. For the crime of enforced disappearance, although international and regional human rights bodies recognized that the prohibition of enforced disappearance as a “stand-alone” crime reached customary international law status, it is still unclear which definition of the crime became customary and as of when. IACtHR, *Goiburú et al. v. Paraguay*, Judgment of 22 September 2006, para. 93; IACtHR, *Gelman v. Uruguay*, Judgment of 24 February 2011, para. 75. The Working Group on Enforced or Involuntary Disappearances found that “The Declaration [on the Protection of All Persons from Enforced Disappearance] enshrines a rule of jus cogens, namely the prohibition of enforced disappearance and the corresponding obligation to investigate and punish perpetrators, and it largely reflects, codifies and consolidates the customary international law that is legally binding on all States”, suggesting the Declaration’s definition of enforced disappearance would have reached international customary status. WGEID, *Thirtieth anniversary of the Declaration on the Protection of All Persons from Enforced Disappearance*, UN Doc. A/HRC/51/31/Add.3, 31 August 2022, para. 77. See further ICJ, *Enforced Disappearance and Extrajudicial Execution: Investigation and Sanction*, Practitioners’ Guide No. 9, 2015, p. 20. For the definition of enforced disappearance as a war crime, see Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law, Volume I: Rule 98*. For the definition of enforced disappearance as the crime against humanity of inhumane acts, part of customary international law as of at least 1975, see ECCC, *Nuon and Khieu*, Case File No. 002/19-09-2007/ECCC/TC, Trial Judgment (“Case 002/01 Judgement”), 7 August 2014, paras 441-448, in particular para. 448.

138. ICJ, *International Law and the Fight Against Impunity*, Practitioners’ Guide No. 7, 2015, pp. 392-397. The principle of legality also requires that the law be publicly and sufficiently accessible and the criminal

Accordingly, as the Draft Law's present formulation refers to Law No. 10 of 2013, which defines torture and "forced disappearance", these crimes could only be prosecuted as such with respect to acts committed after 2013, whereas the temporal jurisdiction of the Chambers commences in 1969.¹³⁹ The principle of legality and non-retroactivity of the criminal law, however, does not prevent a court from relying on the definitions of crimes recognized under international law, including customary international law at the time when the conduct concerned occurred,¹⁴⁰ even if national law did not criminalize the conduct concerned or did not do so consistently with international law.¹⁴¹

Finally, while article 1 of the Draft Law as currently formulated indirectly refers to war crimes since it defines "violation" as including "grave or systematic breaches of international humanitarian law",¹⁴² the Draft Law currently omits crimes against humanity from the Chambers' material jurisdiction.¹⁴³ In light of the findings of the FFM¹⁴⁴ and the International Criminal Court (ICC)¹⁴⁵, among others, that crimes against humanity may have been committed in Libya, including against migrants and refugees, and given the role that the Chambers are to play in implementing the duty of the Libyan authorities to investigate and, when warranted by the evidence, prosecute, try and if found guilty, punish perpetrators of crimes under international law, including crimes against humanity, the omission of such serious crimes under international law from the Chambers' material jurisdiction is particularly problematic.

4.2.1. Penalties for the crimes

The Libyan criminal justice system sanctions some felonies with the death penalty.¹⁴⁶ For instance, under Libyan criminal law, the crime of "massacre" resulting in the death of one or more persons¹⁴⁷ attracts a mandatory death sentence upon conviction. With respect to this, the ICJ points out that there is an emerging norm that the death penalty is *per se* incompatible with the right to life, as protected by article 6 of the International Covenant on Civil and Political Rights

liability foreseeable and capable of being clearly understood in its application and consequences. Thus, crimes must be classified and described in precise and unambiguous language that narrowly defines the punishable offence with a clear definition of the criminalized conduct, establishing its elements and the factors that distinguish it from conduct that is not criminally proscribed. Criminal law must not proscribe any act or omission in terms that are vague, imprecise, arbitrary or overly broad. Criminal law must not be construed broadly to an accused person's disadvantage. In the case of ambiguity, the definition of a particular offence should be interpreted in favour of the accused. See ICJ, *8 March Principles for a Human Rights-Based Approach to Criminal Law Proscribing Conduct Associated with Sex, Reproduction, Drug Use, HIV, Homelessness and Poverty*, March 2023, principle 1.

139. Prior to Law No. 10 of 2013, the 1954 Penal Code did criminalize kidnapping (art. 428) and torture ordered or committed by a public official (art. 435). While the definition of "forced disappearances", as per Law No. 10 of 2013, replicated almost *verbatim* the definition of kidnapping, the definition of torture was expanded to include elements set out in the Convention against Torture's definition. Therefore, although criminal conduct prior to 2013 could be prosecuted as torture, the definition did not comply with international law, and conduct amounting to enforced disappearances could not be characterised as "forced disappearance" as per the applicable domestic law. See further ICJ, *Accountability for Serious Crimes under International Law in Libya*, pp. 31-35. Regarding the crime of rape, it has been criminalized in the Penal Code since Law No. 28 of 1956 on Amending Certain Provisions of the Penal Code.

140. As noted above, in footnote 137, it is unclear when the crime of enforced disappearance, as a "stand-alone" crime, reached customary international law status in 1969 already. Enforced disappearances could still be prosecuted as war crimes and crimes against humanity.

141. ICCPR, art. 15(2). See ICJ, *Accountability Through the Specialized Criminal Chambers: The Adjudication of Crimes under Tunisian and International Law, Practical Guide 1*, p. 19: Article 15(2) applies exclusively to conduct that constituted a crime under international law (such as torture, enforced disappearance, or crimes against humanity) and has no bearing on conduct that did not qualify as a crime under international law at the relevant time For all conduct that was neither criminalized by international law nor national law at the time it occurred, article 15(1) requires that national courts abide by the principle of non-retroactivity."

