
COMMENTS ON LIBYA'S DRAFT CONSTITUTION: UPDATED COMMENTS ON THE PROHIBITION OF TORTURE AND ILL-TREATMENT

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INTRODUCTION

In April 2015, LFJL and REDRESS prepared a detailed legal commentary of the Constitutional Drafting Assembly's December 2014 Constitutional Recommendations (the **December 2014 Constitutional Recommendations**) regarding their effectiveness in enshrining the absolute prohibition of torture and other cruel, inhuman or degrading treatment or punishment (**torture and ill-treatment**).¹

The commentary set out Libya's international human rights obligations for ensuring the absolute prohibition of torture; provided a comparative analysis of constitutional anti-torture protections from around the world; examined Libya's constitutional history regarding the prohibition of torture; and made specific comments and drafting suggestions to ensure that the absolute right to be free from torture and related guarantees are safeguarded within Libya's future constitutional document.

Since the publication of that commentary, the Constitutional Drafting Assembly (CDA) has been working to consolidate its draft recommendations into a final draft on which the CDA will find consensus. The CDA most recently published a draft on 19 April 2016 (the **April 2016 Constitutional Draft**), on which 34 CDA members voted in favour, and which has been referred to the House of Representatives. In this process, a number of the relevant anti-torture provisions contained within the December 2014 Constitutional recommendations have been amended. However, the process has stalled and the validity of the April 2016 Constitutional Draft is uncertain because the CDA did not adhere to the requirement of the Constitutional Declaration to submit a draft that had achieved a two-thirds-plus-one majority, or 41 votes in favour, and had amended its own quorum and voting rules in order to submit the draft. LFJL and REDRESS have analysed the April 2016 Constitutional Draft and now provide the following additional recommendations on the new text. These recommendations are provided to the CDA with a view to ensuring that the future constitution of Libya, and its provisions on the prohibition of torture and ill-treatment in particular, are in line with international legal standards. Suggested drafting amendments for each recommendation can be found in the Annex.

¹ The previous in-depth analysis of the December 2014 draft recommendations can be found here: <http://www.libyanjustice.org/downloads/Publications/anti-torture-commentary---final---pdf.pdf>.

1. THE PROHIBITION OF TORTURE AS A SEPARATE PROVISION

The December 2014 Constitutional Recommendations did not contain a separate provision on the absolute prohibition of torture and ill-treatment; the April 2016 Constitutional Draft has adopted the same approach.

As part of a general article on "The physical and mental inviolability and integrity of the body", the December 2014 draft Constitutional Recommendations committed the state to "take the necessary measures to... Prohibit torture as well as harsh, inhumane and degrading penalties".

In the April 2016 Constitutional Draft, elements of the right to freedom from torture can be found in articles 38 and 40. Article 38 on "The right to safety" indicates that "Every human being has the right to personal, physical, and mental safety." Article 40 on "Human dignity" provides that the state "shall be committed to protecting human dignity and preventing all types of violence, torture, inhumane, cruel and humiliating treatment, as well as enforced disappearance" and also prohibits human trafficking, slavery and involuntary servitude.

The language of the new article 40 is ambiguous as it only addresses one aspect of the state's obligation, namely the obligation of "preventing" torture but fails to highlight other aspects of the obligation like the obligation to *prohibit*, punish and protect from acts of torture. In addition, the text does not create an absolute prohibition of the crime of torture or establish a clearly enforceable obligation on behalf of the state to take positive steps to eliminate acts of torture. Further, the revised article 73 provides that "the competent authorities shall provide grounds for their orders that affect rights and freedoms." In the absence of a non-derogatory clause prohibiting torture under all circumstances, this article could be misunderstood as implying that torture *can* be justified in some circumstances, contrary to Libya's obligations under international law.²

The lack of a separate provision with an express prohibition of torture is problematic. While articles 38 and 40 of the April 2016 Constitutional Draft provide a general statement of the prohibition of torture and ill-treatment, they do not convey the specific obligations required to ensure the adequate protection of this absolute right. **A separate and elaborative provision is needed to draw adequate attention to the importance of**

² UNCAT article 2(2) is clear that "No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture."

A separate and elaborative provision is needed to draw adequate attention to the importance of the prohibition of torture, which is a significant gap when considering the extensive use of torture and ill-treatment in Libya and the indelible scars this crime has left on so many Libyans.

the prohibition of torture, which is a significant gap when considering the extensive use of torture and ill-treatment in Libya and the indelible scars this crime has left on so many Libyans.

