

Entrenching the rule of Law in Libya

Security sector's accountability through
civilian control and oversight



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.

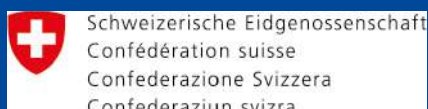
® Entrenching the rule of Law in Libya: Security sector's accountability through civilian control and oversight.

© Copyright International Commission of Jurists, July 2022

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 its headquarters at the following address:

International Commission of Jurists
P.O. Box 1740
Rue des Buis 3
CH 1211 Geneva 1
Switzerland
t: +41 22 979 38 00
f +41 22 979 38 01
www.icj.org

This briefing was made possible with the support of the Swiss Federal Department of Foreign Affairs



Entrenching the rule of Law in Libya

Security sector's accountability through
civilian control and oversight

July 2022

Table of Contents

1. Introduction.....	2
Background	2
2. Establishing effective civilian oversight over the security sector	5
International law and standards	5
Libyan law.....	6
Recommendations.....	7
3. Ensuring adequate vetting of military, security forces and intelligence services members.....	7
International law and standards	7
Libyan law.....	8
Recommendations.....	9
4. Removing immunity from prosecution for crimes under international law	10
International law and standards	10
Libyan law.....	11
Recommendations.....	12
5. Excluding the jurisdiction of military tribunals over crimes under international law	13
International law and standards	13
Libyan law.....	14
Recommendations.....	14
6. Strengthening guarantees of non-recurrence under the transitional justice process	15
International law and standards	15
Libyan law.....	15
Recommendations.....	16

1. Introduction

In the present legal briefing, the International Commission of Jurists (ICJ) analyzes the Libyan legal framework regulating the military, security forces and the intelligence services, which at present does not fully comply with international law and standards.

In particular, the briefing formulates recommendations for reform to bring the security sector in line with Libya's international law obligations, including with respect to: establishing civilian oversight over the security sector; ensuring adequate prior vetting¹ of its members; removing immunities that may bar the prosecution of crimes under international law; excluding the jurisdiction of military tribunals over such crimes; and strengthening guarantees of non-recurrence under the country's ongoing transitional justice process.

For present purposes, the phrase "security sector" will be understood as follows:

"Security sector" is a broad term often used to describe the structures, institutions and personnel responsible for the management, provision and oversight of security in a country. It is generally accepted that the security sector includes defence, law enforcement, corrections, intelligence services and institutions responsible for border management, customs and civil emergencies. ... Other non-State actors that could be considered part of the security sector include customary or informal authorities and private security services. ... Security sector reform describes a process of assessment, review and implementation as well as monitoring and evaluation led by national authorities that has as its goal the enhancement of effective and accountable security for the State and its peoples without discrimination and with full respect for human rights and the rule of law.²

Reforming the security sector in accordance with the principles of rule of law and respect for human rights is key to attaining political stability and enduring peace in Libya.

Background

Under Muammar Gadhafi's rule (1969-2011), the security apparatus was instrumental to the regime's repression of the population. In the aftermath of Gadhafi's fall, the existence of a myriad of armed groups, which had fought Gadhafi's forces during the 2011 armed conflict and have continued proliferating since, has become a major source of insecurity and instability in Libya, and the main challenge to the State's monopoly on the use of force.

¹ United States Institute of Peace, *Conclusions of USIP Roundtable on Lessons Learned from Prior Vetting Processes* (24 January 2003), p. 109, at <https://www.govinfo.gov/content/pkg/CHRG-108shrg90493/pdf/CHRG-108shrg90493.pdf>: "[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." For further analysis, see section 3 below.

² *Securing Peace and Development: The Role of the United Nations in Supporting Security Sector Reform*, Report of the Secretary-General, UN Doc. A/62/659-S/2008/39 (23 January 2008), paras 14 and 17.

Weakened State institutions have made multiple attempts disbanding armed groups and integrating their members into Libya's official military and security forces.³ Yet, several factors have frustrated such efforts. These include: rushed integration processes without adequate prior vetting;⁴ the maintenance of the armed groups' command structures; pre-existing loyalties; and Libyan political factions' attempts to exploit alliances with such groups to consolidate their own interests within the country's internal power struggles.⁵

The institutional and political divide that has characterized Libya since 2014 – where competing authorities who have been in control of the West and the East of the country have fought multiple armed conflicts – has only worsened the situation, with several armed groups expanding their influence and power. As a consequence, the State's monopoly on the use of force is either significantly diminished or enforced by armed groups that often operate autonomously, even when nominally integrated into State institutions.⁶

In such a context, numerous reports continue to arise disclosing credible evidence that both State actors and armed groups, including those formally incorporated into security forces, are committing serious violations and abuses of international human rights law and international humanitarian law (IHL) throughout the country. In the West, militias such as the Stability Support Apparatus or the Joint Operations Force, which have been established and/or are financed by the State, have allegedly perpetrated serious human rights violations, including extrajudicial killings, torture and arbitrary detentions.⁷ In the East, reports indicate that a coalition of armed groups known as the Internal Security Agency, which is under the control of the Libyan Arab Armed Forces led by Khalifa Haftar, has arbitrarily detained local civil society activists and journalists, and been responsible for violations of their rights to freedom of peaceful assembly and expression, more generally.⁸

The fact that members of armed groups and of Libya's military, security forces and intelligence services are implicated in serious violations of international human rights law and IHL demonstrates the urgent need for a thorough reform, conducted in line with the principles of the rule of law and the respect for human rights of the country's security sector. In this respect,

³ It is worth recalling that the implementation of disarmament, demobilization and reintegration programmes should always abide by the applicable international legal frameworks, including international humanitarian law, international human rights law, international criminal law and international refugee law. See UN Disarmament, Demobilization and Reintegration Resources Centre, *The Legal Framework for UN DDR*, at <https://www.unddr.org/wp-content/uploads/2021/02/IDDRS-2.11-The-Legal-Framework-For-UNDDR.pdf>.

⁴ Amnesty International, *Libya: Decree Integrating Radaa Forces Into a New Security Apparatus Overlooks Need for Accountability* (21 June 2018), at <https://www.amnesty.org/en/documents/mde19/8629/2018/en/>.

⁵ Roberta Maggi, *Building Security: How Europeans Can Help Reform Libya*, European Council on Foreign Relations (February 2022), pp. 4–6, at <https://ecfr.eu/publication/building-security-how-europeans-can-help-reform-libya/>. For in-depth analyses, see Emadeddin Badi, Archibald Gallet and Roberta Maggi (eds.), *The Road to Stability: Rethinking Security Sector Reform in Post-Conflict Libya*, DCAF – Geneva Centre for Security Sector Governance (2021); Hamzeh al-Shadeedi, Erwin van Veen and Jalel Harchaoui, *One thousand and one failings: Security sector stabilization and development in Libya*, Clingendael Institute (April 2020); Murat Aslan, *Security Sector Reform for Libya: A Crucial Step Towards State Building*, Statistical, Economic and Social Research and Training Centre for Islamic Countries (2020).

