
The Challenge of Prosecuting Conflict-Related Gender-Based Crimes under Libyan Transitional Justice

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"We as Libyans cannot begin Saif's trial. There is no central power to prosecute him."¹

— *Ahmed al-Jehani, the Libyan
Coordinator for the ICC*

I. Introduction

In the recent Libyan armed conflict, as well as in most internal and international wars, civilians, particularly women and children, have formed the primary target for all forms of sexual violence—best expressed as conflict-related gender-based crimes.² These crimes have been systematically conducted on a large scale against both Libyan women and men as a weapon of war with the intention of damaging the fabric of Libyan society, driving a wedge between families and tribes, and undermining Libyan social and community cohesion.

Addressing wartime rape and other forms of sexual violence at the outset of any Libyan truth and reconciliation campaign would help ensure a durable peace, amnesty, transparency, and accountability among Libyan communities and tribes.³ Failure on the part of the Libyan government and the General National Congress to restore justice and build peace may well trigger cycles of revenge and place the whole country on the horns of a dilemma.

However, in the aftermath of internal conflict and civil war, which usually result in mass violence and gross human rights violations, transitional justice must be an essential element and an integral component

¹ Barak Barfi, "Libya's Unwilling Revolutionaries," Online: Project Syndicate (3 July 2012) <<http://www.project-syndicate.org/commentary/libya-s-unwilling-revolutionaries>> Accessed on: 13 February 2013 [Libya's Unwilling Revolutionaries].

² UN Department of Political Affairs, *Guidance for Mediators: Addressing Conflict-Related Sexual Violence in Ceasefire and Peace Agreements* (New York, N.Y.: United Nations Publications, 2012) 8.

³ *Ibid.*, at p. 9.

of any political or legal process that aims at achieving conflict resolution and peace-building.⁴ To ensure accountability, establish equity, make justice and achieve reconciliation, Libyan transitional justice should involve a full range of socio-legal mechanisms that would help the Libyan people deal with widespread or systematic human rights violations, particularly conflict-related gender-based crimes committed by all parties to the conflict.⁵ Ultimately, transitional justice has to be constituted of different measures and processes, including criminal justice, truth-seeking and reconciliation commissions, reparations to victims, and institutional reforms.⁶

This article argues that the incompetence of the current Libyan transitional justice system, manifested in its failure to respond adequately to conflict-related gender-based crimes, impedes access to justice for victims, encourages the culture of impunity, and leaves the Libyan peace-building process open to the danger of collapse. Accordingly, this analysis deals with gender-based crimes in a war setting as a case study and with transitional justice as a combination of a variety of socio-legal approaches to provide both victims and perpetrators with a sense of justice.⁷

In another work, the author defined the term “gender-based crimes” as those crimes committed against individuals based on socially constructed norms of maleness and femaleness, while sexual violence is a subset of these crimes.⁸ In this connection, Article 1 of the Declaration on the Elimination of

⁴ Jens David Ohlin, “On the Very Idea of Transitional Justice,” (Winter/Spring 2007) *The Whitehead Journal of Diplomacy and International Relations* 52; Laurel E. Fletcher & Harvey M. Weinstein, “Violence and Social Repair: Rethinking the Contribution of Justice to Reconciliation,” (2002) 24 *Human Rights Quarterly* 574; Matiangai Sirleaf, “Regional Approach to Transitional Justice? Examining the Special Court for Sierra Leone and the Truth & Reconciliation Commission for Liberia,” (2009) 21 *Florida Journal of International Law* 209; Par Engstrom, “Transitional Justice and Ongoing Conflict,” (1 November 2011). Available at SSRN: <<http://ssrn.com/abstract=2004313>> or <<http://dx.doi.org/10.2139/ssrn.2004313>> (Accessed on: 15 January 2013) at p. 18 [Transitional Justice and Ongoing Conflict].

⁵ Secretary-General’s Report on Transitional Justice and the Rule of Law in Conflict and Post-Conflict Societies, 3 August 2004, S/2004/616.

⁶ Andrew B. Friedman, “Transitional Justice And local Ownership: A Framework for the Protection of Human Rights,” Electronic copy available at: <<http://ssrn.com/abstract=1919874>> (Accessed on: 15 January 2013) at p. 4; Hemi Mistry, “Transitional Justice and the Arab Spring,” Chatham House (1 February 2012) at pp. 3-4 [Transitional Justice and the Arab Spring]; Cybèle Cochran, “Transitional Justice: Responding to Victims of Wartime Sexual Violence in Africa” (2008) 9 *The Journal of International Policy Solutions* 33 [Responding to Victims of Wartime Sexual Violence in Africa]; Katherine M. Franke, “Gendered Subjects of Transitional Justice,” (2006) 15:3 *Columbia Journal of Gender and Law* 813; *The 2012 International and Transitional Justice Forum: ‘Drawing Lessons From Local Processes to Improve Regional and International Perspectives of Justice’*, Avocats Sans Frontières and others (30th -31st July 2012) at p. 2 [International and Transitional Justice Forum]; UN Support Mission in Libya, *Transitional Justice – Foundation for a New Libya*, 17 September 2012, at p.1.

⁷ Fionnuala Ní Aoláin & Catherine Turner, “Gender, Truth, and Transition,” (2007) 16 *UCLA Women’s Law Journal* 233; International and Transitional Justice Forum, *supra* note 6, at p. 2; Rosemary Nagy, “Transitional Justice as Global Project: Critical Reflections,” (2008) 29:2 *Third World Quarterly* 276; Zachary D. Kaufman, “The Future of Transitional Justice,” (2005) 1 *St. Antony’s International Review* 58.

⁸ Hilmi M. Zawati, *Fair Labelling and the Dilemma of Prosecuting Gender-Based Crimes at the International Criminal Tribunals* (New York, N.Y.: Oxford University Press, 2014) at p. xiii [Hilmi M. Zawati].

Violence against Women states that violence against women “means any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life.”⁹ The 1995 Beijing Declaration and the Platform for Action expanded this definition to incorporate gender-based crimes and other violations of women’s rights in a wartime setting, including systematic rape, sexual slavery, forced pregnancy, forced sterilization, coercive/forced use of contraceptives, and forced abortion.¹⁰

In addressing the above argument, this research study examines four overarching themes, which emerge in the course of the following sections. The first deals with Libya’s conflict-related gender-based crimes and transitional justice. It focuses on gender-based crimes as a weapon of war in the recent Libyan Civil War conducted by both government forces and paramilitaries and to a lesser degree by rebel fighters. It also examines Libya’s project of transitional justice and peace-building process. The second section reviews wartime rape crime under Libyan laws. It looks into the laws adopted by the Libyan National Transitional Council (NTC) before the handing over of power to the elected General National Congress (GNC) on 8 August 2012 and into Libyan Penal Law and its amendments. Finally, this section affirms Libya’s obligations under the norms of international law to protect victims and prosecute alleged gender-based crimes.

The third part of this analysis underlines the dilemma of prosecuting gender-based crimes under Libyan transitional justice. It brings to light four major obstacles to adequately addressing gender-based crimes under the Libyan transitional justice system, including legal impunity and lawlessness, lack of the rule of law v. militia justice, absence of security and public order, and lack of democratic institutions. Finally, this study scrutinizes three key mechanisms for gender-sensitive transitional justice in Libya, involving urgent reform of the justice system by incorporating the international crimes listed in Articles 6-8 of the Rome Statute of the International Criminal Court (ICC) into the provisions of the Libyan Penal Code, establishing an unprejudiced truth-seeking and reconciliation commission to investigate and address gender-based crimes committed by all parties to the recent civil war in Libya—including those committed by rebel brigades during and after the war—and finally setting up a Libyan special court as a hybrid judicial system for legal accountability similar to the systems founded in Sierra Leone and Cambodia. Finally, this inquiry concludes by elucidating the findings of the above sections and answering the question of what must be done to improve Libyan transitional justice so as to adequately address gender-based crimes and end the culture of impunity.

⁹ *Declaration on the Elimination of Violence against Women* GA Res. 48/104, 48 UN GAOR Supp. (No. 49) at 217, UN Doc. A/48/49 (1993).

¹⁰ *Beijing Declaration and Platform for Action, Fourth World Conference on Women*, 15 September 1995, A/CONF.177/20 (1995) and A/CONF.177/20/Add.1 (1995) at paras. 15 & 15 bis.

II. Gender-Based Crimes and Transitional Justice in Libya

In order to grasp fully the two main components of this study—conflict-related gender-based crimes and the Libyan transitional justice system—it is necessary at the outset of this work to briefly discuss the horrific use of wartime rape and other forms of sexual violence by all parties to the Libyan civil war, whether during or after the conflict, and its damaging impact on the fabric of Libyan society, on the one hand, and the role of the Libyan transitional justice system in addressing the needs of the victims—regardless of their tribal or political orientation—restoring justice, and building peace, on the other.

1. Gender-Based Crimes as a Weapon of War

a. Rape Accounts:

(i) Rape of Libyan Women and Minors

It has been largely reported that thousands of Libyan women, children and men were drafted for different forms of conflict-related gender-based crimes conducted by both government forces and militias, and to a lesser extent by rebel fighters during and after the conflict,¹¹ whether at the victims' homes or in detention centres for the purpose of extracting information.¹² These crimes included systematic mass rape, gang rape,¹³ sexual torture,¹⁴ sexual enslavement,¹⁵ sexual terrorism, gender-based persecution, male rape,¹⁶ and forced nudity.¹⁷ Investigations revealed that

¹¹ See *8000 Wartime Rape Cases in Libya, 2000 of Them by Rebel Forces: An Interview with Seham Sergewa*, Free Libya Satellite Channel (11 June 2012) <<https://www.youtube.com/watch?v=9jbV5ly9waE>> (Accessed on: 16 February 2013), (Arabic). See also Report of the International Commission of Inquiry on Libya, *infra* note 12, at para. 525.

¹² *The Battle for Libya: Killings, Disappearances and Torture*, Amnesty International, September 2011, Index: MDE 19/025/2011, at pp. 76-77 [the Battle for Libya]; *Militias Threaten Hopes for New Libya*, Amnesty International, February 2012, Index: MDE 19/002/2012, at p. 14 [Militias Threaten Hopes for New Libya]; UN Human Rights Council, "Report of the International Commission of Inquiry on Libya," UN Doc. A/HRC/19/68 (2 March 2012) para. 69 [Report of the International Commission of Inquiry on Libya].

¹³ A case in point is the famous instance of Iman al-Obeidi, a lawyer from Benghazi, bursting into the Rixos Hotel in Tripoli to tell the foreign media that she had been tortured and gang raped by fifteen members of the government forces. See Human Rights Watch, "Libya: Transitional Government Should Support Victims, Promote Justice for Sexual Violence," (19 September 2011) at p. 1; Karen Leigh, "Rape in Libya: The Crime that Dare Not Speak its Name," *Time* (Thursday, 9 June 2011). Online: <<http://www.time.com/time/world/article/0,8599,2076775,00.html>> (Accessed on: 15 February 2013).

¹⁴ Michelle Faul, "Hundreds of Women Raped By Gaddafi Militia," *The Independent* (Sunday, 29 May 2011). Online: <<http://www.independent.co.uk/news/world/africa/hundreds-of-women-raped-by-gaddafi-militia-2290609.html>> (Accessed on: 15 February 2013); Report of the International Commission of Inquiry on Libya, *supra* note 12, at para. 504.

¹⁵ It was reported to the Independent Civil Society Fact-Finding Mission to Libya by numerous sources that Tawerghans sold girls from Misrata for 7,000 dinars. See Report of the Independent Civil Society, *infra* note 20, at para. 171.

¹⁶ Some reports claim that when Qadhafi was captured by Misrata rebel fighters on 20 October 2011, a militiaman sexually assaulted him by thrusting a bayonet in his anus. See Human Rights Watch, "Death of a Dictator: Bloody Vengeance in Sirte," (October 2012), at p. 28 [Death of a

Qadhafi himself had ordered that a supply of anti-impotence drugs be given to his soldiers and mercenaries and that he had authorized them to deliberately rape Libyan opponent women in a brutal, continuous, and wide-scale campaign.¹⁸ Despite uncertainty about the exact numbers and locations of Libyan rape victims, and the difficulty of investigating allegations of sexual violence conducted during armed conflict, high-ranking officers in the Libyan Revolution's Military Council have affirmed that Libyan rebels found cellphone pictures and videos of rape,¹⁹ as well as condoms and Viagra in the vehicles and uniform pockets of Qadhafi loyalists who were captured on the battlefield.²⁰ Accordingly, these attacks constituted crimes against humanity, as they were widespread and reportedly inflicted upon the civilian

Dictator]; Jennifer Nimry Eseed, "The International Criminal Court's Unjustified Jurisdiction Claims: Libya as a Case Study," (2013) 88:2 Chicago-Kent Law Review 572 [Jennifer Nimry Eseed].

¹⁷ According to Colonel Salim Juha, leader of the Misrata insurgents, who spoke recently on Al Jazeera, many women in Misrata and its suburbs were forced to strip naked in front of strangers or their children, while others were brutally raped in their homes and severely traumatized. See Richard Sollom & Hani Mowafi, "32nd Brigade Massacre: Evidence of War Crimes and the Need to Ensure Justice and Accountability in Libya," Physicians for Human Rights, December 2011, at p. 19-20 & 31; Hilmi M. Zawati, *infra* note 20.

¹⁸ Manpavan Joth Kaur, "Mercenaries' in Libya: Impact of Legal Impunity," RSIS Commentaries, No. 43/2011 (17 March 2011), at p. 1; Physicians for Human Rights, "Witness to War Crimes: Evidence from Misrata, Libya," (August 2011), at p. 16 [Witness to War Crimes].

¹⁹ The author received two cellphone video clips of sexual torture. One of them shows government security forces sexually torturing a Libyan woman, while the other demonstrates the sexual torture of a man by rebel investigators. The author was unable to independently verify them. See also *Libyan Rebels: Proof of Systematic Rape on Cell Phones*. Duration: 3:52:00. Directed by Sara Sinder, CNN, 2011. Available at: <<https://www.youtube.com/watch?v=XWDdUv42VNY>> (Accessed on: 15 February 2013).

²⁰ "Battle for Libya: Rape Used As a Weapon of War," Online: Aljazeera News Chanel (27 March 2011) <<http://www.youtube.com/watch?v=ISLz8Fv0eik>> (Accessed on: 25 October 2013); Arab Organization for Human Rights, et al., "Report of the Independent Civil Society Fact-Finding Mission to Libya," (January 2012), at para. 110 [Report of the Independent Civil Society]; Elizabeth Marcus, "Rape and the Arab Spring: The Dark Side of the Popular Uprisings in the Middle East," Center for American Progress (December 2011) at p. 3 [Elizabeth Marcus]; Ewen MacAskill "Gaddafi 'Supplies Troops with Viagra to Encourage Mass Rape', Claims Diplomat," Online: The Guardian (29 April 2011) <<http://www.theguardian.com/world/2011/apr/29/diplomat-gaddafi-troops-viagra-mass-rape>> (Accessed on: 11 October 2013); Hilmi M. Zawati, "Hidden Deaths of Libyan Rape Survivors: Rape Casualties Should be Considered Wounded Combatants Rather than Mere Victims of Sexual Violence," *The National Law Journal* (9 January 2012) 35; Hilmi M. Zawati, "Libyan Rape Casualties as Veterans of a Just War, Not a Shameful Statistic," 207:2 *The New Jersey Law Journal* (9 January 2012) 31 [Hilmi M. Zawati]; "ICC to Investigate Reports of Viagra-Fueled Gang-Rapes in Libya," Online: CNN World (17 May 2011) <<http://www.cnn.com/2011/WORLD/africa/05/17/libya.rapes.icc/index.html>> (Accessed on: 25 October 2013); Júlia Garraio, "Arresting Gaddafi Will Be the Most Effective Way to Stop these Rapes': Sexual Violence in the Western Media's Coverage of the War in Libya," in Júlia Garraio, Mihaela Mihai & Teresa Toldy, eds., (Coimbra: Centro de Estudos Sociais, Universidade de Coimbra, 2012) 112; Leila Mokhtarzadeh, "Ending War Rape: A Matter of Cumulative Convictions," (2013) 36 *Fordham International Law Journal* 1054; Owen Bowcott, "Libya Mass Rape Claims: Using Viagra Would be a Horrific First— Reports of the Distribution of 'Viagra-type' Pills to Troops Add an Unprecedented Element to Gaddafi's Alleged War Crimes," The Guardian (9 June 2011) <<http://www.theguardian.com/world/2011/jun/09/libya-mass-rape-viagra-claim>> (Accessed on: 11 October 2013); Patrick Cockburn "Amnesty Questions Claim that Gaddafi Ordered Rape as Weapon of War," Online: The Independent (24 June 2011) <<http://www.independent.co.uk/news/world/africa/amnesty-questions-claim-that-gaddafi-ordered-rape-as-weapon-of-war2302037.html>> (Accessed on: 11 October 2013).

population, with knowledge of the reason for the attack.²¹

(ii) Rape as a Strategic Weapon of War

Utilising rape as a political weapon of war was not a strategy unique to undermining Libyan society. It was carried out in the civil wars of the 1990s that took place in the former Yugoslavia, Rwanda, Sierra Leone, and in other war zones around the world. What makes the Libyan case different is the patriarchal and conservative nature of Libyan society, which holds women's chastity and honour as among the most highly regarded of values. For this reason, wartime rape has caused severe damage to the social foundations of the Libyan community and its familial relations, and has served as a horrific tool of political repression.²² This notion has been clearly reflected in the following statement by a key informant to Physicians for Human Rights: "If Qaddafi destroys a building, it can be rebuilt. But when he rapes a woman, the whole community is destroyed forever. Qaddafi knows this, and so rape is his best weapon."²³

b. Challenges Facing the Victims

(i) Socio-legal Challenges

Rape is an endemic of war and previously considered a collateral damage in many armed conflicts. But in Libya, it was deliberate, systematic, and widespread. Rape campaigners in Libya were aware that wartime rape, unlike physical wounds, can permanently devastate the victim's life, particularly in Libya's highly patriarchal and conservative society, which holds women's honour in the highest regard.²⁴ They were mindful of the fact that raping a Libyan woman, whether in peacetime or in armed conflict, would cast an extended profound shame and humiliation on her and the entire family.²⁵ Indeed, raping a Libyan woman simply means, in many cases, sentencing her to death, physically,²⁶ psychologically, or socially.²⁷

²¹ Report of the Independent Civil Society, *supra* note 20, at para. 114; Report of the International Commission of Inquiry on Libya, *supra* note 12, at para. 118.

²² Elizabeth Marcus, *supra* note 20, at p.1; Gang-Raped for Two Days, Tortured and Strangled: Libyan Woman Finally Reveals Full Horrific Details of Attack by Gaddafi's Thugs, Online: Mail on Line (13 April 2011) <<http://www.dailymail.co.uk/news/article-1376235/Libya-Iman-al-Obeidi-describes-rape-o>> (Accessed on: 15 February 2013); Paul Salem & Amanda Kadlec, "Libya's Troubled Transition," (Washington, D.C.: Carnegie Endowment for International Peace, 2012), at p. 11 [Libya's Troubled Transition].

²³ Witness to War Crimes, *supra* note 18, at p.15. See also David Cairns, "Libya: Gaddafi's Men 'Use Rape as Weapon of War'" Online: First Post Newsgroup IPR (2011) <<http://www.stopdemand.org/afawcs0153418/CATID=5/ID=222/SID=499253057/Libya>> (Accessed on: 15 February 2013); Kareem Fahim, "Claims of Wartime Rapes Unsettle and Divide Libyans," *New York Times* (20 June 2011 A11, available online at: <http://www.nytimes.com/2011/06/20/world/africa/20rape.html?pagewanted=all&_r=0> (Accessed on: 16 February 2013).

²⁴ Elizabeth Marcus, *supra* note 20, at p. 3.

²⁵ Hilmi M. Zawati, *supra* note 20.

²⁶ To safeguard their honour and protect them from rape and shame, particularly in wartime settings, some Arab families may force their daughters into an early marriage. Women may also be killed to prevent expected rape. It has been reported that a Syrian man shot dead his daughter as they were being approached by a group of Syrian government forces to prevent the

Raped women may commit suicide, being unable to bear the stigma and shame, or be killed by relatives—following the pattern of “honour killing”—or be rejected by families.²⁸

In a recent interview, Seham Sergewa, a psychologist in Benghazi Hospital and human rights activist, provides that approximately 30% of married raped women were subsequently divorced by their husbands and 20% abandoned and not treated as wives anymore, while the rest tended either to isolate themselves, flee the country to the unknown, or kill themselves.²⁹ In this connection, campaigners for the US-based organization “Physicians for Human Rights” reported that three teenage sisters aged 15, 17, and 18 had gone missing after Qaddafi troops arrived in Tomina. They had been raped in the al-Wadi al-Akhdar elementary school for three consecutive days. They were then murdered by their father, who slit their throats in an honour killing for “bringing shame on the family.”³⁰ Of course, this is a social value that contravenes Islamic law, which prohibits victimizing the victim and encourages Muslim men to marry raped women and treat them gently.³¹

Furthermore, there is a constant cause of concern that the Libyan Penal Law does not distinguish between adultery in peacetime and rape in conflict

shame of being raped. See *Syria: A Regional Crisis-The IRC Commission on Syrian Refugees*, International Rescue Committee (January 2013), at p.7. See also Hamida Ghafour, “Rape ‘prevalent’ in Syria conflict,” *The Toronto Star* (14 January 2013), available online at: <<http://www.thestar.com/news/world/article/1315048--rape-prevalent-in-syria-conflict>> (Accessed on: 16 February 2013).