142. Draft Reconciliation Law, art. 1, unofficial translation by UNSMIL.

143. The only express reference to crimes against humanity is in article 32(1), which prohibits the granting of amnesty for violations that constitute a crime against humanity or a war crime.

144. See for example: FFM, *Report of the Independent Fact-Finding Mission on Libya*, 27 June 2022, paras 34, 40, 42 and 75; FFM, *Report of the Independent Fact-Finding Mission on Libya*, 3 March 2023, paras 2, 41-42, 55 and 61.

145. ICC, Office of the Prosecutor, *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. 25.

146. Penal Code, 1 January 1954, art. 53.

147. Penal Code, art. 296. The article defines "massacre" as "Anyone who, with the intention to kill, commits acts that do not undermine the safety of the State but endanger public safety."

(ICCPR),¹⁴⁸ by which Libya is bound as a State party. In addition, the Human Rights Committee considers that mandatory death sentences “are arbitrary in nature.”¹⁴⁹ More generally, criminal law sanctions must be consistent with human rights, including by being non-discriminatory and proportionate to the gravity of the offence. Custodial sentences may only be imposed as a measure of last resort.¹⁵⁰

In light of the above, Libyan legislators should amend the Draft Law to:

- **Define the crimes under international law over which the Chambers are competent, including by an express reference to customary international law;**
- **Remove the reference to Law No. 10 of 2013 in the preamble;**
- **Clarify that, in addition to rape, the Chambers would have jurisdiction over other forms of sexual violence;**
- **Include crimes against humanity, as defined under international law, including customary international law, in the list of violations falling within the material jurisdiction of the Chambers to ensure that the gravity of the underlying crimes, when committed as part of a widespread or systematic attack directed against a civilian population, be fully reflected in the legal characterizations retained by the Chambers;**
- **Expressly exclude capital punishment from the sanctions that can be imposed.**¹⁵¹

4.3 Individual criminal liability

4.3.1. Superior responsibility

The Draft Law provides for superior responsibility, a mode of individual criminal liability applicable solely to crimes under international law committed by those in a position of command when there is a superior-subordinate (*de jure* or *de facto*) relationship, for the violations provided for in the law, that is “grave or systematic breach of international human rights law or international humanitarian law.” In its previous version, the Draft Law provided for superior responsibility when the superior failed to take measures to prevent the human right abuse or measures to bring the suspects to justice that they could have taken by virtue of their position or their authority.¹⁵² It therefore lacked the mental element required for the perpetrator to be held individually criminally responsible and liable for punishment, as defined under international law, including customary international law, namely that the superior must have had the requisite knowledge that a subordinate was about to commit, was committing or had committed a crime.¹⁵³ This omission was remedied in the second version of the Draft. However, the material element still falls short of international standards. The reference to the impossibility of the superior to

148. A growing number of States have assumed the legal obligation to abolish the death penalty and the UN General Assembly has adopted repeated resolutions, adopted by an overwhelming majority, calling on States which have not yet abolished the practice, to declare an immediate moratorium. ICCPR art. 6; Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the Abolition of the Death Penalty, 999 UNTS 414, 15 December 1989; HRCComm, *General Comment No. 3*, para. 22; HRC, *General Comment No. 36*, paras 50-51; UN General Assembly, Resolution 73/175, UN Doc. A/RES/73/175, 7 November 2018.

149. HRCComm, *General comment No. 36: Article 6: right to life*, UN Doc. CCPR/C/GC/36, 3 September 2019, para. 37.

150. ICJ, *8 March Principles for a Human Rights-Based Approach to Criminal Law Proscribing Conduct Associated with Sex, Reproduction, Drug Use, HIV, Homelessness and Poverty*, March 2023, principle 13.

151. More generally, the Libyan authorities should establish a moratorium on the death penalty for all crimes.

152. Draft Reconciliation Law, art. 36, “Under the provisions of this law, whoever refrains from taking measures that they could have taken by virtue of his position or his actual authority to prevent the occurrence of a human rights violation or to bring suspects to justice, shall be held accountable when they knew or should have known according to the circumstances surrounding the commission of his subordinates, or to know about their intention to commit these violations. In this regard, it is not acceptable for the chief/boss to argue that his subordinates are not disciplined or that they are out of his control.” Unofficial translation by UNSMIL, adapted by the ICJ.

153. ECCC, *Ieng et al., Pre-Trial Chamber, Decision of the Pre-Trial Chamber on Appeals by Nuon Chea and Ieng Thirith against the Closing Order*, Case No. 002/19-09-2007-ECCC/OCIJ (PTC 145 & 146), 15 February 2011, paras 191 and 230. See also ICTY, *Prosecutor v. Orić*, Case No. IT-03-68-A, Appeals Chamber, Judgment, 3 July 2008, para. 18; *UN Impunity Principles*, principle 27. See further ICJ, *Accountability Through the Specialized Criminal Chambers: Modes of Individual Criminal Liability Under Tunisian and International Law, Practical Guide 4*, 2023, pp. 59-63.