As we indicated in our previous commentary on the December 2014 Constitutional Recommendations, we urge the CDA to prohibit all acts of torture or cruel, inhuman or degrading treatment or punishment, following the language used in the 1984 UN Convention Against Torture (UNCAT), and to draw the necessary attention to this prohibition with a separate article. This will allow for much greater elaboration of the related obligations and safeguards which are necessary to provide a comprehensive framework of protections against torture and other ill-treatment. This would also help to remove the existing ambiguities within the current text and ensure that institutions tasked with the implementation of constitutional provisions, such as the judiciary and legislature, have a clear understanding of the absolute nature of the prohibition and of its importance.

2. DEFINING TORTURE

The April 2016 Constitutional Draft does not contain a definition of torture or ill-treatment. In our commentary examining the December 2014 Constitutional Recommendations we recommended that in addition to including the prohibition of torture and ill-treatment in a separate article, the CDA should include a definition of torture in line with article 1 of UNCAT. Therefore, our original proposal for providing a definition of torture applies equally to the April 2016 Constitutional Draft:

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.

We suggest defining 'torture' 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 thereof.

3. MEDICAL EXPERIMENTS

The December 2014 Constitutional Recommendations prohibited “scientific and medical experiments on humans for reasons other than their therapeutic interest” as part of its article on “The physical and mental inviolability and integrity of the body”. In our analysis, we recommended that this be revised in conformity with International Covenant on Civil and Political Rights 1966 (ICCPR) article 7 to ensure that scientific and medical experiments against the will of an individual are not permitted, even where they are deemed to be in the patient’s therapeutic interest.

The April 2016 Constitutional Draft has removed references to medical and scientific experimentation; article 38 provides only that “Material gain from a human being and his organs shall not be permissible”. We urge the CDA to include a safeguard requiring that scientific experiments or medical treatment or procedures can only be undertaken with freely provided consent from the person who is to be subjected to the treatment or procedure. As we recommended in our previous commentary, we suggest that this provision is included as part of the revised and separate article on the absolute prohibition of torture and ill-treatment.

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.

The effect of article 73 may be to imply that arbitrary detention is permissible as long as the individual is compensated.

4. INHERENT DIGNITY AND THE RIGHT TO LIBERTY AND SECURITY OF PERSON

Torture and ill-treatment involve the denial of a person's inherent human dignity. Including a provision on the right to respect for one's dignity is therefore an important protection against torture. The April 2016 Constitutional Draft makes a number of references to the right to dignity, in particular that "Everyone shall enjoy respect of human dignity, as is his right, in all criminal proceedings" as part of article 72 on "Procedural guarantees". This is welcome; however our previous comment on this point still applies:

... 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,³ given the prevalence of torture and other forms of ill-treatment against detainees in Libya.

5. OTHER VIOLATIONS WHICH CONTRIBUTE TO TORTURE AND ILL-TREATMENT

i. Prohibition of arbitrary detention

Arbitrary detention creates risks of torture and ill-treatment, and safeguards against arbitrary arrest serve to reduce the likelihood of such risks.⁴ The right to personal security protects interests in bodily and mental integrity that are also protected by the absolute prohibition of torture.⁵ Safeguarding the right not to be detained arbitrarily is vital to address the high numbers of detainees reportedly held awaiting trial, many of whom have not been judicially screened.⁶ Thousands of individuals are estimated to be detained across Libya by parties to the current conflict, both in facilities run by the state and informally under control of armed militias.⁷ Many reports and first-hand accounts by lawyers and activists have noted that detainees are subjected to torture and ill-treatment with alarming frequency.⁸

Article 72 on "Procedural guarantees" provides some safeguards against arbitrary detention, including: "Competent authorities shall justify their orders that affect rights and liberties."; "there shall be no detention except in places designated for this purpose and for a specific legal period of time that is proportionate with the accusation, while making this [detention] known to the competent judicial body and the family or chosen person of the detained."

3 ICCPR article 10: *All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.*

4 United Nations Human Rights Committee, General comment No. 35, CCPR/C/GC/35, 16 December 2014, para. 56.

5 *Ibid.*

6 Human Rights Watch, "The Endless Wait: Long-Term Arbitrary Detentions in Western Libya", December 2015.

7 United Nations Support Mission in Libya and the Office of the High Commissioner for Human Rights, "Report on the human rights situation in Libya", November 2015, pages 1 and 31.

8 DIGNITY Danish Institute Against Torture, Consequences of Torture and Organised Violence – Libya Needs Assessment Survey, October 2014, page 19.