²⁷ If a raped woman were single, she would lose the opportunity to get married since she had lost her virginity before marriage, despite this having happened without her consent. And if she were married she might be divorced. See Sophie McBain, “Breaking the Silence: Confronting Rape in Post-War Libya: A Network of Secret Crisis Centres are Struggling to Help the Swathe of Rape Victims in the Wake of the 2011 Libyan Uprising,” Online: *The Guardian* (10 June 2013) <<http://www.theguardian.com/global-development-professionals-network/2013/jun/07/confronting-rape-post-war-libya>> (Accessed on: 8 October 2013).

²⁸ Libya: War and Rape, Online: Aljazeera show- People & Power (29 June 2011) <https://www.youtube.com/watch?v=iP_fFP3b3W0> (Accessed on: 17 February 2013). Hilmi M. Zawati, *supra* note 20.

²⁹ Interview with Seham Sergewa on the Impact of Rape on Libyan Women and Families, Free Libya Satellite Channel (14 November 2011) <<https://www.youtube.com/watch?v=2WmgD6n3igA>> (Accessed on: 16 February 2013), (Arabic).

³⁰ See Witness to War Crimes, *supra* note 18, at p. 15; Chris Hughes, “Dad Murders Three Teenage Daughters Raped by Gaddafi Thugs,” *Daily Mirror* (31 August 2011). Online: <<http://www.mirror.co.uk/news/uk-news/dad-murders-three-teenage-daughters-150740>> (Accessed on: 15 February 2013).

³¹ ^cAbdul-^cAziz Ibn Bāz, *Majmū‘ Fatāwī wa Maqālāt Mutanawwī‘ah* [Collection of Legal Opinions and Various Articles], 14 vols. (al-Riyad, Saudi Arabia: Maktabat al-Ma‘ārif, 1996) 8:241; Hilmi M. Zawati, Review Essay of *Forgetting Children Born of War: Setting the Human Rights Agenda in Bosnia and Beyond*, by R. Charli Carpenter (New York, N.Y.: Columbia University Press, 2010), ILAF Review Articles 1 (2012), at pp. 12-14. Available at SSRN: <<http://ssrn.com/abstract=2193110>> (Accessed on: 15 February 2013); Jād al-Haq ^cAlī Jād al-Haq, *Buhūth wa Fatāwī Islāmiyyah fī Qadaya Mu‘asirah* [Treatises and Islamic Legal Opinions on Contemporary Issues], 4 vols. (Cairo: Dār al Hadīth, 2005) 3:175; *Rape of Bosnian Muslim Women*. Produced and Directed by Davor Rocco, running time 00:33:00, the Islamic Relief Organization, Croatia, 1993. (Videocassette); *Wounded Souls: Women of Bosnia-Herzegovina*. Produced and Directed by the Islamic Relief Organization, running time 00:32:00, the Islamic Relief Organization, 1994. (Videocassette).

settings. It treats a woman who was sexually abused in wartime, i.e., entirely against her will, in the same manner as a woman who of her own accord engages in sex out of wedlock. This is another barrier to justice, which makes victims reluctant to come forward and seek judicial remedy. However, the final Report of the International Commission of Inquiry on Libya affirms this dilemma and reveals that the Commission had difficulties in collecting evidence in cases of wartime sexual violence. It maintains that the reluctance of victims to disclose information about their ordeal was due to the associated stigma, on the one hand, and to Libyan law which discriminates against female victims, on the other.³² Law No. 70 of 1973, which establishes the *hadd* penalty for *zina* (adultery) and modifies some of the provisions of the penal code, criminalizes *zina*, which is defined as sexual intercourse between a man and a woman who are not bound to each other by marriage.³³ It prescribes for illicit intercourse punishment by flogging, or by flogging and imprisonment,³⁴ regardless of whether or not it was consensual or whether it took place in war or peacetime. Should pregnancy result, the woman has virtually no choice but to give birth, forcing a victim of rape to choose between raising the child of the rapist and shunning him. The conflict between reason and emotions, in this case, eventually produces another horribly painful trauma.

(ii) Health Challenges

Victims of conflict-related gender-based crimes may suffer from a range of medical problems, including sexually transmitted diseases and post-traumatic stress disorder (PTSD). In the case of the former, victims were especially vulnerable due to the fact that some of the rapists had been recruited by the Qadhafi regime from Sub-Saharan Africa,³⁵ meaning that they may well have infected their victims with HIV. According to the UNAIDS and WHO AIDS epidemic update reports, Sub-Saharan Africa is the region most heavily affected worldwide by HIV, accounting for over two

³² Report of the International Commission of Inquiry on Libya, *supra* note 12, at para 497.

³³ Law No. 70 of 1973, regarding the establishment of the *hadd* penalty for *zina* (adultery) and modifying some of the provisions of the penal code, Art. (1).

³⁴ *Ibid*, Article 2 (1).

³⁵ The government security forces and paramilitaries, who allegedly committed most of wartime rape accounts, were formed of three major different groups: Libyan troops loyal to Qaddafi; the Qadhafi orphans, including children whom he adopted in the aftermath of the early 1990s civil wars in Eastern Europe—many of whom may have been “rape orphans” as in Bosnia-Herzegovina and Croatia alone there were thousands of women who were forcibly impregnated, resulting in thousands of unwanted children; and finally, African mercenaries. See Alex de Waal, “African Roles in the Libyan Conflict of 2011,” (2013) 89: 2 *International Affairs* 366; Bill Van Auken “The Rape of Libya,” Online: World Socialist Web Site (26 August 2011) <<http://www.wsws.org/en/articles/2011/08/libya-a26.html>> (Accessed on: 22 October 2013); Diana Wueger, “Libya,” Online: Women under Siege (8 February 2012) <<http://www.womenundersiegeproject.org/conflicts/profile/libya>> (Accessed on: 22 October 2013); Thomas Miles “Libya’s ‘African Mercenary’ Problem,” Online: The Tomathon (20 February 2011) <<http://tomathon.com/mphp/2011/02/libyas-african-mercenary-problem/>> (Accessed on: 22 October 2013).

thirds (67%) of all people living with the virus.³⁶

However, due to the trauma, shame, and stigma linked to sexual assault, and due to the fear of family ostracism, many victims prefer to suffer in silence rather than seek medical help and psycho-social counselling (all characteristic of PTSD). In this connection, Colonel Salim Juha, leader of the Misrata insurgents, speaking recently on the widely seen Aljazeera show *Bilā Hudūd* (without borders),³⁷ provides that many women in Misrata and its suburbs were forced to strip naked in front of strangers or their children, while others were brutally raped in their homes—watched by family members—and severely traumatized. Quite apart, therefore, from the danger to women's health overall, ignoring the sufferings of those women and destroying rape evidence would encourage the culture of impunity and constitute a barrier to justice.³⁸

2. *Libya's Project for Transitional Justice and Peace-Building*

For the purpose of this analysis, the term transitional justice refers to a variety of approaches, both judicial and non-judicial,³⁹ that the Libyan transitional government may undertake to deal with widespread or systematic human rights abuse as it moves from the revolution stage to the rule of law, to sustainable peace, democracy, and respect for the rights of all

³⁶ Missale Ayele, *Public Health Implications of Mass Rape as a Weapon of War* (M.Sc., Institute of Public Health, Georgia State University, 2011), at p. 28; Sub-Saharan Africa: Latest Epidemiological Trends, Online: UNAIDS Fact Sheet (24 November 2009) <http://www.unaids.org/en/media/unaids/contentassets/dataimport/pub/factsheet/2009/20091124_fs_ssa_en.pdf> (Accessed on: 17 February 2013). See also Colin McInnes, "Conflict, HIV and AIDS: a new dynamic in warfare?," (2009) 21:1 *Global Change, Peace & Security* 99-114; Jessica Kruger, *A Comparative Analysis of Genocidal Rape in Rwanda and the Former Yugoslavia: Implications for the Future* (M.A., Department of Sociology, Anthropology, and Criminology, Eastern Michigan University, 2011); *Libya: The Hounding of Migrants Must Stop*, International Federation for Human Rights, 2012, at p. 32 [The Hounding of Migrants Must Stop]; Lahoma Thomas and Rebecca Tiessen, "Human Security, Gender-Based Violence and the Spread of HIV/AIDS in Africa: A Feminist Analysis," (2010) 44:3 *Canadian Journal of African Studies* 479-502; Zaryab Iqbal and Christopher Zorn, "Violent Conflict and the Spread of HIV/AIDS in Africa," (2010) 72:1 *The Journal of Politics* 149-162.

³⁷ The Future of the Libyan Revolution after Liberation: An Interview with Colonel Salim Juha, leader of the Misrata insurgents, Online: Aljazeera show *Bilā Hudūd* (without borders) (26 October 2011) <<http://www.aljazeera.net/programs/pages/6313feb8-dd85-469b-9575-bb7fbb5a37b0>> (Accessed on: 17 February 2013). (Arabic)

³⁸ Margot Wallström, "Introduction: Making the Link between Transitional Justice and Conflict-Related Sexual Violence," (2012) 19:1 *William & Mary Journal of Women and the Law* 2.

³⁹ Andrew B. Friedman, "Transitional Justice And local Ownership: A Framework for the Protection of Human Rights," at pp.4-5. Electronic copy available at: <<http://ssrn.com/abstract=1919874>>; Dorota Gierycz, "Transitional Justice – Does It Help or Does It Harm?" NUI Working Paper No. 737, Norwegian Institute of International Affairs, 2008, at p. 5 [Transitional Justice – Does It Help or Does It Harm]; Transitional Justice and the Arab Spring, *supra* note 6, at p. 3; *Law No. (17) for the Year 2012 on Establishing the Rules of National Reconciliation and Transitional Justice*, National Transitional Council, Libya, 26 February 2012, at Art. 1 [Law No. (17)]; Romi Sigsworth, "Gender-Based Violence in Transition," Centre for the Study of Violence and Reconciliation (September 2008), at p. 14 [Gender-Based Violence in Transition]; Rosemary Nagy, "Transitional Justice as Global Project: Critical Reflections," (2008) 29:2 *Third World Quarterly* 276; UN Security Council, "Report of the Secretary-General: The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies," UN Doc. S/2004/616 (23 August 2004), at para. 8.

Libyan citizens.⁴⁰ This process requires that the Libyan people tolerate exposure to the painful legacy of the past in order to achieve justice for all citizens, reconcile Libyan society, and prevent future abuses.⁴¹

To achieve this goal, the NTC adopted in 2012 a number of laws, including Law No. 17 on the “Establishment of Rules of National Reconciliation and Transitional Justice,”⁴² Law No. 26 on the “Higher Body for Implementation of the Criteria of Integrity and Transparency,”⁴³ Law No. 35 “On an Amnesty for Some Crimes,”⁴⁴ and Law No. 38 regarding “Some Procedures Relating to the Transitional Period.”⁴⁵ Moreover, the Council established the “National Council of Human Rights and Fundamental Freedoms” as an independent body, in December 2011, to investigate violations of human rights.⁴⁶

Furthermore, a two-day conference on “Truth and Reconciliation in Libya” was organized on 12-13 December 2012 by the Fact-Finding and Reconciliation Commission and the Human Rights Committee of the General National Congress, in partnership with the United Nations Support Mission in Libya (UNSMIL) and the UN Development Programme (UNDP).⁴⁷ After two days of deliberation, the participants discussed the relevance and challenges of truth-seeking, the role of victim groups, as well as the legal and institutional framework required for truth-seeking. The conference also looked at the role of the Fact-Finding and Reconciliation Commission and that of tribal leaders in reconciliation, and called on Libyan authorities to display the political will necessary to pursue transitional justice.⁴⁸ However, the conference failed to raise crucial issues, including the lack of security and poor governance, which has resulted in a fragile judicial system and tendency towards revenge and collective punishment.⁴⁹

Nonetheless, after a closer look at the above laws, one may argue that they fell short of the Libyan People’s expectations. For example, Law No. 35

⁴⁰ UN General Assembly, “The Rule of Law at the National and International Levels,” a Statement by Fathallah al-Sanusi al-Jadi, Member Libya’s Mission to the United Nations, Sixty-Seventh Session, before the Sixth Committee, On Item (83), New York (10 October 2012) [The Rule of Law at the National and International Levels].

⁴¹ UN Support Mission in Libya, *Transitional Justice – Foundation for a New Libya*, 17 September 2012, at p. 2.

⁴² Law No. (17), *supra* note 39.

⁴³ Law No. (26) for the year 2012 on the High Commission for the Application of National Standards and Integrity, National Transitional Council, Libya, 4 April 2012 [Law No. (26)].

⁴⁴ Law No. (35) for the YEAR 2012 on Amnesty for Some Crimes, National Transitional Council, Libya, 2 May 2012 [Law No. (35)].

⁴⁵ Law No. (38) for the Year 2012 on Some Special Measures Regarding the Transitional Period, National Transitional Council, Libya, 2 May 2012 [Law No. (38)].

⁴⁶ The Rule of Law at the National and International Levels, *supra* note 40.

⁴⁷ Conference on Truth and Reconciliation Opens in Tripoli, Online: UNSMIL (12 December 2012) <<http://unsmil.unmissions.org/Default.aspx?tabid=3543&ctl=Details&mid=6187&ItemID=791590&language=en-US>> (Accessed on: 17 February 2013).

⁴⁸ Conference on Truth and Reconciliation in Libya Concludes with Recommendations on the Way Forward, Online: UNSMIL (12 December 2012) <<http://unsmil.unmissions.org/Default.aspx?tabid=3543&ctl=Details&mid=6187&ItemID=807743&language=en-US>> (Accessed on: 17 February 2013).

⁴⁹ *Ibid.*

addresses only violations of human rights by former government agents between 1 September 1969 and 15 February 2011. In other words, it fails to consider violations committed individually or collectively by the rebels or the transitional government's agents. Moreover, Article 7(4) of the above law stipulates the exclusion of the members of the Revolutionary Committees from all platforms of national reconciliation as a precondition for reconciliation and implementation of transitional justice.⁵⁰ By the same token, Law No. 26 prohibits a large segment of the Libyan population listed in Article 8(B) "General Regulations"⁵¹—up to 60%, specified in 16 categories who held leading positions in the former Libyan government over the past 35 years—from holding 18 leading positions, listed in Article 9, in the political, economic, military, diplomatic, and educational domains.⁵² In addition, Law No. 35 excludes from amnesty Qadhafi's wife, children (biological and adopted), brothers, sisters, sons and daughters in-law, and assistants. The latter category is open to interpretation depending on

⁵⁰ Law No. (35), *supra* note 44, Art. 7(4).

⁵¹ Law No. (26), *supra* note 43, Art. 8(B). It states: "These regulations are intended to apply to incumbents of positions or candidates for them from the former regime regardless of a positive role played in the February 17 Revolution. They cover the following roles: 1. Those who had proven membership in the revolutionary committees and were active members; 2. Members of the Revolutionary Guard, the Popular Guard, or revolutionary work team; 3. Student union heads after 1976; 4. All those known for glorifying the former regime or calling for the ideology of the Green Book, whether in media or in direct talks with citizens; 5. All those who stood opposed to the February 17 Revolution whether by incitement, financial participation, or otherwise; 6. All those accused or sentenced for any crime of wasting or stealing public funds; 7. All those involved in prisons or torture of citizens during the period of the previous regime; 8. All who have undertaken any act against Libyan dissidents both abroad and at home; 9. All who have undertaken operations to seize people's property during the period of the previous regime or afterward; 10. All corrupt individuals who squandered the money of the Libyan people became rich at their expense, and made riches and accounts home and abroad; 11. All business partners with Gaddafi's sons and the heads of the former regime; 12. All those who took jobs of leadership related to the Gaddafi's sons and their institutions (such as Watassemo Association, the Gaddafi International Foundation for Charity and Development Associations, the Libya of Tomorrow Foundation, etc.); 13. All those who were opponents abroad, negotiated with the regime, and consented to work in leadership positions with the former regime against the interests of the Libyan people; 14. All those who unlawfully obtained gifts or in-kind funds from the former regime; 15. All those who attended graduate studies in the ideology of the Green Book; 16. Members who were named to the Council of Leaders of the Revolution, Free Unionist Officers, and Comrades."

⁵² *Ibid*, Art. 9. This prohibition includes the following positions and functions: "1. The head and members of the National Transitional Council; 2. The head and members of the Government; 3. Office of the Transitional Council; 4. Office of the Prime Minister; 5. Agents and assistant agents of ministers; 6. Ambassadors and diplomats; 7. Heads of local councils; 8. Heads and members of local administrations (governors, mayors, and members of municipal councils); 9. Heads and members of boards of directors of public bodies, companies, and institutions; 10. Executive directors of public companies, bodies, and institutions; 11. Security and military leaders (leaders of the security services, the army, immigration control, and first and second class officers); 12. Heads of companies (domestic, foreign, and oil investment and national companies, without exception); 13. Financial monitors; 14. University presidents, deans of faculties, heads of departments, and managers of institutes, schools, and all educational and research institutions; 15. Heads and board members of trade unions, heads of student unions; 16. Candidates of the elections of the General National Congress; 17. Chair and Members of the General National Congress and its office; 18. All those charged with any function before the interim National Transitional Council or interim Government."

personal interests and political orientation.⁵³

Finally, Law No. 38 is in conflict with the norms of international treaties and covenants on human rights. For example, Article 4, which put rebels above the law, provides that “there shall be no penalty for military, security, or civil actions dictated by the February 17th Revolution that were performed by revolutionaries with the goal of promoting or protecting the revolution.”⁵⁴ Earlier reports suggested that this amnesty law was drafted in order to appease Libya’s tribal leaders who apparently fear that anti-Qadhafi rebels will be held accountable for human rights violations they committed during the uprising.⁵⁵

Moreover, Article 5 of the same code abolishes the right of individuals who were arbitrarily detained by rebels from legally pursuing the government or its agents. It states that even if a court acquits a person who was detained by militia, that person has no right to initiate a criminal or civil complaint against the state or the militia, unless the detention was based on fabricated or mendacious allegations.⁵⁶

Likewise, Article 6 of the same law authorizes the Ministries of Defence and Interior to take measures that restrict a person’s movements or place him/her under house arrest if they are considered a threat to public security or stability, based on the person’s previous actions or affiliation with an official or unofficial apparatus or tool of the former regime.⁵⁷

Nonetheless, the above law violates Libya’s Constitutional Declaration of 3 August 2011.⁵⁸ While Article 6 of the Declaration states that Libyans shall be equal before the law and enjoy equal civil and political rights without discrimination of any kind, Article 7 provides that human rights and basic freedoms be respected by the State. The State has committed itself to joining international and regional declarations and charters which protect such rights and freedoms. But it’s clear that the blanket amnesty granted for rebels and the transitional government’s agents violates Libya’s obligations under international law to investigate and prosecute serious violations of international humanitarian and human rights law.⁵⁹

⁵³ Law No. (35), *supra* note 44, Art. 1; Lawyers for Justice in Libya (LFJL), Press Statement, “LFJL Strongly Condemns New Laws Breaching Human Rights and Undermining the Rule of Law,” (7 May 2012), p.1 [Laws Breaching Human Rights and Undermining the Rule of Law].

⁵⁴ Human Rights Watch, “Libya: Amend New Special Procedures Law,” (11 May 2012), at p. 1 [Amend New Special Procedures Law]; Law No. (38), *supra* note 45, at Art. 4.

⁵⁵ Mark Kersten, “Impunity Rules: Libya Passes Controversial Amnesty Law,” Online: Justice in Conflict (8 May 2012) <<http://justiceinconflict.org/2012/05/08/impunity-rules-libya-passes-controversial-amnesty-law/>> (Accessed on: 1 January 2013) [Libya Passes Controversial Amnesty Law].

⁵⁶ Law No. (38), *supra* note 45, at Art. 5.

⁵⁷ Amend New Special Procedures Law, *supra* note 54, at p. 1; Law No. (38), *supra* note 45, at Art. 6.

⁵⁸ *The Constitutional Declaration*, National Transitional Council, Libya, 3 August 2011 [the Constitutional Declaration].

⁵⁹ Christi L. Thornton & Clarinsa v. Grives, “The Contribution of the Arab Spring to the Role of Transitional Justice and Amnesty Laws: A Review of Tunisia, Egypt and Libya,” Electronic copy Available at: <http://works.bepress.com/clarinsa_grives/1> [Contribution of the Arab Spring to the Role of Transitional Justice and Amnesty Laws].

Nevertheless, the Libyan case is not unique. In the aftermath of internal and extraterritorial armed conflicts, other states have issued amnesty laws to protect or to reward its agents for their role in protecting political regimes, establishing stability or state-building. Louise Mallinder provides several examples of governments that have acted in this way on the cessation of hostilities, such as: Jimmy Carter's 1977 amnesty to state agents liable for crimes during the Vietnam war;⁶⁰ the 1982 Guatemalan amnesty laws designed to protect the government's security forces who had participated in actions against rebellion; and Algeria's 2006 amnesty law to protect its armed forces against prosecution for crimes committed during the civil war that followed the military suspension and nullification of the parliamentary elections won by the Islamic Salvation Front (FIS), an Algerian political party, in 1992.⁶¹

Likewise, states may also amnesty crimes under international law. A case in point is the American pressure placed on the UN Security Council to issue Resolution 1487 (2003), adopted on 12 June 2003, to exempt the American troops and personnel serving in any UN force in Iraq from prosecution for international war crimes under the Rome Statute of the ICC.⁶²

III. Wartime Rape under Libyan Laws

This part examines the crime of wartime rape under recent laws adopted

⁶⁰ Kieran McEvoy & Louise Mallinder, "Amnesties in Transition: Punishment, Restoration, and the Governance of Mercy," (2012) 39:3 *Journal of Law and Society* 410.