⁶ *Final Report of the Panel of Experts Established Pursuant to Resolution 1973 (2011) concerning Libya*, UN Doc. S/2022/427 (27 May 2022), para. 8.

⁷ Amnesty International, *Libya: Hold Stability Support Authority Militia Leaders to Account* (4 May 2022), at <https://www.amnesty.org/en/latest/news/2022/05/libya-hold-stability-support-authority-militia-leaders-to-account/>; *Libya: State-Financed Militia Must Be Held to Account for Extrajudicial Execution in Misratah* (31 March 2022), at <https://www.amnesty.org/en/latest/news/2022/03/libya-state-financed-militia-must-be-held-to-account-for-extrajudicial-execution-in-misratah/>.

⁸ Amnesty International, *Libya: The LAAF is 'Brutally Crushing' Freedom of Expression and Peaceful Assembly* (19 April 2022), at <https://www.amnesty.org/en/latest/news/2022/04/libya-the-laaf-is-brutally-crushing-freedom-of-expression-and-peaceful-assembly/>; *Libya: The Internal Security Agency Intensifies Crackdown on Freedom of Expression* (23 March 2022), at <https://www.amnesty.org/en/latest/news/2022/03/libya-the-internal-security-agency-intensifies-crackdown-on-freedom-of-expression/>.

the Conclusions to the Second Berlin Conference on Libya, held in June 2021, did call for a reform that:

... place[s the security sector] firmly under unified, civilian authority and oversight ..., with a credible, verifiable and comprehensive process of demobilization and disarmament of armed groups and militias in Libya and the integration of suitable personnel into civilian, security and military state institutions on an individual basis and based on a census of armed groups personnel and professional vetting.⁹

The UN Human Rights Council has also underlined “the importance of restoring the rule of law throughout Libya, together with the full restoration of State control, including through a holistic security strategy built on united, professional and accountable security institutions.”¹⁰ The UN Independent Fact-Finding Mission on Libya too has stressed that “[i]mportant institutional changes in the form of Security Sector Reform are vital for guarantees of non-recurrence of atrocities”, and that “it is essential to ensure that the Libyan State remains the sole legitimate holder of power through effective Security Sector Reform.”¹¹

At the domestic level, the 2015 Libyan Political Agreement, which attempted to unify Libyan State institutions, stressed the need for “security sector officials [to be] subject to civilian oversight and accountability in accordance with the Libyan legislations in force.”¹² Moreover, in the context of the 2020 Libyan Political Dialogue Forum (LPDF),¹³ Libyan civil society organizations affirmed that:

Persons implicated in serious violations of international humanitarian and human rights law must be barred from holding high public office or senior positions in the security and justice sectors, nor should such persons be granted any position that may shield them from legal indictment. Vetting should be performed, while ensuring transparency and due process for individuals considered for office.

The disarming and dismantling of armed groups and enacting effective security sector reform through a structured law for security institutions, and a national strategy to implement it, including human rights vetting, are critical to prevent future violations.¹⁴

The reform of the security sector, including the military, security forces and the intelligence services, should be an integral component of the ongoing constitutional reform and transitional

⁹ The Second Berlin Conference on Libya (23 June 2021), *Conference Conclusions*, paras 5 and 32, at <https://www.auswaertiges-amt.de/en/newsroom/news/berlin-2-conclusions/2467750>. See also The Berlin Conference on Libya, *Conference Conclusions* (19 January 2020), paras 35–36, at <https://www.diplomatie.gouv.fr/en/country-files/libya/news/2020/article/the-berlin-conference-on-libya-conference-conclusions-19-jan-2020>; *Declaration of the Paris International Conference for Libya* (12 November 2021), para. 12, at <https://www.elysee.fr/en/emmanuel-macron/2021/11/12/declaration-of-the-paris-international-conference-for-libya>; *Report of the Independent Fact-Finding Mission on Libya*, UN Doc. A/HRC/49/4 (23 March 2022), paras 95(l), 96(a) and 97(a).

¹⁰ Resolution 48/25, UN Doc. A/HRC/RES/48/25 (13 October 2021), preambular para. 15.

¹¹ *Report of the Independent Fact-Finding Mission on Libya*, UN Doc. A/HRC/50/63 (27 June 2022), para. 107.

¹² *Libyan Political Agreement* (17 December 2015), preambular para. 9 and principles 19–20.

¹³ The LPDF was a “fully inclusive intra-Libyan political dialogue established by the Berlin Conference Outcomes, which were endorsed by Security Council resolutions 2510 (2020) and 2542 (2020). Invited participants in the LPDF are drawn from different constituencies, based on the principles of inclusivity, fair geographic, ethnic, political, tribal, and social representation. ... The overall objective of the LPDF will be to generate consensus on a unified governance framework and arrangements that will lead to holding national elections in the shortest possible timeframe in order to restore Libya’s sovereignty and the democratic legitimacy of Libyan institutions.” See *Acting Special Representative of the Secretary-General for Libya Stephanie Williams Announces the Launch of the Libyan Political Dialogue Forum Process* (25 October 2020), at <https://unsmil.unmissions.org/acting-special-representative-secretary-general-libya-stephanie-williams-announces-launch-libyan>.

¹⁴ Working Group on International Humanitarian Law and Human Rights, *Key Principles for a Rights-based Roadmap Towards Sustainable Peace in Libya* (6 November 2020), principles III, at https://unsmil.unmissions.org/sites/default/files/civil_society_principles_doc_for_lpdf_eng_-_7_nov_2020.pdf.

justice processes in Libya.¹⁵ For such reform to entrench the rule of law in the country, at a minimum, the following three paramount prerequisites must be realized:

- i. Establishing effective civilian oversight over the military, security forces and the intelligence services;
- ii. Guaranteeing adequate prior vetting of their members to exclude any individuals responsible for crimes under international law; and
- iii. Ensuring that members of the security sector that are responsible for such crimes be held to account before ordinary civilian courts, in proceedings that fully respect international fair trial standards and exclude the death penalty.