However, a number of additional safeguards initially included in the December 2014 Constitutional Recommendations have been removed, while others have been weakened in the April 2016 Constitutional Draft. For example, the April 2016 Constitutional Draft no longer refers expressly to the prohibition of arbitrary arrest,⁹ the right to know the identity of the person in charge of the arrest and the person conducting the investigation,¹⁰ nor does it provide for the right of a detainee to be "well-informed of his/her rights at the time of the arrest."¹¹ Further, while the December 2014 Constitutional Recommendations provided that provisional detention should be an exceptional measure to "maintain evidence or public order",¹² the April 2016 Constitutional Draft now appears to permit it without restrictions.

The current article 72 provides that the detainee is to "be informed of his right in not to be forced to submit evidence against himself and his responsibility for any statements he makes, as well as to utilize an interpreter and to choose and contact an attorney." While we suggest moving these provisions to the article which safeguards the right to a fair trial, the current text of article 72 does not provide a number of other safeguards against arbitrary detention that are well recognised under international law, such as a detainee's right to be informed of the reasons for one's arrest, to be informed as to the specific charges, and the right of *access* to a lawyer,¹³ all of which must be defined clearly and included within the constitution in order to protect against arbitrary arrest and detention.

Further, article 73 of the April 2016 Constitutional Draft contains the following problematic measure: "*Any person who is deprived of his freedom as a precaution or in implementation of a sentence shall be entitled to proper reparations upon an order that there is no cause for prosecution, or a judgement of acquittal due to the lack of a crime or evidence based on the regulations of the law.*"

The effect of article 73 may be to imply that arbitrary detention is permissible as long as the individual is compensated. Further, it appears to imply that the arbitrariness of detention depends, in some cases, on the innocence of the detainee when in fact an arrest is arbitrary where due process safeguards are not maintained. In addition to compensating for cases of arbitrary detention, the future constitution must safeguard against arbitrary detention by prohibiting arbitrary detention explicitly, and providing for the right to be brought promptly before a judge in criminal cases and the right to petition before a competent and independent judicial authority for a writ of *habeas corpus* within 24 hours of being detained.¹⁴

9 Committee 6, Rights and Liberties, article on "Physical and mental Inviolability and Integrity of the Body".

10 Committee 6, Rights and Liberties, article on "The Right to Fair Trial".

11 *Ibid.*

12 *Ibid.*

13 The right of access to a lawyer differs from the right "to choose and contact" a lawyer in that the right of access would safeguard continuous access, and for a lawyer to be provided where the detainee does not choose one. In its General Comment 35 on ICCPR article 9 (Liberty and security of person), the UN Human Rights Committee stated that access to independent legal advice is a necessary guarantee for article 9 conditions to be met.

14 *Habeas corpus is a petition to be brought before a judge to have the legality of one's detention determined.*

We urge the CDA to revise article 42 to ensure that the principle of non-refoulement, as elaborated, applies to all foreign nationals and not only those who have legal residency.

We recommend that the article 73 provision for preventative (“precautionary”) detention be removed. If it is kept, “precautionary” detention 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 of the law.*

While the provisions of articles 72 and 73 are important to prevent arbitrary detention, adopting a separate article on the right to liberty and security in line with ICCPR article 9 would provide a further safeguard of dignity and humane treatment, particularly of detainees. Therefore we continue to recommend what was already suggested in relation to the December 2014 Constitutional Recommendations, namely:

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.

ii. Prohibition of enforced disappearance

The December 2014 Constitutional Recommendations prohibited enforced disappearance, as well as secret detention as part of the right to a fair trial. We recommended the following clarification in order to provide a stronger protection against the practices:

Although Libya is not yet a party to the International Convention for the Protection of All Persons from Enforced Disappearance 2006 (ICPPED), 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.

This recommendation has not been adopted in the April 2016 Constitutional Draft. The revised article 40 on “Human dignity” provides that “The State shall be committed to... preventing all types of violence, torture, inhumane, cruel and humiliating treatment as well as enforced disappearance.”

Elements of the prohibition of enforced disappearance can also be found in articles 72 and 73. Article 72 states: “There shall be no detention except in places designated for this purpose and for a specific legal period that is proportionate with the accusation” and provides for the notification of the detainee’s family or chosen person and competent judicial body as to the arrest and location. Article 73 states: “Every individual shall have the right to personal freedom. There shall be no deprivation of freedom except in the case of insufficient measures, procedures, or alternative penalties.” Whilst these measures may provide for some protection, our original recommendation that the future constitution adopts a detailed definition of enforced disappearance still applies. Enforced disappearance leaves an individual vulnerable to torture; ensuring its prohibition according to the ICPPED definition is therefore an essential safeguard against torture.