⁶¹ Louise Mallinder, *Amnesty, Human Rights and Political Transitions: Bridging the Peace and Justice Divide* (Oxford; Portland, Ore.: Hart, 2008) 66. For further readings, see Louise Mallinder, "Amnesties and International Criminal Law," in William A. Schabas & Nadia Bérnáz, eds., *The Handbook of International Criminal Law* (New York, N.Y.: Routledge 2010. Available at SSRN: <<http://ssrn.com/abstract=1531701>> (Accessed on: 21 October 2013); Louise Mallinder, "Can Amnesties and International Justice be Reconciled?," (2007) 1:2 *The International Journal of Transitional Justice* 208–230; Louise Mallinder, "Exploring the Practice of States in Introducing Amnesties," in Kai Ambos, Judith Large, Marieke Wierda, eds., *Building a Future on Peace and Justice: Studies on Transitional Justice, Peace and Development, the Nuremberg Declaration on Peace and Justice* (Berlin: Springer-Verlag, 2009) 127–171; Louise Mallinder, *The Ongoing Quest for Truth and Justice: Enacting and Annuling Argentina's Amnesty Laws* (May 2009). Available at SSRN: <<http://ssrn.com/abstract=1531759>> or <<http://dx.doi.org/10.2139/ssrn.1531759>> (Accessed on: 21 October 2013); Louise Mallinder, "The Role of Amnesties in Conflict Transformation," Online: School of Law, Queen's University Belfast (11 March 2009) <<http://www.queens.ie/schools/SchoolofLaw/Research/InstituteofCriminologyandCriminalJustice/Research/BeyondLegalism/filestore/Filetoupload,163783,en.pdf>> Accessed on 21 October 2013; Louise Mallinder, *Uruguay's Evolving Experience of Amnesty and Civil Society's Response* (16 March 2009). Transitional Justice Institute Research. Available at SSRN: <<http://ssrn.com/abstract=1387362>> or <<http://dx.doi.org/10.2139/ssrn.1387362>> (Accessed on: 21 October 2013); Louise Mallinder & Kieran McEvoy, "Rethinking Amnesties: Atrocity, Accountability and Impunity in Post-Conflict Societies," (2011) 6:1 *Journal of the Academy of Social Sciences* 107–128.

⁶² Hilmi M. Zawati, "Impunity or Immunity: Wartime Male Rape and Sexual Torture as a Crime against Humanity," (2007) 17:1 *Journal on Rehabilitation of Torture Victims and Prevention of Torture* 37; UN Security Council's Resolution 1487 (2003), *Requesting that the ICC shall for a 12 months period starting 1 July 2003 not commence or proceed with investigation or prosecution of any case arising involving current or former officials or personnel from a contributing state not a Party to the Rome Statute over acts or omissions relating to a UN established or authorized operations* (12 June 2003) UN Doc. S/RES/1487 (2003).

by the NTC during the transitional period following the fall of the former regime, and under the Libyan Penal Code of 1953 and its amendments. It reveals that the failure of Libyan legislators before and after the recent civil war to amend the Libyan Penal Code and incorporate international crimes embodied in Articles 6-8 of the Rome Statute of the ICC, and to recognize the norms promulgated in several international treaties and conventions of human rights, has resulted in a *lacuna* in Libyan criminal law and in the competence of the latter to adequately address conflict-related gender-based crimes committed by all parties to the conflict. It also underlines Libya's obligations under the provisions of domestic and international humanitarian and human rights law to criminalize and prosecute alleged gender-based crimes and bring justice to both victims and perpetrators.

1. *Laws of the Transitional Period*

Since it was established on 27 February 2011 and until the handing over of power to the elected General National Congress on 8 August 2012, the NTC has adopted dozens of laws and decisions, although none of them has explicitly condemned wartime rape or other forms of gender-based crimes as crimes of war or crimes against humanity. This was despite the fact that the Council was keenly aware that hundreds of Libyan women and men had been drafted for widespread and systematic rape in Misrata, Zawya, Ajdabya, and other ravished cities by former government security forces and paramilitaries, including African mercenaries.

Sexual crimes are implicitly mentioned twice in the transitional Law, viz., Law No. 17 and Law No. 35, respectively. Article 4(2) of Law 17, referring to the jurisdiction of the newly established Fact Finding and Reconciliation Commission, lists damages sustained as a result of attack on honour (*'ird* in Arabic) as being one of the many other incidents that will be examined and investigated by the Commission. Attacks on *'ird* might be broadly interpreted as slandering, defamation, rape, or any other form of sexual violence.⁶³ Another instance may be found in Article 1(3) of Law 35 where reference is made to *al-muwāqā'a bil-quwwah*,⁶⁴ which literally means having sex with someone by force.⁶⁵ This crime, however, happens in peacetime just as it does in the midst of armed conflict! Having that said, none of the transitional laws has criminalized conflict-related gender-based crimes or prosecuted it.

2. *The Libyan Penal Code*

Historically speaking, The Libyan Penal Code was adopted by a royal decree on 28 November 1953.⁶⁶ The code, which contains 507 articles, was largely influenced by the Italian Penal Code, and was subjected to twenty-

⁶³ Law No. (17), *supra* note 39, at Art. 4(2).

⁶⁴ Law No. (35), *supra* note 44, at Art. 1(3).

⁶⁵ Mahmūd Ibn 'Umar al-Zamakhsharī, *Asās al-Balāghah* [The Genesis of Eloquence] (Beirut: Dār al-Ma'rifah, 1982) s.v. "waqā'a." (Arabic Dictionary).

⁶⁶ *Libyan Penal Code*, 28 November 1953 [Libyan Penal Code].

two amendments, the most worthy of note being two substantive amendments in 1956⁶⁷ and 1975 respectively. The latter amended 32 articles in the section entitled “crimes against the public interest,” to include 21 articles providing for death penalty for crimes against the interests of the State.⁶⁸

When the Penal Code was adopted in 1953, only a few international humanitarian and human rights treaties had been adopted, including: the United Nations Charter, 1945;⁶⁹ the Universal Declaration of Human Rights, 1948;⁷⁰ the Four Geneva Conventions, 1949;⁷¹ the European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950;⁷² and the Convention on the Prevention and Punishment of the Crime of Genocide, 1948.⁷³

At the national level, the Code was preceded only by the Libyan Constitution, which had been promulgated in 1951,⁷⁴ and included several general rules relevant to human rights law, such as the legality principle,⁷⁵ the principle of non-retroactivity of criminal law,⁷⁶ and the right to be presumed innocent until proved guilty.⁷⁷

⁶⁷ Law No. 48 of 23 September 1956, which provided for the cancellation of 9 articles, adding 20 articles, and modifying two hundred and thirteen articles.

⁶⁸ Under Law No. 38 of 1975.

⁶⁹ *United Nations Charter*, (1945), Signed at San Francisco, 26 June 1945. 59 Stat. 1031, T.S. 993, 3 Bevans 1153, Entered into force on 24 October 1945. Libya was admitted to the United Nations on 14 December 1955 [United Nations Charter].

⁷⁰ *Universal Declaration of Human Rights*, Adopted on 10 December 1948, GA Res. 217A (III), 3 UN GAOR (Resolutions, part 1) at 71, UN Doc. A/810 (1948); Reprinted in 43 American Journal of International Law Supp. 127 (1949) [Universal Declaration of Human Rights].

⁷¹ Including *Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (Geneva I)*, Opened for signature 12 August 1949, 6 U.S.T. 3114, T.I.A.S. No.3362, 75 U.N.T.S. 31 (Entered into force on 21 October 1950) [Geneva I], Ratified / acceded by Libya on 22 May 1956; *Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Geneva II)*, 75 U.N.T.S. 85 (Entered into force on 21 October 1950) [Geneva II], Ratified / acceded by Libya on 22 May 1956; *Convention Relative to the Treatment of Prisoners of War (Geneva III)*, Opened for signature 12 August 1949, 6 U.S.T. 3316, T.I.A.S. No.3364, 75 U.N.T.S. 135 (Entered into force on 21 October 1950) [Geneva III], Ratified / acceded by Libya on 22 May 1956; *Convention Relative to the Protection of Civilian Persons in Time of War (Geneva IV)*, Opened for signature 12 August 1949, 6 U.S.T. 3516, T.I.A.S. No.3365, 75 U.N.T.S. 287 (Entered into force on 21 October 1950) [Geneva IV], Ratified / acceded by Libya on 22 May 1956.

⁷² *European Convention for the Protection of Human Rights and Fundamental Freedoms*, Opened for signature 4 November 1950, Europe. T.S. No. 5, 213 U.N.T.S. 221 (Entered into force on 3 September 1953). It was not signed by Libya.

⁷³ *Convention on the Prevention and Punishment of the Crime of Genocide*, 9 December 1948, GA Res. 260A (III), 3 UN GAOR at 174, UN Doc. A/810 (1948), 78 U.N.T.S. 277 [Genocide Convention]. Acceded by Libya on 16 May 1986.

⁷⁴ *The Constitution of Libya*, contained 213 articles, was promulgated by the National Constituent Assembly on 7th October 1951 and abolished by a military *coup d'état* on 1st September 1969. Available online at <<http://www.libyanconstitutionalunion.net/constitution%20of%20libya.htm>> (Accessed on: 18 February 2013) [The Constitution of Libya].

⁷⁵ Article 17 of the Libyan Constitution of 1951 states the “No offence may be established or penalty inflicted except shall be subject to the penalties specified therein for those offences; the penalty inflicted shall not be heavier than the penalty that was applicable at the time the offence was committed.”

⁷⁶ *Ibid.*

⁷⁷ Article 15 of the Libyan Constitution of 1951 provides that “Everyone charged with an offence shall be presumed to be innocent until proved guilty according to law in a trial at which he has

However, despite the several amendments made over the past sixty years, it is an unfortunate fact that none of the above agreements' norms came to be reflected in the provisions of the Libyan Penal Code. In other words, Libyan legislators utterly failed during this long period of time to incorporate international crimes into the Libyan Penal Code or to take steps to domesticate war crimes and crimes against humanity embodied in the Rome Statute of the ICC. Accordingly, Libya has no criminal jurisdiction over such crimes.

Nonetheless, Book III of the Libyan Penal Code, entitled "Offences against Freedom, Honour, and Morals," does condemn different forms of sexual violence in 17 articles (407-424), where an inventory is made of gender-based crimes that may be expected to occur, and to be dealt with, in peacetime.⁷⁸

3. *Libya's Obligations under Domestic and International Law to Prosecute Alleged Conflict-Related Gender-Based Crimes*

Although the Rome Statute of the ICC does not include a provision explicitly requesting States to adopt the principle of universal jurisdiction for the crimes of genocide, crimes against humanity and war crimes, listed in Articles 6-8, in their own domestic criminal law, it does insist that "it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes."⁷⁹ In fact, the failure of the Libyan legislator, either before or after the recent civil war, to incorporate these crimes into the Libyan Penal Code leaves the country in a *vacuum juris* that will likely result in unfair trials, chaos, and bloody cycles of revenge.

However, Libya is obligated to investigate, prosecute, and bring to justice persons having allegedly committed international crimes, including gender-based crimes, whether they belong to the former regime's security forces or to the rebels, under a number of legal principles and provisions of different domestic, international humanitarian and human rights law instruments, and under regional treaties ratified by Libya.

a. Obligations under Domestic Law

On the national level, there are several legal instruments that would make it an obligation on the part of the Libyan transitional government to criminalize and prosecute gender-based crimes. Article 14 of the 1951 Libyan Constitution provides that "Everyone shall have the right to resource to the

the guarantees necessary for his defence. The trial shall be public save in exceptional cases prescribed by law."

⁷⁸ Including: carnal connection by force (Art. 407); indecent assaults (Art. 408); seduction of juvenile (Art. 409); indecent acts between persons of the same sex (Art. 410); abduction with intention to marry (peacetime forced marriage) (Art. 411); abduction for the commission of indecent acts (Art. 412); abduction without force of a juvenile under fourteen years of age or a mental defective (Art. 413); incitement to prostitution (Art. 415); forced prostitution (Art. 416); and trafficking in women to foreign territory (Art. 418). See Libyan Penal Code, *supra* note 66.

⁷⁹ *Rome Statute of the International Criminal Court*, UN Doc. A/CONF.183/9 (17 July 1998), 37 I.L.M. (Entered into force on 1 July 2002), the Preamble [The Rome Statute of the ICC].

Courts, in accordance with the provisions of the law.”⁸⁰ Similarly, Articles 6 & 7 of the Constitutional Declaration of 3 August 2011⁸¹ emphasize the following values to the Libyan people without any kind of discrimination:

Libyans shall be equal before the law, enjoy equal civil and political rights with, have the same opportunities in all areas and be subject to the same public duties and obligations, without distinction on the grounds of religion, belief, language, wealth, gender, kinship, political opinions, social status, or tribal, regional or familial adherence.⁸²

The State shall safeguard human rights and fundamental freedoms, endeavor to join the regional and international declarations and covenants which protect these rights and freedoms and strive for the promulgation of new covenants which recognize the dignity of man as Allah’s representative on earth.⁸³

Moreover Article 39 of the Libyan Military Penal Code of 1974 provides that “Crimes shall not lapse by time. Provisions relevant to proscription of crimes shall not apply to crimes perpetrated by military personnel or those provided for in the present Law or those which are under the jurisdiction of martial courts.”⁸⁴

Furthermore, Article 60 of the Libyan Code of Criminal Procedure for Armed Personnel (1999) guarantees the defendant’s right to examine the prosecution witnesses regarding their testimony. Article 64 of the same code entitles the defendant to have an interpreter if he/she does not understand Arabic.⁸⁵

As well, Article 31(C) [criminal justice] of the Libyan Constitutional Proclamation of 11 December 1969 provides that “the defendant shall be presumed innocent until proven guilty. All necessary guarantees for the exercise of his defense shall be provided. The accused or imprisoned shall not be subjected to mental or physical harm.”⁸⁶

In addition, Article 9 of the Great Green Charter of Human Rights of the Jamahiriya states that “The Jamahiriyan society guarantees the right to bring a suit or action before the law and the independence of the judicial system. Each of its members is entitled to a fair and complete trial.”⁸⁷

Finally, Article 30 of Law No. 20 of 1991 on Promoting Freedom provides that “Every person is entitled to judicial redress according to the law. The Court shall provide all the necessary guarantees, including legal

⁸⁰ The Constitution of Libya, *supra* note 74, at Art. 14.

⁸¹ The Constitutional Declaration, *supra* note 58.

⁸² *Ibid*, at Art. 6.

⁸³ *Ibid*, at Art. 7.

⁸⁴ Libyan Arab Jamahiriya, Military Penal Code, 1974, at Art. 39.

⁸⁵ Libyan Arab Jamahiriya, *Libyan Code of Criminal Procedure for Armed Personnel* (1999), at Articles 60 & 64.

⁸⁶ Libyan Arab Republic, *Libyan Constitutional Proclamation*, adopted on 11 December 1969, at Art. 31(c).

⁸⁷ Libyan Arab Jamahiriya, *the Great Green Charter of Human Rights in the Jamahiriyan Era*, adopted on 12 June 1988 by The General Congress of the People of the Popular and Socialist Libyan Arab Jamahiriya, at Art. 9.

representation.”⁸⁸

b. Obligations under General Concepts and Principles of International Criminal Law

The Libyan transitional government is obliged to prosecute or arrest and extradite perpetrators of gender-based crimes to the ICC under the *aut dedere aut judicare* principle, part of the *jus cogens* rule. Accordingly, the duty to prosecute and extradite perpetrators of such heinous and serious crimes—which may constitute a threat to international peace and security if committed on a large scale as a political weapon of war—applies under the customary international law doctrine of universal jurisdiction as a mandatory and affirmative obligation.⁸⁹ In other words, Libya cannot derogate from its duty to prosecute or extradite perpetrators indicted by the ICC, and any state that ignores or fails to fulfil its duty in this respect is in breach of its mandatory obligations as a member of the international community.⁹⁰

Moreover, several United Nations documents have emphasized that war crimes and crimes against humanity, including wartime rape and other gender-based crimes, are *hostis humani generis*, and that there are no limitation barriers to prosecutions for such profound crimes under international humanitarian and human rights law. Articles 55 and 56 of the United Nations Charter oblige member states to act jointly and individually in cooperation with the international community to achieve justice by

⁸⁸ Libyan Arab Jamahiriya, *Law No 20 of 1991 on Promoting Freedoms*, entered into force on 1 September 1991, at Article 30.

⁸⁹ The Four Geneva Conventions of 1949, which Libya had ratified on 22 May 1956, explicitly incorporate the principle *aut dedere aut judicare* by imposing an obligation on High Contracting Parties to search for persons alleged to have committed, or given orders to commit, “grave breaches” of these conventions, and to bring them—regardless of their nationality—to justice, or transfer them, in accordance with a state’s own legislation, to stand trial before the courts of another High Contracting Party. See Hilmi M. Zawati, *Gender-Related Crimes in Armed Conflict Settings: Legal Challenges and Prospects* (Lewiston, N.Y.: The Edwin Mellen Press). (Forthcoming, 2014) at p 274 [Hilmi M. Zawati]; Geneva I, *supra* note 71, at Art. 49; Geneva II, *supra* note 71, at Art. 50; Geneva III, *supra* note 71, at Art. 129; Geneva IV, *supra* note 71, at Art. 46; Laura M. Olson, “Re-enforcing Enforcement in a Specialized Convention on Crimes against Humanity: Inter-State Cooperation, Mutual Legal Assistance, and the *Aut Dedere Aut Judicare* Obligation,” in Leila Nadya Sadat, *Forging a Convention for Crimes against Humanity* (New York, N.Y.: Cambridge University Press, 2011) 326; M. Cherif Bassiouni, *International Extradition and World Public Order* (Dobbs Ferry, N. Y.: Sitjhoff-Oceana Publications, 1974) 7; UN Commission on Human Rights, *Progress Report on the Question of the Impunity of Perpetrators of Human Rights Violations*, Prepared by Mr. Guissé and Mr. Joinet, UN Doc. E/CN.4/ Sub.2/1993/6 (19 July 1993) para. 55.

⁹⁰ Christopher C. Joyner, “Arresting Impunity: The Case for Universal Jurisdiction in Bringing War Criminals to Accountability,” (1996) 59:4 *Law & Contemporary Problems* 167; Enikő Horváth, et al., *Gender-Based Violence Laws in Sub-Saharan Africa*, The New York City Bar in collaboration with the Center for Reproductive Rights, and the Cyrus R. Vance Center for International Justice, 2007, at p. 14167; *United Kingdom: Universal Jurisdiction and Absence of Immunity for Crimes against Humanity*, Amnesty International, 1 January 1999, AI-Index: EUR 45/001/1999, at p. 19.

respecting and observing human rights and fundamental freedoms for all people without distinction as to race, sex, language or religion.⁹¹ These rights are articulated and protected by several UN treaties and resolutions, some of which endorsed the Nüremberg principles and individual responsibility for war crimes, crimes against peace, and crimes against humanity.⁹²

c. Obligations under International Humanitarian Law

Libya is also obligated under the norms of the Geneva Conventions and their Additional Protocols to investigate and prosecute grave breaches of the conventions, including gender-based crimes during national and international armed conflicts. On 22 May 1956, Libya acceded to and became a Contracting Party to the 1949 Geneva Conventions, including the Fourth Geneva Convention Relative to the Protection of Civilian Persons in Times of War.⁹³ However, Article 3 common to the Geneva Conventions, prohibits ill-treatment and molestation of civilians, wounded combatants, and *hors de combat*. It proscribes certain acts, *inter alia*, violence to life, mutilation, cruel treatment, torture, outrage upon personal dignity—in particular humiliation and degrading treatment—and passing sentences without a duly constituted court or carrying out summary executions.⁹⁴ Moreover, Article 27 of the same convention explicitly requires Contracting Parties to protect women against all forms of sexual violence. It states that “women shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution or any form of indecent assault.”⁹⁵

Article 4(e) of Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)⁹⁶ took a further step by explicitly considering

⁹¹ United Nations Charter, *supra* note 69, at Arts. 55 & 56.

⁹² Draft Code of Crimes against the Peace and Security of Mankind (26 July 1996) Articles 19-22; Reprinted in Gabrielle Kirk McDonald & Olivia Swaak-Goldman, eds., *Substantive and Procedural Aspects of International Criminal Law: The Experience of International and National Courts*, vol. 2, part 1 (The Hague, The Netherlands: Kluwer Law International, 2000) 335-410; Guy S. Goodwin-Gill, “Crime in International Law: Obligations *Erga Omnes* and the Duty to Prosecute,” in Guy S. Goodwin-Gill & Stefan Talmon, eds., *The Reality of International Law: Essays in Honour of Ian Brownlie* (New York, N.Y.: Oxford University Press, 1999) 210; Naomi Roht-Arriaza, “Sources in International Treaties of an Obligation to Investigate, Prosecute, and Provide Redress,” in Naomi Roht-Arriaza, ed., *Impunity and Human Rights in International Law and Practice* (New York, N.Y.: Oxford University Press, 1995) 25; Principles of International Cooperation in the Detection, Arrest, Extradition, and Punishment of Persons Guilty of War Crimes and Crimes against Humanity, GA Res. A/RES/3074 (3 December 1973) paras. 1 & 6; Principles of International Law Recognized in the Charter of the Nüremberg Tribunal and in the Judgement of the Tribunal, GA Res. A/RES/95 (I) (11 December 1946); Stephen P. Marks, “Forgetting ‘The Policies and Practices of the Past’: Impunity in Cambodia,” (1994) 18:2 *Fletcher Forum for World Affairs* 20; UN Commission on Human Rights, *Systematic Rape, Sexual Slavery and Slavery-Like Practices during Armed Conflict: Final Report Submitted by Ms. Gay J. McDougall, Special Rapporteur*, UN Doc. E/CN.4/Sub.2/1998/13 (22 June 1998) at para. 25.