“argue that his subordinates are not disciplined or that they are out of his control”,¹⁵⁴ suggests that there is a presumption of control by the superior whereas customary international law requires the demonstration *in concreto* that the superior exercises effective control.¹⁵⁵

Further, the Draft Law preambles refers to Law No. 10 of 2013 concerning the Criminalization of Torture, Forced Disappearance and Discrimination, which holds the superior responsible if they “do not take the necessary measure to prevent or uncover [the] crimes while being capable thereof, or prevents in any way the referral of such crimes to the authorities in charge of discipline, investigation or prosecution”.¹⁵⁶ The definition omits the required mental element for this mode of liability under customary international law, namely, the superior’s requisite knowledge as described above, and fails to fully articulate, as part of the material element, the failure to punish the alleged perpetrators.¹⁵⁷

4.3.2. Amnesties and pardons

With respect to serious crimes under international law, such as those resulting from gross violations of international human rights law and serious violations of international humanitarian law, international law prohibits amnesties and similar measures that exempt perpetrators of responsibility,¹⁵⁸ effectively granting them impunity for their crimes. Principle 24 of the UN Impunity Principles states that:

Even when intended to establish conditions conducive to a peace agreement or to foster national reconciliation, amnesty and other measures of clemency shall be kept within the following bounds: (a) The perpetrators of serious crimes under international law may not benefit from such measures until such time as the State has met the obligations to which principle 19¹⁵⁹ refers or the perpetrators have been prosecuted before a court with jurisdiction - whether international, internationalized or national - outside the State in question.¹⁶⁰

The Human Rights Committee¹⁶¹ and the African Commission of Human and Peoples’ Rights¹⁶² have held that amnesties and similar measures violate the rights of victims. In the case of Saif Gadhafi, one of Muammar Gadhafi’s sons and a presidential candidate in the next elections,¹⁶³ the ICC’s Pre-Trial Chamber I held that “there is a strong, growing, universal tendency that grave and systematic human rights violations – which may amount to crimes against humanity by their very nature – are not subject to amnesties or pardons under international law.”¹⁶⁴ The

154. Draft Reconciliation Law, art. 36.

155. SCSL, Appeals Chamber, *Prosecutor v. Brima et al.*, Judgment, Case No. SCSL-2004-16-A, 22 February 2008, para. 257; ICTY, Appeals Chamber, *Prosecutor v. Halilović*, Judgment, Case No. IT-01-48-A, 16 October 2007, para. 59; ICTR, Appeals Chamber, *Prosecutor v. Bagilishema*, Judgment, Case No. ICTR-95-1A-A, 3 July 2002, paras 50 and 60-61. See further ICJ, *Accountability Through the Specialized Criminal Chambers: Modes of Individual Criminal Liability Under Tunisian and International Law*, Practical Guide 4, p. 59.

156. Law No. 10 of 2013 concerning the Criminalization of Torture, Forced Disappearance and Discrimination, 14 April 2013, art. 5.

157. For more details, see further ICJ, *Accountability for Serious Crimes under International Law in Libya: An Assessment of the Criminal Justice System*, pp. 47-49. The term “uncover” is unclear and could refer to action such as inquiry or investigation but does not necessarily encompass punishment. Furthermore, preventing the referral of the crime to the competent authorities is narrower than failing to punish.

158. See ICJ, *The Right to a Remedy and Reparation for Gross Human Rights Violations, Practitioners’ Guide No. 2*, Revised Edition, October 2018, pp. 250-270.

159. “States shall undertake prompt, thorough, independent and impartial investigations of violations of human rights and international humanitarian law and take appropriate measures in respect of the perpetrators, particularly in the area of criminal justice, by ensuring that those responsible for serious crimes under international law are prosecuted, tried and duly punished.” *UN Impunity Principles*, principle 19.

160. See also UN Secretary-General, *Transitional Justice A Strategic Tool for People, Prevention and Peace*, p. 17.

161. HRCComm, *General Comment No. 31: Nature of the General Legal Obligation on States Parties to the Covenant*, UN Doc. CCPR/C/21/Rev.1/Add.13, 26 May 2004, para. 18; HRCComm, *General comment No. 36: Article 6: right to life*, para. 27; HRCComm, *Hugo Rodríguez v. Uruguay*, UN Doc. CCPR/C/51/D/322/1988, 9 August 1994, para. 12.4.

162. ACommHPR, *Malawi African Association et al. v. Mauritania*, Communications Nos. 54/91, 61/91, 98/93, 164/97-196/97 and 210/98, 11 May 2000, para. 83.

163. Elections were initially planned for December 2018 and then December 2021 but have since been endlessly postponed.

164. ICC, Pre-Trial Chamber I, *Prosecutor v. Saif al-Islam Gadhafi*, Case No. ICC-01/11-01/11, Pre-Trial Chamber

prohibition of amnesties for crimes under international law also applies to transitional justice mechanisms.¹⁶⁵

The Draft Law, as presently formulated, would prohibit “amnesties” or “pardons”¹⁶⁶ for war crimes and crimes against humanity,¹⁶⁷ but would still allow “amnesties” or “pardons” granted by the Chambers for other crimes. However, international law and standards require that States exclude amnesties and similar measures that exempt perpetrators of gross human rights violations of responsibility for the “stand-alone” crimes of torture, enforced disappearance, extrajudicial execution and slavery, and not only war crimes and crimes against humanity.

Furthermore, the Draft Law, in its current formulation, fails to address the interaction of these provisions with already existing amnesty laws. In this regard, the Draft Law’s preamble cites Law No. 38 of 2012 on Procedures concerning the Transitional Phase and Law No. 6 of 2015 on General Amnesty, as amended by Law No. 4 of 2024,¹⁶⁸ without detailing which provision prevails. Law No. 38 of 2012 provides that “there is no penalty for necessities of the 17 February Revolution in terms of military, security or civil acts carried out by revolutionaries to save or protect the revolution”,¹⁶⁹ while Law No. 6 of 2015, as amended by Law No. 4 of 2024, grants a “general amnesty ... to all Libyans who have committed crimes during the period before 15 February 2011 until the promulgation of present Law [7 September 2015].”¹⁷⁰

Furthermore, the Draft Law, as currently formulated, is unclear concerning the procedure for granting “amnesties” or “pardons.” The Commission would be tasked with “facilitating the granting of amnesties/pardons to those who fully disclose the facts associated with the violations”¹⁷¹ while the Prosecution Office would refer the possible grant of “amnesties” or “pardons” to the Chambers if it believes the conditions set out in the Draft Law are met. One of such conditions is for the perpetrator to “effectively contribute to the uncovering of the truth.”¹⁷² However, the Draft Law does not specify if the perpetrator should make their “contribution” in front of the Commission or before the Prosecution Office. The Draft Law does not further detail what the “facilitation of the granting of amnesties/pardons” would entail and the weight of the Commission’s recommendations on the Prosecution Office and the Chambers’ decision.