6. PREVENTION

i. Non-refoulement

Article 42 on “Rights of foreigners” provides that “Foreigners who have legal residency shall have the right to movement and ownership of a residence. It shall be prohibited to subject them to mass or arbitrary displacement. In addition, it shall be prohibited to extradite them if they are expected to face torture, and this shall be subject to judicial guarantees.”

While it is essential that the principle of non-refoulement of any person within Libya’s jurisdiction, irrespective of their nationality and where there are substantial grounds for believing that he or she would be in danger of being subjected to torture or ill-treatment,¹⁵ be explicitly included in the separate provision on the absolute prohibition of torture and ill-treatment, this principle should also be included in Article 42. With regard to the category of foreigners considered in this provision, we urge the CDA to revise article 42 to ensure that the principle of non-refoulement, as elaborated, applies to all foreign nationals and not only those who have legal residency. This is because the absolute prohibition of torture applies to anyone within the state’s jurisdiction, not only to persons with residency status.¹⁶ In addition, the principle of non-refoulement should apply not only to those who are accused or sentenced but to *any* person whose life or freedom would be threatened on account of his race, religion,

¹⁵ See UNCAT article 3(1). In this regard, please see our suggestions on the amendments to the text of the provision which prohibits torture and ill-treatment.

¹⁶ See UNCAT article 2(1) read in conjunction with article 3(1).

nationality, membership of a particular social group or political opinion¹⁷ and where there are substantial grounds for believing that he would be in danger of being subjected to torture.¹⁸ Finally, with regard to the risks faced upon return, this provision has not been amended since the December 2014 Constitutional Recommendations and our previous concerns and recommendations regarding its wording therefore still apply, namely:

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 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.

ii. Exclusion of testimony extracted through torture

The December 2014 Constitutional Recommendations included a measure protecting against the use of evidence extracted through torture in the recommendation for the judiciary: "The courts do not admit any evidence extracted under coercion or through illegal measures."¹⁹ The April 2016 Constitutional Draft has removed this explicit prohibition of the use of evidence extracted through torture, in contradiction to Libya's obligation under UNCAT article 15.²⁰

In addition, article 72 concerning procedural guarantees, which states that "Competent authorities shall justify their orders that affect rights and liberties", is highly unusual and problematic, as it appears to imply that "competent" authorities have permission to derogate from human rights protections.

The exclusionary rule, as required by UNCAT article 15 and without any possibility for derogation, is an extremely important safeguard against torture. Torture occurs most frequently on arrest and during the first days of interrogations for the purpose of extracting confessions or information.²¹ We urge the CDA to reinstate the exclusionary provision, and to amend the draft to

17 See Article 33(1) of the Convention Relating to the Status of Refugees.

18 See UNCAT article 3(1).

19 The right to a fair trial also required "legitimacy of conviction evidence", which the authors noted was ambiguous and potentially weakened the explicit safeguard against extracted evidence.

20 UNCAT article 15: "Each State Party shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made."

21 United Nations Support Mission in Libya (UNSMIL), *Torture and Deaths in Detention in Libya*, October 2013.

specify clearly that any statement, confession or testimony obtained from an accused person or from any other individual by means of torture shall be unlawful. We strongly urge the CDA to remove the following provision from article 72: "Competent authorities shall justify their orders that affect rights and liberties."

7. CRIMINAL ACCOUNTABILITY

i. Torture as a crime

The December 2014 Constitutional Recommendations included limited provisions with regard to the criminalisation of human rights violations.²² The April 2016 Constitutional Draft provides that "The State shall be committed to protecting human dignity and preventing all types of violence, torture, inhumane, cruel and humiliating treatment as well as enforced disappearance. No statutory limitation shall apply to their crimes"²³ implying that torture is a crime.

The April 2016 Constitutional Draft also provides for criminal prosecution of human rights violations in the context of transitional justice: "The State shall be committed to adopting the following measures: [...] Prosecute criminally all those who had a role in human rights violations and corruption crimes [...]."²⁴

In order to comply with UNCAT article 4, we recommend including a constitutional provision explicitly criminalising any acts of torture when committed, attempted, aided and abetted, or incited by anyone, whether a public official or other person acting in an official or private capacity, in the revised separate article on the prohibition of torture. This approach is necessary to recognise that torture is not committed only by certain groups or in certain circumstances. We also recommend expressly noting the state's obligation to investigate, prosecute and punish acts of torture and ill-treatment in all instances, in line with UNCAT articles 12 and 13.

