

## Comments on the prohibition of torture and inhuman, cruel, or degrading treatment or punishment in Libya's Draft Constitutional Recommendations

### I. The Prohibition of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment

Torture is a crime and serious human rights violation that has devastating consequences for its victim, his or her family and whole communities. The practice of torture is in stark contrast to the rule of law. The abhorrent nature of the crime is recognised in constitutions around the world and in international law, under which torture is absolutely prohibited. This absolute prohibition means that there are no exceptions and no justifications for this crime, even in times of emergency.

Libya is party to a number of key international and regional treaties that enshrine the absolute prohibition of torture and other cruel, inhuman or degrading treatment or punishment (ill-treatment). These include the 1966 International Covenant on Civil and Political Rights (**ICCPR**) (articles 7 and 10), the 1981 African Charter on Human and Peoples' Rights (**ACHPR**) (article 5), the 1984 United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (**UNCAT**) and the 1989 Convention on the Rights of the Child (**CRC**) (article 37).

Under international law, states parties to a treaty are bound to implement its provisions and must ensure that their domestic law complies with their treaty obligations.<sup>1</sup> According to article 2 UNCAT 'Each State Party shall take effective *legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.*'<sup>2</sup> Libya therefore has a duty to enshrine the prohibition of torture in its domestic legal order. In addition, Libya must ensure that such prohibition is enforced in practice, particularly by ensuring that domestic institutions comply with laws which seek to prevent torture.<sup>3</sup>

States have a measure of discretion as to how to implement their international legal obligations, unless provided otherwise. UN human rights treaty bodies have, however, repeatedly called on

<sup>1</sup> Article 26 of the Vienna Convention on the Law of Treaties; Human Rights Committee, *General Comment 31: Nature of the General Legal Obligation on States Parties to the Covenant*, UN Doc. CCPR/C/21/Rev.1/Add.13 (2004), para. 13.

<sup>2</sup> Emphasis added.

<sup>3</sup> Committee Against Torture (CAT), *General Comment 2: Implementation of article 2 by states parties*, UN Doc. CAT/C/GC/2 (2008). See further REDRESS, *Bringing the International Prohibition of Torture Home* (January 2006), 15.

states to enshrine the prohibition of torture in their constitution to emphasise the seriousness of torture as a crime and human rights violation.<sup>4</sup> Vesting the absolute prohibition of torture with constitutional rank also ensures that all organs of the state are bound by it.<sup>5</sup> It further provides a safeguard, protecting the prohibition of torture from: (i) being subsequently overruled by parliament with simple majority or set aside by the judiciary; and (ii) being derogated from in time of emergency.<sup>6</sup>

In several of its concluding observations on states parties' reports, the Committee against Torture has stressed the importance of ensuring that the prohibition of torture is incorporated into national constitutions. For example, on Jordan, the Committee stated that:

While noting that a definition of torture has been included in article 208 of the Penal Code, the Committee regrets that Chapter Two of the Jordanian Constitution which provides for "Rights and Duties of Jordanians" does not contain a specific prohibition of torture and other forms of ill-treatment or punishment. ... The State party should incorporate the prohibition of torture into the Constitution to show a real and important recognition of torture as a serious crime and human rights abuse and to fight impunity.<sup>7</sup>

With respect to Zambia, the Committee expressed its concern that:

... article 25 of the State party's Constitution does not clearly stipulate the absolute prohibition of torture, regardless of whether a state of war or a public emergency has been declared (art. 2).

The State party should incorporate in its Constitution and other laws the principle of an absolute prohibition of torture whereby no exceptional circumstances whatsoever may be invoked to justify it.<sup>8</sup>

Further, when commenting on Ghana's report, the Committee was concerned 'at the absence of clear legal provisions ensuring that the absolute prohibition against torture is not derogated from under any circumstances'.<sup>9</sup> Equally, the Special Rapporteur on torture requested Ghana to 'incorporate clear legal provisions into the constitution and national laws to the effect that the prohibition of torture is absolute and non-derogable, in accordance with article 2, paragraph 2, of the convention against torture and other cruel, inhuman or degrading treatment or punishment.'<sup>10</sup>

The Committee on the Rights of the Child has also voiced support for the inclusion of the prohibition of torture at a constitutional level.<sup>11</sup>

## **II. Constitutional approaches to enshrining the absolute prohibition of torture and other ill-treatment**

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<sup>4</sup> See also *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, Juan E. Méndez, UN Doc. A/HRC/25/60/Add.1 (5 March 2014), para 95.

<sup>5</sup> Human Rights Committee, General Comment 31, above note 1, para. 4.

<sup>6</sup> REDRESS, above note 3, 44.

<sup>7</sup> CAT, *Concluding Observations: Jordan*, UN Doc. CAT/C/JOR/CO/2 (25 May 2010), para 9.

<sup>8</sup> CAT, *Concluding Observations: Zambia*, UN Doc. CAT/C/ZMB/CO/2 (26 May 2008), para 5.

<sup>9</sup> CAT, *Concluding Observations: Ghana*, UN Doc. CAT/C/GHA/CO/1 (15 June 2011), para 11.

<sup>10</sup> Report of the Special Rapporteur on torture, above note 4, para 95(a).

<sup>11</sup> Committee on the Rights of the Child, *Concluding Observations: Nigeria*, UN Doc. CRC/C/NGA/CO/3-4 (21 June 2010), para 39(a); *Concluding Observations: Pakistan*, UN Doc. CRC/C/15/Add.217 (27 October 2003), para 41(c).

The prohibition of torture and other ill-treatment entails an overarching duty for states to take measures to prevent torture, including by legislative means, and a series of specific obligations relating to preventive measures, criminal accountability and reparation.<sup>12</sup> States must both refrain from torture and take positive steps with a view to ensuring that torture does not take place, and, where it does, that justice is done.<sup>13</sup>

Most states that have adopted constitutions in the last decade have included constitutional provisions prohibiting torture. The following overview sets out the models used and examines the merits of the various approaches taken.

### **A. General prohibition on torture**

Several constitutions confine themselves to stipulating a general prohibition on torture and ill-treatment. This general prohibition usually takes one of the following forms:

#### *1. Torture and other cruel, inhuman or degrading treatment or punishment is prohibited*

The approach of setting out a concise, general prohibition is reflected in article 18 of South Sudan's 2011 transitional constitution, which states: 'No person shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment'.<sup>14</sup> This is frequently complemented by provisions that stipulate that there shall be no derogation from the prohibition of torture even in times of emergency, for example in the constitutions of the Democratic Republic of Congo,<sup>15</sup> South Sudan<sup>16</sup> and Sudan.<sup>17</sup>

#### *2. Torture and other cruel, inhuman or degrading treatment or punishment is prohibited; torture is specified to include mental or psychological torture*

Article 23 of the 2014 constitution of Tunisia stipulates that: 'The state protects human dignity and physical integrity, and prohibits mental and physical torture.'<sup>18</sup> Article 7 of Greece's constitution (as revised in 2008) provides that 'Torture, any bodily maltreatment, impairment of health or the use of

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<sup>12</sup> CAT, General Comment 2, above note 3; Human Rights Committee, General Comment 31, above note 1; *Prosecutor v. Furundzija*, International Criminal Tribunal for the former Yugoslavia, (10 December 1998); Case No. IT-95-17/I-T, para. 149.

<sup>13</sup> *Ibid.* See also *Velasquez Rodriguez v. Honduras*, Inter-Am.Ct.H.R. (Ser.C.) No. 4 (1988), in particular para. 166.

<sup>14</sup> See similarly article 33 Interim National Constitution of the Republic of Sudan, 2005.

<sup>15</sup> Article 61 of the Democratic Republic of Congo's Constitution of 2005 as amended: 'In no case, even when the state of siege or the state of urgency has been proclaimed in accordance with Articles 85 and 86 of this Constitution, can there be derogation of the rights and fundamental principles enumerated as follows: [...]the prohibition of torture and of cruel, inhuman or degrading punishments or treatment.'

<sup>16</sup> Article 188 of the Transitional Constitution of the Republic of South Sudan 2011: 'During a state of emergency, the President may, by law or orders, take any measures that shall not derogate from the provisions of this Constitution except as provided herein: (a) to suspend part of the Bill of Rights. However, there shall be no infringement on the... prohibition against torture...'

<sup>17</sup> Article 211(a) of the Interim National Constitution of the Republic of Sudan, 2005: 'The President of the Republic, with the consent of the First Vice President, may during the state of emergency take, by virtue of law or exceptional order, any measures that shall not derogate from the provisions of this Constitution and the Comprehensive Peace Agreement except as may be provided herein:- (a) to suspend part of the Bill of Rights. However, there shall be no infringement on ...sanctity from torture...'