2. Establishing effective civilian oversight over the security sector

International law and standards

The military, security forces and intelligence services should always ultimately be subject to civilian control exercised by a democratically-elected government. The UN Impunity Principles provide that, to entrench the rule of law and respect for human rights:

[c]ivilian control of military and security forces as well as of intelligence agencies must be ensured and, where necessary, established or restored. To this end, States should establish effective institutions of civilian oversight over military and security forces and intelligence agencies, including legislative oversight bodies.¹⁶

The UN Human Rights Council has called upon States “to make continuous efforts to strengthen the rule of law and promote democracy”, including by ensuring that “the military remains accountable to relevant national civilian authorities.”¹⁷ The UN Human Rights Committee has underlined the importance of ensuring civilian oversight over the military from a rule of law perspective, by expressing concern at “the lack of full and effective control by civilian authorities over the military and the security forces”¹⁸ in certain States, as well as “the lack of a clear legal framework, defining and limiting the role of the security forces and providing for effective civilian control over them.”¹⁹

¹⁵ For more information on these processes, see in general ICJ, *Women's Human Rights in the Libyan Draft Constitution: Ensuring Equality, Overcoming Discrimination* (October 2021), at <https://www.ici.org/wp-content/uploads/2021/10/Libya-Women-in-Constitution-publications-legal-briefings-2021-ENG.pdf>; ICJ, *Impunity No More: A Roadmap to Strengthening Transitional Justice in Libya* (July 2020), at <https://www.ici.org/wp-content/uploads/2020/07/Libya-Transitional-justice-Publications-Reports-thematic-report-2020-ENG.pdf>; ICJ, *Towards Gender-Responsive Transitional Justice in Libya: Addressing Sexual and Gender-Based Crimes against Women* (March 2022), at <https://www.ici.org/wp-content/uploads/2022/03/Libya-Gender-responsive-transitional-justice-process-publications-briefing-paper-2022-ENG.pdf>.

¹⁶ *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 35(c) and 36(c). See also *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, UN Doc. A/RES/60/147 (16 December 2005), para. 23(a); African Commission on Human and Peoples' Rights (ACoMHPR), *Guidelines on Combating Sexual Violence and its Consequences in Africa*, 60th Ordinary Session (8–22 May 2017), guideline 63.

¹⁷ Human Rights Council Resolution 19/36, UN Doc. A/HRC/Res/19/36 (19 April 2012), para. 16(j)(vi).

¹⁸ See, for example, Human Rights Committee, *Concluding Observations: El Salvador*, UN Doc. CCPR/C/79/Add. 34 (18 April 1994), para. 4.

¹⁹ See, for example, Human Rights Committee, *Concluding Observations: Romania*, CCPR/C/79/Add. 11 (29 July 1999), para. 9.

Libyan law

In Libya, a clear framework establishing civilian oversight over the military, security forces and intelligence services is needed to ensure compliance with international human rights law and standards. The 2011 Libyan Constitutional Declaration, which functions as the country's interim Constitution, is silent with respect to the question of regulating the military, security forces or intelligence services. The 2017 Draft Constitution,²⁰ on the other hand, envisages a certain degree of civilian control over these institutions. Article 177 provides that the armed forces are "subject to civilian authority",²¹ and article 108 makes the country's elected President their commander-in-chief.²² According to article 178, the armed forces "shall support security apparatuses in accordance with the law",²³ which appears to mean that they may be involved in law enforcement and intelligence activities. Furthermore, among other things, article 179 states that the police are a civilian body, and that its personnel shall receive human rights training.²⁴

The status of the military is regulated by Law No. 40 of 1974; members of the armed forces are subject to the Military Penal Code and the Military Code of Criminal Procedure, and are generally subject to the jurisdiction of military tribunals.²⁵ The non-compliance of certain provisions of these laws with international law and standards will be discussed in sections 3 to 5 below. Furthermore, Law No. 10 of 1992 on Security and Police regulates the status and powers of security forces; shortcomings of this Law will be analyzed in sections 3 and 4 below.²⁶

The 2017 Draft Constitution does not address the intelligence services. Law No. 7 of 2012, however, establishes the Libyan Intelligence Service (LIS) as a civilian agency subordinated to

²⁰ *Proposal of a Consolidated Draft Constitution* (29 July 2017) (2017 Draft Constitution), at <https://security-legislation.ly/node/35174>. The 2017 Draft Constitution was adopted by the Constitution Drafting Assembly (CDA) as the latest version that had arisen from the constitutional reform process ongoing in the country since 2014. While the 2017 Draft Constitution is set to be put to popular referendum for approval, this has not yet happened. For further analysis of the constitutional process, see in general ICJ, *The Draft Libyan Constitution: Procedural Deficiencies, Substantive Flaws* (December 2015), at <https://www.ici.org/wp-content/uploads/2016/07/Libya-Draft-Constitution-Flaws-Deficiencies-Publications-Reports-2015-ENG.pdf>; *Women's Human Rights in the Libyan Draft Constitution: Ensuring Equality, Overcoming Discrimination* (October 2021).

²¹ Article 177: "The army shall be a national armed military force based on discipline and hierarchy. It shall be formed and organized structurally in accordance with the law. It shall be obliged to observe complete neutrality and shall be subject to civilian authority. It shall neither interfere in the peaceful rotation of power nor in political life. Army members may not join any political party and the law shall stipulate the necessary measures therefor. The conditions and terms of national service shall be regulated by law."

²² Article 108: "The President of the Republic shall be the Commander-in-Chief of the Armed Forces. He shall declare war and conclude reconciliation in accordance with the provisions of the Constitution."

²³ Article 178: "The Army shall assume the task of defending the country and its independence, unity, and territorial integrity. It shall support security apparatuses in accordance with the law. The Army may neither undermine the constitutional system and State institutions, obstruct their activity, nor restrict the rights and freedoms of citizens."

²⁴ Article 179: "The police shall be a systematic, civilian, technical, disciplined, hierarchical, professional, and specialized body. Its mission shall be to combat crime, provide public safety and peace, maintain order, respect the law, and protect the rights, freedoms, security, and property of persons. Police personnel shall receive training on the respect of human rights and methods to prevent and uncover crimes. They may not exercise political work." See also Law No. 10 of 1992 on Security and Police (3 September 1992), art. 10.

²⁵ Law No. 40 of 1974 on service in the Armed Forces (20 June 1974); Law No. 37 of 1974 issuing the Military Penal Code (14 May 1974) (Military Penal Code); Law No. 1 of 2000 on issuing the Code of Criminal Procedure of the Armed People (20 April 2000) (Military Code of Criminal Procedure), art. 45; Law No. 11 of 2013 amending the Military Penal Code and the Code of Military Procedure (20 April 2013).