The express criminalisation of torture and ill-treatment or punishment is key to addressing the ongoing impunity with which such acts are carried out in Libya.²⁵

ii. No amnesty, pardon, immunity or statutes of limitation

Libya's obligations arising from UNCAT make clear that there must be no legal barriers to criminal accountability for those accused of torture or other forms of ill-treatment.²⁶ The December 2014 Constitutional Recommendations expressly prohibited "amnesty in

22 See: Committee 6, Rights and Liberties, Chapter 8, "General Rules"; and Committee 6, Transitional Measures, "Criminal Trials".

23 April 2016 Constitutional Draft article 40.

24 April 2016 Constitutional Draft article 197(5).

25 For comparative constitutional examples that make such provisions, see section II(B)(i), page 7 of LFJL-REDRESS Comments on the prohibition of torture and inhuman, cruel, or degrading treatment or punishment in Libya's Draft Constitutional Recommendations, above note 1.

26 See CAT, *General Comment No. 3: Implementation of article 14 by states parties*, UN Doc. CAT/C/GC/3 (2012), paras. 40-42; CAT *found pardons to be incompatible with UNCAT article 2 in Kepa Urra Guridi v. Spain*, Communication No. 212/2002, U.N. Doc. CAT/C/34/D/212/2002 (2005).

We strongly urge the CDA to remove the following provision from article 72: "Competent authorities shall justify their orders that affect rights and liberties."

Torture and ill-treatment must be excluded from any amnesty, immunity or statute of limitation and this must be the case whether they are committed during the transitional period or not.

crimes against humanity, genocides, war and torture crimes; they shall not be subject to the statute of limitation.”²⁷ In the April 2016 Constitutional Draft, article 40 on “Human dignity” provides that “The statute of limitations shall not apply” to the crimes of torture and forced disappearance. However, article 44 on “Crimes against humanity” does not include torture in the list of crimes that cannot be subject to statutes of limitation or pardon.²⁸

Further, article 117 of the April 2016 Constitutional Draft regarding a “Special Amnesty” provides that “Special amnesty shall be by a decree by the President of the Republic...in a manner that does not contravene the provisions of this Constitution”. It is unclear which crimes will be covered by any resulting pardon or amnesty, but crimes of torture could fall within such measures as there is now no express prohibition on including them. Further, article 44 provides that “The statute of limitations shall not apply to [crimes against humanity, war crimes and genocide], and it shall not be permissible to pardon them *in contradiction with the provisions of the Constitution*” which may be interpreted to mean that crimes in articles 44 may be subject to any pardon issued pursuant to the constitution. As a result, the scope of any future pardon or amnesty may cover human rights violations including torture and other ill-treatment, in violation of Libya’s international obligations.²⁹ Consequently, the April 2016 Constitutional Draft should be amended to make clear that no crime under international law, such as torture, should be subject to an amnesty, pardon or statute of limitation.

The language used in the transitional measures has also been weakened: the December 2014 Constitutional Recommendations provided for “the principle of non-escape from criminal prosecution in relation to all those who took part in systematic violations of human rights” and stated that there would be no immunity or amnesty for such crimes.³⁰ These provisions have been weakened in the April 2016 Constitutional Draft: article 197(5) commits the state to the criminal prosecution of alleged perpetrators of human rights violations, but no longer stipulates that there shall be no immunity, amnesty or statute of limitation in relation to these violations.

Torture and ill-treatment must be excluded from any amnesty, immunity or statute of limitation and this must be the case whether they are committed during the transitional period or not. UNCAT article 4 is clear that acts of torture must be made an offence under Libya’s criminal law, and

27 Committee 6, Rights and Liberties, Chapter 8, “General Rules” point 10. Article 40: “All patterns of behavior that constitute crimes against humanity, war crimes and genocide shall be prohibited. No statute of limitation shall apply to them, and they shall not be pardonable as is consistent with provisions of this constitution. International jurisdiction shall be left to the Libyan judiciary.”

29 Above at 26.

30 Committee 6, Transitional Measures, “Criminal Trials”.

the Robben Island Guidelines, a standard to which Libya is expected to adhere,³¹ elaborate on this obligation, providing that states must ensure that there is no immunity from prosecution for nationals suspected of torture.³² Further, the African Commission has indicated clearly that states must desist from adopting amnesty laws for perpetrators of human rights abuses.³³ We urge the CDA to reinstate into article 44 the prohibition on amnesties, pardons and statutes of limitation applying to crimes of torture, in order to limit the existing amnesty provided by Law 30 of 2012 and to prevent future amnesties or pardons applying to the crime of torture.