<sup>18</sup> The Constitution contains no other reference to torture other than to state that crimes of torture are not subject to any statute of limitations.

psychological violence, as well as any other offence against human dignity are prohibited and punished as provided by law.’ Other states, such as Algeria and Angola,<sup>19</sup> follow a similar model. According to article 34 of Algeria’s constitution of 1963, as amended, ‘The State shall guarantee the inviolability of the human person. Any form of physical or moral violence or infringement of dignity shall be prohibited’.

3. *In addition to stating the prohibition of torture and other ill-treatment with or without specification that torture includes mental/psychological torture as outlined above at (1) and (2), adding a prohibition on medical and scientific experimentation in line with Article 7 ICCPR.*

According to Article 22 of Kyrgyzstan’s 2011 constitution: ‘1. No one may be subject to torture as well as other inhuman, cruel and degrading forms of treatment or punishment. [...] 2. Conducting of medical, biological or psychological experiments on people without their duly expressed and verified voluntary consent is prohibited.’ Other countries having similar provisions in their constitutions include Madagascar,<sup>20</sup> Rwanda,<sup>21</sup> Serbia,<sup>22</sup> Fiji,<sup>23</sup> South Africa,<sup>24</sup> Somalia,<sup>25</sup> Russia<sup>26</sup> and Turkey.<sup>27</sup>

4. *As in (1) including specific forms of violence as amounting to torture*

According to article 15 (4) of Somalia’s 2012 constitution ‘Female circumcision is a cruel and degrading customary practice, and is tantamount to torture. The circumcision of girls is prohibited.’

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<sup>19</sup> Article 36 of Angola’s 2010 Constitution gives everyone ‘b) The right not to be tortured or treated or punished in a cruel, inhumane or degrading manner; [and] c) The right to fully enjoy physical and mental integrity.’

<sup>20</sup> Article 8 of Madagascar’s 2010 Constitution provides that: ‘No one may be submitted to torture or to cruel, inhuman or degrading penalties or treatments. In particular, it is prohibited to submit a person without their free consent to a medical or scientific experiment.’

<sup>21</sup> Article 15 of Rwanda’s Constitution of 2003 with amendments through 2010 reads: ‘Every person has the right to physical and mental integrity. No one shall be subjected to torture, physical abuse or cruel, inhuman or degrading treatment. No one shall be subjected to experimentation without his/her informed consent. The modalities of such consent and experiments are determined by Law.’

<sup>22</sup> Article 25 of Serbia’s Constitution of 2006 stipulates that: ‘Physical and mental integrity is inviolable. Nobody may be subjected to torture, inhuman or degrading treatment or punishment, nor subjected to medical and other experiments without their free consent.’

<sup>23</sup> Article 11 of Fiji’s Constitution of 2013 provides that: ‘(1) Every person has the right to freedom from torture of any kind, whether physical, mental or emotional, and from cruel, inhumane, degrading or disproportionately severe treatment or punishment. [...] (3) Every person has the right to freedom from scientific or medical treatment or procedures without an order of the court or without his or her informed consent, or if he or she is incapable of giving informed consent, without the informed consent of a lawful guardian.’

<sup>24</sup> In addition to the prohibition on torture, article 12 of South Africa’s 1996 Constitution provides that: ‘Everyone has the right to bodily and psychological integrity, which includes the right -[...] c. not to be subjected to medical or scientific experiments without their informed consent.’

<sup>25</sup> In addition to the prohibition on torture, article 15 (3) of Somalia’s provisional Constitution 2012 provides that: ‘Every person has the right to physical integrity, which cannot be violated. No one may be subjected to medical or scientific experiments without their consent or, if a person lacks the legal capacity to consent, the consent of a near relative and the support of expert medical opinion.’

<sup>26</sup> Article 21 of Russian Federation’s Constitution of 1993 as amended provides that: ‘Nobody should be subjected to torture, violence, or other severe or humiliating treatment or punishment. Nobody may be subjected to medical, scientific or other experiments without voluntary consent.’

<sup>27</sup> In addition to the prohibition on torture, article 17 of Turkey’s 1982 Constitution provides that no one shall ‘be subjected to scientific or medical experiments without his/her consent.’

Article 15 of the 2009 constitution of Bolivia, while not specifying what constitutes torture, stipulates that every person has the right to ‘sexual integrity’ (as well as physical and psychological integrity.)

*5. As in (1) and specifying right to dignity and humane treatment, particularly in detention*

According to article 55 of Egypt’s 2014 constitution: ‘Every person who is either arrested, detained, or has his/her freedom restricted, shall be treated in a manner that maintains his/her dignity. He/she may not be tortured, intimidated, coerced or physically or morally harmed; and may not be seized or detained except in places designated for that purpose, which shall be adequate on human and health levels.’ Article 18 of the 2005 constitution of the Democratic Republic of Congo stipulates that ‘Any detainee must benefit from a treatment which preserves his life, his physical and mental health as well as his dignity.’ Article 22 (2) of Kyrgyzstan’s 2011 constitution provides that: ‘Each person deprived of liberty shall have the right to human treatment and respect of human dignity.’ The constitutions of Fiji, Kenya and South Africa<sup>28</sup> contain similar provisions.

*6. As in (1) but including other violations besides the prohibition of torture*

For example, article 66 (3) of Ecuador’s 2008 constitution provides that: ‘The following rights are recognised and guaranteed: [...] prohibition of torture, forced disappearance and cruel, inhuman or degrading treatment or punishment.’

**B. Other specific components of right to be free from torture and ill-treatment**

In addition to the general prohibition of torture, several more recently adopted constitutions set out specific components of the right to be free from torture and ill-treatment:

*1. Preventive measures and safeguards*

Complementing Article 2 UNCAT, several UNCAT articles impose specific obligations on states aimed at preventing torture. This includes the prohibition of sending someone to a country where he or she would be at risk of torture or ill-treatment, known as *refoulement*,<sup>29</sup> and the exclusionary rule, according to which confessions or statements extracted under torture are not admissible in any proceedings.<sup>30</sup> It also comprises a number of custodial safeguards, such as the right of access to a lawyer of one’s choice, the right to inform one’s family members, the right to see a doctor and the

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<sup>28</sup> Article 35 (2) (e) of the 1996 Constitution of South Africa states that detainees have the right ‘to conditions of detention that are consistent with human dignity, including at least exercise and the provision, at state expense, of adequate accommodation, nutrition, reading material and medical treatment.’

<sup>29</sup> See in particular article 3 UNCAT which states: ‘No State Party shall expel, return (“refouler”) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.’ CAT General Comment 2, above note 3, para. 3, makes it clear that the prohibition on *refoulement* also applies to cases of ill-treatment as well as torture, stating: ‘the measures required to prevent torture must be applied to prevent ill-treatment.’

<sup>30</sup> Article 15 UNCAT.

right to habeas corpus.<sup>31</sup> These safeguards are also an integral part of other rights, particularly the right to liberty and security and the right to a fair trial.<sup>32</sup>

(i) Non-refoulement

The constitutions of Angola (2010) and Ecuador (2008) specifically prohibit refoulement.<sup>33</sup> According to article 70 (2) of Angola's constitution: 'The extradition of foreign citizens...in cases where it is justifiably recognised that extradition may lead to the torture, inhumane or cruel treatment of the individual concerned or will result in irreversible damage to their physical integrity under the law of the state applying for extradition, shall not be permitted.'

(ii) Exclusion of evidence extracted through torture

A number of constitutions enshrine the exclusionary rule. Afghanistan's 2004 constitution provides that: 'A statement, confession or testimony obtained from an accused or of another individual by means of compulsion shall be invalid.'<sup>34</sup> Article 76 of Ecuador's 2008 constitution provides: 'Evidence obtained or presented in violation of the Constitution or the law shall not have any validity and shall fail to qualify as evidence.' Article 55 of Egypt's 2014 constitution, in a provision prohibiting ill-treatment and coercion of detainees, provides that: 'Every statement proved to be made by a detainee under any of the foregoing actions, or threat thereof, shall be disregarded and not be relied upon.' Other constitutions containing similar provisions include Somalia,<sup>35</sup> South Africa,<sup>36</sup> and Iraq.<sup>37</sup>

## 2. Criminal accountability

Torture is a crime under international law, and UNCAT obliges states to make torture an offence under national law.<sup>38</sup> States have a positive obligation to investigate, prosecute and punish acts of

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<sup>31</sup> See Human Rights Committee, *General Comment 35, Article 9: Liberty and Security of Person* (2014), para.58 and CAT, General Comment 2, above note 3, para.13.