²⁶ For instance, article 13 of Law No. 10 of 1992, which regulates the use of force by members of the police, does not comport with article 6 of the International Covenant on Civil and Political Rights on the right to life, to which Libya is party. Article 13 of the Law allows the use of potentially lethal force in instances where there is no imminent danger to a person's life; also, it does not require such use of force to be a last resort, necessary, and proportional to the threat faced, as prescribed by international law and standards. See Human Rights Committee, *General Comment No. 36: The Right to Life (Article 6)*, UN Doc. CCPR/C/GC/36 (30 October 2018), paras 12–13.

the “Head of the State”,²⁷ which presumably means the elected President. Some of the provisions of Law No. 7 of 2012 fail to comply with Libya’s obligations under international human rights law. For example, article 3 provides that, among others, the LIS’s tasks include to “[m]onitor suspicious activities hostile to Libya’s security”, and “[i]ntercept hostile activities carried out by countries and organisations that target national identity and the values and principles of society.”²⁸ This language is undefined and vague and, as such, open to abuse, potentially allowing the LIS to interfere in an illegitimate and unlawful manner with civil society organizations and with human rights work, in violation of, *inter alia*, articles 19, 21 and 22 of the International Covenant on Civil and Political Rights, which guarantee the rights to freedom of expression, to peaceful assembly, and to freedom of association, respectively. Legislative undergird for such a potential for abuse is all the more concerning, particularly in light of the continuous repression of civil society and human rights work in Libya.²⁹

On the other hand, Law No. 7 of 2012 provides that “[t]he LIS shall conduct its activities in accordance with the law and in a way that ensures respect for human rights and fundamental freedoms. Activities thereof that violate such rights and freedoms shall not enjoy immunity” from investigation and prosecution;³⁰ and that “[t]he LIS shall conduct its activities in accordance with human rights and fundamental freedoms guaranteed and protected under the law.”³¹ The inclusion of this language is an important development, yet actual compliance of the LIS with such provisions requires, in practice, effective monitoring by an independent and impartial body. Moreover, immunities from prosecution must not apply to LIS members.³²

Recommendations

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

- **Establish effective civilian oversight over the military, security forces and intelligence services, including by:**
 - **Adequately defining their role in the Constitution and related legislative frameworks;**
 - **Specifically limiting the role of the armed forces to matters related to national defence; and**
 - **Setting up an independent and impartial mechanism to oversee the functioning of such institutions.**

3. Ensuring adequate vetting of military, security forces and intelligence services members

International law and standards

Adequate prior vetting of members of the military, security forces and intelligence services is essential to entrenching the rule of law in Libya and preventing the reoccurrence of serious

²⁷ Law No. 7 of 2012 on establishing the Libyan Intelligence Service (6 February 2012), art. 1. See also article 53(12), which prohibits LIS members to “[j]oin or form political parties throughout the duration of his work for the LIS or join a political, social, national, or foreign entity, except with the permission of the Chief of the LIS.”

²⁸ Law No. 7 of 2012, art. 3(4 and 7).

²⁹ Defender Center for Human Rights, *A Year of Missed Opportunities: A Briefing of the Human Rights Situation in Libya in 2021* (December 2021), pp. 20–23, at <https://www.defendercenter.org/5615>.

³⁰ Law No. 7 of 2012, art. 89.

³¹ Law No. 7 of 2012, art. 90.

³² For further discussion on immunities from prosecution, see section 4 below.

violations of international human rights law and IHL.³³ Accordingly, individuals who have allegedly committed such acts must not be recruited into the military, security forces and intelligence services; if they are already members of such institutions, they should be dismissed from them forthwith through processes that respect due process guarantees.³⁴ The UN Impunity Principles provide that:

Public officials and employees who are personally responsible for gross violations of human rights, in particular those involved in military, security, police, intelligence and judicial sectors, shall not continue to serve in State institutions. Their removal shall comply with the requirements of due process of law and the principle of non-discrimination. Persons formally charged with individual responsibility for serious crimes under international law shall be suspended from official duties during the criminal or disciplinary proceedings.

Parastatal or unofficial armed groups shall be demobilized and disbanded. Their position in or links with State institutions, including in particular the army, police, intelligence and security forces, should be thoroughly investigated and the information thus acquired made public. States should draw up a reconversion plan to ensure the social reintegration of the members of such groups.³⁵

The UN Human Rights Committee has also called on States “to ensure that persons involved in gross human rights violations are removed from military or public service.”³⁶

Libyan law

As mentioned above, several armed groups – which have filled the vacuum left by the State authorities throughout Libya – carry out arrests and detain individuals without any form of judicial oversight or accountability. The same armed groups routinely subject detainees to serious violations and abuses of human rights and IHL, including extrajudicial killings, arbitrary detention, torture and ill-treatment, also through sexual and gender based violence.³⁷

The 2017 Draft Constitution does not include any vetting requirement regarding members of the military, security forces and intelligence services.³⁸ Law No. 40 of 1974 on Service in the Armed Forces prescribes that members of the armed forces must not have been convicted of “any felony unless he has been rehabilitated”, or “be subject to a disciplinary decision expelling

³³ OHCHR, *Rule-Of-Law Tools for Post-Conflict States – Vetting: An Operational Framework*, Doc. HR/PUB/06/5 (2006), p. 4: “[v]etting is an important aspect of personnel reform in countries in transition. Vetting can be defined 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. Public 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.”

³⁴ *Ibid.*, p. 21.

³⁵ *Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity*, principles 36(a) and 37(1). See also *Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions*, UN Doc. E/1989/89 (January 1991), principle 18.

³⁶ *Concluding Observations: Argentina*, UN Doc. CCPR/CO/70/ARG (15 November 2000), para. 9. See also *Concluding Observations: Bolivia*, UN Doc. CCPR/C/79/Add.74 (5 May 1997), para. 15.

³⁷ *Report of the Independent Fact-Finding Mission on Libya*, UN Doc. A/HRC/48/83 (1 October 2021), paras 54–56.

³⁸ It should be noted that articles 101 and 115 sets criteria for the election of the President and the appointment of Government members, respectively. On the other hand, article 198 of the 2016 Draft Constitution provided that: “The State shall be committed to adopting the following measures: 1. To examine public establishments for their structural reform and to clear them from those who had a hand in human rights violations and corruption crimes, and to review the entitlements of ranks, grades, and positions in them in accordance with the law. Any public institution found to be in violation of the Constitution must be dissolved. 2. To disarm and dismantle all armed organizations and provide psychological and professional rehabilitation for their personnel.”

him from public service.”³⁹ Law No. 10 of 1992 on Security and Police provides that the members of the police must have not be “convicted of any felony or misdemeanour of moral turpitude, even if [they] ha[ve] been rehabilitated.”⁴⁰ Law No. 7 of 2012 on establishing the Libyan Intelligence Service employs almost identical language with regard to LIS members.⁴¹

Given that Libyan criminal law does not penalize certain crimes under international law (e.g., war crimes and crimes against humanity), or fails to define them in line with international law and standards (e.g., with respect to torture and enforced disappearance),⁴² the featuring of “felony” in the abovementioned Laws is not sufficient to ensure that persons allegedly responsible for serious violations or abuses of international human rights law and IHL be excluded from serving within the military, security forces or intelligence services.