⁹³ Geneva IV, *supra* note 71.

⁹⁴ Geneva Convention IV, *supra* note 71, at Art. 3.

⁹⁵ *Ibid*, at Art. 27.

⁹⁶ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, (Protocol II), Opened for signature on 12 December 1977, 1125 U.N.T.S. 609 (Entered into force on 7 December 1978).

rape and other forms of sexual violence, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault, committed in non-transnational armed conflicts as “outrages upon personal dignity.”⁹⁷

d. Obligations under International Human Rights Law

Libya is a signatory to a number of core international human rights treaties, which require it, as a State Party, to take effective legislative, administrative, and judicial measures to prevent, prosecute and punish crimes committed against civilians. These treaties include: the Convention on the Prevention and Punishment of the Crime of Genocide;⁹⁸ the International Covenant on Civil and Political Rights,⁹⁹ the Convention on the Elimination of All Forms of Discrimination against Women;¹⁰⁰ the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;¹⁰¹ the United Nations Convention against Transitional Organized Crime;¹⁰² the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity;¹⁰³ the African [Banjul] Charter on Human and Peoples’ Rights;¹⁰⁴ and the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa.¹⁰⁵

Under the provisions of the above treaties, Libya is obligated to prosecute gender-based crimes deliberately perpetrated against the civilian population during the recent armed conflict in Libya, and to provide victims with an effective remedy, including judicial, social, and adequate

Ratified / acceded by Libya on 7 June 1978.

⁹⁷ *Ibid*, at Art. 4(2)(e).

⁹⁸ Genocide Convention, *supra* note 73.

⁹⁹ *International Covenant on Civil and Political Rights*, (1966), GA Res. 2200 (XXI), 21 UN GAOR, Supp. (No.16) at 52, UN Doc. A / 6316 (1966), 999 U.N.T.S. 302, 1976 Can. T.S. No. 47 (1966). (Entered into force on 23 March 1976). Acceded by Libya on 15 May 1970 [Covenant on Civil and Political Rights].

¹⁰⁰ *Convention on the Elimination of All Forms of Discrimination against Women*, (1979), GA Res. 34/180, 34 UN GAOR, Supp. (No.46) at 193, UN Doc. A / 34 / 46 (1979). (Entered into force on 3 September 1981). Acceded by Libya on 16 May 1989.

¹⁰¹ *Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*, GA Res. 39/46, 39 UN GAOR, Supp. (No.51) at 197, UN Doc. A / 39 / 51 (1984), reprinted in 23 *International Legal Materials* 1027 (1984), *Substantive changes noted in* 24 I.L.M. 535 (1985) (Entered into force on 26 June 1987). Acceded by Libya on 16 May 1989 [Convention against Torture].

¹⁰² *United Nations Convention against Transnational Organized Crime*, G.A. Res. 25, annex I, U.N. GAOR, 55th Sess., Supp. No. 49, at 44, U.N. Doc. A / 45 / 49 (Vol. I) (2001), *entered into force* Sept. 29, 2003. Ratified by Libya on 18 June 2004.

¹⁰³ *Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity*, G.A. res. 2391 (XXIII), annex, 23 U.N. GAOR Supp. (No. 18) at 40, U.N. Doc. A / 7218 (1968), *entered into force* Nov. 11, 1970. Acceded by Libya on 16 May 1989.

¹⁰⁴ *African [Banjul] Charter on Human and Peoples’ Rights*, Adopted on 27 June 1981, O.A.U. Doc. CAB / LEG / 67 / 3 / Rev. 5, (1981); Reprinted in 21 I.L.M. 58 (1982) (Entered into force on 21 October 1986). Ratified by Libya on 19 July 1986 [African Charter on Human and Peoples’ Rights].

¹⁰⁵ *Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa*, Adopted by the 2nd Ordinary Session of the Assembly of the Union, Maputo, CAB / LEG / 66.6 (Sept. 13, 2000); reprinted in 1 *African Human Rights Law Journal* 40, *entered into force* Nov. 25, 2005 [Protocol on the Rights of Women in Africa]

reparations. As a State Party to the International Covenant on Civil and Political Rights (ICCPR), e.g., Libya has an obligation to provide an accessible, effective, and enforceable remedy to the victims of crimes. Article 2(3)(b) of the same instrument provides that such remedy should be determined by competent judicial, administrative, or legislative authorities, or by any other competent authority provided for by the legal system of the state.¹⁰⁶

Moreover, rape and other forms of sexual violence, including sexual torture, violate the right of Libyans not to be subjected to torture or to cruel, inhuman or degrading treatment, and obligate the Libyan authorities to take effective legislative, administrative, judicial or other measures to prevent such acts in any territory under Libyan jurisdiction.¹⁰⁷ In addition, the Security Council's Resolution 1325 (2000) "calls on all parties to armed conflict to take special measures to protect women and girls from gender-based violence, particularly rape and other forms of sexual abuse."¹⁰⁸ Likewise, Resolution 1820 (2008) emphasizes that "sexual violence, when used or commissioned as a tactic of war in order to deliberately target civilians or as part of a widespread or systematic attack against civilian populations, can significantly exacerbate situations of armed conflict."¹⁰⁹

On the regional treaties level, Article 5 of the African [Banjul] Charter on Human and Peoples' Rights, provides that "Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited."¹¹⁰ By the same token, Article 11(3) of the above Protocol on the Rights of Women in Africa, focussing as it does on the protection of women in armed conflicts, requests that States Parties, including Libya, protect women against all kinds of violence, particularly rape and other forms of sexual exploitation. The same article stresses that such acts should be considered war crimes, genocide and/or crimes against humanity and that their perpetrators be brought to justice before a competent criminal judicial body.¹¹¹

¹⁰⁶ Covenant on Civil and Political Rights, *supra* note 99, at Art. 2(3)(b).

¹⁰⁷ Convention against Torture, *supra* note 101, at Art. 2(1).

¹⁰⁸ UN Security Council's Resolution 1325 (2000), *Women and Peace and Security* (31 October 2000), UN Doc. S/RES/1325 (2000), 40 I.L.M. 500-502 (2001), at para. 10 [UN Security Council's Resolution 1325].

¹⁰⁹ Rosemary Grey & Laura J. Shepherd, "Stop Rape Now?: Masculinity, Responsibility, and Conflict-related Sexual Violence," (2012) 16:1 *Men and Masculinities* 116; UN Security Council's Resolution 1820 (2008), *Noting that Rape and other Forms of Sexual Violence can Constitute a War Crime, a Crime against Humanity, or a Constitutive Act With Respect to Genocide* (31 March 2008) UN Doc. S/RES/1820 (2008), at para. 1 [UN Security Council's Resolution 1820].

¹¹⁰ African Charter on Human and Peoples' Rights, *supra* note 104, at Art. 5.

¹¹¹ Protocol on the Rights of Women in Africa, *supra* note 105, at Article 11(3). See also Christine Ocran, "Recent Developments – Actualities: The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa," (2007) 15 *African Journal of International & Comparative Law* 150; Helène Combrinck, "Rape Law Reform in Africa: 'More of the Same' or More Opportunities?," in Clare McGlynn & Vanessa E. Munro, eds., *Rethinking Rape Law: International and Comparative Perspectives*. (New York, N.Y.: Routledge, 2010) 124.

In sum, the above humanitarian and human rights law instruments, not only oblige the Libyan transitional government to prosecute conflict-related gender-based crimes and bring perpetrators to justice, but underline its duty to prevent future violations.

IV. The Dilemma of Prosecuting Gender-Based Crimes Under Libyan Transitional Justice

The fall of Qadhafi's totalitarian regime due to a popular uprising in October 2011, as is often the case with the collapse of autocratic systems, left Libya faced with serious challenges as a result of inheriting the former regime's socio-political problems. Other factors making the situation difficult were the social construct and culture of the Libyan people, the new dramatic political and security situation, and the failure of the Libyan consecutive transitional governments to restore justice and public order. An examination of the new socio-legal scene in Libya identifies four major challenges facing Libyan transitional justice in any future effort to prosecute wartime rape and other forms of sexual violence, namely legal impunity and lawlessness, weakness of the rule of law as opposed to insurgents' justice, absence of security and public order, and the lack of democratic institutions.

1. *Legal Impunity and Lawlessness*

Implementing an effective transitional gender justice program in post-Qadhafi Libya requires the Libyan transitional justice system to independently investigate the vast scope of sexual crimes committed by the former regime's security forces during and before the armed conflict, as well as those crimes committed by rebel forces and the transitional government's agents during and after the uprising. In other words, to ensure justice for all, Libya's transitional justice system must investigate, prosecute and hold accountable all persons who allegedly committed conflict-related gender-based crimes, whether for extracting information from detainees or as a revenge attack against communities discerned to be supporters of the former regime. Moreover, the system should also emphasize that victims' rights to effective remedies be determined by competent judicial, administrative or legislative authorities, not by insurgents' councils.¹¹²

Nonetheless, a closer look at the Libyan transitional laws, particularly Law No. 38, shows that these laws were promulgated in a way that makes them retributive rather than constructive. As already noted at the outset of this work, Article 4 of the above law, which provides blanket immunity for persons who carried out the task of toppling the former regime, approves the status of lawlessness and encourages the culture of impunity.¹¹³ Early reports suggest that this amnesty law was drafted in order to address the tribal

¹¹² Covenant on Civil and Political Rights, *supra* note 99, at Art. 2(3)(b).

¹¹³ The Hounding of Migrants Must Stop, *supra* note 36, at p. 70; Kevin Jon Heller, "The International Commission of Inquiry on Libya: A Critical Analysis," (2012). Electronic copy available at: <<http://ssrn.com/abstract=2123782>>, at p.37; Law No. (38), *supra* note 45, at Art. 4; Laws Breaching Human Rights and Undermining the Rule of Law, *supra* note 53, at p. 2.

leaders' concerns of holding members of relative rebel forces accountable for human rights violations allegedly committed during and after the uprising.¹¹⁴

In contrast to Article 12 of the Libyan Constitution,¹¹⁵ which stresses that all Libyans shall be treated equally before the law, Law No. 17 regarding the establishment of rules of national reconciliation and transitional justice limits cases to be addressed by the Fact-Finding and Reconciliation Commission to crimes allegedly associated with the former regime between 1 September 1969 and 23 October 2011, while crimes committed by rebels and transitional government's agents remain unconsidered.¹¹⁶ Furthermore, this law specifies the disqualification of all members of the former regime's revolutionary committees, revolutionary guards, and secret security forces from all platforms of national reconciliation—regardless of the fact that many of them were not involved in attacks against Libyan civilians—as a precondition for reconciliation and implementation of transitional justice.¹¹⁷

In light of the above discussion, one might say that the provisions of Laws 35 and 38 demonstrate the lack of thought that went into the law-making process, effectively invalidating much of what the transitional justice law is attempting to achieve.¹¹⁸ Moreover, they promote a culture of impunity by allowing a significant number of people who allegedly committed gender-based and other serious crimes to walk free, based on their political affiliation. At the same time, the above laws preserve a culture of selective justice, which was in turn a direct cause of the popular revolution against the former regime.¹¹⁹

2. *Rule of Law v. Militia Justice*

Restoring the rule of law in post-Qadhafi Libya requires that every Libyan citizen, regardless of his political affiliation or tribal lineage, be subject to the law, which must be fair, non-discriminatory, respectful of the human rights of the Libyan people, and be applied by a competent and fair legal system that complies with the international criminal law and human rights standards, embodied in the provisions of different international human rights and humanitarian law treaties ratified by Libya over the past sixty years.¹²⁰ Supremacy of the law in Libya implies improving security for all

¹¹⁴ Kevin Jon Heller, "Surprise, the NTC Amnesties Its Own Crimes," Online: *Opinio Juris* (Wednesday, 9 May 2012) <<http://opiniojuris.org/2012/05/09/surprise-the-ntc-amnesties-its-own-crimes/>> (Accessed on: 20 February 2013); Libya Passes Controversial Amnesty Law, *supra* note 55; Libya's Transition: The Current State of Play, Atlantic Council & Rafik Hariri Center for the Middle East, November 2012, at p.2; Nasos Mihalakas, "A New Federalism for Libya and the Arab Spring," Online: *Netherlands Aid* (11 April 2012) <<http://www.nl-aid.org/continent/northern-africa/a-new-federalism-for-libya-and-the-arab-spring/>> (Accessed on: 20 February 2013).

¹¹⁵ The Constitution of Libya, *supra* note 74, at Art. 12.

¹¹⁶ Law No. (17), *supra* note 39, at Arts.1&2.

¹¹⁷ *Ibid*, at Art.7.

¹¹⁸ Libya's Troubled Transition, *supra* note 22, at p.12.

¹¹⁹ Amend New Special Procedures Law, *supra* note 54, at p.1.

¹²⁰ Mohamed Eljarh, "Peace, Security and the Rule of Law Reform in Libya," Online: *Middle East*

citizens,¹²¹ reforming the Libyan justice system, providing an effective transitional justice through truth and reconciliation committees, granting adequate reparations to victims, and prosecuting conflict-related crimes, including wartime rape and other forms of sexual violence.¹²² It must also ensure Libyan women's security and access to justice by providing gender-sensitive justice and by prosecuting gender-based crimes perpetrated by all parties to the conflict.

It goes without saying that the blanket amnesty provided to the Libyan rebel militias by several laws adopted by the NTC, particularly Article 4 of Law No. 38, on the one hand, and the failure of Libyan lawmaker to incorporate crimes listed in the Rome Statute of the ICC¹²³ into the Libyan Penal Code, on the other, has weakened the State's governance and resulted in a fragile judicial system that puts fair trials out of reach.¹²⁴

Indeed, one of the serious challenges facing the current transitional government is the immediate need to gain control over hundreds of militia groups and disarm them.¹²⁵ Rebel groups are affecting most aspects of Libyans' lives—including security and justice—¹²⁶and forming several *quasi*-states and *de facto* authorities within the Libyan state.¹²⁷ Thousands of Libyans were, and still are, vulnerable to kidnapping by rebel militias. Some of the latter are held in different detention facilities outside the jurisdiction of Libya's justice system, while others have been subjected to extrajudicial killing,¹²⁸ or assassination in mysterious circumstances.¹²⁹

Online (10 January 2012) <www.middle-east-online.com/english/?id=49918> (Accessed on: 21 February 2013) [the Rule of Law Reform in Libya]; UN Development Programme, "Rule of Law: Building Lasting Peace through Justice and Security," (October 2012), at p. 1.

¹²¹ "Libya: Rocky Road Ahead for Libya's Tawergha Minority," *IRIN*, Tripoli, Libya, 13 December 2011.

¹²² UN High Commissioner for Human Rights, *Rule-of-Law Tools for Post-Conflict States: Amnesties*. (New York, N.Y.: United Nations Publications, 2009), at 33-35.

¹²³ The Rome Statute of the ICC, *supra* note 79, at Arts. 6-8.

¹²⁴ Hilary Homes, "Fair Trials Still out of Reach in Libya," Amnesty International Canada (7 September 2012) [Fair Trials Still out of Reach in Libya].

¹²⁵ Militias Threaten Hopes for New Libya, *supra* note 12, at p. 32; Sarah Leah Whitson, "In Libya, Building the Rule of Law," *The New York Times* (29 December 2011). Online: <<http://www.nytimes.com/2011/12/30/opinion/in-libya-building-the-rule-of-law.html>> (Accessed on: 21 February 2013) [Sarah Leah Whitson].

¹²⁶ The general prosecutor in al-Zawiya, 50 km to the west of Tripoli, told Amnesty International that the judicial system is functioning in difficult and tense circumstances as armed militias control most aspects of life in the city. He added that a group of armed militias stormed the court room and threatened one of the judges as they thought he had imposed a light sentence on an alleged Qadhafi supporter. In another similar incident, a group of armed men abducted a public prosecutor in al-Zawiya, held him for several hours and dragged him to the prosecution's office demanding that he must be punished for ordering the release of a detainee they accused of committing crimes. See Fair Trials Still out of Reach in Libya, *supra* note 124.

¹²⁷ Fair Trials Still out of Reach in Libya, *supra* note 124; Libya's Unwilling Revolutionaries, *supra* note 1.

¹²⁸ This includes the killing of Muammar Qadhafi and his son Mu'tasim on 20 October 2011. The NTC promised an investigation into these deaths but nothing has as yet emerged. Moreover, Amnesty International and Human Rights Watch documented the summary execution of 65 Libyan citizens on 23 October 2011 by rebel forces outside the Mahari Hotel in Sirte. See Militias Threaten Hopes for New Libya, *supra* note 12, at p. 33; Sarah Leah Whitson, *supra* note 125.

¹²⁹ A case in point is the assassination of Abdul-Fattah Younes al-Obeidi, who defected to the

During and in the aftermath of the conflict, rebel fighters arrested and arbitrary detained thousands of suspected security forces of the former regime, loyalists, and alleged foreign mercenaries. They continue to hold many of these in secret detention facilities without indictment or trial and in inhuman conditions, subjecting many of them to humiliation, torture, sexual torture, rape or threat of rape, mutilation and torture leading to death.¹³⁰ To cite but one example, *Thuwwar* al-Zintan, a rebel militia group functioning in western Libya, captured Saif al-Islam Qadhafi (hereinafter Saif al-Islam) on 19 November 2011, locked him in a secret place, and refused to hand him over to the Libyan transitional government. Since then the NTC and successor transitional governments have utterly failed, for more than 15 months,¹³¹ to provide him with a fair trial under the jurisdiction of the Libyan justice system or execute the ICC's arrest warrant and extradite him to the Court in The Hague.¹³² In this respect, Ahmed al-Jehani, Libya's representative to the ICC, has said: "we as Libyans cannot begin Saif's trial. There is no central power to prosecute him."¹³³ This is an egregious violation of Saif's right to be tried without undue delay, and a proof of the incompetence of the Libyan judicial system. The competence of any judicial body depends on its capacity to deliver justice in a timely, efficient, and impartial way. The current Libyan judicial system has shown itself incapable, thus far, of meeting this standard.

3. *Lack of Security and Public Order*

Libya is currently facing a cluster of complex security challenges. The most direct challenge to Libya's transition is the lack of central authority and

opposition in February 2011 and became the commander-in-chief of the rebel forces. On 27 July 2011, a group of rebel fighters took him for questioning in a military camp in Gharyounes. It has been reported that he was shot dead together with his aides in late July 2011. Recently, Hassan Jum'ah al-Jazzawi, a judge investigating the death of al-Obeidi, was assassinated in Benghazi. See Christine N. Myers, "Tribalism and Democratic Transition in Libya: Lessons from Iraq," (2013) 7:5 *Global Tides* 1-28. Available at: <<http://digitalcommons.pepperdine.edu/globaltides/vol7/iss1/5>> (Accessed on: 11 October 2013) 18; Militias Threaten Hopes for New Libya, *supra* note 12, at. pp. 32-33.

¹³⁰ Amnesty International, "Libya: Militia Stranglehold Corrosive for Rule of Law," News (4 July 2012), at p. 1; *Libya: Rule of Law or Rule of Militias?*, Amnesty International, 5 JULY 2012, Index: MDE 19/012/2012, at pp. 17-18 & 24 -25 [Rule of Law or Rule of Militias?]; Militias Threaten Hopes for New Libya, *supra* note 12, at. p. 32.

¹³¹ Jonathan O'Donohue, "Libya's Defining Moment: Justice or Revenge? Gaddafi-regime Officials must be Tried in the International Criminal Court to Ensure a Fair Trial," Online: Aljazeera (22 September 2013) <<http://www.aljazeera.com/indepth/opinion/2013/09/201392210557425280.html>> (Accessed: 3 October 2013); "Saif al-Islam in Libyan Court for First Time: Son of Former Libyan Leader Muammar Gaddafi Appears in Zintan Court over ICC Delegation Case," Online: Aljazeera (17 January 2013) <<http://www.aljazeera.com/news/africa/2013/01/20131171676991400.html>> (Accessed on: 17 January 2013) [Saif Al-Islam in Libyan Court for First Time]; Vivienne Walt, "Libya's Disaster of Justice: The Case of Saif al-Islam Gaddafi Reveals a Country in Chaos," Online TIME (28 June 2013) <<http://world.time.com/2013/06/28/libyas-disaster-of-justice-the-case-of-saif-al-islam-gaddafi-reveals-a-country-in-chaos/>> (Accessed on: 3 October 2013).

¹³² Warrant of Arrest for Saif al-Islam Qadhafi, ICC Pre-Trial Chamber I, No. ICC-01/11 (27 June 2011) [Warrant of Arrest for Saif al-Islam Qadhafi].