<sup>32</sup> Article 9 ICCPR on the right to liberty and security of person provides that someone who is arrested shall be entitled to: be informed of reasons for arrest and charges against him or her; be brought promptly before a judge; the right to bring a habeas corpus proceeding; and the right to compensation for unlawful arrest or detention. Article 14 ICCPR on the right to a fair trial provides *inter alia* that an accused shall be entitled: to a fair and public hearing; to be presumed innocent until proved guilty; to have access to legal counsel and time to prepare a defence; to be tried without undue delay; to be tried in his presence; to examine witnesses against him and have witnesses on his behalf appear for him; not to be compelled to testify against himself; to a right of appeal; to a right to compensation for miscarriage of justice; and to protection from a rule against double jeopardy.

<sup>33</sup> Article 66 (14) of Ecuador's 2008 Constitution (though without explicitly referring to torture, instead using the terms 'life, liberty, safety or well-being').

<sup>34</sup> Article 30 of the Constitution of Afghanistan 2004.

<sup>35</sup> Article 35 (4) of Somalia's Constitution 2012 provides that: 'a verdict may not be based on evidence acquired by means of coercion'.

<sup>36</sup> Article 35 (5) of South Africa Constitution 1996 stipulates that: 'Evidence obtained in a manner that violates any right in the Bill of Rights must be excluded if the admission of that evidence would render the trial unfair or otherwise be detrimental to the administration of justice,' which should be read to exclude evidence obtained under torture.

<sup>37</sup> Article 37 (c) of Iraq's Constitution 2005 provides that: 'Any confession made under force, threat, or torture shall not be relied on, and the victim shall have the right to seek compensation for material and moral damages incurred in accordance with the law.'

<sup>38</sup> Article 4 UNCAT.

torture and ill-treatment.<sup>39</sup> The crime of torture and other forms of ill-treatment must not be subject to legal barriers, such as amnesties, immunities or statutes of limitation that undermine, if not altogether frustrate, the prospect of criminal accountability of the perpetrators.<sup>40</sup>

(i) Torture as a crime

Article 52 of Egypt's 2014 constitution specifically criminalises torture: 'Torture in all forms and types is a crime that is not subject to prescription'. Article 22 of Morocco's 2011 constitution provides that: 'The practice of torture, under any of its forms and by anyone, is a crime punishable by the law.' Article 7 (2) of Greece's 2008 constitution provides that: 'Torture, any bodily maltreatment, impairment of health or the use of psychological violence, as well as any other offence against human dignity are prohibited and punished as provided by law.' Article 26 (2) of Nepal's 2007 constitution stipulates that the torture of detainees 'shall be punishable by law'. Article 15 of the Bolivian constitution of 2009 provides that the state shall punish acts designed to cause pain and suffering: 'The State shall adopt the necessary measures to prevent, eliminate and punish sexual and generational violence, as well as any action or omission intended to be degrading to the human condition, to cause death, pain, and physical, sexual or psychological suffering, whether in public or private spheres.'

(ii) No amnesty, immunity or statutes of limitation

Article 120 (13) of Ecuador's constitution of 2008 provides that there shall be no amnesty granted in respect of 'genocide, torture, forced disappearance of persons, kidnapping, or homicide on political or moral grounds.' Ecuador's constitution also provides that the National Assembly shall be able to initiate the impeachment of the President for, inter alia, crimes of 'genocide, torture, forced disappearance of persons, kidnapping or homicide on political or moral grounds.'<sup>41</sup> Article 23 of Tunisia's 2014 constitution stipulates that 'Crimes of torture are not subject to any statute of limitations' as does article 52 of Egypt's 2014 constitution cited above (at B. 2 (i)).

3. *Reparation for victims of torture*

Victims of torture have a right to reparation, which comprises the procedural right to effective access to justice and the substantive right to adequate forms of reparation, including restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.<sup>42</sup>

(i) Right to effective access to justice

The right to effective access to justice in constitutions is often a generic right, rather than one specifically attached to the prohibition of torture. For example, article 97 of Egypt's 2014 constitution provides: 'Litigation is a safeguarded right guaranteed to all.' Article 75 of Ecuador's 2008 constitution provides that 'Every person has the right to free access to justice and the effective, impartial and expeditious protection of their rights and interests, subject to the principles of

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<sup>39</sup> See in particular articles 12 and 13 UNCAT.

<sup>40</sup> See CAT, *General Comment No. 3: Implementation of article 14 by states parties*, UN Doc. CAT/C/GC/3 (2012), paras. 40-42.

<sup>41</sup> Article 129.

<sup>42</sup> CAT, *General Comment 3*, above note 40.

immediate and swift enforcement.’ Other examples of such access to justice provisions can be found in the constitutions of Morocco<sup>43</sup> and Somalia.<sup>44</sup> Article 58 of Afghanistan’s 2004 constitution provides the right of effective access to justice with specific reference to the national human rights commission: ‘To monitor respect for human rights in Afghanistan as well as to foster and protect it, the state shall establish the Independent Human Rights Commission of Afghanistan. Every individual shall complain to this Commission about the violation of personal human rights. The Commission shall refer human rights violations of individuals to legal authorities and assist them in defense of their rights.’

(ii) Right to substantive reparation

The constitutions of Iraq and Nepal specifically provide for compensation for victims of torture. Article 37 of Iraq’s 2005 constitution provides that: ‘Any confession made under force, threat, or torture shall not be relied on, and the victim shall have the right to seek compensation for material and moral damages incurred in accordance with the law.’ According to article 26 of Nepal’s 2007 interim constitution: ‘any person so treated [ie. tortured or ill-treated during detention] shall be provided with such compensation as may be determined by law.’ Article 89 (4) of Ecuador’s 2008 constitution provides for release and rehabilitation measures in cases of torture: ‘If any kind of torture, inhumane, cruel or degrading treatment is confirmed, the order to release the victim, provide integral and specialized care, and provide measures that are alternative to imprisonment when applicable shall be issued.’ Other constitutions provide in a more general way for compensation for victims of crimes. For example, article 52 of Russia’s 1993 constitution (as amended) provides, ‘The rights of victims of crimes and of abuses of office shall be protected by law. The State shall provide the victims with access to justice and compensation for damage sustained.’

**C. Assessment**

Recent constitutional provisions incorporating the prohibition of torture demonstrate that states have adopted two principal approaches; either to simply stipulate the prohibition in concise terms or, in addition, spell out in greater detail various aspects of, and obligations pertaining to, the prohibition.

A brief, general provision stipulating the prohibition of torture and other ill-treatment reflects a widely used, traditional approach to fundamental rights protection or the establishment of a bill of rights within a constitutional framework. The constitution is used to set out rights as general guarantees, which bind the legislature and executive, and guide the judiciary in its adjudication of cases and interpretation of the law. This model is appropriate in a functioning rule of law context. However, it places considerable responsibility on the legislature and judiciary to interpret the provision in line with internationally agreed standards. This is particularly the case where there is limited or no practice of adequately addressing the issue of torture and a lack of guidance on applicable standards, such as in countries undergoing transitions from conflict or dictatorship. In

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<sup>43</sup> Article 118 of Morocco’s 2011 Constitution provides that ‘Access to justice is guaranteed to every person for the defense of their rights and of their interests protected by the law.’

<sup>44</sup> Article 34 of Somalia’s 2012 provisional Constitution provides that ‘Every person is entitled to file a legal case before a competent court’ and that the state shall provide free legal defence to those who do not have their own means and to ‘individuals or communities if they are legally pursuing the public interest.’

such circumstances, those drafting a constitution often desire to be more specific and prescriptive so as to make sure that it contributes to furthering key objectives, such as that there should be no impunity for torture.

Establishing the various elements of torture and other ill-treatment in conformity with article 7 ICCPR, and prohibiting related violations, such as enforced disappearance, is important to ensure that the prohibition of torture is fully covered in the constitution. In addition, the constitution may usefully set out specific obligations that have not been adhered to in the past, or that are at risk of not being adhered to, with a view to ensuring that these obligations are given explicit constitutional status forming part of the prohibition of torture. This applies particularly to the need to make torture a criminal offence, the inapplicability of any barriers to criminal accountability for torture, and reparation for torture.

Effectively ensuring that torture is absolutely prohibited in both national law and practice requires the establishment of a comprehensive framework of legislative, administrative and institutional measures. Notably, constitutional provisions that assure other rights, in respect of interaction between individuals and state institutions, are vital. The prohibition of torture and other ill-treatment. should therefore not be seen in isolation but read in the context of the constitution as a whole.