8. REPARATION

i. Right to effective access to justice

The December 2014 Constitutional Recommendations provided that “the right of litigation and defence is guaranteed”; we recommended that the article should also 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.”³⁴ Article 70 in the April 2016 Constitutional Draft provides a similarly general guarantee of the right of access to justice: “The right to litigation is guaranteed for all”. Accordingly, our original recommendation that the article should also specify that the right of access to justice must be *effective* still applies.

ii. Right to substantive reparation

In the December 2014 Constitutional Recommendations, provision was made for compensation for violations of “rights, liberties and judicial errors”,³⁵ and for compensation for victims of systematic human rights violations or those which occurred during military or armed conflicts.³⁶ In our previous recommendations, we welcomed these articles as a positive step forward in ensuring a measure of reparation for torture victims, but suggested adding specific

We strongly urge the CDA to remove the following provision from article 72: “Competent authorities shall justify their orders that affect rights and liberties.”

32 The Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa (the Robben Island Guidelines) Adopted by the African Commission 2002.

33 African Commission, Sudan Human Rights Organisation and Centre on Housing Rights and Evictions (COHRE) v Sudan 279/03-296/05, African Commission on Human and Peoples’ Rights, May 2009.

34 Section 8(i), page 17 of LFJL-REDRESS Comments on the prohibition of torture and inhuman, cruel, or degrading treatment or punishment in Libya’s Draft Constitutional Recommendations, above note 1 (emphasis added). See in this regard CAT, General Comment No. 3: Implementation of article 14 by states parties, UN Doc. CAT/C/GC/3(2012), paras. 40-42.

35 Committee 6, Rights and Liberties, “General Rules” (12).

36 Committee 6, Transitional Justice Measures, “The Right to Compensation”.

measures to repair violations of the prohibition of torture within the proposed separate article on torture.³⁷

In the April 2016 Constitutional Draft, the provision for compensation in cases of judicial errors or violations of rights and liberties has been removed. This means that there is no general entitlement to reparation for human rights violations including torture and ill-treatment or punishment within the future constitution if adopted in its current form. Libya's obligations arising under UNCAT are clear that there is a substantive right to adequate forms of reparation, including restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.³⁸

The April 2016 Constitutional Draft does, however, contain a provision for compensation in relation to transitional justice. Article 197(2) provides that the state is committed to adopting measures "to compensate the victims and persons harmed by systematic violations to human rights and fundamental freedoms a compensation proportionate to the harm". Article 197(2) also includes provision for "Treatment of the psychological and social effects, and rehabilitation of victims". These measures are welcome, as they provide for the protection of the right to reparation for human rights violations including torture and other ill-treatment or punishment. However, as these measures form part of the future constitution's transitional measures we recommend including a separate provision for compensation and reparation for victims of human rights violations including torture or ill-treatment which applies clearly to all such violations, not only those taking place during the transitional period or as a result of military operations and armed conflicts.

9. COMPLEMENTARY RIGHTS/PROVISIONS

i. Fundamental rights – fair trial

The December 2014 Constitutional Recommendations provided a separate article on the right to a fair trial in the work of Committee 6 on Rights and Liberties. This article has now been removed from the April 2016 Constitutional Draft. Instead, article 70 appears to guarantee the right to a fair trial, stating that "every person shall have the right to a fair trial before his natural judge and *within a reasonable period* in which guarantees shall be provided."

37 See Section 8(ii), page 17 of LFJL-REDRESS Comments on the prohibition of torture and inhuman, cruel, or degrading treatment or punishment in Libya's Draft Constitutional Recommendations, above note 1, where we said: "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."
38 CAT, *General Comment 3: Implementation of article 14 by states parties*, UN Doc. CAT/GC/3 (2012), paras. 40-42.

Further, some fair trial protections are contained within article 72 on procedural guarantees, for example: "Every individual shall enjoy respect of human dignity, as is his right, in all criminal proceedings"; "Competent authorities shall justify their orders that affect rights and liberties"; the arrested person "shall be given enough time and the necessary facilities to prepare his defense; he shall be informed of his right in not be (sic) forced to submit evidence against himself and his responsibility for any statements he makes, as well as to utilize an interpreter and to choose and contact an attorney. The State shall guarantee judicial assistance."

These are important measures, however a number of the safeguards which were included in the separate fair trial article in the December 2014 Constitutional Recommendations have been removed or weakened in the April 2016 Constitutional Draft. For example, the right to be present at trial, to a public hearing,³⁹ to appeal to a higher court,⁴⁰ and the power of *res judicata* (the principle preventing a person from being tried twice for claims relating to the same facts) have been removed and are no longer protected.