¹³³ Libya's Unwilling Revolutionaries, *supra* note 1.

public order. Tens of thousands of armed revolutionaries, approximately 125,000, are operating within more than one hundred brigades and spread throughout Libyan territory.¹³⁴ Each of these groups claims its share of legitimacy, operates separately from other groups, and has its own procedures regarding organization, arrest, and detention.¹³⁵

These groups have refused several calls from the NTC and transitional governments to surrender their arms and merge into the national army and security forces. This is however prevented by the state of mistrust existing between individual groups, on the one hand, and between them and the central government, on the other. This situation has complicated the state of security and would obstruct any attempt to reach reconciliation, peace-building and restoring justice.¹³⁶

However, this status of fragmentation reflects Libya's socio-cultural landscape. Before independence in 1951, Libyan tribes functioned to a considerable extent as independent political, economic, and military bodies. This has been a feature of Libya's political and economic life over the past sixty years; in fact, more than 70% of the population, despite considerable migration in the 1960s and 1970s to Tripoli and other large cities during the oil boom, still identify themselves as members of a tribe, retaining the same tribal values and trends.¹³⁷ This socio-cultural identity is profoundly rooted

¹³⁴ Arturo Varvelli, "The Role of Tribal Dynamics in the Libyan Future," International Society for Performance Improvement (ISPI), Analysis No. 172, May 2013, at p.5; Chris Hughes, "Libya: Tribal Warfare Looms in Battle for Power in Post-Gaddafi Era," Online: Mirror (23 August 2011) <<http://www.mirror.co.uk/news/uk-news/libya-tribal-warfare-looms-in-battle-149199>> (Accessed on: 3 October 2013); Florence Gaub, "The Libyan Armed Forces between Coup-proofing and Repression," (2013) 36:2 Journal of Strategic Studies 239; Igor Cherstich, "Libya's Revolution: Tribe, Nation, Politics," Online: Open Democracy (3 October 2011) <<http://www.opendemocracy.net/igor-cherstich/libyas-revolution-tribe-nation-politics>> (Accessed on: 3 October 2013); "Libya: Fragile Security, Fragmented Politics," (2013) 19:2 IISS Strategic Comments xv; Yahia H Zoubir & Erzsébet N Rózsa, "The End of the Libyan Dictatorship: The Uncertain Transition," (2012) 33:7 Third World Quarterly 1270; Rosan Smits, et al., *Revolution and Its Discontents: State, Factions and Violence in the New Libya* (The Hague, Conflict Research Unit, the Clingendael Institute, 2013) 42.

¹³⁵ Graeme Smith, "In Libya, the Revolution Will be Tribalized," Online: The Globe and Mail (7 March 2011) <<http://www.theglobeandmail.com/news/world/in-libya-the-revolution-will-be-tribalized/article569819/>> (Accessed on: 3 October 2013); *Holding Libya Together: Security Challenges After Qadhafi*, International Crisis Group, Middle East/North Africa Report N°115 (14 December 2011) at p. 3 [Security Challenges After Qadhafi]; Katarina Marcella Pedersen, *After Gaddafi, What Now? Issues of Transitional Justice* (M.A., Georgetown University, 2013) 47; Libya's Troubled Transition, *supra* note 22, at p. 7; Mathieu Galtier, "Militias are Taking over in Post-Gadhafi Libya," Online: USA TODAY (3 January 2013) <<http://www.usatoday.com/story/news/world/2013/01/03/libya-militias/1802523/>> (Accessed on: 3 October 2013); Youssef Sawani & Jason Pack, "Libyan Constitutionality and Sovereignty Post-Qadhafi: The Islamist, Regionalist, and Amazigh Challenges," (2013) 18:4 The Journal of North African Studies 524.

¹³⁶ Hanan Salah, "Dispatches: Law and Order in Libya, Tripoli-Style," Online: Human Rights Watch (27 August 2013) <<http://www.hrw.org/news/2013/08/27/dispatches-law-and-order-libya-tripoli-style>> (Accessed on: 3 October 2013); Michael Shkolnik, "Libya's Fragmentation: Tribal Conflict, Islamism, and the Quest for Power," United Nations Association in Canada, 15 May 2012; Paul Iddon, "A Clear-Cut Reminder of Libya's Tribal Divisions," Online: Digital Journal (2 May 2013) <<http://digitaljournal.com/article/349326>> (Accessed on: 3 October 2013); The Rule of Law Reform in Libya, *supra* note 120.

¹³⁷ Haala Hweio, "Tribes in Libya: From Social Organization to Political Power," (2012) 2: 1 African Conflict & Peacebuilding Review 114 [Haala Hweio]; Meftah Ali Dakhil, *Migration,*

in the Libyans' political and economic life and is strongly reflected in the formation of post-Qadhafi security forces and rebel brigades.¹³⁸

Inevitably, the lack of security has resulted in poor governance, a fragile judicial system, and difficulties in breaking with the legacy of impunity inherited from the former regime.¹³⁹ The absence of a centralized authority resulted in the failure of the transitional government to protect foreign diplomatic corps in Benghazi,¹⁴⁰ as well as Libyan high ranking officials,¹⁴¹ and minorities. The latter case is best illustrated by the case of African workers and immigrants who became a "legitimate" target of frequent arbitrary arrests and abuse.¹⁴² The lack of the transitional government's control over armed militias promotes a large scale of retaliation attacks,

Development, and Place Preferences: The Example of Libya (Ph.D., Dissertation, University of Kentucky, 1989) 33; Mohamed Farag Malhauf, *A Study of Newly Developed Communities in Libya* (Ph.D., Dissertation, University of California-Berkeley, 1979) 21.

¹³⁸ Hilmi M. Zawati, *Aftermath of Rape and Sexual Violence: The Dilemma of Libyan Women Wartime Rape Survivors*, International Speakers' Lecture Series, Faculty of Law, Queen's University, Kingston, Ontario, 29 March 2012; Seth Kaplan, "Understanding Libya: The Role of Ethnic and Tribal Groups in Any Political Settlement," *Online Fragile States* (1 March 2012) <<http://www.fragilestates.org/2012/03/01/understanding-libya-the-role-of-ethnic-and-tribal-groups-in-any-political-settlement/>> (Accessed on: 3 October 2013).

¹³⁹ *Divided We Stand: Libya's Enduring Conflicts*, International Crisis Group, Middle East/North Africa Report N° 130 (14 September 2012).

¹⁴⁰ The attack on the US diplomatic mission in Benghazi on 11 September 2012, and the failure of the transitional government to respond adequately to the incident, illustrates the lack of the rule of law and the constant failure of the government to impose it. See Barak Barfi, "Libya's Anti-Military Militias," *Online: Project Syndicate* (7 January 2013) <<http://www.project-syndicate.org/commentary/replacing-militias-with-national-security-forces-in-libya-by-barak-barfi>> (Accessed on: 24 February 2013).

¹⁴¹ Recently, on 6 January 2013, Mohamed Magarief, head of the Libyan General National Congress, was attacked by gunmen during his visit to Sebha to meet with members of local tribes on the subject of tribal clashes between Awlad Suleiman and Qadhafha tribes, which left several dead on both sides. Moreover, at the time of writing this paper, Ali Zeidan, the Libyan prime minister, has been abducted and held for several hours by armed men associated with the fragmented Libyan security apparatus—the Libyan Revolutionaries Operations Room (LROR) and the Anti-Crimes Unit. This is yet another high-profile example of the state of confusion and lawlessness in Libya two years after the fall of the Qadhafi regime. See "Details Emerge of Attack on Magarief in Sebha," *Online: Libya Herald* (6 January 2013) <<http://www.libyaherald.com/2013/01/06/reports-emerge-of-magarief-assassination-attempt-in-sebha/>> (Accessed on: 24 February 2013); "Freed Libyan Prime Minister Urges Calm: Ali Zeidan was Held for Several Hours by Former Rebel Brigades," *Online: Aljazeera* (10 October 2013) <<http://www.aljazeera.com/news/africa/2013/10/freed-libyan-prime-minister-urges-calm-2013101015129385582.html>> (Accessed on: 11 October 2013); Kim Sengupta, "Is No One Safe in Libya? PM has to be Rescued from Kidnap Gang : Ali Zeidan was Freed after Half a Day, but his Abduction Highlights a Nation's Slide into Chaos," *Online: The Independent* (10 October 2013) <<http://www.independent.co.uk/news/world/africa/is-no-one-safe-in-libya-pm-has-to-be-rescued-from-kidnap-gang-8870655.html>> (Accessed on: 11 October 2013); "Libyan Prime Minister Seized by Armed Men," *Online* (10 October 2013) <<http://www.aljazeera.com/news/africa/2013/10/libyan-pm-ali-zeidan-kidnapped-by-armed-men-2013101042630477468.html>> (Accessed on: 11 October 2013); Mahmud Turkia "Show of Power by Libya Militia in Kidnapping," *New York Times* (10 October 2013) <<http://www.nytimes.com/2013/10/11/world/africa/libya.html?pagewanted=1&r=0>> (Accessed on: 11 October 2013).

¹⁴² The battle for Libya, *supra* note 12, at pp. 9 & 80; Human Rights Watch, "Libya: Cease Arbitrary Arrests, Abuse of Detainees Thousands Arrested Without Review in Tripoli," (30 September 2011), at p. 2; Report of the International Commission of Inquiry on Libya, *supra* note 12, at para. 62; Rule of Law or Rule of Militias?, *supra* note 130, at p. 15.

including rape and other forms of sexual violence, against groups or communities believed to be loyalists to the former regime. Some townships and districts in Western Libya have been ethnically cleansed and turned into virtual ghost towns, particularly Tuwergha, Bani Walid, and Sirte.¹⁴³

However, security is essential to the Libyan transitional justice process, just as it is also critical to preventing future conflicts and stopping rape retaliation attacks, bringing justice to wartime rape victims, providing fair trials to perpetrators, and helping the Libyan people to tolerate the painful legacy of the past, so as to achieve justice for all citizens.

4. *Lack of Democratic Institutions*

Despite the differences between the three consecutive regimes that have governed Libya since independence in 1951, they all shared a consensus in considering the Libyan tribes as an important component and central player in shaping the Libyan state and contributing to its political identity.¹⁴⁴ King Muhammad Idris al-Sanusi, the first and last king of Libya, who was interested in reigning more than governing, had used the Libyan tribes as social associations to strengthen his control over the country and as an alternative to democratic institutions.¹⁴⁵ However, although the King tried in the middle of the 1960s to transfer responsibilities under the jurisdiction of the tribes over to government institutions, the tribal structure continued to be in a strong position when Qadhafi toppled the monarchy on September 1, 1969.¹⁴⁶

To reinforce his regime during the 42 years of his authoritarian rule, Qadhafi marginalized the army and distributed weapons to many informal tribal groups. Then, to further consolidate power, he dismantled the traditional state institutions and replaced them, according to his political vision, with revolutionary committees.¹⁴⁷ These committees formed the courts, carried out wide-ranging powers of arrest, and controlled the media and other aspects of Libyans' lives.¹⁴⁸ Furthermore, taking advantage of the

¹⁴³ Ann Elizabeth Mayer, "Building the New Libya: Lessons to Learn and to Unlearn," (2013) 34 *University of Pennsylvania Journal of International Law* 372; Security Challenges after Qadhafi, *supra* note 135, at p. 27.

¹⁴⁴ Haala Hweio, *supra* note 137, at 112.

¹⁴⁵ Barak Barfi, "Rebuilding the Ruins of Qaddafi," Online: Project Syndicate (22 December 2011) <<http://www.project-syndicate.org/commentary/rebuilding-the-ruins-of-qaddafi>> (Accessed on: 24 February 2013) [Rebuilding the Ruins of Qaddafi].

¹⁴⁶ Dirk Vandewalle, *Libya since Independence: Oil and State-Building* (Ithaca, NY: Cornell University Press, 1998), at p. 196 [Libya since Independence]; Haala Hweio, *supra* note 137, at p. 116.

¹⁴⁷ Emanuela Paoletti, "Libya: Roots of a Civil Conflict," (2011) 16:2 *Mediterranean Politics* 317; Mohammed El-Katiri, "State-Building Challenges in a Post-Revolution Libya," U.S. Army War College, October 2012, at p. 23 [State-Building Challenges in a Post-Revolution Libya]; Saskia van Genugten, "Libya after Gadhafi," (2011) 53:3 *Survival: Global Politics and Strategy* 70 [Libya after Gadhafi]; Thomas Hüsken, "Tribal Political Culture and the Revolution in the Cyrenaica of Libya," in *Libya from Revolution to a State Building: Challenges of the Transitional Period*. A Conference sponsored by the Libyan Centre for Studies and Research, Doha, Qatar, 7-8 January 2012, at p. 7.

¹⁴⁸ Rebuilding the Ruins of Qaddafi, *supra* note 145.

fact that tribalism is a factor of daily life in Libya,¹⁴⁹ Qadhafi implemented the strategy of “divide and rule” by pitting Libyan tribes one against another,¹⁵⁰ which led to the formation on February 17th of rebel brigades spread all over the country. This resulted in the emergence of some 140 militant groups—approximately the number of the existing Libyan tribes and clans—fighting against each other for legitimacy and rule.

By weakening the state’s institutions—the cornerstone in any process of state building and democratization—and supporting the rise of the tribal politicization to further his autocratic regime, Qadhafi turned Libya, despite its great natural resources, into an underdeveloped, consumerist police state.¹⁵¹ As Haala Hweio suggests, there was a direct relation between weakening Libya’s institutions and the increase in the role of the tribes in political life, on the one hand, and the long-term plan of Qadhafi to remain in power, on the other.¹⁵²

In light of the above accounts, it is fair to say that the NTC and the consecutive traditional governments have inherited a state without political institutions or an effective judicial system. This situation has resulted in a dual authority over the country, unskilled political leaders,¹⁵³ and failure by the government to reign in militias and restore the rule of law and public order. These constitute the major challenges that Libyans need to face in traversing the transitional period on their way to sustainable peace, state-building, and democracy.¹⁵⁴

V. Transitional Justice v. Retributive Justice: Key Mechanisms for Gender-Sensitive Transitional Justice in Libya

There are a variety of international instruments that emphasize the right of Libyan victims of gross and systematic violations of human rights to obtain an effective remedy and various forms of reparation. These instruments can provide them with a transnational judicial and non-judicial framework that would enable them to appear before national judicial bodies

¹⁴⁹ State-Building Challenges in a Post-Revolution Libya, *supra* note 147, at p. 1.

¹⁵⁰ Christopher S. Chivvis, et al., “Libya’s Post-Qaddafi Transition: The Nation-Building Challenge,” RAND Corporation, 2012, at p. 11.

¹⁵¹ Craig R. Black, “Deterring Libya: The Strategic Culture of Muammar Qadhafi,” *Future War fair Series No. 8*, Air War College, Air University, Maxwell Air Force Base, Alabama, US, October 2000, at p. 10; Haala Hweio, *supra* note 137, at p. 118; Libya since Independence, *supra* note 146, at p. 9; State-Building Challenges in a Post-Revolution Libya, *supra* note 147, at p. 7; Ulla Holm, “Libya in Transition: The Fragile and Insecure Relation between the Local, the National and the Regional,” in Louise Riis Andersen, ed., *How the Local Matters Democratization in Libya, Pakistan, Yemen and Palestine* (Copenhagen, Denmark: Danish Institute for International Studies, DIIS, 2013), at p. 27.

¹⁵² Haala Hweio, *supra* note 137, at p. 120.

¹⁵³ Barak Barfi, “Libya’s Transition to Transition,” Online: Project Syndicate (15 March 2012) <<http://www.project-syndicate.org/commentary/libya-s-transition-to-transition>> (Accessed on: 27 February 2013).

¹⁵⁴ Libya after Gadhafi, *supra* note 147, at p. 70; Rebuilding the Ruins of Qaddafi, *supra* note 145.

exercising universal jurisdiction, regional courts of human rights, international committees, and truth and reconciliation commissions to seek redress.

As has already been noted at the beginning of this analysis, mechanisms for gender-sensitive transitional justice in Libya may comprise a wide range of options, including those offered by judicial and non-judicial bodies.¹⁵⁵ The latter option may involve several national justice-serving measures: truth-seeking, fact-finding, and reconciliation commissions, which aimed at the investigation of gender-based crimes perpetrated by both state and non-state actors before, during, and after the recent eight-month civil war. Similar commissions, e.g., the truth and reconciliation commissions of South Africa, Sierra Leone, Peru, etc., usually conclude their reports by providing the results of their investigation and recommendations for amnesty, legal prosecution, and reparation to victims.¹⁵⁶ Accountability mechanisms may include Libya's civil and criminal courts, the ICC,¹⁵⁷ and perhaps a special court for Libya, composed of domestic and international judges and applying both Libyan and international criminal law.

In order to overcome the challenges posed by the failure of consecutive Libyan governments over the past sixty years to reform the judicial system and to incorporate international crimes identified in different international legal instruments, particularly the Rome Statute of the ICC,¹⁵⁸ it is necessary that the current transitional government utilize a number of overlapping key mechanisms in order to achieve gender-sensitive transitional justice in Libya.

¹⁵⁵ Gender-Based Violence in Transition, *supra* note 39, at p. 14; Kai Ambos, "The Legal Framework of Transitional Justice: A Systematic Study with a Special Focus on the Role of the ICC," in Kai Ambos et al. (eds.), *Building a Future on Peace and Justice: Studies on Transitional Justice, Peace and Development* (Berlin: Springer-Verlag, 2009) 19 [The Legal Framework of Transitional Justice]; The Rule of Law Reform in Libya, *supra* note 120; Sirkku K. Hellsten, "Transitional Justice and Aid," Working Paper No. 2012/06, United Nations University, January 2012, at p.16.

¹⁵⁶ Transitional Justice and the Arab Spring, *supra* note 6, at p. 9.

¹⁵⁷ Based on the prosecutor's investigation into the situation in Libya pursuant to the Security Council's Resolution 1970 (2011), arrest warrants were issued on 27 June 2011 by the ICC Pre-Trial Chamber I to Muammar Gaddafi, Saif Gaddafi, and Abdullah al-Senussi, for their individual responsibility in crimes committed by government's security forces after 15 February 2011 in different locations of the Libyan Territory. See The International Criminal Court, the Office of the Prosecutor, "First Report of the Prosecutor of the International Criminal Court to the UN Security Council Pursuant to UNSCR 1970 (2011)", (26 February 2011); The International Criminal Court, the Office of the Prosecutor, "Second Report of the Prosecutor of the International Criminal Court to the UN Security Council Pursuant to UNSCR 1970 (2011)", (9 November 2011); The International Criminal Court, the Office of the Prosecutor, "Third Report of the Prosecutor of the International Criminal Court to the UN Security Council Pursuant to UNSCR 1970 (2011)", (4 June 2012); The International Criminal Court, the Office of the Prosecutor, "Fourth Report of the Prosecutor of the International Criminal Court to the UN Security Council Pursuant to UNSCR 1970 (2011)", (7 July 2012); Prosecutor's Application Pursuant to Article 58 as to Muammar Mohammad Abu Minyar Gaddafi, Saif al-Islam Gaddafi, and Abdullah al-Senussi, Pre-trial Chamber I, Case No. ICC-01/11 (16 May 2011); UN Security Council's Resolution 1970 (2011), *Situation Referred to International Criminal Court* (26 February 2011), UN Doc. S/RES/1970 (2011) [UN Security Council's Resolution 1970]; Warrant of Arrest for Saif al-Islam Qadhafi, *supra* note 132.

¹⁵⁸ The Rome Statute of the ICC, *supra* note 79, at Arts. 6-8; Transitional Justice and the Arab Spring, *supra* note 6, at p. 4.

The following section underlines three significant mechanisms that can help in this effort, including: urgent legal justice system reform; an effective truth and reconciliation process involving the participation of Libyan feminist legal scholars and activists; and a special court for Libya with a hybrid legal system—similar to the Special Court for Sierra Leone (SCSL)¹⁵⁹ and the Extraordinary Chambers of the Courts of Cambodia (ECCC)¹⁶⁰—to adequately prosecute and punish conflict-related gender-based crimes and provide justice for both victims and perpetrators, regardless of their political affiliation or tribal lineage and the time-frame of the offences. The employment of these mechanisms by the transitional government would partly fulfil its obligations under international law and be consistent with the Security Council’s resolutions.¹⁶¹ These resolutions demand that states ensure women’s involvement in all aspects of post-conflict reconciliation and peace-building,¹⁶² and emphasize accountability for crimes committed during any conflict against women, including wartime rape and other forms of sexual violence.¹⁶³

1. Legal Justice System Reform

For many years, domestic and international criminal laws avoided recognizing wartime rape and other forms of sexual violence as punishable crimes under their provisions. After the incorporation of gender-based crimes into the laws of some national courts¹⁶⁴ exercising universal jurisdiction,¹⁶⁵ as well as into the statutes of international tribunals and courts, there has been a tendency in many recent post-conflict trials for the above judicial bodies to prosecute high-ranking officers for inciting rape and other gender crimes, leaving the actual perpetrators to remain at large. As a result, many of the atrocities committed against women and men go unpunished and victims see their claims ignored.¹⁶⁶

Accordingly, reforming the inherited defective Libyan legal system is a *condicio sine qua non* for an effective gender-sensitive transitional justice that

¹⁵⁹ *Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone* (16 January 2002), 2178 U.N.T.S. 138.

¹⁶⁰ *Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea*, 27 October 2004 (NS/RKM/1004/006).