Such a system requires several components being in place, which include:

- The recognition of fundamental rights which protect individuals from discrimination and thereby lessen their vulnerability to forms of abuse of power, including torture and other ill-treatment, such as the right to equality and the rights of members of particular groups, such as persons with disability;
- The protection of other fundamental rights that act as safeguards against torture and ill-treatment, particularly the right to liberty and security, the right to a fair trial and the right to effective access to justice. This includes the right to litigate torture cases before national courts and, ideally, to challenge the unconstitutionality of laws on the grounds that they are incompatible with the prohibition of torture;
- Provisions establishing the status and lawful powers of law enforcement and security forces. Constitutional provisions should also guarantee transparency and accountability mechanisms in relation to the conduct of public authorities, such as the establishing of independent monitoring bodies and measures guaranteeing transparency and accountability;
- The independence of the judiciary, including adequate safeguards against any undue interference;
- As a complementary measure, the establishment of national human rights institutions tasked with the promotion and protection of human rights, and, in a country with a legacy of impunity, bodies tasked with providing truth, justice and reparation to victims of human rights violations;
- Provisions recognising the status of international law in the domestic legal order in conformity with the state's international obligations; and
- Vesting bodies, such as a law commission or a national human rights commission, with the task of monitoring the conformity of national laws with the state's international obligations.

### III. The Prohibition of Torture and Inhuman, Cruel or Degrading Treatment or Punishment in Libya's constitutional history

#### A. Libya's constitutional history in relation to the prohibition of torture

##### 1951-1969

The Libyan Constitution of 1951 contained many provisions concerning the protection of human rights, including the express prohibition of torture and degrading punishment in article 16. It also safeguarded the independence of the judiciary in article 145. The effectiveness of these articles was somewhat undermined, however, by other articles granting disproportionate power to the executive branch, namely the King. As a result, the role of the judiciary was left very limited, with no explicit mechanisms for judicial review and no means of reviewing other laws to ensure their compatibility with the constitution. Further, the constitution was silent on the relationship between national and international law. These factors meant that the human rights protected in the constitution, including the prohibition of torture, could easily be repealed or ignored. In fact, human rights protections were undermined in practice, as the King suppressed protests and tried people for their membership in political parties.<sup>45</sup>

##### 1969-2011

The new Constitutional Proclamation of 1969 stated that 'The accused or imprisoned shall not be subject to mental or physical harm.'<sup>46</sup> While this wording does not expressly prohibit torture and other forms of ill-treatment it does cover the essential elements of the prohibition, though confining it to the criminal justice and custodial context. The limited application of the prohibition enabled laws to be adopted that were inconsistent with the absolute prohibition of torture, such as law 54 of 1974 prescribing corporal punishment. However, the Constitutional Proclamation was subsequently repealed in the Declaration on the Establishment of the Authority of the People 1977. As a result, there have been no constitutional provisions that prohibit torture and ill-treatment in Libya since 1977.

Legislative protections against torture were adopted during this period. However, these limited protections were not upheld, as UN treaty bodies have highlighted consistently. In the period from 2007 to 2014, the Human Rights Committee adopted fourteen views in which it found Libya to have violated its obligations under article 7 of the ICCPR.<sup>47</sup> Twelve of these views were adopted in

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<sup>45</sup> M. Cherif Bassiouni, *Libya: From Repression to Revolution: A Record of Armed Conflict, A Record of Armed Conflict and International Law Violations*, 2011-2013, 13-12-2013 p. 44.

[http://news.bbc.co.uk/onthisday/hi/dates/stories/september/1/newsid\\_3911000/3911587.stm](http://news.bbc.co.uk/onthisday/hi/dates/stories/september/1/newsid_3911000/3911587.stm)

<sup>46</sup> Article 31 (c) of the Constitutional Proclamation of Libya 1969.

<sup>47</sup> Human Rights Committee, *El Awani v The Libyan Arab Jamahiriya*, Communication No. 1295/2004, Views adopted 11 July 2007, UN Doc. CCPR/C/90/1295/2004, para. 6.5, 6.6; Human Rights Committee, *El Hassy v Libya*, Communication No. 1422/2005, views adopted 24 October 2007, UN Doc CCPR/C/91/1422/2005, para. 6.2, 6.3, 6.4, 6.8, 6.11, 7; Human Rights Committee, *El Abani v Libyan Arab Jamahiriya*, Communication No. 1640/2007, Views adopted 26 July 2010, UN Doc. CCPR/C/99/D/1640/2007, para. 7.4, 7.5, 7.7 and 8; Human Rights Committee, *Ali Bashasha v The Libyan Arab Jamahiriya*, Communication No. 1776/2008, Views Adopted

response to communications filed by individuals whose relatives had been subjected to enforced disappearance. In each of these cases, the Human Rights Committee found violations of article 7 with respect to both the person who had been disappeared and the relative bringing the case. For example, in *El Hassy v Libya* (2007), the Human Rights Committee held that treatment at Abu Salim prison, which included severe beatings of inmates, amounted to a violation of article 7.<sup>48</sup> Cases raising torture before the Human Rights Committee have highlighted the non-independence of the judiciary, the lack of meaningful safeguards of the right to a fair trial, and the lack of accountability for acts of torture, as factors inhibiting the implementation of the prohibition of torture.

### *2011-Present*

During Libya's transitional period, the 2011 Constitutional Declaration has been the primary source of human rights guarantees. The Constitutional Declaration represents a step forward from its 1969 predecessor, however it provides narrower protections for freedom from torture-related rights than the 1951 Constitution:

#### No general prohibition on torture

The Constitutional Declaration makes no explicit reference to the prohibition of torture, only providing the following unspecific protection in article 7:

The State shall safeguard human rights and fundamental freedoms, endeavour to join the regional and international declarations and covenants which protect these rights and freedoms and strive for the promulgation of new covenants which dignify the human as the successor of God on earth.

#### Preventative measures and safeguards

Although the Constitutional Declaration provides that the extradition of political refugees shall be prohibited it does not enshrine the principle of non-refoulement to prohibit the return of a person

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20 October 2010, UN Doc. CCPR/C/100/D/1776/2008, para. 7.4, 7.5, 7.7, and 8; Human Rights Committee, *Aboussedra v Libyan Arab Jamahiriya*, Communication No. 1751/2008, Views adopted 25 October 2010, UN Doc. CCPR/C/100/D/1751/2008, para. 7.4, 7.5, 7.7, 7.10, and 8; Human Rights Committee, *El Hagog Jumaa v Libya*, Communication No. 1755/2008, Views adopted 19 March 2012, UN Doc. CCPR/C/104/1755/2008/Rev.1, para. 8.6; Human Rights Committee, *Nenova et al v Libya*, Communication No. 1880/2009, Views adopted 20 March 2012, UN Doc. CCPR/C/104/D/1880/2009, para. 7.6; Human Rights Committee, *Aboufaied v Libya*, Communication No. 1782/2008, Views adopted 21 March 2012, UN Doc. CCPR/C/104/D/1782/2008, para. 7.4, 7.5 and 7.10; Human Rights Committee, *Il Khwildy v Libya*, Communication No. 1804/2008, view adopted 1 November 2012, UN Doc. CCPR/C/106/D/1804/2008, para. 7.5, 7.6, 7.8 and 8; Human Rights Committee, *Benali v Libya*, Communication No. 1805/2008, Views adopted 1 November 2012, UN Doc. CCPR/C/106/D/1805/2008, para. 6.8 and 7; Human Rights Committee, *Abushaala v Libya*, Communication No. 1913/2009, Views adopted 18 March 2013, UN Doc. CCPR/C/107/D/1913/2009, para. 6.3, 6.4, 6.6, 6.9, 7; Human Rights Committee, *Al Khazmi v Libya*, Communication No. 1832/2008, Views adopted 18 July 2013, UN Doc. CCPR/C/108/D/1832/2008, para. 8.3 and 8.5; Human Rights Committee, *Almegaryaf and Matar v. Libya*, Communication No. 2006/2010, Views adopted 21 March 2014, UN Doc. CCPR/C/110/D/2006/2010, para. 7.5, 7.7 and 7.10; and Human Rights Committee, *Al-Rabassi v Libya*, Communication No. 1860/2009, Views adopted 18 July 2014, UN Doc. CCPR/C/111/1860/2009, para. 7.4, 7.8, 7.9, 8.

<sup>48</sup> Human Rights Committee, *El Hassy v Libyan Arab Jamahiriya*, Views adopted 24 October 2007, UN Doc. CCPR/C/91/D/1422/2005, para. 6.3.

who may be at risk of torture or other ill-treatment. The Constitutional Declaration also does not explicitly exclude the use of evidence extracted through torture.