4.3.3. Statutes of limitation

It is well established under international law that statutes of limitation do not apply to crimes under international law.¹⁷³ For instance, principle 23 of the UN Impunity Principles states that “[p]rescription shall not apply to crimes under international law that are by their nature imprescriptible.”

I, Decision on the ‘Admissibility Challenge by Dr. Saif Al-Islam Gadaffi pursuant to Articles 17(1)(c), 19 and 20(3) of the Rome Statute’, 5 April 2019, para. 61, see also para. 77. See also IACtHR, *Barrios Altos v. Peru* (Merits), Series C No. 75, 14 March 2001, para. 41; UN Secretary-General, The rule of law and transitional justice in conflict and post-conflict societies, para. 10. For further reference on amnesties, see ICJ, *The Right to a Remedy and to Reparation for Gross Human Rights Violations, Practitioners’ Guide No. 2*, pp. 250-270; ICJ, *Accountability for Serious Crimes under International Law in Libya: An Assessment of the Criminal Justice System*, pp. 54-58.

165. UN Impunity Principles, principle 24.

166. The word used in the original Arabic version, “عفو” could be translated into English as both “amnesty” and “pardon.” However, the legislature and the head of State normally grant amnesties and pardons respectively, whereas in the present case the judiciary would grant such “amnesties” or “pardons.”

167. Draft Reconciliation Law, art. 32.

168. Law No. 4 of 2024 amending Law No. 6 of 2015 on General Amnesty, 19 March 2024, art. 1.

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

170. Law No. 6 of 2015 on General Amnesty, 7 September 2015, art. 1.

171. Draft Reconciliation Law, art. 23(7), unofficial translation by UNSMIL.

172. Draft Reconciliation Law, art. 32, unofficial translation by UNSMIL.

173. UN *Basic Principles and Guidelines*, paras 6-7; *Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity*, adopted by General Assembly resolution 2391 (XXIII) of 26 November 1968, art. 1; *Ljubljana The Hague Convention on International Cooperation in the Investigation and Prosecution of the Crime of Genocide, Crimes against Humanity, War Crimes and Other International Crimes*, 26 May 2023, not entered into force yet, art. 11; Rome Statute of the International Criminal Court, 17 July 1998, art. 29. See also HRCComm, *General Comment No. 31: Nature of the General Legal Obligation on States Parties to the Covenant*, para. 18. For war crimes, see ICRC, Customary IHL Database, rule 160; ICJ, *International Law and the Fight against Impunity, Practitioners’ Guide No. 7*, January 2015, chapter X.

However, article 35 of the Draft Law, as presently formulated, provides that, “[s]tatute of limitation ... may not preclude revealing the truth of the violations and making reparation for the victims”,¹⁷⁴ without mentioning the prosecution of crimes under international law. Although the Supreme Court recently found, in the Abu Salim prison massacre case,¹⁷⁵ that the ten year prescription for felonies does not apply to crimes against humanity and war crimes,¹⁷⁶ the necessity of guaranteeing the imprescriptibility of crimes under international law is still stark as the Penal Code continues to prescribe that criminal liability for felonies, the most serious crimes under Libyan criminal law,¹⁷⁷ shall be extinguished after ten years starting from the day of the commission of the crime.¹⁷⁸

A prescription of ten years would significantly affect the scope of temporal jurisdiction of the Chambers. While their temporal jurisdiction would start in September 1969, when Muammar Gadhafi took power, the Chambers would only be able to prosecute and try crimes committed after 2014, thereby undermining the criminal accountability objectives of the Draft Law with regard to all crimes committed during the Gadhafi regime.

In light of the above, Libyan legislators should amend the Draft Law to:

- **Remove the reference to Law No. 10 of 2013 in the preamble;**
- **Define superior responsibility in line with and in reference to customary international law;**
- **Expand the prohibition of “amnesties” and “pardons” to the “stand-alone” crimes of torture, enforced disappearance, extrajudicial execution and slavery;**
- **Expressly state that the amnesties provided for in Law No. 38 of 2012 and Law No. 6 of 2015 do not apply to crimes under international law;**
- **Clarify that statutes of limitation do not apply to the prosecution of all crimes under international law.**

174. Unofficial translation by UNSMIL.

175. In June 1996, security forces killed an estimated 1,200 prisoners following a riot at the Abu Salim prison. HRW, *Libya: June 1996 Killings at Abu Salim Prison*, 2003.