In order to comply with international law and standards, the Libyan authorities must ensure adequate prior vetting of members of the military, security forces and intelligence services, particularly when armed group members are already integrated into such institutions or when their integration is envisaged. As further discussed below, prior vetting is also a guarantee of non-recurrence relevant to the Libyan transitional justice process.⁴³

Recommendations

In light of the above, the ICJ recommends to the Libyan authorities to ensure:

- **Adequate prior vetting of members of the military, security forces and intelligence services, particularly in the context of the integration of armed group members into such institutions, including by:**
 - **Inserting in the Constitution provisions barring persons allegedly responsible for violations and abuses of international human rights law and IHL from service in the military, security forces and intelligence services; and**
 - **Reviewing Law No. 40 of 1974 on Service in the Armed Forces, Law No. 10 of 1992 on Security and Police, and Law No. 7 of 2012 on establishing the Libyan Intelligence Service to include recruitment and membership requirements that exclude persons allegedly responsible for violations or abuses of international human rights law and IHL;**
- **That any dismissal based on such requirements occurs in compliance with due process standards.**

³⁹ Law No. 40 of 1974 on service in the Armed Forces (20 June 1974), arts. 19 and 22.

⁴⁰ Law No. 10 of 1992, arts. 19 and 22.

⁴¹ Law No. 7 of 2012, art. 15.

⁴² ICJ, *Accountability for Serious Crimes under International Law in Libya: an Assessment of the Criminal Justice System* (July 2019), pp. 31–47, at <https://www.icj.org/wp-content/uploads/2019/07/Libya-Accountability-serious-crimes-Publications-Reports-Thematic-reports-2019-ENG.pdf>.

⁴³ Guarantees of non-recurrence are a form of reparation that aims to prevent the future occurrence of serious violations and abuses of international human rights law and IHL. See section 6 below.

4. Removing immunity from prosecution for crimes under international law

International law and standards

Immunities are exemptions from penalties, prosecution or lawsuits from which an individual who would otherwise be subject to them may benefit as a result of their official capacity when acting in the exercise of their duties, or of their status as a State official.⁴⁴

Under international law, Libya has an obligation to investigate, prosecute and punish, as warranted by the evidence, crimes under international law,⁴⁵ including when committed by non-State armed groups, and provide redress to victims.⁴⁶ This obligation must not be frustrated by the granting of immunities in connection with an alleged perpetrator's function or status.

The UN Impunity Principles provide that:

States should adopt and enforce safeguards against any abuse of rules such as those pertaining to ... immunities ... that fosters or contributes to impunity. ... [t]he official status of the perpetrator of a crime under international law – even if acting as head of State or Government – does not exempt him or her from criminal or other responsibility and is not grounds for a reduction of sentence.⁴⁷

⁴⁴ Under international law, a State official cannot invoke immunities, based on their official function (functional immunities) or status (personal immunities), to bar the prosecution of crimes under international law before national courts of the same country. International and domestic courts have concluded that functional immunities may not be invoked even in foreign domestic courts to impede the prosecution of crimes under international law. See, *inter alia*, *Nazi Conspiracy and Aggression: Opinion and Judgment*, US Government Printing Office (1947), p. 53; ICTY, *Prosecutor v. Blaškić*, Case No. IT-95-14, Appeals Chamber, Judgment on the Request of The Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997 (29 October 1997), para. 41; *R v Bow Street Metropolitan Stipendiary Magistrate, Ex Parte Pinochet Ugarte*, No 3 [1999] UKHL 17 (24 March 1999). Personal immunities accrue to incumbent heads of State and heads of government and Ministries of Foreign Affairs, and may bar foreign domestic prosecutions of such individuals for the duration of their tenure unless the sending State opts for a waiver. See International Court of Justice, *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment (14 February 2002), paras 58–61, 70–71. However, personal immunities may not be invoked before international courts and tribunals prosecuting crimes under international law, including the International Criminal Court (ICC). See, *inter alia*, Special Court for Sierra Leone, *Prosecutor v. Taylor*, Case No. SCSL-2003-01-1, Appeals Chamber, Decision on Immunity from Jurisdiction (31 May 2004), para. 52; ICC, *Prosecutor v. Al-Bashir*, Case No. ICC-02/05-01/09 OA2, Appeals Chamber, Judgment in the Jordan Referral re Al-Bashir Appeal (6 May 2019), paras 95 ff.

⁴⁵ *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 1465 UNTS 85, 10 December 1984 (CAT) (Libya acceded on 16 May 1989), arts. 12–13; *Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity*, principle 19; Human Rights Committee, *General Comment No. 31: Nature of the General Legal Obligation on States Parties to the Covenant*, UN Doc. CCPR/C/21/Rev.1/Add.13 (26 May 2004), paras 15 and 18; ICJ, *The Investigation and Prosecution of Potentially Unlawful Death – Practitioners' Guide No. 14* (June 2019), pp. 51–62 and 113–116, at <https://www.icj.org/wp-content/uploads/2019/09/Universal-PG-14-Unlawful-death-Publications-Reports-Practitioners-Guides-series-2019-ENG.pdf>.

⁴⁶ AComHPR, *Guidelines on Combating Sexual Violence and its Consequences in Africa*, guideline 9; Committee on the Elimination of Discrimination Against Women (CEDAW Committee), *General Recommendation No. 30 on Women in Conflict Prevention, Conflict and Post-Conflict Situations*, UN Doc. CEDAW/C/GC/30 (1 November 2013), para. 24(b); CEDAW Committee, *General Recommendation No. 35 on Gender-Based Violence against Women, Updating General Recommendation No. 19*, UN Doc. CEDAW/C/GC/35 (26 July 2017), para. 28(a).

⁴⁷ *Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity*, principles 22 and 27(c). See also *Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions*, principle 19; *The Minnesota Protocol on the Investigation of Potentially Unlawful Death (2016)*, Office of the High Commissioner for Human Rights (New York/Geneva 2017), para. 8(c).

The Human Rights Committee, the Committee against Torture and the African Commission of Human and Peoples' Rights have affirmed that immunities are incompatible with obligations under their respective treaties.⁴⁸

Libyan law

Article 69(1) of the Libyan Penal Code provides that:

An act committed through the exercise of a right or the performance of a duty imposed by law or by a lawful order of a public authority shall not be subject to punishment. If an act which constitutes an offence has been carried out by order of authority, the public official who gave the order is responsible for that offence ...