#### Criminal accountability

The Constitutional Declaration does not enshrine accountability for violations of the prohibition of torture. This failure has been aggravated by a prevailing culture of revolutionary legitimacy and the provision of amnesties such as those granted by Law 38 of 2012 'For actions made necessary by the 17 February Revolution.' This has resulted in the total impunity of those alleged to have committed serious human rights violations including torture, further undermining the constitutional protections currently in place.

#### Reparation for victims of torture

On the right to effective access to justice, article 33 of the Constitutional Declaration provides that 'Every citizen shall have the right to resort to their natural judge.' However, no provision is made for the right to substantive reparation.

#### Other factors relevant to safeguarding the prohibition on torture

The Constitutional Declaration contains reference to the right to a fair trial and the independence of the judiciary. Article 31 guarantees the principle of legality, the presumption of innocence, and the right to recourse. It also establishes the right for a defendant to 'have the necessary guarantees to defend themselves.' Article 32 establishes judicial independence in general terms.

However, the articles do not provide the necessary safeguards against torture, such as those included in the right to liberty and security and the right to a fair trial. Important safeguards relevant to the prohibition of torture contained in the ICCPR on the right to liberty and security (article 9) include the right to be informed, at the time of arrest, of the reasons for the arrest; to be granted access to a lawyer; to be promptly charged and informed of the charges; and to be brought promptly before a court. Further, the Constitutional Declaration does not specify the inadmissibility of statements made, or information extracted, under torture (UNCAT article 15). As torture is known to occur most frequently on arrest and during the first days of interrogations, these measures are key to prevent pre-trial torture from occurring.<sup>49</sup> Libya is required to respect and ensure these rights as part of its wider obligations on the right to liberty and security and the right to a fair trial as a party to the ICCPR.

#### **IV. Recommendations for the 2014 draft constitutional recommendations**

In consideration of international human rights standards and constitution-making best practices from around the world, we recommend that the CDA considers the following revisions to the draft recommendations.<sup>50</sup>

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<sup>49</sup> United Nations Support Mission in Libya (UNSMIL), *Torture and Deaths in Detention in Libya*, October 2013.

<sup>50</sup> The annex to this report contains a marked up text showing the suggested amendments.

## **1. Prohibition of torture as separate provision**

The prohibition of torture presently forms part of the article titled ‘The Physical and Mental Inviolability and Integrity of the Body.’ This article also prohibits non-therapeutic scientific experiments. As a result the constitutional prohibition currently resembles the constitutional model discussed above in Part II (A) (3), conforming with a general approach to prohibition of torture and other ill-treatment, with a reference to the prohibition of scientific and medical experiments. The Physical and Mental Inviolability and Integrity of the Body also prohibits financial gain from the human body, slavery, forced disappearance and arbitrary arrest, crimes against humanity, war and genocide crimes, all forms of violence and ensures healthcare for all.

Whilst all of these guarantees are vital, their consolidation within a single article fails to reflect their distinctive nature and risks undermining their importance. In light of Libya’s problematic history of adequately addressing the issue of torture and ill-treatment, each of these elements merits a separate article in order to elaborate on the related obligations and safeguards and to provide a comprehensive framework of protections against torture and other ill-treatment. This would better ensure that institutions tasked with the implementation of constitutional provisions, such as the judiciary and legislature, have a clear understanding of the scope of the prohibition and its importance.

Further, the current recommendation prohibits ‘torture as well as harsh, inhumane and degrading penalties’. This language does not conform to that set out in UNCAT which requires the prohibition to be extended to torture and other cruel, inhuman or degrading *treatment* or punishment. See the Annex for our drafting suggestion.

## **2. Defining torture**

We suggest that torture is defined in a separate article in order to provide a comprehensive legal foundation for the prohibition of torture. The definition should closely mirror the language of article 1 UNCAT and clarify that torture can comprise physical or mental suffering, and be carried out for multiple purposes (obtaining information or confession, punishment, intimidation or coercion or any reason based on discrimination).

The exceptional and uncertain situation that Libya currently faces means that the definition of torture must be defined by the act, not by the identity of the victim and should not be limited to public officials as perpetrators. Such a definition recognises the fact that torture can be committed by any individual, including a non-state actor. Providing a definition that is not limited to certain groups or circumstances will address a key issue present in the Law Criminalising Torture, Enforced Disappearances and Discrimination 2013, which restricts torture to acts committed against detainees.

Accordingly, we suggest that ‘torture’ should be defined as any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for the purpose of obtaining from him/her or a third person information or a confession, punishing him/her for an act he/she or a third person has committed or is suspected of having committed, or intimidating or coercing him/her or a third person, or for any reason based on discrimination of any kind.

Enshrining the suggested definition will bring Libya in line with the standard of UNCAT, to which it is expected to adhere as a state party. The Annex contains a drafting suggestion for a definition of torture in the article 'The Prohibition of Torture'.

### **3. Medical experiments**

The current recommendation prohibits 'scientific and medical experiments on humans for reasons other than their therapeutic interest'. This definition fails to include the necessity of free consent and, as such, the article may be interpreted to permit scientific and medical experiments against the will of an individual if deemed to be in their therapeutic interest.

We recommend that this provision is included as part of the revised article on torture and amended to reflect the wording of ICCPR article 7, which requires that experiments can only be undertaken with free consent. See the Annex for the suggested draft article on the prohibition of torture.

### **4. Inherent Dignity and the Right to Liberty and Security**

Torture, cruel, inhuman or degrading treatment involves the denial of a person's inherent human dignity. The recommendation for the right to a fair trial protects 'The right to the respect of human dignity in all criminal procedures' is therefore welcome.

However, we suggest that safeguards for dignity and humane treatment are provided for in a separate provision concerning the right to liberty. This provision should explicitly protect the dignity and right to humane treatment of detainees, in line with article 10 of the ICCPR, given the prevalence of torture and other forms of ill-treatment against detainees in Libya. See the Annex for suggested draft article on the right to liberty and security.

### **5. Other violations**

The current draft recommendations provide that 'The State shall take the necessary measures to prohibit forced disappearance and arbitrary arrest' as part of the article on the Physical and Mental Inviolability and Integrity of the Body. The language of taking 'necessary measures' is weak and does not convey an absolute obligation on the state to guarantee the prohibition of enforced disappearance and arbitrary arrest without exception as crimes of serious gravity. The prohibition of arbitrary detention and enforced disappearance should be amended as follows:

#### **i. Prohibition of Arbitrary Detention**

In the current draft recommendations in Rights and Liberties on the right to a fair trial, safeguards against arbitrary detention are made in the draft article's subsection 1. The states safeguards are the 'Declaration of the arrest to the competent judicial authority, family of the arrestee of whomever he/she chooses, identification of the location of the arrest and keeping him/her well informed of his/her rights at the time of the arrest.'

The prohibition of arbitrary arrest and detention should form part of a separate right to liberty and include the right to be brought promptly before a judge in criminal cases and the right to petition for a writ of *habeas corpus*. *Habeas corpus* is a petition to be brought before a judge to have the legality of one's detention determined.

In addition, the right to be informed of the reasons of one's arrest, to be informed as to the specific charges and the right of access to a lawyer must be clearly defined and included within the text. The current wording of keeping the detainee 'well-informed' does not provide sufficient certainty to safeguard against arbitrary arrest.

Safeguarding the right to not be detained arbitrarily is vital to address the high numbers of detainees reportedly held awaiting trial, many of whom have not been judicially screened.<sup>51</sup> This is urgent in light of reports suggesting that 53% of those arrested, detained or imprisoned in Libya reported being subjected to torture or violence,<sup>52</sup> and that torture is most likely to occur upon arrest and during the first days of interrogation.<sup>53</sup> Our drafting suggestions on the prohibition of arbitrary detention according to article 9 of the ICCPR are shown in the revised article on liberty and security in the Annex.

## **ii. Prohibition of Enforced Disappearance**

A general prohibition against enforced disappearance appears in Committee 6's article 'The Physical and Mental Inviolability of the Body.' In addition the right to a fair trial prohibits secret detention, which is necessary to prevent enforced disappearance. Whilst these measures are welcome, stronger clarification is needed to ensure this practice is absolutely prohibited.

Although Libya is not yet a party to the International Convention for the Protection of All Persons from Enforced Disappearance 2006, we suggest adopting the wording of the definition of enforced disappearance contained in its article 2 , which represents best practice on the issue. The act of enforced disappearances should therefore be defined as the arrest, detention, abduction or any other form of deprivation of liberty by any party. This is followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which places such a person outside the protection of the law. Please see the Annex for our drafting suggestions made as part of the revised article on the prohibition of torture.