176. Human Rights Solidarity, *The case of the Abu Salim Prison Massacre*, 29 June 2021.

177. Crimes are classified as felonies, misdemeanours and infractions.

178. Penal Code, art. 107.

5. The victims' right to an effective remedy and reparation

Under international human rights law, the right to an effective remedy and reparation imposes on States the obligation to ensure that victims and their next of kin have access to a competent body to file a claim and to request reparation commensurate to the gravity of the violation they suffered and tailored to their needs.¹⁷⁹ The UN Basic Principles and Guidelines provide for five types of remedies: restitution, compensation, satisfaction, rehabilitation and guarantees of non-repetition.¹⁸⁰ In more recent studies, the UN Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence consecrated guarantees of non-recurrence as a pillar of transitional justice, independent of reparations.¹⁸¹ Guarantees of non-recurrence will therefore be examined in a latter section,¹⁸² in line with the Special Rapporteur's distinction and the Draft Law's structure.¹⁸³

Reparations are set out as objectives of the current version of the Draft Law.¹⁸⁴ One of the three committees of the Commission would be dedicated to reparations.¹⁸⁵ The Reparation Committee "shall come up with reasoned recommendations on reparation" and "refer its recommendations to the Board of Directors for approval and referral to the Compensation Fund for Victims or return them to the Committee for amendment."¹⁸⁶

Article 37 of the Draft Law states that "the State shall guarantee reparation to victims for the damage resulting from violations", and that such reparations shall take one or more of the following forms:

1. Respond in a way that ensures, as much as possible, restoration of the situation of the victim prior to the violation.
2. Monetary compensation for material damage within the limits of the loss inflicted on the victim, excluding the loss of gain, provided that the damage is estimated at the time of its occurrence, taking into account inflation. Compensation may be in the form of salaries, shares, bonds, or scholarships.
3. Rehabilitation, which includes medical and psychological care, in addition to legal and social services.
4. Public apology to the victims and community, including an acknowledgment of incidents and acceptance of responsibility.
5. Memorial commemorations as decided by the Commission.
6. Any other form of reparation deemed by the Commission.¹⁸⁷

The Draft Law, as presently formulated, thus provides for all four types of reparations, namely compensation (5.1), restitution (5.2), satisfaction (5.3) and rehabilitation (5.4). The procedure relating to the granting of reparations, however, remains unclear (5.5).

5.1. Compensation

As mentioned above, the Draft Law, if enacted in its current formulation, would provide for

179. ICCPR, art. 2(3); Arab Charter on Human Rights, arts 12 and 23; *UN Basic Principles and Guidelines*, paras 2(c), 3(c-d), 11, 15-23; *UN Impunity Principles*, principle 31; HRCComm, *General Comment No. 31: Nature of the General Legal Obligation on States Parties to the Covenant*, para. 16; Committee against Torture, *General Comment No. 3: Implementation of article 14 by States parties*, UN Doc. CAT/C/GC/3, 13 December 2012, para. 6.

180. *UN Basic Principles and Guidelines*, paras 19-23.

181. SR on transitional justice and Special Adviser to the Secretary-General on the Prevention of Genocide, *Joint study on the contribution of transitional justice to the prevention of gross violations and abuses of human rights and serious violations of international humanitarian law, including genocide, war crimes, ethnic cleansing and crimes against humanity, and their recurrence*, paras 12-15; SR on transitional justice, International legal standards underpinning the pillars of transitional justice. See also UN Secretary-General, *Transitional Justice A Strategic Tool for People, Prevention and Peace*, p. 2.

182. See below, section 6.

183. Chapter five of the Draft Law deals with reparations and chapter six with institutional reform.

184. Draft Reconciliation Law, art. 2(3).

185. Draft Reconciliation Law, art. 25.

186. Draft Reconciliation Law, art. 40.

187. Unofficial translation by UNSMIL, adapted by the ICJ.

the monetary compensation of material damages by the State through the Compensation Fund for Victims. Article 43 specifies that the Fund can claim the sums it disbursed from the perpetrators of violations. However, the Draft Law does not specify that perpetrators should only pay compensation commensurate to the harm that they have individually caused.

The UN Basic Principles and Guidelines provide that compensation should “be provided for any economically assessable damage, as appropriate and proportional to the gravity of the violation and the circumstances of each case, resulting from gross violations of international human rights law and serious violations of international humanitarian law.”¹⁸⁸ Compensation is thus construed too narrowly in the current version of the Draft Law as it would be limited to material damage and exclude moral damage and loss of gain.¹⁸⁹

In light of the above, Libyan legislators should amend the Draft Law to:

- **Specify that perpetrators should only pay compensation commensurate to the harm that they have individually caused;**
- **Provide for compensation of moral damage and loss of gain.**

5.2. Restitution

According to the UN Basic Principles and Guidelines, restitution should “whenever possible, restore the victim to the original situation before the gross violations of international human rights law or serious violations of international humanitarian law occurred.”¹⁹⁰

5.2.1. Restoration of citizenship

Since the second version of the Draft Law, article 55 provides for the restoration of citizenship when it had been revoked by the Gadhafi regime. However, an individual who: (1) later underwent military service in a foreign country “without their own government’s permission”; or (2) went to Israel, supported it financially or morally or could be considered a Zionist, cannot have their citizenship restored. The article further states that people to whom the Gadhafi regime granted citizenship after 15 February 2011 for the purpose of recruiting mercenaries or for military purposes, and people who were granted citizenship in contradiction to nationality laws in force at the time, more generally, shall lose their Libyan nationality.

This article gives rise to concern for two reasons. Firstly, the Draft Law should not frame revocation of citizenship as a form of restitution as reparations are meant to redress human rights violations and not revoke one’s right especially if it could result in the person’s statelessness. Secondly, concerning the restoration of citizenship as a restitution, measures of reparation should apply to any victim of human rights violations without any discrimination.¹⁹¹

5.2.2. Other forms of restitution

Under international standards, restitution should encompass more than merely the restoration of citizenship.¹⁹² It should include return to one’s place of residence,¹⁹³ restoration of liberty,¹⁹⁴

188. *UN Basic Principles and Guidelines*, para. 20. See also SR on transitional justice, *International legal standards underpinning the pillars of transitional justice*, para. 49.