The above provision, which grants immunity to persons committing crimes pursuant to a legal duty, fails, in part, to comply with international law. The second sentence of Article 69(1) is compliant to the extent that it does not shield from punishment public officials who have ordered or materially committed a crime.⁴⁹ However, the first sentence is clearly not in line with Libya's international legal obligations because it generally excludes criminal liability of public officials without envisaging an exception with respect to crimes under international law.

Moreover, article 36(2) of Libya's Military Penal Code stipulates that "[t]he use of weapons for the purpose of returning deserters to zones of active hostilities or to military units tasked with combat missions, stopping pillaging or vandalism, or executing service duties shall not be punishable, if such cannot be achieved without the use of weapons."⁵⁰ This provision, which envisages an immunity from prosecution in relation to the employment of "weapons" by armed force members, may well be applicable to cases in which the use of force, which is unlawful pursuant to international law, may result in the injuring or killing of an individual. The aims pursued by the use of potentially lethal force under this article, however, are too vague and undefined, particularly when referring to "stopping pillaging or vandalism, or executing service duties." Military personnel must employ potentially lethal force in accordance with international law, i.e., IHL when such force is used in connection with the conduct of hostilities,⁵¹ and international human rights law in the context of law enforcement operations.⁵² Only lethal force employed in compliance with the strict requirements set by both bodies of law can be justified and as such lawful; any use of force that breaches such requirements must be prosecuted. Immunities barring such prosecutions, including article 36(2) of the Libyan Military penal Code, violate international law and standards.

Law No. 10 of 1992 on Security and Police provides that "... no investigation or criminal action procedure may be undertaken against the member of the police agency for any mistake he commits during the performance of his duties or due to the exercise of his functions unless by

⁴⁸ See e.g., Human Rights Committee, *General Comment No. 31*, para. 18; *General Comment No. 36*, para. 27; CAT Committee, *General Comment No. 3: Implementation of Article 14 by States Parties*, UN Doc. CAT/C/GC/3 (13 December 2012), para. 42; AComHPR, *General Comment No. 3: The Right to Life (Article 4)*, 57th Ordinary Session (4–18 November 2015), para. 28.

⁴⁹ Article 35 of the Military Penal Code includes a similar provision.

⁵⁰ Military Penal Code, art. 36(2).

⁵¹ *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts*, 1125 UNTS 3 (8 June 1977), arts. 48, 51 and 57; *Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of Non-International Armed Conflicts*, 1125 UNTS 610 (8 June 1977), art. 13; International Committee of the Red Cross, *Customary International Humanitarian Law Database*, rules 1–5, at https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_cha.

⁵² Human Rights Committee, *General Comment No. 36*, paras 12–13; AComHPR, *General Comment No. 3*, para. 27; *Code of Conduct for Law Enforcement Officials*, UN Doc. A/RES/34/169 (17 December 1979); *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials*, Eighth UN Congress on the Prevention of Crime and the Treatment of Offenders (27 August–7 September 1990).

the written authorization of the [Minister of Justice].⁵³ Such a broad immunity is incompatible with Libya's obligation to investigate and prosecute crimes under international law, including those committed by State officials. Indeed, judicial authorities should be able to investigate alleged crimes committed by police members without having to request authorization from the Minister of Justice.

The same observations apply in relation to article 80 of Law No. 7 of 2012 on establishing the Libyan Intelligence Service, which stipulates: "[e]xcept in cases of *flagrante delicto*, no investigative action may be taken against any employee of the LIS with regard to a felony or a misdemeanour, except with the written permission of the Chief of the LIS." On the other hand, article 89 provides that "[t]he LIS shall conduct its activities in accordance with the law and in a way that ensures respect for human rights and fundamental freedoms. Activities thereof that violate such rights and freedoms shall not enjoy immunity." Therefore, article 89 seems to bar immunities in connection with conduct with which article 80 is concerned if, in turn, such conduct discloses evidence of human rights violations, and by implication serious violations amounting to crimes under international law. If that interpretation were correct, Law No. 7 of 2012 would comply with international law and standards. More clarity regarding the interaction between these two provisions, however, is necessary.

Immunity from prosecution may also arise in connection to amnesties. Law No. 38 of 2012, for instance, provided a blanket amnesty for the "necessities of the 17 February Revolution in terms of military, security or civil acts carried out by revolutionaries to save or protect the revolution", in contravention of Libya's obligations under international law.⁵⁴ Amnesties may also be granted under Law No. 29 of 2013 on transitional justice, although the criteria for the granting of such amnesties are undefined.⁵⁵ To comply with international law and standards, such criteria must be clearly defined in law. In particular, amnesties may not be granted for crimes under international law and cannot prejudice the rights of victims and their families to truth and to an effective remedy and reparation.⁵⁶ The lack of any such criteria in Law No. 29 of 2013 leaves open the possibility that amnesties be awarded in violations of Libya's obligation to investigate, prosecute and punish crimes under international law.

Recommendations

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

- **Include in the Constitution a provision excluding immunity from investigation, prosecution and punishment of public officials, including members of the military, security forces and intelligence services, who are allegedly responsible for crimes under international law;**

⁵³ Law No. 10 of 1992, art. 103.

⁵⁴ Law No. 38 of 2012 on some Procedures concerning the Transitional Phase (2 May 2012), art. 4. In 2012 and 2015, two amnesty laws have been enacted that excluded some but not all crimes under international law from their scope of application. See Law No. 35 of 2012 on the Amnesty of Particular Crimes (2 May 2012), art. 1; Law No. 6 of 2015 on General Amnesty (7 September 2015), art. 1. For an analysis of these laws, see ICJ, *Accountability for Serious Crimes under International Law in Libya*, pp. 55–58.

⁵⁵ Article 5 of Law No. 29 of 2013 states that transitional justice "shall be based on ... legislative amnesty and general amnesty." For this purpose, the FFRC is tasked to establish a "department of arbitration and reconciliation based on the call for consensual reconciliation and legislative and general amnesty." The Fact-Finding and Reconciliation Commission (FFRC), established under the Law, may also refer decisions to award compensation to "amnesty committees." As the ICJ observed, it is problematic that Law No. 29 of 2013 does not specify any criteria or procedure for the granting of amnesties, nor does it clarify whether the FFRC is itself empowered to bestow them or whether it is only entrusted to make recommendations concerning amnesties. See ICJ, *Impunity No More: A Roadmap to Strengthening Transitional Justice in Libya* (July 2020), pp. 7–9 and 15–17.

⁵⁶ *Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity*, principle 24.