¹⁶¹ Particularly, UN Security Council’s Resolution 1325, *supra* note 108; UN Security Council’s Resolution 1820 *supra* note 109; UN Security Council’s Resolution 1888 (2009), *Women and Peace and Security* (30 September 2009) UN Doc. S/RES/1888 (2009); UN Security Council’s Resolution 1889 (2009), *Women and Peace and Security* (5 October 2009) UN Doc. S/RES/1889 (2009).

¹⁶² UN Department of Peacekeeping Operations, *Review of the Sexual Violence Elements of the Judgments of the International Criminal Tribunal for the Former Yugoslavia, the International Criminal Tribunal for Rwanda, and the Special Court for Sierra Leone in the Light of Security Council Resolution 1820* (New York, N.Y.: United Nations Publications, 2009), at pp. 13-14.

¹⁶³ Nahla Valji, *A Window of Opportunity? Making Transitional Justice Work for Women* (New York, N.Y.: United Nations Development Fund for Women, 2010) 1 [Making Transitional Justice Work for Women].

¹⁶⁴ Fore example, see *Canadian Crimes against Humanity and War Crimes Act*, R.S.C., 2000, c.24.

¹⁶⁵ *R. v. Désiré Munyaneza*, (22 May 2009) Montreal Superior Court, 500-73-002500-052, C.A.H.W.C.A., at 737.

¹⁶⁶ *Gender-Based Violence in Transition*, *supra* note 39, at p. 15.

guarantees Libyan women's rights and especially their participation in post-conflict policy-making and decision-taking on equal footing with Libyan men.¹⁶⁷ Needless to say, the Libyan transitional government has inherited a flawed legal system that lacked independence—and therefore the confidence of the Libyan people—over the past four decades, and does not specifically incorporate international crimes embodied in the Rome Statute of the ICC, including genocide, crimes against humanity, war crimes, extrajudicial killings, and gender-based crimes.¹⁶⁸ This *lacuna* in the law may prevent Libyan judicial bodies from prosecuting and punishing those responsible for previous and recent international crimes committed in a number of war-torn Libyan cities and towns.¹⁶⁹ Moreover, a gender-sensitive transitional justice requires that gendered legal norms be included in and considered as an integral part of the Libyan Penal Code. This process is necessary to develop a new legal understanding of the harms of rape and other forms of sexual violence in war settings.¹⁷⁰

2. Gender Transitional Justice as Restorative Justice: The Libyan Truth and Reconciliation Commission

This long-term and painstaking non-judicial mechanism requires that both perpetrators and victims acknowledge, remember and learn from the past with the aim of transforming Libyan society from a state of war and lawlessness into one of sustainable peace, rule of the law, democracy, and state-building.¹⁷¹ This will require truth-seeking, and fact-finding and

¹⁶⁷ Christine Bell & Catherine O'Rourke, "Does Feminism Need a Theory of Transitional Justice? An Introductory Essay," (2007) 1 *The International Journal of Transitional Justice* 25 & 30; Helen Scanlon & Kelli Muddell, "Gender and transitional justice in Africa: Progress and prospects," (2009) 9:2 *African Journal on Conflict Resolution* 25; Rashida Manjoo & Calleigh McRaith, "Gender-Based Violence and Justice in Conflict and Post-Conflict Areas," (2011) 44 *Cornell International Law Journal* 17; Report of the Secretary-General, *Women's Participation in Peacebuilding*, UN Doc A/65/354-S/2010/466 (7 September 2010), paras. 4 & 18; Making Transitional Justice Work for Women, *supra* note 163, at p. 25.

¹⁶⁸ The battle for Libya, *supra* note 12, at p. 10; Contribution of the Arab Spring to the Role of Transitional Justice and Amnesty Laws, *supra* note 59, at p. 9; Leila Hanafi, "Libya and the ICC: Inspiring Transitional Justice Reform," Online: JURIST-Hotline (16 May 2012) <<http://jurist.org/hotline/2012/05/leila-hanafi-libya-ICC.php>> (Accessed on: 27 February 2013) [Inspiring Transitional Justice Reform]; Report of the International Commission of Inquiry on Libya, *supra* note 12, at para. 770.

¹⁶⁹ To be able to prosecute international crimes in its courts, Libya has to incorporate core crimes, particularly crimes against humanity into its domestic criminal code. For further discussion, see Leila Nadya Sadat, "A Comprehensive History of the Proposed International Convention on the Prevention and Punishment of Crimes Against Humanity," in Leila Nadya Sadat, *Forging a Convention for Crimes against Humanity* (New York, N.Y.: Cambridge University Press, 2011) 474.

¹⁷⁰ Campbell, Kirsten, "The Gender of Transitional Justice: Law, Sexual Violence and the International Criminal Tribunal for the Former Yugoslavia," (2007) 1 *The International Journal of Transitional Justice* 428.

¹⁷¹ Anja Mihr, "Transitional Justice and the Quality of Democracy – From democratic institution building to reconciliation," in Anja Mihr, ed., *Transitional Justice: Between Criminal Justice, Atonement and Democracy* (Utrecht: Utrecht University, 2012) 32; Martina Fischer, "Transitional Justice and Reconciliation: Theory and Practice," Online <http://www.berghof-handbook.net/documents/publications/fischer_tj_and_rec_handbook.pdf> (Accessed on: 28 February 2013), p. 407; Romi Sigsworth, "Gender-Based Violence in Transition," Concept Paper, in Violence and Transition Project Roundtable Sponsored by Centre for the Study of Violence

reconciliation commissions. The main object of this process, which can only complement but not substitute for criminal justice,¹⁷² is to investigate conflict-related gender-based crimes, bring justice to Libyan women and men victims of wartime rape and other forms of sexual violence, and emphasize their rights to justice and remedy pursuant to the principle *ubi jus ibi remedium*, regardless of their political affiliation or tribal lineage, or of whether they were abused before, during or after the recent civil war.

Libyan victims' fundamental rights to an effective remedy are thus clearly established and crystallized in international humanitarian and human rights law.¹⁷³ They have been enshrined in the norms of international customary humanitarian law pre-WWI; the Treaty of Versailles; the judgements of the Permanent Court of International Justice (PCIJ); and the Harvard Draft, which provides in Article 7 that states are responsible for injuries caused by an act or omission of the state.¹⁷⁴

The international human rights instruments that entered into force after the establishment of the United Nations in 1945, and that were ratified by Libya, recognize the victim's substantive rights to effective and adequate remedy, whether these rights were violated by other individuals or by government authorities, intentionally or through negligence. Article 8 of the Universal Declaration of Human Rights was the first provision to emphasize the victim's substantive right to obtain an effective remedy, implying that the remedy must be individualized and adjudicatory.¹⁷⁵ On the other hand, the International Covenant on Civil and Political Rights (ICCPR), which emphasizes the civil and political rights listed in the Universal Declaration of Human Rights, elucidates the victim's right to an effective remedy in Article

and Reconciliation Transitional Justice Programme, Johannesburg, 7 – 9 may 2008, at p. 18; Sanam Naraghi Anderlini, et. al., "Transitional Justice and Reconciliation." In *Inclusive Security, Sustainable Peace: A Toolkit for Advocacy and Action*. Hunt Alternatives Fund, 2007, at p.2; Transitional Justice – Does It Help or Does It Harm, *supra* note 39, at p. 4; Transitional Justice and Ongoing Conflict, *supra* note 4, at 6.

¹⁷² The Legal Framework of Transitional Justice, *supra* note 155, at 34.

¹⁷³ Human Rights Watch, "Truth and Justice Can't Wait: Human Rights Developments in Libya amid Institutional Obstacles," (December 2009), at p. 59.

¹⁷⁴ In the *Chorzow Factory* case, 1928, the Permanent Court of International Justice ruled that "... it is a principle of international law, and even a general conception of law, that any breach of an engagement involves an obligation to make reparation." See *Chorzow Factory*, Merits, Judgement No. 13 (1928) P. C. I. J., Series A, No. 17, p. 29. See also: Chittharanjan Felix Amerasinghe, *Local Remedies in International Law* (New York, N.Y.: Cambridge University Press, 2004) 88; *Harvard Draft of the Law of Responsibility of States for Damages done in their Territory to the Persons or Property of Foreigners* (Supplement to 1929) 23 *American Journal of International Law* 131; Karen Parker & Jennifer F. Chew, "Compensation for Japan's World War II War-Rape Victims," (1994) 17:3 *Hastings International and Comparative Law Review* 524-525; *Reparation for Torture: A Survey of Law and Practice in Thirty Selected Countries, Redress*, Report, April 2003, p. 10; Sompong Sucharitkul, "State Responsibility and International Liability in Transnational Relations," in Jerzy Makarczyk, ed., *Theory of International Law at the Threshold of the 21st Century: Essays in Honour of Krzysztof Skubiszewski* (Boston, Mass.: Kluwer Law International, 1996) 286; *Treaty of Versailles*, 28 June 1919, 2 *Bevans* 43; Reprinted in Leon Friedman, ed., *The Law of War: A Documentary History*, vol. 1 (New York, N.Y.: Random House, 1972) 417-434.

¹⁷⁵ It states that "[e]veryone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law." See Universal declaration of Human Rights, *supra* note 70, Article 8.

2(3). It extends this right to violations committed by government personnel and officials by ruling out the defences of sovereign immunity or following superior orders, and by obliging governments to investigate and prosecute violations regardless of the fact that they were committed by persons in an official capacity.¹⁷⁶

Similar norms are explicitly embodied in several regional and international human rights law instruments, particularly those treaties and conventions codified in the aftermath of WWII¹⁷⁷ and during the 1990s—the years of proliferation of United Nations human rights treaty bodies and monitoring mechanisms—which produced dozens of reports on the human rights situations in the former Yugoslavia and Rwanda.¹⁷⁸

¹⁷⁶ Article 2(3) of the International Covenant on Civil and Political Rights reads: Each State Party to the present Covenant undertakes:

- a. To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;
- b. To ensure that any person claiming such a remedy shall have his rights thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;
- c. To ensure that the competent authorities shall enforce such remedies when granted.

See Covenant on Civil and Political Rights, *supra* note 99, Article 2(3).

¹⁷⁷ Michael O'Flaherty, "Treaty Bodies Responding to States of Emergency: The Case of Bosnia and Herzegovina," in Philip Alston & James Crawford, eds., *The Future of UN Human Rights Treaty Monitoring* (New York, N.Y.: Cambridge University Press, 2000) 439 & 444; Naomi Roht-Arriaza, "State Responsibility to Investigate and Prosecute Grave Human Rights Violations in International Law," (1990) 78 *California Law Review* 475 & 478; Rebecca J. Cook, "State Responsibility for Violations of Women's Human Rights," (1994) 7 *Harvard Human Rights Journal* 169; René Provost, *International Human Rights and Humanitarian Law* (Cambridge, U.K.: Cambridge University Press, 2002) 43; UN Commission on Human Rights, *Question of the Impunity of Perpetrators of Human Rights Violations (Civil and Political): Final Report Prepared by Mr. Joinet Pursuant to Sub-Commission Decision 1996/119*, UN Doc. E/CN.4/Sub.2/1997/20 (26 June 1997), p. 7.

¹⁷⁸ Between 1992 and 1998, Special Rapporteurs of the UN Commission on Human Rights, René Deqni-Séqui, M. Tadeuse Mazowiecki, and Elisabeth Rehn, submitted dozens of reports on the situation of human rights in Rwanda and the former Yugoslavia, some of which are listed in the following:

Reports submitted by René Deqni-Séqui on the situation of human rights in Rwanda: UN Commission on Human Rights, *Report on the Situation of Human Rights in Rwanda Submitted by Mr. René Deqni-Séqui*, UN Doc. E/CN.4/1995/7 (28 June 1994); UN Commission on Human Rights, *Report on the Situation of Human Rights in Rwanda Submitted by Mr. René Deqni-Séqui*, UN Doc. E/CN.4/1995/12 (12 August 1994); UN Commission on Human Rights, *Report on the Situation of Human Rights in Rwanda Submitted by Mr. René Deqni-Séqui*, UN Doc. E/CN.4/1995/70 (11 November 1994); UN Commission on Human Rights, *Report on the Situation of Human Rights in Rwanda Submitted by Mr. René Deqni-Séqui*, UN Doc. E/CN.4/1995/71 (17 January 1995); UN Commission on Human Rights, *Report on the Situation of Human Rights in Rwanda Submitted by Mr. René Deqni-Séqui, Special Rapporteur, under Paragraph 20 of Resolution S-3/1 of 25 May 1994*, UN Doc. E/CN.4/1996/7 (28 June 1995); UN Commission on Human Rights, *Report on the Situation of Human Rights in Rwanda Submitted by Mr. René Deqni-Séqui, Special Rapporteur of the Commission on Human Rights, under Paragraph 20 of Resolution S-3/1 of 25 May 1994*, UN Doc. E/CN.4/1996/68 (29 January 1996); UN Commission on Human Rights, *Report on the Situation of Human Rights in Rwanda Submitted by Mr. René Deqni-Séqui, Special Rapporteur of the Commission on Human Rights, under Paragraph 20 of Resolution S-3/1 of 25*

This right, which is also incorporated in conventional and customary international humanitarian law, including the 1907 Hague Convention IV and the Protocol I additional to the Geneva Conventions of 1949, may take the form of restitution, rehabilitation, truth commissions, or monetary compensation.¹⁷⁹ The basic principles and guidelines of these forms were

May 1994, UN Doc. E/CN.4/1997/61 (20 January 1997).

Reports submitted by M. Tadeusz Mazowiecki on the situation of human rights in the territory of the former Yugoslavia: UN Commission on Human Rights, *Analytical Report on the Situation of Human Rights in the Territory of the Former Yugoslavia Submitted by M. Tadeusz Mazowiecki, Special Rapporteur of the Commission on Human Rights, Pursuant to Paragraph 14 of Commission Resolution 1992/S-1/1 of 14 August 1992*, UN Doc. E/CN.4/1992/S-1/9 (28 August 1992); UN Commission on Human Rights, *Report on the Situation of Human Rights in the Territory of the Former Yugoslavia Submitted by Mr. Tadeusz Mazowiecki*, UN Doc. E/CN.4/1993/50 (10 February 1993); UN Commission on Human Rights, *Fourth Periodic Report on the Situation of Human Rights in the Territory of the Former Yugoslavia, Submitted by Mr. Tadeusz Mazowiecki*, UN Doc. E/CN.4/1994/8, (26 September 1993); UN Commission on Human Rights, *Periodic Report on the Situation of Human Rights in the Territory of the Former Yugoslavia Submitted by Mr. Tadeusz Mazowiecki*, UN Doc. E/CN.4/1994/3 (5 May 1993); UN Commission on Human Rights, *Second Periodic Report on the Situation of Human Rights in the Territory of the Former Yugoslavia Submitted by Mr. Tadeusz Mazowiecki*, UN Doc. E/CN.4/1994/4 (19 May 1993); UN Commission on Human Rights, *Fourth Periodic Report on the Situation of Human Rights in the Territory of the Former Yugoslavia Submitted by Mr. Tadeusz Mazowiecki*, UN Doc. E/CN.4/1994/8 (26 September 1993); UN Commission on Human Rights, *Fifth Periodic Report on the Situation of Human Rights in the Territory of the Former Yugoslavia Submitted by Mr. Tadeusz Mazowiecki*, UN Doc. E/CN.4/1994/47 (17 November 1993); UN Commission on Human Rights, *Situation of Human Rights in the Territory of the Former Yugoslavia Submitted by Mr. Tadeusz Mazowiecki*, UN Doc. E/CN.4/1995/4 (10 June 1994). Reports submitted by Elisabeth Rehn on the situation of human rights in the territory of the former Yugoslavia: UN Commission on Human Rights, *Situation of Human Rights in the Territory of the Former Yugoslavia: Report Submitted by Ms. Elisabeth Rehn, Special Rapporteur of the Commission on Human Rights, Pursuant to Commission Resolution 1995/89*, UN Doc. E/CN.4/1996/63 (14 March 1996); UN Commission on Human Rights, *Situation of Human Rights in the Territory of the Former Yugoslavia: Periodic Report Submitted by Ms. Elisabeth Rehn, Special Rapporteur of the Commission on Human Rights, Pursuant to Paragraph 45 of Commission Resolution 1996/71*, UN Doc. E/CN.4/1997/5 (17 July 1996); UN Commission on Human Rights, *Situation of Human Rights in the Territory of the Former Yugoslavia: Periodic Report Submitted by Ms. Elisabeth Rehn, special Rapporteur of the Commission on Human Rights, Pursuant to Paragraph 45 of Commission Resolution 1996/71*, UN Doc. E/CN.4/1997/9 (22 October 1996); UN Commission on Human Rights, *Situation of Human Rights in the Territory of the Former Yugoslavia: Final Report of Ms. Elisabeth Rehn, Special Rapporteur of the Commission on Human Rights on the Situation of Human Rights in Bosnia and Herzegovina, the Republic of Croatia and the Federal Republic of Yugoslavia*, UN Doc. E/CN.4/1998/63 (14 January 1998); UN Commission on Human Rights, *Situation of Human Rights in the Territory of the Former Yugoslavia: Report on the Human Rights Situation in Bosnia and Herzegovina Submitted by the Special Rapporteur Ms. Elisabeth Rehn, Pursuant to Commission Resolution 1997/57*, UN Doc. E/CN.4/1998/13 (15 October 1997); UN Commission on Human Rights, *Situation of Human Rights in the Territory of the Former Yugoslavia: Report on the Situation of Human Rights in the Republic of Croatia Submitted by Ms. Elisabeth Rehn, Special Rapporteur, Pursuant to Commission Resolution 1997/57*, UN Doc. E/CN.4/1998/14 (31 October 1997); UN Commission on Human Rights, *Situation of Human Rights in the Territory of the Former Yugoslavia: Report on the Situation of Human Rights in the Federal Republic of Yugoslavia Submitted by Ms. Elisabeth Rehn, Special Rapporteur, Pursuant to Commission Resolution 1997/57*, UN Doc. E/CN.4/1998/15 (31 October 1997).

¹⁷⁹ *Recommendation on the Issue of "Comfort Women,"*: Supplementary Explanation, Japan Federation of Bar Association Report, 1995, at p. 5; Responding to Victims of Wartime Sexual Violence in Africa, *supra* note 6, at p. 36; UN Commission on Human Rights, Study Concerning the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms, Final Report Submitted by Mr. Theo van Boven, Special Rapporteur, UN Doc. E/CN.4/Sub.2/1993/8 (2 July 1993) [Boven Final Report]; UN Commission on Human Rights, Report of the Independent Expert on the Right to Restitution,

proposed by Theo van Boven, the United Nations special rapporteur, in his 1993 final report on reparations for gross violations of human rights and fundamental freedoms. Noting that it is usually too difficult for a victim to obtain an optimal remedy for gross violations committed on a massive scale—e.g. systematic mass rape and genocide in the former Yugoslavia and Rwanda—Boven asserted that to restore justice, the responsibility of the perpetrator must be established and the rights of the victim preserved to the fullest possible extent. In other words, remedies must be both effective and adequate¹⁸⁰—a principle which the Truth and Reconciliation Commission is supposed to emphasize, notwithstanding its limited success due to the lack of enforcement powers and procedural obstructions.¹⁸¹

It should also be noted that the Libyan Fact-Finding and Reconciliation Commission, established pursuant to Law No. 17 for the year 2012, will not work properly without abolishing Law No. 38, particularly Article 4.¹⁸² Indeed, the failure to investigate crimes committed by the rebels during and after the conflict would encourage the culture of impunity and undermine the truth and reconciliation process.¹⁸³

3. *Accountability Mechanisms: Who Has Jurisdiction over Libya's Gender-Based Egregious Crimes?*

The debate over where to hold Saif al-Islam and other conflict-related

Compensation and Rehabilitation for Victims of Grave Violations of Human Rights and Fundamental Freedoms, M. Cherif Bassiouni, Submitted Pursuant to Commission on Human Rights Resolution 1998/43, UN Doc. E/CN.4/1999/65 (8 February 1999); UN Commission on Human Rights, Final Report of the Independent Expert on the Right to Restitution, Compensation and Rehabilitation for Victims of Grave Violations of Human Rights and Fundamental Freedoms, Mr. Cherif Bassiouni, Submitted Pursuant to Commission on Human Rights Resolution 1999/33, UN Doc. E/CN.4/2000/62 (18 January 2000).

¹⁸⁰ However, Boven's principles and guidelines were revised by M. Cherif Bassiouni, an independent expert, who replaced the special rapporteur in 1998. A final version of Bassiouni's report was submitted in 2000 and circulated for comments by the Office of the High Commissioner in 2002. A revised version of Bassiouni's report deleted all references to international humanitarian law and changed the title to: "Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Law." Finally, the Commission called for Alejandro Salinas to make another revised version by consulting Boven and Bassiouni, taking into consideration remarks made by organizations and governments. A final revised draft was submitted on 1 October 2004. See Boven Final Report, *supra* note 179, at paras. 131 & 137; Dinah Shelton, "The United Nations Principles and Guidelines on Reparations: Context and Contents," in Koen De Feyter, et al., eds., *Out of the Ashes: Reparation for the Victims of Gross and Systematic Human Rights Violations* (Antwerpen, U.K.: Intersentia, 2005) 15-18; Reparation: A Sourcebook for Victims of Torture and other Violations of Human Rights and International Humanitarian Law, Redress, Report, March 2003, p. 15; *Torture Survivors' Perceptions of Reparation: Preliminary Survey*, Redress, Report, 2001, p. 13; UN Commission on Human Rights, *Systematic Rape, Sexual Slavery and Slavery-Like Practices during Armed Conflict: Final Report Submitted by Ms. Gay J. McDougall, Special Rapporteur*, UN Doc. E/CN.4/Sub.2/1998/13 (22 June 1998).