189. *UN Basic Principles and Guidelines*, para. 20.

190. *UN Basic Principles and Guidelines*, para. 19; SR on transitional justice, *International legal standards underpinning the pillars of transitional justice*, para. 48.

191. *UN Basic Principles and Guidelines*, para. 25; African Union, *Transitional Justice Policy*, para. 66(ii); SR on transitional justice, *International legal standards underpinning the pillars of transitional justice*, para. 16.

192. *UN Basic Principles and Guidelines*, para. 19; ICCPR, art. 24(3); Arab Charter, art. 29; Convention on the Rights of the Child, art. 8; WGEID, *General Comment on Article 19 of the Declaration on the Protection of All Persons from Enforced Disappearance*, UN Doc. E/CN.4/1998/43, 12 January 1998, para. 75; ACommHPR, *Malawi African Association et al. v. Mauritania*, recommendation 2.

193. *UN Basic Principles and Guidelines*, para. 19; ICCPR, arts 12(4) and 17; Arab Charter, art. 27; ACHPR, arts 12(1)-12(2); WGEID, *General Comment on Article 19 of the Declaration on the Protection of All Persons from Enforced Disappearance*, para. 75; HRCComm, *Jiménez Vaca v. Colombia*, UN Doc. CCPR/C/74/D/859/1999, 15 April 2002, para. 9; ACommHPR, *Malawi African Association et al. v. Mauritania*, recommendation 2.

194. *UN Basic Principles and Guidelines*, para. 19; ICCPR, art. 9; Arab Charter, art. 14; ACHPR, art. 6; WGEID, *General Comment on Article 19 of the Declaration on the Protection of All Persons from Enforced*

return of property,¹⁹⁵ enjoyment of human rights, identity, family life¹⁹⁶ and restoration of employment.¹⁹⁷ While the Draft Law, as presently formulated, mentions the right to return to one's place of residence,¹⁹⁸ it does not frame it as a form of reparation and omits to address other forms of restitution altogether.

The Draft Law, as presently formulated, also provides that the State should award collective reparations, including reconstruction, local development programmes and the removal of legislative and administrative "hurdles" – without specifying which hurdles.¹⁹⁹ The Draft Law does not address other types of collective reparations, including the restitution of communal lands, rebuilding health, education, security, judicial and other public service infrastructure, as well as the livelihood systems of affected communities, and compensation in the form of money or services to the community.²⁰⁰ Nor does the Draft Law provide that collective reparations should also consider the affected communities' culture and traditions and be awarded in keeping with the principle of non-discrimination.²⁰¹

In light of the above, Libyan legislators should amend the Draft Law to:

- **Remove the provisions that allow for arbitrariness in the granting of reparation measures and exclude any punishment as a form of restitution, especially if it could result in the person concerned being rendered stateless;**
- **Refrain from framing the revocation of citizenship as a reparation in the context of the transitional justice process;**
- **Provide for all forms of restitution, including collective restitutions, as provided in the UN Basic Principles and Guidelines, as practicable;**
- **Ensure that collective reparations be allocated in keeping with the principle of non-discrimination.**

5.3. Satisfaction

The UN Basic Principles and Guidelines detail that satisfaction, which refers to acknowledging the harm suffered by victims, should include "effective measures aimed at the cessation of continuing violations; verification of the facts and full and public disclosure of the truth; the search for the whereabouts of the disappeared; an official declaration or a judicial decision restoring the dignity, the reputation and the rights of the victim; public apology; judicial and administrative sanctions against persons liable for the violations; commemorations and tributes to the victims and inclusion of an accurate account of the violations that occurred in international human rights law and international humanitarian law training and in educational material."²⁰²

The ICJ welcomes the inclusion of an article entirely dedicated to the preservation of national memory, in line with principle 3 of the UN Impunity Principles, in the second version of the Draft Law.²⁰³ Article 3 reads as follows:

Disappearance, para. 75.

195. *UN Basic Principles and Guidelines*, para. 19; Arab Charter, art. 31; ACHPR, art. 14; WGEID, *General Comment on Article 19 of the Declaration on the Protection of All Persons from Enforced Disappearance*, para. 75; HRCComm, *Brok and Brokova v. Czech Republic*, UN Doc. CCPR/C/73/D/774/1997, 31 October 2001, paras 7.4 and 9; ACommHPR, *Malawi African Association et al. v. Mauritania*, paras 127-128 and recommendation 2.

196. *UN Basic Principles and Guidelines*, para. 19; ICCPR, art. 17; Arab Charter, art. 33; ACHPR art. 18; WGEID, *General Comment on Article 19 of the Declaration on the Protection of All Persons from Enforced Disappearance*, para. 75.

197. *UN Basic Principles and Guidelines*, para. 19; International Covenant on Economic, Social and Cultural Rights, 16 December 1966, Libya ratified on 15 May 1970, art. 6; Arab Charter, art. 34; ACHPR, art. 15; WGEID, *General Comment on Article 19 of the Declaration on the Protection of All Persons from Enforced Disappearance*, para. 75. See further ICJ, *Impunity No More: A Roadmap to Strengthening Transitional Justice in Libya*, pp. 25-27.

198. Draft Reconciliation Law, art. 8(5).

199. Draft Reconciliation Law, art. 39.

200. African Union, *Transitional Justice Policy*, para. 65(iv).

201. *UN Basic Principles and Guidelines*, para. 25; African Union, *Transitional Justice Policy*, para. 66(ii); SR on transitional justice, *International legal standards underpinning the pillars of transitional justice*, para. 16.

202. *UN Basic Principles and Guidelines*, para. 22. See also SR on transitional justice, *International legal standards underpinning the pillars of transitional justice*, para. 51.