## **6. Prevention**

### **i. Non-refoulement**

Currently, the draft recommendations contain an article on the rights of 'foreigners who have legal residency', which prohibits the 'handover of accused and convicted persons in case of suspicion that they will be exposed to torture.'<sup>54</sup>

Whilst the recognition of the principle of non-refoulement is welcome, the article should be amended to clarify that return, transfer or extradition of any person to another state is prohibited in all cases where their life or freedom may be threatened, not solely where that

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<sup>51</sup> According to statistics released by the Ministry of Justice in March 2014, there were 6,200 detainees held in prisons under the Judicial Police. Of these, only 10% had been convicted of a crime.

<sup>52</sup> DIGNITY Danish Institute Against Torture, *Consequences of Torture and Organised Violence – Libya Needs Assessment Survey*, October 2014, page 19.

<sup>53</sup> The United Nations Support Mission in Libya, *Torture and Deaths in Detention in Libya*, October 2013.

<sup>54</sup> Rights and Liberties, Chapter 7 'Rights of Special Groups', The Rights of Foreigners, subsection 2.

person may be subject to torture. Competent authorities should be obliged, when making their determination in a given case, to take into consideration all relevant considerations to ensure this, including consistent patterns of gross, flagrant violation, or mass violations of human rights in the requesting state.

These additions will ensure adherence to Article 3 UNCAT in accordance with the Committee Against Torture's General Comment 2 which clarifies that the prohibition of refoulement applies to ill-treatment and not only to torture. A drafting suggestion is made in the proposed article on the prohibition of torture in the Annex.

## **ii. Exclusion of testimony extracted through torture**

Article 6 in the work of Committee 3 on the Judiciary and Constitutional Court states that 'The courts do not admit any evidence extracted under coercion or through illegal measures' which is considered to be broadly in line with best practice.

However, the wording of Committee 6 within the right to a fair trial requires the 'Legitimacy of conviction evidence'. This is an altogether more vague standard that, as a result, creates an inconsistency which weakens the safeguard. A specific prohibition of evidence extracted through torture or threat is needed, to ensure such evidence is not considered lawful or legitimate.

Second, the 'evidence' must not be limited to 'conviction evidence'; all extracted evidence must be prohibited in order to comply with Article 15 UNCAT. We recommend specifying that any statement, confession or testimony obtained from an accused person or from any other individual by means of threat or force shall be invalid. See the Annex on the right to a fair trial.

## **7. Criminal accountability**

### **i. Torture as a crime**

The 'General Rules' contained in Chapter 8 of the work of Committee 6 on Rights and Liberties provides that 'Criminalization and punishment shall be in accordance with the requirements of necessity and balance between rights, liberties and public interest.' The 'Proportionality of the punishment, crime and the personality of its perpetrator' is also noted. Further, the draft recommendations of Committee 6 on Rights Freedoms and Transitional Justice Measures '...enshrine the principle of non-escape from criminal prosecution [accountability] in relation to all those who took part in systematic violations of human rights...'.

We would recommend specifying that the practice of torture in all its forms, when carried out, attempted, or incited by anyone, is a crime punishable by the law, in line with article 4 UNCAT,. This measure should be included in the article on the prohibition of torture so that it is clear that it applies to all instances of torture and not only those which occurred during the transitional period. Further, we recommend expressly noting the state's obligation to investigate, prosecute and punish acts of torture and ill-treatment in all instances, in line with articles 12 and 13 UNCAT. Enshrining this measure is key to addressing the ongoing

impunity for acts of torture and ill-treatment in Libya. Please see the Annex for our suggestions on the prohibition of torture.

## **ii. No amnesty, immunity or statutes of limitation**

In addition to enshrining ‘the principle of non-escape from criminal prosecution’ for systematic human rights violations, the draft recommendations of Committee 6 on Rights Freedoms and Transitional Justice Measures also specify that no immunity or amnesty applies and that such crimes are not subject to the statute of limitations. Further, the ‘General Rules’ in article 8 of the section on Rights and Liberties provides a prohibition of ‘amnesty in crimes against humanity, genocides, war and torture crimes; they shall not be subject to the statute of limitations.’ These provisions are welcome, and may address the amnesty of Law 38 of 2012. However, they should be clarified by including an article which prohibits amnesties and immunity for any person who commits torture or related crimes at any time. This will ensure that any prohibition is not limited to amnesties relating to human rights violations committed during the transitional period. Please see our drafting suggestions in the Annex on the prohibition of torture.

## **8. Reparation**

### **i. Right to effective access to justice**

The draft recommendations provide a general right of access to justice stating in article 4 of Committee 3 on the Judiciary and Constitutional Court that “the right of litigation and defence is guaranteed”. It is our recommendation that the article should specify that the right of access to justice must be effective in order to provide the basis for fulfilling Libya’s obligation to provide an effective remedy under UNCAT.<sup>55</sup> For our suggested revisions on the right to a fair trial, please see the Annex.

### **ii. Right to substantive reparation**

The ‘General Rules’ in the Rights and Liberties section provides for compensation for violations of ‘rights, liberties and judicial errors’.<sup>56</sup> This represents a positive step forward in ensuring a measure of reparation for torture victims. The Transitional Mechanisms section provides compensation for victims of systematic human rights violations or those which occur during military operations or armed conflicts.<sup>57</sup> We suggest that a separate provision be included ensuring adequate, effective and prompt reparation, which includes compensation and other forms of reparation, for victims of torture or inhuman treatment in the article on the prohibition of torture. Please see the Annex for our drafting suggestions as part of the revised article outlining the prohibition of torture.

## **9. Complementary rights/provisions**

### **i. Fundamental rights – liberty and security**

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<sup>55</sup> Committee Against Torture, General Comment 3, above note 40.

<sup>56</sup> Committee 6, Rights and Liberties, ‘General Rules’ (12).

<sup>57</sup> Committee 6, Transitional Justice Measures, ‘The Right to Compensation’.

The current recommendations do not provide for a separate right to liberty and security, instead combining elements of the right to liberty in the provision for the right to a fair trial. The right to liberty and security provides a further safeguard of dignity and humane treatment, particularly of detainees. We recommend that in addition to the provision prohibiting arbitrary arrest outlined above, the article also includes:

- Explicit recognition of every person’s right to liberty and security of their person except on grounds and in accordance with the procedure as established by law;
- The right of anyone arrested to be informed, at the time of arrest, of the reasons of arrest and promptly informed of the charges against him or her. This should be done in a language the person understands;
- Provision for the right of anyone arrested or detained on criminal charges to be brought before a judge promptly, and their entitlement to a trial within a reasonable time; and
- Measures to protect the right of anyone deprived of their liberty by arrest or detention to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his or her detention and order his or her release if the detention is not lawful.

See the Annex for our suggested article on the right to liberty and security.

## **ii. Fundamental rights – fair trial**

The right to a fair trial is addressed in the work of Committee 6 on Rights and Liberties. The right to a fair trial should contain key safeguards for the prohibition of torture and ill-treatment. Of particular importance is the exclusionary principle outlined above at point 7 (ii), which prohibits the use of any evidence or statement extracted through torture, but which is also required as part of the ICCPR article 14 fair trial guarantees in relation to the prohibition of compulsion to testify against oneself or confess guilt. The Human Rights Committee has stated that this principle is a non-derogable element of the right to a fair trial.<sup>58</sup> Further, access to independent doctors and lawyers as part of the right to a fair trial is a vital safeguard to the prevention of torture.<sup>59</sup>

The recommendations for the right to a fair trial currently combine elements of the right to a fair trial with elements of the right to liberty. We suggest separating the two rights, as outlined above at point (4). The right to a fair trial must be amended as follows:

- The initial statement of the article sets out the general right to a fair trial, including the right to be brought before a competent court ‘established by law where all safeguards shall be ensured’. This statement must also stress the right to have a

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<sup>58</sup> Human Rights Committee, *General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial*, UN Doc CCPR/C/GC/32 (2007), para. 6 .

<sup>59</sup> CAT, *Concluding Observations: Ukraine*, UN Doc. CAT/C/UKR/CO/5 (3 August 2007), para. 9.