- **Amend the Penal Code, the Military Penal Code, and Law No. 10 of 1992 on Security and Police to provide for the criminal liability of public officials, including military personnel and police officers, responsible for a crime under international law in the performance of their duties, and expunge any provision that could grant immunity from investigation, prosecution and punishment for such crimes;**
- **Amend Law No. 7 of 2012 to better clarify that no immunity applies to LIS members allegedly responsible for crimes under international law; and**
- **Amend Law No. 29 of 2013 on transitional justice to ensure that amnesties do not include crimes under international law in their scope of application, and do not prejudice the rights of victims and their families to truth and to an effective remedy and reparation.**

5. Excluding the jurisdiction of military tribunals over crimes under international law

International law and standards

Under international law, military tribunals should not have jurisdiction to try and adjudicate crimes under international law committed by armed force members, particularly when the victims include civilians.⁵⁷ In this respect, the UN Impunity principles provide that:

The jurisdiction of military tribunals must be restricted solely to specifically military offences committed by military personnel, to the exclusion of human rights violations, which shall come under the jurisdiction of the ordinary domestic courts or, where appropriate, in the case of serious crimes under international law, of an international or internationalized criminal court.⁵⁸

Military tribunal should never have jurisdiction to try and adjudicate serious violations of international human rights law and IHL, including crimes under international law.⁵⁹ Military tribunals should try and adjudicate only “offences of a purely military nature committed by military personnel.”⁶⁰ The notion of what constitutes “specifically military offences” should be interpreted narrowly and be restricted to “infractions strictly related to their military status”,⁶¹ including “disciplinary” offences.⁶² In addition, when adjudicating such matters, military tribunals must in any event fully comply with international fair trial standards.⁶³

⁵⁷ *Report of the Working Group on Arbitrary Detention*, UN Doc. E/CN.4/1999/63 (18 December 1998), para. 80(b). Although this briefing is concerned with jurisdiction over military personnel only, it should be noted that military tribunals should never have jurisdiction to try civilians, who should always be subject to the jurisdiction of ordinary civilian courts. See AComHPR, *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*, Doc. OS(XXX)247 (2003), principle L(c); *Draft Principles Governing the Administration of Justice through Military Tribunals (Decaux Principles)*, UN Doc. E/CN.4/2006/58 (13 January 2006), principle 5.

⁵⁸ *Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity*, principle 29.

⁵⁹ *Draft Principles Governing the Administration of Justice through Military Tribunals (Decaux Principles)*, principle 9.

⁶⁰ AComHPR, *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*, principle L(a).

⁶¹ *Draft Principles Governing the Administration of Justice through Military Tribunals (Decaux Principles)*, principle 8.

⁶² ICJ, *Challenges for the Libyan Judiciary: Ensuring Independence, Accountability and Gender Equality* (July 2016), p. 72, at <https://www.icj.org/wp-content/uploads/2016/07/Libya-Challenges-the-Judiciary-Publications-Reports-Thematic-report-2016-ENG.pdf>.

⁶³ Human Rights Committee, *General Comment No. 32: Right to Equality before Courts and Tribunals and to a Fair Trial (Article 14)*, UN Doc. CCPR/C/GC/32 (23 August 2007), para. 22; AComHPR, *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*, principle L(b); *Draft Principles Governing the Administration of Justice through Military Tribunals (Decaux Principles)*, principles 13–17. As previously noted by the ICJ, military tribunals in Libya fail to fully comply with international fair trial standards, particularly in relation

Libyan law

The 2017 Draft Constitution provides that “[t]he military judiciary shall be the judiciary competent to review military offences committed by military personnel in accordance with the procedures defined by law, in a manner that ensures fair trial. This shall include the right to appeal at cassation as specified by the law.”⁶⁴ While this provision incorporates some of the requirements prescribed under international law and standards, it fails to expressly exclude crimes under international law from the jurisdiction of military tribunals.

Military tribunals in Libya have jurisdiction to try and adjudicate ordinary offences under the Libyan Penal Code when committed by armed force members, e.g., murder, as well as so-called “military crimes” envisaged under the Military Penal Code,⁶⁵ such as “killing or harming wounded persons”, “abandoning wounded persons”, or “pillaging.”⁶⁶ Given that, when criminalized under Libyan criminal law, crimes under international law are characterized as “ordinary offences” or “military crimes”,⁶⁷ it follows that military tribunals have jurisdiction to try and adjudicate such crimes when committed by armed force members, in violation of international law and standards.

On the other hand, ordinary civilian courts are “competent to try military personnel who assist civilians” in the commission of punishable offences.⁶⁸ This may be interpreted in the sense that civilian courts are competent to try armed force members when they aid or abet, or otherwise provide assistance in, the commission of an offence, whose principal perpetrator is a civilian. While such a provision is a positive step forward, the Military Penal Code and the Military Code of Criminal Procedure should guarantee that ordinary civilian courts be competent to try all serious violations of international human rights law and IHL.

Recommendations

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

- **Include in the Constitution a provision that expressly excludes the jurisdiction of military tribunals to try and adjudicate serious violations of international human rights law and IHL, including crimes under international law;**
- **Amend the Military Penal Code, the Military Code of Criminal Procedure and any related laws to:**
 - **Transfer the competence to try and adjudicate crimes under international law from military tribunals to ordinary civilian courts;**
 - **Limit the jurisdiction of military tribunals to specifically military offences committed by armed force members that do not constitute human rights violations; and**
- **Ensure that military tribunals, when trying and adjudicating offences under their jurisdiction, comply with international fair trial standards.**

to their competence, independence and impartiality, as well as the right to appeal. See ICJ, *Challenges for the Libyan Judiciary*, pp. 67–69 and 74–75.

⁶⁴ 2017 Draft Constitution, article 135.

⁶⁵ Military Penal Code, arts. 2–3, 19; Military Code of Criminal Procedure, art. 45; Law No. 11 of 2013 amending the Military Penal Code and the Code of Military Procedure (20 April 2013), arts. 2–3. For more information, see ICJ, *Challenges for the Libyan Judiciary*, pp. 66–67, 71, 73–74.

⁶⁶ Military Penal Code, arts. 55–56 and 107.

⁶⁷ ICJ, *Accountability for Serious Crimes under International Law in Libya*, pp. 31–47.

⁶⁸ Law No. 11 of 2013, art. 4.