203. Principle 3 states: "A people's knowledge of the history of its oppression is part of its heritage and, as

Preserving the national memory is a right of successive generations of the Libyan people, and a duty of the State. The Commission shall work to achieve it in order to draw lessons, perpetuate the memory of the victims, and prevent the recurrence of violations.

The Draft Law, as presently formulated, also provides for “public apologies to the victims and community, including an acknowledgment of incidents and acceptance of responsibility.”²⁰⁴

However, it fails to address other forms of satisfaction recognized by international standards, including, among other things, the “search for the whereabouts of the disappeared, for the identities of the children abducted, and for the bodies of those killed, and assistance in the recovery, identification and reburial of the bodies.”²⁰⁵ The latter is particularly relevant in the present situation as the Draft Law does recognize the need to address enforced disappearances thoroughly,²⁰⁶ and considering the prevalence of this crime in Libya.²⁰⁷

In light of the above, Libyan legislators should amend the Draft Law to:

- **Recognize the search for, the establishment of the whereabouts and reburial of the disappeared as a satisfaction measure.**

5.4. Rehabilitation

According to the UN Basic Principles and Guidelines, rehabilitation should “include medical and psychological care as well as legal and social services.”²⁰⁸ The Draft Law, as currently formulated, adequately defines rehabilitation in line with international standards, by including all forms of rehabilitation.

5.5 Procedure relating to the granting of reparations

The reparations procedural regime presented in the Draft Law remains unclear. The Draft Law, in its current formulation, provides for the Reparations Committee to refer its recommendation to the Board of Directors. The Board can then approve and refer them to the Compensation Fund for Victims or refer them back to the Committee for amendment.²⁰⁹ However, it is unclear on what basis the Board of Directors may send back the recommendations for amendment.

In light of the above, Libyan legislators should amend the Draft Law to:

- **Clarify on what basis the Board of Directors may send back the Reparations Committee’s recommendations for amendment.**

such, must be ensured by appropriate measures in fulfilment of the State’s duty to preserve archives and other evidence concerning violations of human rights and humanitarian law and to facilitate knowledge of those violations. Such measures shall be aimed at preserving the collective memory from extinction and, in particular, at guarding against the development of revisionist and negationist arguments.” See also *UN Basic Principles and Guidelines*, para. 22.

204. Draft Reconciliation Law, art. 37(4), unofficial translation by UNSMIL.

205. *UN Basic Principles and Guidelines*, para. 22.

206. Draft Reconciliation Law, art. 4(1). See also art. 8(4) on the missing.

207. FFM, *Detailed findings on the situation in Tarhuna*, UN Doc. A/HRC/50/CRP.3, 1 July 2022, paras 175-180; FFM, *Report of the Independent Fact-Finding Mission on Libya*, 3 March 2023, paras 2, 54-59.

208. *UN Basic Principles and Guidelines*, para. 21. See also SR on transitional justice, International legal standards underpinning the pillars of transitional justice, para. 50; Committee against Torture, *General Comment No. 3: Implementation of article 14 by States parties*, para. 11.

209. Draft Reconciliation Law, art. 40.

6. Guarantees of non-repetition

The UN Basic Principles and Guidelines provide a list of measures to ensure that human rights violations do not reoccur in the future, including “ensuring effective civilian control of military and security force; ensuring that all civilian and military proceedings abide by international standards of due process, fairness and impartiality; strengthening the independence of the judiciary; protecting persons in the legal, medical and health-care professions, the media and other related professions, and human rights defenders; providing, on a priority and continued basis, human rights and international humanitarian law education to all sectors of society and training for law enforcement officials as well as military and security forces; promoting the observance of codes of conduct and ethical norms, in particular international standards, by public servants, including law enforcement, correctional, media, medical, psychological, social service and military personnel, as well as by economic enterprises; promoting mechanisms for preventing and monitoring social conflicts and their resolution and reviewing and reforming laws contributing to or allowing gross violations of international human rights law and serious violations of international humanitarian law.”²¹⁰

Guarantees of non-repetition are a critical component of transitional justice as they aim to ensure that “victims do not again have to endure violations of their rights.”²¹¹ In this regard, the Draft Law, as presently formulated, lists institutional reform as one of its objectives and principles.²¹²

If the Draft Law was enacted in its current formulation, the Institutional Reform Committee would be tasked with examining public institutions, particularly the “judicial, security, military, educational and media institutions, and companies”, with the aim of ensuring the “restoration of trust and non-recurrence of corruption and violations.”²¹³ According to the Draft Law, the Committee’s analysis should include examining the ability of individuals working for such institutions to exercise their function and their integrity, as revealed, among other things, by their human rights record.²¹⁴ A specific committee composed of retired judges selected by the “Presidency of the State” would examine the judicial bodies.²¹⁵ The Institutional Reform Committee would then draft a report suggesting “practical proposals”²¹⁶ to reform the institutions involved in corruption and violations, and recommending to the Board of Directors to remove, order the retirement, investigate or start disciplinary proceedings against the examined individuals.²¹⁷ The Board of Directors, after adopting these recommendations, would present them to the House of Representatives or the Council of Ministers.²¹⁸

While the removal of individuals involved in human rights violations from public institutions is in line with the UN Impunity Principles, their removal shall comply with the “requirements of due process of law and the principle of non-discrimination.”²¹⁹

In the case of Libya particularly, as outlined in ICJ’s report *Entrenching the rule of Law in Libya: Security sector’s accountability through civilian control and oversight*,²²⁰ guarantees of non-repetition should include the establishment of civilian oversight over the military, the security forces and intelligence services and adequate prior vetting of their members.²²¹

210. *UN Basic Principles and Guidelines*, para. 23. See also SR on transitional justice, *International legal standards underpinning the pillars of transitional justice*, paras 71 ff.