¹⁸¹ Hilmi M. Zawati, *supra* note 89, at 273.

¹⁸² Law No. (17), *supra* note 39; Law No. (38), *supra* note 45, at Art. 4; Libya: Transitional Government Should Support Victims [1] Promote Justice for Sexual Violence, Human Rights Watch (19 September 2011); Libyan Women Demand Support for War Rape Victims, *Reuters*, Tripoli, Libya, 26 November 2011.

¹⁸³ Contribution of the Arab Spring to the Role of Transitional Justice and Amnesty Laws, *supra* note 59, at p. 44.

criminal suspects and under whose jurisdiction they fall has led to a continuous legal tug of war between the various Libyan transitional governments and the ICC.¹⁸⁴ While Libya insists on its right to try suspects at home—where the alleged crimes were committed—in Libyan courts and before Libyan judges, the latter has repeatedly asked the Libyan NTC and successive transitional governments to surrender Saif al-Islam and Abdullah Senussi (hereinafter Senussi) to the Court, confirming its jurisdiction over their trial pursuant to the UN Security Council’s Resolution 1970 (2011)—adopted unanimously under Chapter VII of the UN Charter and pursuant to Article 13 (b) of the Rome Statute of the ICC on 26 February 2011.¹⁸⁵ This Resolution refers the situation in Libya to the ICC and requests the Libyan transitional government to cooperate fully with the Court and the Prosecutor.¹⁸⁶

Acting on the above resolution, the Prosecutor initiated investigations and sought arrest warrants on 16 May 2011 against Muammar Qadhafi, Saif al-Islam and Senussi for responsibility for alleged crimes against humanity committed in Libya between 15 and 28 February 2011.¹⁸⁷ On 27 June 2011, the Pre-Trial Chamber I accepted the Prosecutor’s application,¹⁸⁸ and issued three warrants of arrest for the above officials in relation to murders and persecutions allegedly committed after 15 February 2011 by state security forces.¹⁸⁹ Accordingly, the Registry filed, on 4 July 2011, its request to the Libyan Arab Jamahiriya for the arrest and surrender of Muammar Mohammed Abu Minyar Qadhafi, Saif al-Islam and Senussi.¹⁹⁰ Proceedings against Muammar Qadhafi were officially terminated on 22 November 2011,¹⁹¹ following his capture and execution by rebels from Misrata near his

¹⁸⁴ Leila Hanafi, “Libya and the ICC: in the pursuit of justice?,” Online: Middle East Monitor (9 May 2012) <<http://www.middleeastmonitor.com/articles/middle-east/3737-libya-and-the-icc-in-the-pursuit-of-justice>> (Accessed on: 1 March 2013) [Libya and the ICC]; Mark S. Kersten, “After the War: Negotiating Justice in Post-Gaddafi Libya,” in Kirsten Fisher and Robert Stewart (eds.), *Transitional Justice and the Arab Spring*, (Routledge, Forthcoming 2013), at p. 12 [Negotiating Justice in Post-Gaddafi Libya]; Mike Corder, “Court Mulls Where Gadhafi’s Son Should Be Tried,” Associated Press, The Hague, Netherlands, (9 October 2012) [Court Mulls Where Gadhafi’s Son Should Be Tried]; *Transitional Justice and the Arab Spring*, *supra* note 6, at p. 9.

¹⁸⁵ UN Security Council’s Resolution 1970, *supra* note 157, at para. 4.

¹⁸⁶ *Ibid*, at para. 5. See also Anna F. Triponel & Paul R. Williams, “The Clash of the Titans: Justice and Realpolitik in Libya,” (2013) 28 *American University International Law Review* 800.

¹⁸⁷ Prosecutor’s Application Pursuant to Article 58 as to Muammar Mohammad Abu Minyar Gaddafi, Saif al-Islam Gaddafi, and Abdullah al-Senussi, Pre-trial Chamber I, Case No. ICC-01/11 (16 May 2011).

¹⁸⁸ Decision on the Prosecutor’s Application Pursuant to Article 58 as to Muammar Mohammed Abu Minyar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al-Senussi, Pre-Trial Chamber I, Case No. ICC-01/11 (27 June 2011).

¹⁸⁹ Warrants of Arrest in Respect of Muammar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al-Senussi, Pre-trial Chamber I, Case No. ICC-01/11-01/11-2, ICC-01/11-01/11-3, ICC-01/11-01/11-4 (27 June 2011).

¹⁹⁰ *Prosecutor v. Muammar Mohammed Abu Minyar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, Request to the Libyan Arab Jamahiriya for the arrest and surrender of Muammar Mohammed Abu Minyar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al-Senussi, Registry, Case No. 01/11-01/11-5 (4 July 2011).

¹⁹¹ *Prosecutor v. Muammar Mohammed Abu Minyar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, Decision to Terminate the Case Against Muammar Mohammed Abu Minyar Gaddafi,

hometown of Sirte on 20 October 2011.¹⁹²

Subsequent to the capture of Saif al-Islam on 19 November 2011 by rebel fighters from Zintan, one of Libya's most powerful militia factions, the prosecutor visited Libya and conducted several meetings with Libyan officials. In a joint press conference with the Libyan Minister of Justice, the latter stated that Saif al-Islam could be tried in Libya in coordination with the ICC.¹⁹³ During the conference, the Prosecutor mentioned Libya's right to try Saif al-Islam in Libya and insisted that the ICC would not intervene if the Libyan authorities proceeded along those lines.¹⁹⁴ On the occasion of that visit, Abdurrahim El-Keib, the Prime Minister of the NTC, expressed Libya's desire to try Saif al-Islam and Senussi in Libya, and asserted that Libya was moving forward with an investigation into crimes against humanity allegedly committed by them in February 2011.¹⁹⁵ On the other hand, he asserted that Libya, which was then in the process of adopting a new penal law incorporating international crimes, namely, crimes against humanity, war crimes, and the crime of genocide,¹⁹⁶ would provide the suspects with fair and independent trials.¹⁹⁷ Nonetheless, in complete contrast to what had been stated by or attributed to the Prosecutor, the ICC issued a press release the following day emphasizing that Libya was obligated to surrender the suspect and cooperate fully with the Court in accordance with Resolution 1970. If it was the wish of the Libyan authorities to prosecute Saif al-Islam, they would have to submit an application to the Pre-Trial Chamber I, challenging the admissibility of the case pursuant to Articles 17 and 19 of the Rome Statute of the ICC. The acceptance or rejection of the inadmissibility of the case would be left to the discretion of the Judges of the ICC.¹⁹⁸

Pre-Trial Chamber I, Case No. ICC-01/11-01/11-28 (22 November 2011).

¹⁹² Death of a Dictator, *supra* note 16, at 32.

¹⁹³ Saif al-Islam Gaddafi could be Tried in Libya, Says ICC Prosecutor, Reuters, Tripoli, Libya, 22 November 2011.

¹⁹⁴ *The Prosecutor v. Saif Al-Islam Gaddafi & Abdullah Al-Senussi*, Request to Disqualify the Prosecutor from Participating in the Case Against Mr. Saif Al Islam Gaddafi, The Appeals Chamber, Case No.: ICC-01/11-01/11 (3 May 2012), at para. 13.

¹⁹⁵ *The Prosecutor v. Saif Al-Islam Gaddafi & Abdullah Al-Senussi*, Application on Behalf of the Government of Libya Pursuant to Article 19 of the ICC Statute, Pre-Trial Chamber I, Case No. ICC-01/11-01/11 (1 May 2012) Annex A (Public) Press Statement by H.E. Dr. Abdurrahim El-Keib, Prime Minister of the Transitional Council of Libya on the Occasion of the Visits of Mr. Luis Moreno-Ocampo, Prosecutor of the International Court.

¹⁹⁶ *The Prosecutor v. Saif Al-Islam Gaddafi & Abdullah Al-Senussi*, Application on Behalf of the Government of Libya Pursuant to Article 19 of the ICC Statute, Pre-Trial Chamber I, Case No. ICC-01/11-01/11 (1 May 2012). Annex J (Public) National Transitional Council Decree Recognising the Applicability of International Crimes within Libyan Laws; *The Prosecutor v. Saif Al-Islam Gaddafi & Abdullah Al-Senussi*, Application on Behalf of the Government of Libya Pursuant to Article 19 of the ICC Statute, Pre-Trial Chamber I, Case No. ICC-01/11-01/11 (1 May 2012) Annex K (Public) Letter to Dr. Ahmed Sadiq al-Jehani from Mostafa Eissa Lindi Regarding incorporating Articles 6-8 of the Rome Statute of the ICC in the Libyan Penal Code.

¹⁹⁷ *The Prosecutor v. Saif Al-Islam Gaddafi & Abdullah Al-Senussi*, Application on Behalf of the Government of Libya Pursuant to Article 19 of the ICC Statute, Pre-Trial Chamber I, Case No. ICC-01/11-01/11 (1 May 2012). Annex H (Public) Memorandum Explaining the Guarantees of the Accused in Front of the Libyan Judicial System through the Accusation and Trial Phases.

¹⁹⁸ Press Release, 23 November 2011, "Course of Action before the ICC Following the Arrest of the Suspect Saif Al-Islam Gaddafi in Libya," ICC-CPI-2011/11/23-PR746.

Some months later, despite the fact that the NTC had assured the Pre-Trial Chamber on 23 January 2012 that Libya had no intention at that time to challenge the admissibility of the case, nevertheless, seeking to defer Saif al-Islam's surrender under Article 94,¹⁹⁹ the Libyan government reversed its decision and brought on 1 May 2012 an application to the ICC under Article 19(2)(b) of the Rome Statute challenging the admissibility of the case concerning Saif al-Islam and Senussi.²⁰⁰ The application indicates that Libyan authorities have already started investigating the suspects, and under the principle of complementarity set forth in Article 17 of the Rome Statute of the ICC, the Court has an obligation to rule in favour of this application.²⁰¹ The Libyan government also argued that denying Libya's right to try former regime officials would compromise the sovereignty of the country, and undermine the whole process of Libyan transitional justice. While Ahmed al-Jehani, the Libyan lawyer representing the Libyan government at the Court, has asserted that the ICC's trying of Saif al-Islam would discourage reconciliation and sustainable peace in Libya and render the principle of complementarity meaningless, Melinda Taylor, Saif al-Islam's court-appointed lawyer, emphasizes that the Court should not trust the Libyan government's pledges and its fragile judicial system. She maintains that if the ICC hands the case over to the Libyan authorities, Saif al-Islam will lose his life in a completely vindictive and arbitrary trial that would have nothing to do with justice.²⁰² She stresses that the Libyan authorities are motivated not by the desire for justice but for revenge.²⁰³ However, the Pre-Trial Chamber I of the ICC rejected on 31 May 2013 the challenge to the admissibility of the case against Saif Al Islam and reminded Libya of its obligation to deliver the defendant to the Court.²⁰⁴

On the other hand, Payam Akhavan, McGill University professor of law and member of Libya's legal team to the Court, argues that the ICC need

¹⁹⁹ *The Prosecutor v. Saif Al-Islam Gaddafi & Abdullah Al-Senussi*, Request to Disqualify the Prosecutor from Participating in the Case Against Mr. Saif Al Islam Gaddafi, The Appeals Chamber, Case No.: ICC-01/11-01/11-44-Anx1-Red. (3 May 2012).

²⁰⁰ *The Prosecutor v. Saif Al-Islam Gaddafi & Abdullah Al-Senussi*, Application on Behalf of the Government of Libya Pursuant to Article 19 of the ICC Statute, Pre-Trial Chamber I, Case No. ICC-01/11-01/11 (1 May 2012), at para. 1 [Application on Behalf of the Government of Libya Pursuant to Article 19 of the ICC Statute]. See also Amin Nouri, *The Principle of Complementarity and Libya Challenge to the Admissibility before the International Criminal Court* (M. A., Lund University, 2013), at p.46.

²⁰¹ *Ibid.*

²⁰² Anna Bishop, "Failure of Complementarity: The Future of the International Criminal Court Following the Libyan Admissibility Challenge," (2013) 22 *Minnesota Journal of International Law* 409-410; Court Mulls Where Gadhafi's Son Should Be Tried, *supra* note 184; "Taylor Breaks Silence to Raise Fair Trial Fears," Online: ABC/AFP (7 July 2012) <<http://www.abc.net.au/news/2012-07-06/taylor-breaks-silence-on-libyan-detention/4115916>> (Accessed on: 31 December 2012).

²⁰³ Death awaits Gaddafi's son in Libya, AFP, The Hague, Netherlands (10 October 2012); Timothy William Waters, "Libya's Home Court Advantage: Why the ICC Should Drop Its Qaddafi Case," *Foreign Affairs* (2 October 2013) <<http://www.foreignaffairs.com/articles/139961/timothy-william-waters/libyas-home-court-advantage>> (Accessed on: 3 October 2013).

²⁰⁴ *Prosecutor v. Saif Al-Islam Gaddafi & Abdullah Al-Senussi*, Decision on the Admissibility of the Case against Saif Al-Islam Gaddafi, Pre-Trial Chamber I, Case No.: ICC-01/11-01/11 (31 May 2013), at para. 219.

only take steps to conduct a criminal prosecution when states fail to prosecute or are not able to investigate crimes. Yet in the Libyan case, the country is willing to put Saif al-Islam on trial; so the question really revolves around Libya's capacity to prosecute him.²⁰⁵ In this connection, human rights groups have warned that a local fair trial for Saif al-Islam is impossible, as revenge is more likely to be served than justice.²⁰⁶ The lack of security and public order indicate that a guilty verdict will automatically result in the death penalty.²⁰⁷

Legally speaking, the ICC's jurisdiction over a case is restricted by the principle of complementarity, incorporated in Article 17(1)(a), which provides that the Court should take over a case only when a State is unwilling or unable to carry out the investigation or prosecution.²⁰⁸ In the case of a non-State Party, the ICC cannot investigate and prosecute alleged crimes under the provisions of the Rome Statute unless the UN Security Council refers the case to the Prosecutor pursuant to Article 13(b) of the Statute and under Chapter VII of the UN Charter, as has happened with regard to Libya and Sudan.²⁰⁹ Accordingly, as a non-State Party, Libya is not obligated under the provisions of the statutory laws of the ICC to cooperate with the Prosecutor or the Court, but it is so obligated by virtue of the referral.²¹⁰

²⁰⁵ M. Christopher Pitts, "Being Able to Prosecute Saif Al-Islam Gaddafi: Applying Article 17(3) of the Rome Statute to Libya," (2014) *Emory International Law Review*, 2014 Forthcoming. Available at SSRN: <<http://ssrn.com/abstract=2245790>>, at p.23; Bridget Wayland, "Libyan Tug of War: International Law Professor Payam Akhavan is Playing a Key Role in One of the Most Closely Watched Cases in the aftermath of the Arab Spring," Online: Focus online/News from the Faculty of Law/McGill University (20 December 2012) <<http://publications.mcgill.ca/reporter/2013/01/libyan-tug-of-war/>> (Accessed on: 1 March 2013).

²⁰⁶ Frédéric Mégret & Marika Giles Samson, "Holding the Line on Complementarity in Libya: The Case for Tolerating Flawed Domestic Trials," (2013) 11:3 *Journal of International Criminal Justice* 572.

²⁰⁷ Michael Petrou, "Tripoli vs. The Hague: Two Courts Vie to Try Gadhafi's Son-Libya and the International Criminal Court are at war—over who gets to stage a trial for Saif al-Islam Gadhafi," Online: *Maclean's* (23 May 2012) <<http://www2.macleans.ca/2012/05/23/tripoli-vs-the-hague-two-courts-vie-to-try-gadhafis-son/>> (Accessed on: 1 March 2013); Owen Bowcott "Saif Gaddafi Should Go on Trial in Libya, War Crimes Tribunal Told: Tripoli Urges ICC to Abandon Legal Claim to Try Dictator's Son, and Relative Abdullah al-Senussi, and Let Them Face Justice at Home," Online: *The Guardian* (1 May 2012) <<http://www.guardian.co.uk/world/2012/may/01/saif-gadaffi-trial-libya-icc>> (Accessed on: 1 March 2013).

²⁰⁸ Darryl Robinson, "The Mysterious Mysteriousness of Complementarity," (2010) 21 *Criminal Law Forum* 72; Kevin Jon Heller, "The Shadow Side of Complementarity: The Effect of Article 17 of the Rome Statute on National Due Process," (2006) 17 *Criminal Law Forum* 263; Kirkland Green, "The Libya Cases at the ICC and the Libyan Government's Admissibility Challenge" Online: American Non-Governmental Organizations Coalition for the International Criminal Court: AMICC (14 December 2012), <http://www.amicc.org/docs/Libya_Challenge.pdf> (Accessed on: 28 February 2013); Machteld Boot, *Genocide, Crimes against Humanity, War Crimes: Nullum Crimen Sine Lege and the Subject Matter Jurisdiction of the International Criminal Court* (Antwerpen, Belgium: Intersentia, 2002) 55; The Rome Statute of the ICC, *supra* note 79, at Article 17 (1) (a).

²⁰⁹ *Ibid*, Article 13 (b); Jennifer Nimry Eseed, *supra* note 16, at 580.

²¹⁰ Paragraph 5 of the UN SC Resolution 1970 reads: "... Libyan authorities shall cooperate fully with and provide any necessary assistance to the Court and the Prosecutor pursuant to this resolution and, while recognizing that States not party to the Rome Statute have no obligation

In this connection, one may argue that since Libya is in the process of reforming its judicial system by incorporating international crimes into its penal code, by investigating and showing willingness to try suspect members of the former regime and provide them with independent and fair trials, and by being in no way obligated under any provision of the Rome Statute to cooperate with the ICC, including article 86, the Court has a binding duty to declare the cases against Saif al-Islam and Senussi inadmissible. This fine-sounding argument could be challenged on different bases, including the fact that the primacy of domestic courts related to the principle of complementarity, spelled out in Article 17 of the Rome Statute, is based on both willingness and ability.²¹¹ It is true that Libya is willing to prosecute Saif al-Islam and other former regime officials for alleged crimes committed in Libya against Libyans during the recent conflict, but it has no capacity to do so under its current laws and given its fragile judicial system inherited from the former regime, as well as the retributive justice prevailing under the current transitional regime. Accordingly, Libya is in fact obligated under the UN SC Resolution 1970 to comply with the ICC requests to surrender Saif al-Islam and other wanted suspects to the Court, while the Pre-Trial Chamber I is the only judicial body empowered to decide on the Libyan authorities' application of inadmissibility.²¹² However, while the application for the admissibility of Saif al-Islam's case is still pending at the time of writing this work,²¹³ the Pre-Trial Chamber I of the ICC ruled on 11

under the Statute, urges all States and concerned regional and other international organizations to cooperate fully with the Court and the Prosecutor." See Carsten Stahn, "Libya, the International Criminal Court and Complementarity: A Test for 'Shared Responsibility'," (2012) 10: 2 *Journal of International Criminal Justice* 330; UN Security Council's Resolution 1970, *supra* note 157, at para. 5.

²¹¹ *The Prosecutor v. Saif Al-Islam Gaddafi & Abdullah Al-Senussi*, Prosecution's Response to "Libyan Government's further submissions on issues related to the admissibility of the case against Saif Al-Islam Gaddafi," Pre-Trial Chamber I, Case No.: ICC-01/11-01/11 (12 February 2013), paras. 21-22.

²¹² Dapo Akande, "Is Libya Under an Obligation to Surrender Saif Gaddafi to the ICC? What Does the Rome Statute Say?," Online: EJIL Talk (26 November 2011) <<http://www.ejiltalk.org/is-libya-under-an-obligation-to-surrender-saif-gaddafi-to-the-icc-part-i-what-does-the-rome-statute-say/>> (Accessed on: 28 February 2013); Dapo Akande, "The Effect of Security Council Resolutions and Domestic Proceedings on State Obligations to Cooperate with the ICC," (2012) 10:2 *Journal of International Criminal Justice* 301-303; Konstantinos D. Magliveras, "Challenges for the International Criminal Justice and the ICC following the Arrest of Saif Al-Islam Gaddafi," Online: American Society of International Law, Accountability Series (Spring 2012) <http://www.asil.org/accountability/spring_2012_4.cfm> (Accessed on: 1 March 2013); *The prosecutor v. Saif Al-Islam Gaddafi & Abdullah Al-Senussi*, PCD Request for the Pre-Trial Chamber to Make a Finding of Non-Compliance, Pre-Trial Chamber I, Case No. ICC-01/11-01/11 (27 March 2012).