The draft measures for the right to a fair trial found in article 72 on "Procedural safeguards" currently combine elements of the right to a fair trial with elements of the right to liberty. We suggest separating the two rights. In the separate right to a fair trial we suggest including the following provisions:

- An initial statement of the article setting 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 should also stress the right to have a *public hearing* within a reasonable time by an *independent and impartial court or tribunal established by law*.⁴¹
- The right to be seen by a physician *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*.⁴²
- *Res judicata* (the principle preventing continued claims relating to the same facts), specifying that *no one shall be liable*

39 Article 133 states that trials shall be held in public unless "...the court decided to make its sessions secret in order not to offend morality and public order."

40 Article 70 does state that "No legislation shall be immune from appeal, and no conduct detrimental or threatening to rights and freedoms may be excluded from the jurisdiction of the judiciary."

41 ICCPR article 14(1).

42 CAT, Concluding Observations: Ukraine, UN Doc. CAT/C/UKR/CO/5 (3 August 2007), para. 9.

The right to be present at trial, to a public hearing, to appeal to a higher court, and the power of *res judicata* (the principle preventing a person from being tried twice for claims relating to the same facts) have been removed and are no longer protected.

*to be tried or punished for an offence for which he has already been convicted or acquitted.*⁴³

- 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 accused needs to have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;⁴⁴ the defence must have the same right to examine witnesses as the prosecution has and both parties have the right to legal representation.⁴⁵
- In a criminal trial, the right to be informed promptly and in detail in a language which the accused understands of the nature and cause of the charge against him;⁴⁶ the right to interpretation should be free and guaranteed *throughout the trial process*,⁴⁷ and must ensure that the suspect has information presented in a language he or she understands at all times, including the nature of and cause of the charges being brought against him or her.
- The right to be present at trial must be guaranteed including the right to *effective participation; any person accused in a criminal proceeding shall have the right to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it.*⁴⁸
- The right to a public trial must be guaranteed. Currently, article 133 provides that trials shall be held in public unless “...the court decides to hold private hearings in observance of public order and morals.” The separate article on the right to fair trial should ensure that the right to public trial 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.*⁴⁹
- Article 73 provides for compensation where a person has been deprived of their freedom “as a precaution or in the implementation of a sentence” where later acquitted or it is found that “that there is no cause for prosecution, or a judgement of acquittal due to the lack of a crime or evidence based on the regulations of the law.” This goes some way to guaranteeing the ICCPR article 14(6) right to compensation, but must be revised to specify that compensation is required in cases of miscarriage of justice, reversion of conviction or pardon.

43 ICCPR article 14(7).

44 ICCPR article 14(3)(b).

45 ICCPR article 14(3)(e).

46 ICCPR article 14(3)(a)

47 ICCPR article 14(f).

48 ICCPR article 14(3)(d).

49 United Nations Human Rights Committee, General Comment No. 32, CCPR/C/GC/32, 23 August 2007, para. 29.

- In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.⁵⁰

ii. Transparency and accountability

The December 2014 Constitutional Recommendations did not include measures on the transparency and accountability of law enforcement or security services; the April 2016 Constitutional Draft now includes these provisions in Chapter 10 articles 192-196. This chapter follows some of our previous recommendations.⁵¹

It is important that both law enforcement and security forces are overseen in accordance with the principles of transparency and accountability to safeguard against human rights violations, including violations of the right to a fair trial and the prohibition of torture. While we note that this new chapter goes some way towards achieving this, some of the recommendations that we made in relation to the December 2014 Constitutional Recommendations have not been implemented, and these are necessary to help ensure that national security forces remain transparent and accountable in a way that will help guarantee fundamental rights:

- National security should be promoted and guaranteed in accordance with the following principles:
 - 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.
- 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

50 ICCPR article 14(4).

51 Article 192 places the army ‘solely under state control’; article 193 prohibits discrimination in the hiring of military and police personal; article 194 makes clear that the army must remain politically neutral and is “subject to civilian authority”; article 195 outlines the army’s mandate as being to “defend the country, its independence, and territorial integrity” and that “it is prohibited from undermining the constitutional system and the state’s institutions, obstructing their activity or limiting the rights and freedoms of the citizens”; and article 196 requires that the police receive “training on the protection of human rights and ways of preventing crime and detecting it”.

Article 131 should be revised to ensure that judicial appointments are conducted through transparent processes, without political interference.

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.

iii. Judiciary

The April 2016 Constitutional Draft has cut much of the work of Committee 3 on the Judiciary and Constitutional Court found in the December 2014 Constitutional Recommendations. The revised chapter is now limited in scope and lacks important safeguards and a clear structure for the judicial system.