6. Strengthening guarantees of non-recurrence under the transitional justice process

International law and standards

Guarantees of non-recurrence are a form of reparation that aims to prevent the future occurrence of serious violations and abuses of international human rights law and IHL.⁶⁹ According to the UN Impunity Principles, the aim of these measures is to ensure that “victims do not again have to endure violations of their rights”; to that end, guarantees of non-recurrence should include “institutional reforms and other measures necessary to ensure respect for the rule of law, foster and sustain a culture of respect for human rights, and restore or establish public trust in government institutions.”⁷⁰

Moreover, as any other form of reparation, guarantees of non-recurrence need to be implemented in a gender-sensitive manner, meaning that they “must be based on a diagnosis of the relationship between pre-existing gender inequality and sexual and gender-based violence, with a view to their eradication.”⁷¹ In that respect, guarantees of non-recurrence should be transformative,⁷² namely “aspire to subvert the pre-existing structural inequality that may have engendered” sexual and gender-based violence.⁷³

Establishing civilian oversight over the military, security forces and intelligence services, and ensuring adequate prior vetting of their members (or prospective members), are guarantees of non-recurrence,⁷⁴ and should be an integral part of the Libyan transitional justice process.⁷⁵ To be gender-responsive, guarantees of non-recurrence should, among other things, focus on preventing the future commission of sexual and gender-based crimes by members of such forces.

Libyan law

Law No. 29 of 2013 on transitional justice does not list guarantees of non-recurrence as a form of reparation.⁷⁶ Some provisions of the Law deal with legislative and institutional reform, specifically with regard to the Law’s objectives to repeal “unjust laws that violated human rights and allowed for tyranny in the country” and “reformation of state institutions.”⁷⁷ Moreover, the Fact-Finding and Reconciliation Commission is tasked, among other things, to “... review legislation related to the issue of transitional justice”, and “work to repeal unjust laws and restore proper legal life, in accordance with the constitution and with Sharia law.”⁷⁸

⁶⁹ *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, para. 23.

⁷⁰ *Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity*, principle 35.

⁷¹ UN Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence, *The Gender Perspective in Transitional Justice Processes*, UN Doc. A/75/174 (17 July 2020), para. 63. See also ICJ, *Towards Gender-Responsive Transitional Justice in Libya*, pp. 46–48.

⁷² CEDAW Committee, *General Recommendation No. 30*, para. 79; *General Recommendation No. 35*, para. 33(b).

⁷³ UN Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence, *The Gender Perspective in Transitional Justice Processes*, para. 37.

⁷⁴ *Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity*, principles 35–36; *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, para. 23(a); AComHPR, *Guidelines on Combating Sexual Violence and its Consequences in Africa*, guideline 63.

⁷⁵ ICJ, *Impunity No More: A Roadmap to Strengthening Transitional Justice in Libya*, pp. 28–29; *Towards Gender-Responsive Transitional Justice in Libya: Addressing Sexual and Gender-Based Crimes against Women* (March 2022), pp. 46–48.

⁷⁶ Law No. 29 of 2013 on Transitional Justice (2 December 2013), art. 23.

⁷⁷ Law No. 29 of 2013, arts. 4–5.

⁷⁸ Law No. 29 of 2013, arts. 6 and 8.

While Law No. 29 of 2013 makes reference to “reformation of state institutions”, this is insufficient to specifically address the question of establishing civilian oversight and adequate prior vetting (as described above in section 3), including exclusion from service of members of the military, security forces and intelligence services, who are allegedly responsible for crimes under international law, including sexual and gender-based crimes.

Recommendations

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

- **Amend Law No. 29 of 2013 to ensure that guarantees of non-recurrence form part of the reparation measures under the Law, including by establishing civilian oversight over the military, security forces and intelligence services, and by ensuring adequate prior vetting of their members;**
- **Ensure that guarantees of non-recurrence, including civilian oversight and prior vetting, be designed and implemented in a gender-sensitive manner.**

Commission Members

March 2021 (for an updated list, please visit www.icj.org/commission)

President:

Prof. Robert Goldman, United States

Vice-Presidents:

Prof. Carlos Ayala, Venezuela

Justice Radmila Dragicevic-Dicic, Serbia

Executive Committee:

Justice Sir Nicolas Bratza, UK

Dame Silvia Cartwright, New Zealand

(Chair) Ms Roberta Clarke, Barbados-Canada

Mr. Shawan Jabarin, Palestine

Ms Hina Jilani, Pakistan

Justice Sanji Monageng, Botswana

Mr Belisário dos Santos Júnior, Brazil

Other Commission Members:

Professor Kyong-Wahn Ahn, Republic of Korea

Justice Chinara Aidarbekova, Kyrgyzstan

Justice Adolfo Azcuna, Philippines

Ms Hadeel Abdel Aziz, Jordan

Mr Reed Brody, United States

Justice Azhar Cachalia, South Africa

Prof. Miguel Carbonell, Mexico

Justice Moses Chinhengo, Zimbabwe

Prof. Sarah Cleveland, United States

Justice Martine Comte, France

Mr Marzen Darwish, Syria

Mr Gamal Eid, Egypt

Mr Roberto Garretón, Chile

Ms Nahla Haidar El Addal, Lebanon

Prof. Michelo Hansungule, Zambia

Ms Gulnora Ishankanova, Uzbekistan

Ms Imrana Jalal, Fiji

Justice Kalthoum Kennou, Tunisia

Ms Jamesina Essie L. King, Sierra Leone

Prof. César Landa, Peru

Justice Ketil Lund, Norway

Justice Qinisile Mabuza, Swaziland

Justice José Antonio Martín Pallín, Spain

Prof. Juan Méndez, Argentina

Justice Charles Mkandawire, Malawi

Justice Yvonne Mokgoro, South Africa

Justice Tamara Morschakova, Russia

Justice Willly Mutunga, Kenya

Justice Egbert Myjer, Netherlands

Justice John Lawrence O'Meally, Australia

Ms Mikiko Otani, Japan

Justice Fatsah Ouguergouz, Algeria

Dr Jarna Petman, Finland

Prof. Mónica Pinto, Argentina

Prof. Victor Rodriguez Rescia, Costa Rica

Mr Alejandro Salinas Rivera, Chile

Mr Michael Sfard, Israel

Prof. Marco Sassoli, Italy-Switzerland

Justice Ajit Prakash Shah, India

Justice Kalyan Shrestha, Nepal

Ms Ambiga Sreenevasan, Malaysia

Justice Marwan Tashani, Libya

Mr Wilder Tayler, Uruguay

Justice Philippe Texier, France

Justice Lillian Tibatemwa-Ekirikubinza, Uganda

Justice Stefan Trechsel, Switzerland

Prof. Rodrigo Uprimny Yepes, Colombia



International
Commission
of Jurists

P.O. Box 1740
Rue des Buis 3
CH 1211 Geneva 1
Switzerland

t +41 22 979 38 00
f +41 22 979 38 01
www.icj.org