²¹³ Generally, see *The Prosecutor v. Saif Al-Islam Gaddafi & Abdullah Al-Senussi*, Application for leave to reply to the "Response of the Libyan Government to the 'Urgent Application on behalf of Abdullah Al-Senussi for Pre-Trial Chamber to order the Libyan Authorities to comply with their obligations and the orders of the ICC'" of 1 February 2013, Pre-Trial Chamber I, Case No.: ICC-01/11-01/11 (5 February 2013); *The Prosecutor v. Saif Al-Islam Gaddafi & Abdullah Al-Senussi*, Defence Response on behalf of Mr. Abdullah Al-Senussi to Government of Libya's Application for Leave to Appeal the "Decision on the Urgent Application on behalf of Abdullah Al-Senussi for Pre-Trial Chamber to order the Libyan Authorities to comply with their obligations and the orders of the ICC", Pre-Trial Chamber I, Case No.: ICC-01/11-01/11 (14 February 2013); *The*

October 2013, after a protracted legal dispute between the latter and the Libyan government, that “the case against Senussi is currently subject to domestic proceedings conducted by the Libyan competent authorities and that Libya is willing and able genuinely to carry out such investigation.” Therefore, the Judges concluded that the case is inadmissible before the Court, in accordance with the principle of complementarity enshrined in Article 17(1)(a) of the Rome Statute, founding treaty of the ICC”.²¹⁴ Of course, the prosecutor may still appeal this decision pursuant to Article 19(10) of the same statute, especially as the Libyan justice system’s capability to deliver a fair judgement to the defendant is still in question due to the incompetent legal system, absence of security, lack of public order, and poor governance. In fact, Ali Zeidan, the Libyan prime minister, was kidnapped on 10 October 2013 for a few hours by armed militiamen in Tripoli.²¹⁵

Nevertheless, this analysis triggers three accountability measures to bring members of the former regime who allegedly committed or instigated conflict-related crimes, including gender-based crimes, to justice:

First, local justice, where Libyan authorities request that Saif al-Islam should stand trial in Libya under the jurisdiction of the local judicial system. This is valid to the extent that justice ought to be served where crimes have been committed, reinforcing the integral role of national criminal law in setting grounds for punishments and their socio-pedagogical influences. It also sends a direct message to both victims and perpetrators that when a crime occurs, justice not only be done, but must be seen to be done.²¹⁶ However, this mechanism must be excluded at the present time for many of the reasons mentioned at the outset of this work. The capacity of the Libyan

Prosecutor v. Saif Al-Islam Gaddafi & Abdullah Al-Senussi, Public Redacted Version of the “Response to the “Libyan Government’s further submissions on issues related to admissibility of the case against Saif Al-Islam Gaddafi,” Pre-Trial Chamber I, Case No.: ICC-01/11-01/11 (18 February 2013); *The Prosecutor v. Saif Al-Islam Gaddafi & Abdullah Al-Senussi*, Request for Leave to Reply to the “Libyan Government’s Response to Urgent Defence Request of 21 January 2013,” Pre-Trial Chamber I, Case No.: ICC-01/11-01/11 (22 February 2013); *The Prosecutor v. Saif Al-Islam Gaddafi & Abdullah Al-Senussi*, Response to the “Libyan Government’s Request for leave to reply to Responses by OTP, OPCV and OPCD to Libyan Government’s further submissions on issues related to the admissibility of the case against Saif Al-Islam Gaddafi, Pre-Trial Chamber I, Case No.: ICC-01/11-01/11 (22 February 2013).

²¹⁴ *Prosecutor v. Saif Al-Islam Gaddafi & Abdullah Al-Senussi*, Decision on the Admissibility of the Case against Abdullah Al-Senussi, Pre-Trial Chamber I, Case No.: ICC-01/11-01/11 (11 October 2013), para. 311. See also ICC *Pre-Trial Chamber I Decides that the Al-Senussi Case is to Proceed in Libya and is Inadmissible before the ICC*, Press Release, ICC-CPI-20131011-PR953 (31 May 2013). Available at <http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/pr953.aspx> (Accessed on: 11 October 2013); Owen Bowcott, “Gaddafi Spy Chief’s Trial Should be Held in Libya, ICC Rules: Abdullah al-Senussi Faces Death Penalty for Allegedly Ordering Massacres during 2011 Revolution that Overthrew Regime,” Online: The Guardian (11 October 2013) <<http://www.theguardian.com/world/2013/oct/11/gaddafi-spy-chief-trial-libya-icc-rules>> (26 October 2013).

²¹⁵ *Prosecutor v. Saif Al-Islam Gaddafi & Abdullah Al-Senussi*, Declaration of Judge Christine Van den Wyngaert on the Admissibility of the Case against Abdullah Al-Senussi, Pre-Trial Chamber I, Case No.: ICC-01/11-01/11 (11 October 2013), para. 2.

²¹⁶ A. Simester & G. Sullivan, *Criminal Law: Theory and Doctrine* (Portland, Or.: Hart, 2007) 32; B. Mitchell, “Multiple Wrongdoing and Offence Structure: A Plea for Consistency and Fair Labelling,” 64:3 *Modern Law Review* 398; Hilmi M. Zawati, *supra* note 8, at p. 6.

judicial system to deliver a fair trial must be seriously questioned after 42 years of lawlessness, absence of accountability and rule of law during and after an eight-month bloody civil war, and in the light of a transitional justice that has actively legislated impunity.²¹⁷ Indeed, the current Libyan judicial system is not functioning effectively, suffers from the defects of the past, lacks impartiality, and continues to be a tool of repression. Two years since the fall of the former regime, the NTC and transitional governments are completely unable to provide accountability, sustainable peace, state-building, civil society, and the rule of law. Accordingly, it would be impossible to secure a fair trial for the suspects. The lack of public order and the inability to provide justice and redress to both victims and suspects have motivated the international community to apply the principle of R2P and encourage Libya to immediately launch serious criminal justice reform, and to deliver Saif al-Islam and other former regime officials to the ICC.²¹⁸

Moreover, holding Saif al-Islam *incommunicado* in the rebels' custody at Zintan for more than two years in poor conditions,²¹⁹ without access to a lawyer or an official indictment,²²⁰ is in conflict with Article 55 of the Rome

²¹⁷ Alexander Knoops, "Prosecuting the Gaddafis: Swift or Political Justice?," (2012) 4:1 Amsterdam Law Forum 90; Law No. (38), *supra* note 45, at Art. 4.

²¹⁸ Inspiring Transitional Justice Reform, *supra* note 168; Libya and the ICC, *supra* note 184.

²¹⁹ Generally, see *The Prosecutor v. Saif Al-Islam Gaddafi & Abdullah Al-Senussi*, Public Redacted Version of "OPCD Observations on Libya's Submissions Regarding the Arrest of Saif Al-Islam" (ICC-01/11-01/11-51-Conf, 2 February 2012), Pre-Trial Chamber I, Case No.: ICC-01/11-01/11 (3 February 2012); *The Prosecutor v. Saif Al-Islam Gaddafi & Abdullah Al-Senussi*, Public Redacted Version Urgent Report Concerning the Visit to Libya, Pre-Trial Chamber I, Case No.: ICC-01/11-01/11 (2 March 2012); *The Prosecutor v. Saif Al-Islam Gaddafi & Abdullah Al-Senussi*, Public Redacted Response to the "Notification and Request by the Government of Libya in response to "Decision on Libya's Submissions Regarding the Arrest of Saif Al-Islam Gaddafi," Pre-Trial Chamber I, Case No.: ICC-01/11-01/11 (30 March 2012); *The Prosecutor v. Saif Al-Islam Gaddafi & Abdullah Al-Senussi*, Public Redacted Version of the Corrigendum to the "Defence Response to the Application on behalf of the Government of Libya pursuant to Article 19 of the ICC Statute," Pre-Trial Chamber I, Case No.: ICC-01/11-01/11 (31 July 2012).

²²⁰ When the mission of the Office of Public Counsel for the Defence (OPCD) visited Libya, they were told by a Libyan law officer that Saif al-Islam was not interrogated for war crimes, but "in connection with allegations concerning the fact that he allegedly did not have a licence for two camels, and issues concerning the cleaning of his fish farms." However, Libya's legal team to the Court has denied this story and considers it an inappropriate and unsubstantiated allegation by the OPCD against Libya. See Application on Behalf of the Government of Libya Pursuant to Article 19 of the ICC Statute, *supra* note 200, at para. 94; Kamal Abdallah, "Gaddafi's Men Face Charges," Online: Al-Ahram Weekly (24 September 2013) <<http://weekly.ahram.org.eg/News/4188/19/Gaddafi%E2%80%99s-men-face-charges.aspx>> (Accessed on: 3 October 2013); *The Prosecutor v. Saif Al-Islam Gaddafi & Abdullah Al-Senussi*, Public Redacted Addendum to the Urgent Report Concerning the Visit to Libya, Pre-Trial Chamber I, Case No.: ICC-01/11-01/11 (5 March 2012), para. 38; Chris Stephen, "Melinda Taylor Lashes out at Libya and ICC," Online: Libya Herald (16 December 2012) <<http://www.libyaherald.com/2012/12/16/icc-lawyer-melinda-taylor-lashes-out-at-libya-again/>> (Accessed on: 31 December 2012).

It is also worthy of note that Saif al-Islam appeared before a secret hearing on 17 January 2013 in Zintan after 14 months after his capture on 19 November 2011. He was facing charges related to a visit by the Court mission. He was charged with involvement with the ICC delegation members who were carrying papers related to the national security of Libya. Melinda Taylor, Saif al-Islam's defence lawyer, who was a member of the delegation, has argued that he will not receive a trial that would meet international standards credibility. She adds that his appearance before a Libyan court violates the UN SC Resolution 1970, and calls on the Security Council to impose Sanctions on Libya. See Jamie Dettmer, "Justice for Gaddafi Heir? ICC Fears Saif al-

Statute, which provides for the rights of persons during an investigation.²²¹ It also infringes the principles of the right to fair warning or maximum certainty,²²² and the right to be tried without undue delay.²²³

Nevertheless, leaving aside the ICC request to transfer the defendant to stand trial in The Hague, a pre-trial proceedings session has convened behind closed doors in Tripoli on 24 October 2013 against 38 leading Qadhafi regime figures, including Saif al-Islam; Senussi; Al-Baghdadi Al-Mahmoudi (the former Prime Minister), Abu Zaid Omar Dorda (Qaddafi's External Security Agency head), and Abdulati El-Obaidi (the former Foreign Minister).²²⁴ The defendants were charged with murder, kidnapping, complicity in incitement to rape, plunder, sabotage, embezzling public funds and committing acts harmful to national unity.²²⁵ For security reasons, only a few of the indictees have appeared in court, pleading not guilty to all charges levelled against them by the prosecution. Saif al-Islam, who is facing trial in Zintan on a separate charge of trading information threatening Libya's national security, didn't appear at the pre-trial hearing as militiamen refused to deliver him to the court in Tripoli. However, the lack of security and the wide scale lawlessness dominating the Libyan criminal justice system pose a serious challenge to its ability to ensure fair and impartial trials for all concerned.²²⁶

Islam Trial Won't Be Fair," Online: Daily Beast Company (January 18, 2013) <<http://www.thedailybeast.com/articles/2013/01/18/justice-for-gaddafi-heir-icc-fears-saif-al-islam-trial-won-t-be-fair.print.html>> (28 February 2013); Saif Al-Islam in Libyan Court for First Time, *supra* note 131.

²²¹ The Rome Statute of the ICC, *supra* note 79, at Art. 55.

²²² Andrew Ashworth, *Principles of Criminal Law*, 6th ed., (New York, N.Y.: Oxford University Press, 2009), at pp. 63-64; *Kolender v. Lawson* (1983) 103 S. Ct. 1855; 461 U.S. 352; 75 L. Ed. 2d 903; 1983 U.S. LEXIS 159; 51 U.S.L.W. 4532, at p. 15.

²²³ The Rome Statute of the ICC, *supra* note 79, at Art. 67(1)(c); *Statute of the International Criminal Tribunal for the Former Yugoslavia*, United Nations SCOR, 48th Sess., 3175. Annex, at 40, UN Doc. S/25704, 3 May 1993. (As Amended on 19 May 2003 by Security Council's Resolution 1481), at Article 21(4)(c); *Statute of the International Criminal Tribunal for Rwanda*, UN Security Council's Resolution S/RES/955 (1994) Annex, Adopted in the Security Council's 3454th meeting on 8 November 1994, at Article 20 (4)(c); *Statute of the Special Court for Sierra Leone*, UN Doc. S/2002/246, appendix II, 2178 U.N.T.S. 138. (06/03/2002), at Article 21(4)(c). See also *Prosecutor v. Samuel Hinga Norman, Moinina Fofana, and Allieu Kondewa*, (2004) Decision on Prosecuting Request for Leave to Amend the Indictment, 20 May 2004, SCSL-03-14-PT., Valerie Oosterveld, "Lessons from the Special Court for Sierra Leone on the Prosecution of Gender-Based Crimes," (2009) 17:2 American University Journal of Gender, Social Policy, and the Law 3.

²²⁴ "Libya Court Indicts Gaddafi Aides over 2011 Uprising," Online: Agence France-Presse (24 October 2013) <<http://www.rappler.com/world/regions/middle-east/42163-libya-gaddafi-aides-indictment>> (Accessed on: 28 October 2013); "Libya Court Indicts Former Gaddafi Aides over Crimes during 2011 Uprising," Online: Tripoli Post (25 October 2013) <<http://www.tripolipost.com/articledetail.asp?c=1&i=10752>> (26 October 2013).

²²⁵ Chris Stephen, "Gaddafi's Son, Intelligence Chief and PM Among Defendants in Crucial Trial: Most Important Trial in Libya's Post-Gaddafi Era Switched to Maximum Security Prison in Tripoli over Fears of Violence," Online: The Guardian (19 September 2013) <<http://www.theguardian.com/world/2013/sep/19/gaddafi-son-pm-trial>> (Accessed on: 3 October 2013); Hassiba Hadj Sahraoui, "Libya Must Surrender Saif al-Islam al-Gaddafi to International Criminal Court," Online: Amnesty International (18 September 2013) <<http://www.amnesty.org/en/news/libya-must-surrender-saif-al-islam-al-gaddafi-international-criminal-court-2013-09-18>> (Accessed on: 30 October 2013).

²²⁶ Chris Stephen, "Libya Prepares for Its Trial of the Decade: Government Refused to Hand

The second accountability measure is the ICC, whether it should conduct the trials in The Hague or in Tripoli. Due to the willingness and yet inability of the Libyan authorities to prosecute Saif-al-Islam in Libya, and its reluctance to transfer him to the Court, on the one hand, and to prevent vindictive/victor's justice in Libya, contribute to the reform of the Libyan judicial system, and help in restoring the rule of law and sustainable peace, on the other, the ICC can hold the trial in Tripoli²²⁷ pursuant to Article 3(3) of the Rome Statute, which provides the "[t]he Court may sit elsewhere, whenever it considers it desirable, as provided in this Statute."²²⁸ Holding trials for the former regime officials by the ICC in Tripoli would maintain the standards of international criminal justice and encourage Libya to demonstrate its commitment to international law. This would also address Libya's concerns and desire to try war crimes suspects on the Libyan soil, and encourage wartime rape victims to come forward and testify in a climate of greater security and judicial effectiveness.²²⁹

Finally, as the above mechanism was evidently refused by the Libyan transitional government, a third option could be a hybrid judicial system for legal accountability akin to those systems established in different war-torn countries.²³⁰ This is a relatively new judicial mechanism in international criminal justice whereby international and local judges and prosecutors apply domestic and international law. A hybrid judicial system, which involves international and national components, could be more acceptable to Libyan authorities for several reasons, including the unique opportunity it would present for actors in the Libyan criminal justice system to share proceedings with experienced international judges, prosecutors, and lawyers; maintain Libya's sovereignty; contribute to the restoration and

Muammar Gaddafi's Son and Spymaster over to International Criminal Court for War Crimes," Online: The Guardian (17 September 2013) <<http://www.theguardian.com/world/2013/sep/17/libya-trial-gaddafi-senussi>> (Accessed on: 3 October 2013); "Libya: A Rebuff to the ICC Authorities Fail to Surrender Gaddafi's Son to ICC, Despite Ruling," Online: Human Rights Watch (September 19, 2013) <<http://www.hrw.org/news/2013/09/19/libya-rebuff-icc>> (Accessed on: 30 October 2013); "Libya Court Indicts Gaddafi Aids and Son," Online: News 24 (24 October 2013) <<http://www.news24.com/Africa/News/Libya-court-indicts-Gaddafi-aides-son-20131024-2>> (26 October 2013); Neil Durkin, "Saif Gaddafi's Trial in Libya is Victor's Justice," Online: Huffington Post (21 September 2013) <http://www.huffingtonpost.co.uk/neil-durkin/saif-gaddafi-trial_b_3956043.html> (Accessed on: 3 October 2013).

²²⁷ This is what Mark Kersten calls an *in situ* trial. See Mark Kersten, "ICC Confirms: Trial in Libya by the Court is a Possibility!," Online: Justice in Conflict (21 November 2011) <<http://justiceinconflict.org/2011/11/21/icc-confirms-trial-in-libya-by-the-court-is-a-possibility/>> (Accessed on: 6 March 2013); Mark Kersten, "Trying Saif, Senussi in Libya: Why is Moreno-Ocampo so Lenient?," Online: Justice in Conflict (12 January 2012) <<http://justiceinconflict.org/2012/01/12/trying-saif-senussi-in-libya-why-is-the-moreno-ocampo-so-lenient/>> (Accessed on: 7 March 2013); Rebecca Lowe, "Gaddafi Trial: International or Libyan Law?," Online: International Bar Association (12 December 2011) <<http://www.ibanet.org/Article/Detail.aspx?ArticleUid=21dd8269-4920-4bab-aaa6-5de4f7c2fdb4>> (Accessed on: 7 March 2013).

²²⁸ The Rome Statute of the ICC, *supra* note 79, at Art. 3(3).

²²⁹ Negotiating Justice in Post-Gaddafi Libya, *supra* note 184, at p. 20.

²³⁰ For example, the Special Court for Sierra Leone (SCSL), the Extraordinary Chambers of the Courts of Cambodia (ECCC), the War Crimes Chamber of the Court of Bosnia-Herzegovina (WCCCBH), and the Special Tribunal for Lebanon (STL).

reform of post-conflict judicial system; and strengthen Libya's position on the international stage as a transformed country, newly emerged from statelessness to accountability and the rule of law.²³¹

VI. Conclusion

This analysis argues that the incompetence of the current Libyan transitional justice system, manifested in its failure to respond adequately to conflict-related gender-based crimes, impedes access to justice for victims, encourages the culture of impunity, and leaves Libya's peace-building process open to danger. In pursuing this inquiry, this research study examines Libya's gender-based crimes under transitional justice and affirmed its obligations under the norms of international law to protect victims and prosecute alleged gender-based crimes. It also underlines the dilemma of prosecuting gender-based crimes under Libyan transitional justice by exploring four major obstacles to adequately addressing gender-based crimes under the Libyan transitional justice system, including legal impunity and lawlessness, lack of the rule of law v. militia justice, lack of security and public order, and lack of democratic institutions. Finally, this work scrutinizes three key mechanisms for gender-sensitive transitional justice in Libya, involving urgent justice system reform, establishment of an independent truth-seeking and reconciliation commission to investigate gender-based crimes committed by all parties to the recent civil war, and finally, the setting up of a Special Court for Libya as a hybrid judicial system for bringing perpetrators to justice and bring justice to victims.

However, in spite of the willingness of the Libyan government to prosecute and try Saif al-Islam and other former regime official in Libya and by Libyan courts, and despite guarantees made by the Libyan authorities to provide suspects with high quality trials that meet all international standards, the chance for a fair trial remains very small. Libya's pledge to the ICC and to the international community to amend its laws by incorporating international crimes embodied in articles 6-8 of the Rome Statute of the ICC and its commitment to provide for an independent judiciary have proved the opposite—it is not the case in practice, especially, in terms of security, the rule of law, and a competent and independent judicial system, all of which can be described as inadequate. This results in a lack of trust on the part of victims seeking redress and on the part of suspects confined in the militias' and transitional government's jails awaiting fair trials. .

At this critical juncture, the international community should help Libya to domesticate international criminal and human rights law and avoid the

²³¹ Brendan Leanos, "And Justice for All: Understanding the Future of the International Criminal Court through the Situation in Libya," (2012) *Fordham Law Review* 108; Elizabeth B. Ludwin King, "New Beginnings: A Hybrid Approach to Accountability in Libya," (2011) 2 *Wake Forest Law Review Online* 1; Vanessa A. Arslanian, "Beyond Revolution: Ending Impunity and Lawlessness during Revolutionary Periods" (2013) 36:1 *Boston College International and Comparative Law Review* 31. Available at SSRN: <<http://ssrn.com/abstract=2174477>>.

trap of retributive and victor's justice. If Libya fails to include international crimes in its penal law, it will have no jurisdiction over conflict-related crimes, including allegedly crimes committed by Saif al-Islam, Senussi, and other former regime officials, as it violates the principle of *nullum crimen sine lege*, embodied in Article 22(1) of the Rome Statute of the ICC.²³²

Given the fact that the ICC's jurisdiction over Libya's conflict related crimes has emerged from under the coat-tails of the UN Security Council, pursuant to the UN SC Resolution 1970 (2011), and is accordingly limited to investigating and prosecuting crimes committed by members of the former regime between 15-28 February 2011, the Court has completely failed to investigate and prosecute crimes committed by both sides of the conflict after that date, including the alleged sexual abuse of Muammar Qadhafi, and his arbitrary execution along with his son Mu'tasim on 20 October 2011. Moreover, the ICC prosecutor has also failed to investigate gender-based crimes committed by rebel militias during and after the civil war, particularly those committed in rebels' detention facilities with a view to extracting information or taking revenge. Killing of captured combatants in war settings is a crime of war under Article 8(2)(b)(vi) of the Rome Statute of the ICC.²³³ Furthermore, the failure of Libyan authorities and the ICC to prosecute these crimes will promote the culture of impunity, increase barriers to justice, and encourage extrajudicial retaliation in Libya's tribal society.

²³² The Rome Statute of the ICC, *supra* note 79, at Art. 22(1).

²³³ *Ibid.*, at Article 8(2)(b)(vi).