211. *UN Impunity Principles*, principle 35. See also *UN Basic Principles and Guidelines*, para. 23.

212. Draft Reconciliation Law, art. 2(4).

213. Draft Reconciliation Law, art. 45, unofficial translation by UNSMIL, adapted by the ICJ.

214. Draft Reconciliation Law, art. 48.

215. Draft Reconciliation Law, art. 47.

216. Literal translation from Arabic, unofficial translation by UNSMIL.

217. Draft Reconciliation Law, art. 49.

218. Draft Reconciliation Law, art. 50.

219. *UN Impunity Principles*, principle 36(a).

220. ICJ, *Entrenching the rule of Law in Libya Security sector’s accountability through civilian control and oversight*, pp. 15-16.

221. See further ICJ, *Impunity No More: A Roadmap to Strengthening Transitional Justice in Libya*, pp. 28-29.

Moreover, as stated in the UN Impunity Principles, institutional reforms “should be developed through a process of broad public consultations, including the participation of victims and other sectors of civil society.”²²² However, as noted above,²²³ considering the western and eastern authorities’ recent restrictions imposed on CSOs,²²⁴ the ICJ is concerned that the Institutional Reform Committee will be unable to freely interact with civil society, including victims’ associations.

In light of the above, Libyan legislators should:

- **Amend the Draft Law to ensure that the removal from public office of individuals found responsible for human rights violations comply with due process, the principle of presumption of innocence and the principle of non-discrimination;**
- **Ensure that the Institutional Reform Committee explores guarantees relating to the establishment of civilian oversight over the military, the security forces and intelligence services and adequate prior vetting of their members, and incorporates such guarantees in its report;**
- **Amend the Draft Law to ensure that victims and CSOs be able to freely interact with the Institutional Reform Committee and, at a later stage, in the discussion and implementation of the Committee’s report.**

222. *UN Impunity Principles*, principle 35. See also African Union, *Transitional Justice Policy*, para. 95(i).

223. See section 2.2.2.4.

224. See ICJ, *Q&A: Repressive Frameworks; Continued Attacks*, October 2023; Lawyers for Justice in Libya, *Suppressed and marginalised: Systematic violence against civil society in Libya*, 25 March 2024.

Commission Members

June 2024 (for an updated list, please visit www.icj.org/commission)

President:

Prof. Robert Goldman, United States

Vice-Presidents:

Justice Carlos Ayala, Venezuela

Justice Radmila Dragicevic-Dicic, Serbia

Executive Committee:

Sir Nicolas Bratza, United Kingdom

Dame Silvia Cartwright, New Zealand

Ms Nahla Haidar El Addal, Lebanon

Mr Shawan Jabarin, Palestine

Justice Qinisile Mabuza Swaziland

Ms Mikiko Otani, Japan

Prof. Marco Sassòli Switzerland

Mr Wilder Tayler Uruguay

Other Commission Members:

Ms Hadeel Abdel Aziz, Jordan

Prof Kyong-Wahn Ahn, Republic of Korea

Ms Chinara Aidarbekova, Kyrgyzstan

Justice Carlos Ayala, Venezuela

Professor Adolfo Azcuna, Philippines

Dr Elizabeth Biok, Australia

Ms Catalina Botero, Colombia

Sir Nicolas Bratza, UK

Mr Reed Brody, United States

Professor José Luis Caballero Ochoa, Mexico

Justice Azhar Cachalia, South Africa

Dame Silvia Cartwright, New Zealand

Justice Moses Chinhengo, Zimbabwe

Justice Martine Comte, France

Mr Marzen Darwish, Syria

Justice Radmila Dicic, Serbia

Mr Gamal Eid, Egypt

Ms Leilani Farha, Canada

Professor Robert Goldman, USA

Ms Nahla Haidar El Addal, Lebanon

Mr Michelo Hansungule, Zambia

Ms Gulnora Ishankhanova, Uzbekistan

Mr Shawan Jabarin, Palestine

Ms Hina Jilani, Pakistan

Ms Asne Julsrud, Norway

Justice Kalthoum Kennou, Tunisia

Ms Jamesina King, Sierra Leone

Prof César Landa, Peru

Justice Qinisile Mabuza, Swaziland

Professor Juan Mendez, Argentina

Justice Charles Mkandawire, Malawi

Justice Tamara Morschakova, Russia

Justice Egbert Myjer, Netherlands

Justice Aruna Narain, Mauritius

Prof. Fionnuala Ni Aolain, Ireland

Justice John O'Meally, Australia

Ms Mikiko Otani, Japan

Dr Fatsah Ouguergouz, Algeria

Ms Claudia Paz y Paz, Guatemala

Dr Jarna Petman, Finland

Professor Mónica Pinto, Argentina

Professor Victor Rodriguez Rescia, Costa Rica

Mr Alejandro Salinas Rivera, Chile

Professor Marco Sassòli, Switzerland

Ms Patricia Schulz, Switzerland

Mr Michael Sfard, Israel

Justice Ajit Prakash Shah, India

Justice Kalyan Shrestha, Nepal

Ms Ambiga Sreenevasan, Malaysia

Justice Marwan Tashani, Libya

Mr Wilder Tayler, Uruguay

Justice Lillian Tibatemwa-Ekirikubinza, Uganda

Justice Stefan Trechsel, Switzerland

Dr Rodrigo Uprimny Yepes, Colombia



**International
Commission
of Jurists**

P.o. Box 1270
Rue des Buis 3
1211 Geneva 1
Switzerland

t +41 22 979 38 00

f +41 22 979 38 01

www.icj.org