*public hearing within a reasonable time by an independent and impartial court or tribunal established by law.*

- The right to counsel should specify that it should be of *the detainee's choosing*.
- The legitimacy of conviction evidence must specify the circumstances in which evidence must be excluded or prohibited, particularly *the prohibition of testimony extracted by compulsion*.
- The right to be seen by a physician should be clarified to state that this should occur *as promptly as possible and regularly thereafter*. This is essential to protecting the right to the highest attainable physical and mental health, and to dignity.
- The right of access to a physician should aid detection of torture and other ill-treatment; to ensure this, the attending physician must be *independent of the detention facilities and the examination should not take place in the presence of the custodians*.
- The power of *res judicata* (the principle preventing continued claims relating to the same facts) must detail that *no one shall be liable to be tried or punished for an offence for which he has already been convicted or acquitted*.
- We recommend that the provision for preventative detention be removed. If it is kept, it must be subject to more stringent safeguards. *It must not be arbitrary, it must be based on grounds and procedures established by law, with information and reasons given, and court control of the detention must be available as well as compensation in the case of a breach*.
- The right to a fair trial must also include the requirement of courts to give reasons for their judgements. In accordance with the principles of transparency and open justice there may be no arbitrary judgements and sentences.
- The right to a fair trial must include equality between the parties; the defence must have the same right to examine witnesses as the prosecution has and both parties have the right to legal representation.
- The right to interpretation should be free and guaranteed *throughout the trial process*, and must ensure that the suspect has information presented in a language he or she understands at all times.
- The right to be present at trial is guaranteed in subsection (8), however a general statement of the right to effective participation is not made. The right to effective participation must be stated in addition to the right to be present at trial.
- The right to a public trial is specified in subsection (4) but 'within the boundaries of public order, justice and fairness'. This must be refined to ensure that this right is not limited arbitrarily. The article should state that *in camera trials may only occur where it can be shown that to do so is necessary and proportionate and in the interests of morals, public order or national security in a democratic society; where the interests of the private lives of the parties so requires; or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would be prejudicial to the interests of justice*.<sup>60</sup>

The Annex details our suggested revisions to the article on the right to a fair trial.

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<sup>60</sup> Human Rights Committee, *General Comment No. 32*, see above note 59, para. 29.

### **iii. Transparency and accountability**

The draft provisions do not set out regulations for either law enforcement or security forces. It is important that both law enforcement and security forces are overseen in accordance with transparency and accountability to safeguard against human rights violations, including of the right to a fair trial and the prohibition of torture. The measures must make clear provision for the establishment, structure and conduct of security services that includes clear definitions of what the services entail, to include the following points:

- National security should be for protection against internal and external threats to Libya's territorial integrity and sovereignty, its people, their rights, freedoms, property, peace, stability and prosperity.
- National security should be promoted and guaranteed in accordance with the following principles:
  - National security should be subject to the authority of the constitution and parliament;
  - National security should be pursued in compliance with the law and with the utmost respect for the rule of law, democracy, human rights and fundamental freedoms;
  - In performing their functions and exercising their powers, national security organs should respect the minority communities within Libya;
  - Recruitment by national security organs should reflect the diversity of the Libyan people in fair and equal proportions; and
  - Require recruits to have a clean record in respect of committing past human rights violations.
- The role of the army should be independent and its mandate should be for the protection of the people, not the government.
- A provision should be made for holding the armed forces accountable and ensuring transparency.
- The national police service should be structured to function at all levels of government; national to ensure that it is under executive control and is implementing the law within the country, and regional and local levels in order to respond to local issues more effectively.
- The creation of an effective security service is important for ensuring that citizens can live free from the threat of violence. However, national security must be pursued in compliance with the law, including international law.
- There should be a special body created to regulate the conduct of the military and another special body to regulate that of the police to ensure compliance with laws and ensure individuals are not subject to human rights violations. These might include a national police service commission and a defence council, both including mechanisms for complaints.

### **iv. Judiciary**

The work of Committee 3 on the Judiciary and Constitutional Court contains measures which may disrupt the enforcement of the prohibition on torture and other ill-treatment by failing to achieve a balance between protecting the judiciary from undue influence whilst at the same time being able to hold judges to account. The judiciary must not be subject to influence from the executive or legislature; must have the freedom to safeguard the right to a fair trial; be free to hold perpetrators of torture accountable for their actions, including other government organs; and be free to uphold the prohibition of torture, including through the striking down of laws which are not compatible with the prohibition.

The draft recommendations provide that members of judicial bodies are independent in their work (article 1). However, the manner of judicial appointments (article 2), which is key to the non-politicisation of the judiciary, is left to be regulated by law. Article 2 must be revised to ensure that judicial appointments are conducted through transparent processes, without political interference. Further, judicial immunity (article 3) is granted in a convoluted provision which leaves the question of immunity subject to interpretation. It is important to ensure that members of the judiciary may be removed for legitimate reasons, however, these must be limited to strictly defined situations. Further, judicial removal or discipline should only occur through an authorised, independent body in order to minimise the opportunity for external interference, particularly political. We suggest revising these provisions in order to ensure a more precise balance of judicial independence and accountability, which was historically such a barrier to reparation.

Article 18 in the work of Committee 3 outlines provisions for military courts. Article 18 specifies that military courts may not try civilians ‘except for crimes which constitute a direct aggression on military installations or installations of a similar nature’. It also provides that crimes committed ‘in association with civilians’ may be tried by military courts. This article must be amended to specify that the trying of civilians, cases involving civilians and cases involving human rights violations are prohibited from being tried in military or special courts.<sup>61</sup>

#### **v. National human rights institution**

Articles 14 to 16 on Independent Institutions set out the scope of the National Council for Civil Liberties and Human Rights. Its role is to: ‘Observe the human rights situation and monitor human rights violations as well as report and follow up such violations with the relevant authorities’ as well as to ‘support citizens to enable them to acquire their constitutionally and legally stipulated rights’.

Its commissioner has the right to:

- ‘Challenge constitutionality of legislations related to human rights and public liberties.’

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<sup>61</sup> *Report of the Special Rapporteur on the independence of judges and lawyers*, Gabriela Knaul, UN Doc. A/HRC/20/19, 7 June 2012, para. 56.

- ‘Challenge before the courts rules of procedure of public and private institutions, as well as decisions issued by them in contradiction with constitutional and legal human rights related provisions based on a request by those concerned.’

We recommend that the mandate of the National Council also include the ‘promotion’ of human rights. It is important to clarify that the National Council can review any situation it decides to take up on its own volition, can draw the state’s attention to the situation, and may propose initiatives to end the situation. The draft articles should include provisions which allow the National Council to express an opinion on the positions and reactions of the Government to human rights violations.

The Paris Principles on the National Institutions for the Promotion and Protection of Human Rights highlight that it is necessary to guarantee the transparency of the election process to any human rights institution such as the National Council to ensure a pluralist representation of actors involved in the promotion and protection of human rights. The provision should be amended to take this into account, and to guarantee that the National Council develops relationships with key stakeholders such as NGOs.

We also suggest that the provision is clarified to specify that any individual may complain to the National Council about violations of personal human rights and that the National Council shall refer human rights violations of individuals to legal authorities and assist them to enforce their rights. Including such a measure will increase access to effective justice in the case of human rights violations.

See the Annex for our suggest amendments for the Independent Institutions draft article for the National Council for Public Liberties and Human Rights.

#### **vi. Non-derogation in a state of emergency**

Chapter 8 in the work of the Committee 6 on Rights and Liberties prohibits the restriction of rights and liberties during a state of emergency except ‘when necessary... provided that it is in line with the obligations of the state under international law’. This provision is currently included as part of a set of ‘General Rules’. We suggest that a separate and more detailed provision which specifies which rights cannot be derogated from in any circumstances would better meet the requirements of Article 4 of the ICCPR as elaborated on by the Human Rights Committee in General Comment 29. These must include the right not to be arbitrarily deprived of one’s life, the prohibition of slavery, the prohibition of torture and other cruel, inhuman or degrading treatment or punishment, the prohibition of retroactive penal measures, freedom of movement, the right to recognition before the law and the right to freedom of thought, conscience and religion. Further, derogations from any other right, including the right to a fair trial, may not exceed those strictly required by the emergency situation, provided that such measures are not inconsistent with Libya’s other obligations under international law, do not involve discrimination and never lead to the derogation of non-derogable rights.<sup>62</sup>

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<sup>62</sup> Human Rights Committee, *General Comment 32*, above note 59, para. 6

## Annex

Text in black shows original text.

Text in red shows our suggested amendments.

Text in blue shows items moved.

### Committee 3: The Judiciary and Constitutional Court

#### Article 2

Members of the Judiciary are judges, members of the Public Prosecutor's Office and they shall be appointed and regulated according to the principles of independence, transparency, ~~law regulates the manner in which they are appointed and the way their administrative and career affairs are managed in a manner that ensures their~~ neutrality and integrity...

#### Article 4:

...The right of effective ~~access to justice litigation and defence~~ is guaranteed. This is guaranteed by the Constitution...

#### Article 18

...Civilians, cases involving civilians and cases involving human rights violations are not subject to the jurisdiction of military courts ~~except for crimes which constitute a direct aggression on military installations or installations of a similar nature...~~

### Committee 2: Form and System of Governance

#### Article 67

The President, during the state of emergency, might not impose limitations on basic rights and freedoms except to the extent ~~strictly required by the emergency situation where such measures are not inconsistent with Libya's other obligations under international law, do not involve discrimination and do not lead to the derogation of non-derogable rights.~~ Non-derogable rights are:

- 1) The right to life;
- 2) The prohibition of torture, cruel, inhuman or degrading treatment or punishment
- 3) Medical or scientific experimentation without consent;
- 4) The prohibition of slavery, the slave trade and servitude;
- 5) The prohibition of imprisonment because of inability to fulfil a contractual obligation;
- 6) The principle of legality in the field of criminal law;
- 7) The right of everyone to recognition as a person before the law; and
- 8) The right to freedom of thought, conscience and religion.

~~necessary to preserve the public safety of the country.~~

All the decisions and acts taken by the President during the state of emergency are subject to challenge before the courts.

## Committee 4: Independent Institutions

### **The National Council for Public Liberties and Human Rights**

#### **Article 14**

The National Council for Public Liberties and Human Rights shall undertake the consolidation of promotion and mainstreaming of human rights and public liberties values. It shall also undertake the following:

- Promote human rights.
- Observe, ~~any human rights situation and~~ monitor and express its views on any human rights violations that it chooses of its own volition, including where these relate to the State, as well as report and follow up such violations with the relevant authorities, including by making recommendations.
- Support citizens to enable them to acquire their constitutionally and legally stipulated rights.
- Recommend ratification of, or accession to international human rights covenants in a manner that does not contradict with constitutional texts.

## Committee 6: Rights and Liberties

### **Article ( )**

#### **Physical and Mental Inviolability and Integrity of the Body**

~~Every person shall have the right to the inviolability and integrity of their body. The State shall take the necessary measures to:~~

- ~~1. Prohibit scientific and medical experiments on humans for reasons other than their therapeutic interest.~~
- ~~4. Prohibit torture as well as harsh, inhumane and degrading penalties.~~
- ~~5. Prohibit forced disappearance and arbitrary arrest.~~

### **The Prohibition of Torture**

**Torture and other cruel, inhuman or degrading treatment or punishment is prohibited under any circumstance.**

1. 'Torture' is defined as any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for the purpose of obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind.

2. ~~Prohibit~~ Scientific and medical experiments shall not be carried out on humans for reasons other than their therapeutic interest with the subject's free and informed consent.

3. The practice of torture and cruel, inhuman or degrading treatment or punishment, is a crime punishable by the law. The same shall apply to an attempt to commit torture or cruel, inhuman or degrading treatment or punishment, and to an act by any person which constitutes participation in torture. The crime of torture shall not be subject to any amnesties or immunities, and shall not be subject to any statute of limitations.

4. The State is under a duty to investigate, prosecute and punish all instances of torture and other cruel, inhuman or degrading treatment or punishment.

5. Any victim of torture or cruel, inhuman or degrading treatment or punishment shall have the right to seek adequate reparation, including compensation for material and moral damages and rehabilitation.

6. The deportation, expulsion or extradition of a person in cases of a genuine fear that such acts may lead to the torture or other cruel, inhuman or degrading treatment or punishment of the individual concerned shall not be permitted.

### **The Right to Liberty and Security**

**Everyone is guaranteed the right to liberty and security of person. No one shall be deprived of liberty except in accordance with procedures established by law. The right to liberty and security includes:**

1. The right not to be subjected to arbitrary arrest or detention;

2. The absolute right not to be subjected to ~~f~~ enforced disappearance ~~and secret imprisonment~~~~in places defined by the law~~

a) 'Enforced disappearance' is the arrest, detention, abduction or any other form of deprivation of liberty by any party, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law.

3. The right of all detainees to human treatment and respect of dignity.

4. The ~~d~~Declaration of arrest to the competent judicial authority, family of the arrestee or whomever he/she chooses, identification of the location of arrest ~~and keeping him/her well informed of his/her rights at the time of arrest.~~

5. The right to be informed, from the start of detention, of the reasons for the detention and to be promptly informed of the charges against him or her in a language that he or she understands;

6. The right of ~~e~~Every person ~~shall have the right~~ to know the identity of the person in charge of their arrest and the person conducting the investigation.

7. The right of all detainees to be brought before a judge promptly to have the legality of his or her detention determined (Habeas corpus).

8. The right of anyone arrested or detained on a criminal charge to be brought promptly before a judge or other officer authorised by law to exercise judicial power and the entitlement to be brought to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any stage of the judicial proceedings, and, should occasion arise, for execution of the judgement;

9. The right of anyone who has been the victim of unlawful arrest or detention to have enforceable right to compensation.

10. The right of to reparation, including rehabilitation of those who are incarcerated in them anyone subjected to enforced disappearance.

### **Right to Fair Trial**

Every person shall have the right to fair trial with regards to any criminal charge or to decide on his/her rights and obligations, before a competent court established by law for a public hearing within a reasonable time by an independent and impartial court or tribunal where all safeguards shall be ensured, including in particular:

~~1. Declaration of arrest to the competent judicial authority, family of the arrestee or whomever he/she chooses, identification of the location of arrest and keeping him/her well informed of his/her rights at the time of arrest.~~

1. The right to a counsel of the detainee's choosing. The State shall guarantee a counsel for those in hardship in accordance with judicial aid.

2. A counsel must be present for those facing felony charges before the criminal court.

3. The right to a public hearing. A trial may be held in private within the boundaries of where it can be shown that to do so is necessary and proportionate and in the interests of morals, public order, or national security in a democratic society; where the interests of the private lives of the parties so requires; or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would be prejudicial to the interests of justice and fairness.

4. Legitimacy of the conviction evidence. The invalidity of any statement, confession or testimony obtained from an accused person or from any other individual by means of torture or other ill-treatment, including any threat or coercion.

5. Provide adequate time and necessary facilitations for the preparation of the defence, and allow the accused to contact family, counsels and whomever he/she deems necessary to contact.

6. The right to equality between the parties in respect of access to examine witnesses and the right to legal representation.

~~7. Every person shall have the right to know identity of the person in charge of their arrest and the person conducting the investigation.~~

7. The right to effective participation, including to be present at trial.

8. The right to have information presented in a language that the detainee understands at all times, including to a free interpretation service.

9. The right to remain silent and not to be compelled to provide evidence, as well as to draw his/her attention that he/she is liable for the information he/she provides, and to his/her right to be seen by a physician.

10. The right to be seen by a physician as promptly as possible following arrest and regularly thereafter. The physician must be independent of the detention facilities and the examination may not take place in the presence of custodians or other officials.

11. The right to appeal before a higher court.

12. The accused shall be innocent until proven guilty by a final court ruling.

13. Power of res judicata ensures that no one may be liable to be tried or punished for an offence for which he has already been convicted or acquitted.

14. The right to the respect of human dignity in all criminal procedures.

15. The right to trial within a reasonable period; the speed and duration of proceedings affecting rights and liberties shall be guaranteed.

~~16. Prohibition of arrest and imprisonment in places defined by the law, and guarantee of rehabilitation of those who are incarcerated in them.~~

16. Justification of orders affecting rights and liberties, including the requirement of courts to give reasons for all judgements.

~~18. Provisional detention shall be an exceptional measure to maintain evidence or public order. It shall only be resorted to in the event of insufficient alternatives.~~

### **General Rules**

Legislations shall be based on balance between the public and private interests; they shall be bound by the following:

18. Prohibit the restriction of rights and liberties during the state of emergency except when *strictly necessary and strictly during the state of emergency, provided that it is not inconsistent in-line with the obligations of the state under international law, does not involve discrimination and will not lead to the derogation of non-derogable rights. Non-derogable rights are:*

1) *The right to life;*

2) *The prohibition of torture and other cruel, inhuman or degrading treatment or punishment or of medical or scientific experimentation without consent;*

3) *The prohibition of slavery, the slave trade and servitude;*

4) *The prohibition of imprisonment because of inability to fulfil a contractual obligation;*

5) *The principle of legality in the field of criminal law;*

6) *The right of everyone to recognition as a person before the law; and*

7) *The right to freedom of thought, conscience and religion.*