Articles 130 and 132 in the April 2016 Constitutional Draft provide that members of judicial bodies are independent in their work and “shall not be seconded except to a work that is compatible with its independence and neutrality as defined by the law”. However, article 131 provides that “The requirements for their appointment and promotion shall be defined by law ensuring selection and promotion of the best efficient and capable.” We urge the CDA to ensure that non-politicisation of the judiciary is constitutionally protected: article 131 should be revised to ensure that judicial appointments are conducted through transparent processes, without political interference.⁵²

Further, article 132 on judicial “guarantees” provides that members of the judicial authority shall only be disciplined, transferred from office, dismissed, or removed through “a justified decision by the Higher Judicial Council in accordance with the safeguards and cases defined by the law” and that “In cases other than flagrante delicto, actions that affect the rights and liberties may only be taken by authorization of the Higher Judicial Council.” This provision is unclear and leaves the question of judicial immunity subject to interpretation, with no clear criteria of what actions might warrant discipline or removal. Further, there is no provision for a mechanism to deal with judges, and leaves these decisions to other members of the judicial authority, rather than an independent body. Our previous comments in relation to the December 2014 Constitutional Recommendations therefore continue to apply:

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.

52 For example, the constitution of the Dominican Republic 2010 provides for a public appointment process (article 150(1)); Article 104 of the Italian Constitution provides that the Judiciary is an autonomous institution, independent of all other powers, and Article 106 establishes that the Judges are appointed through competitive examinations.

The December 2014 Constitutional Recommendations indicated that “any natural or legal person with an interest might ask the Constitutional Court to pass legislation to protect their basic rights provided for in the constitution.”⁵³ In the April 2016 Constitutional Draft this measure has been amended to remove reference to protection of fundamental rights and to provide a more general right to challenge a law’s constitutionality.⁵⁴ Article 70 also provides: “...no conduct detrimental or threatening to rights and freedoms may be excluded from judicial jurisdiction.” We recommend that an explicit statement guaranteeing the judiciary’s power to receive fundamental rights petitions is protected, in order to better ensure that courts are able to intervene to remedy or prevent violations of the prohibition of torture or ill-treatment.⁵⁵

Article 133 mandates that courts must be public unless the “observance of public order and morals” requires that the court convene in secret. Secret courts can pose a threat to ensuring that torture and related crimes are dealt with effectively, and generally can have an impact on the accountability of the judiciary as such courts prevent stakeholders from following or understanding proceedings.⁵⁶ We note that article 135 provides simply that “Establishment of special courts shall be prohibited”, which may be intended to prohibit secret courts. This article should be amended to define special courts in order to ensure their prohibition.

53 Committee 3, Judiciary and Constitutional Court, article 25.

54 Article 152 states: “Any individual with an interest may resort to the Constitutional Court to challenge, whether directly or via a serious motion, the unconstitutionality of case that is being considered before the courts, as regulated by the law.”

55 For example, article 32(1) of India’s constitution provides “The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this Part is guaranteed.” Article 37(1) in the Gambian constitution provides “If any person alleges that any of the provisions of section 18 to 33 [rights and freedoms] or section 36 (5) of this Chapter has been, is being or is likely to be contravened in relation to himself or herself by any person he or she may apply to the High Court for redress.”

56 ‘Secret courts’ threaten transparency and accountability. In its General Comment 32 (U.N. Doc. CCPR/C/GC/32 (2007)), the UN Human Rights Committee identified that ‘special tribunals of faceless judges’ result in violations of the basic standards of fair trial, particularly independence and impartiality such as: restrictions on the right to examine witnesses and exclusion of the public. The right to a public hearing, guaranteed by ICCPR article 14 on the right to a fair trial, may only be derogated from in very limited circumstances set out in article 14(1): for reasons of morals, public order or national security in a democratic society, or where the interest of the private lives of the parties so requires, or the extent necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice. In determining whether to hold a trial in secret, a judge must ensure that any derogation of ICCPR article 14 does not exceed those required by the exigencies of the actual situation, and cannot circumvent the protection of non-derogable rights. Also in General Comment 32, the Human Rights Committee stated that the provisions of ICCPR article 14 apply to all courts and tribunals; the requirement of competence, independence and impartiality of a tribunal is absolute. Limitations to article 14 on grounds of national security would be subject to the general principles set out by the UN Human Rights Committee in its, General Comment No 31, UN Doc CCPR/C/21/Rev.1/Add.13, paragraph 6.

The April 2016 Constitutional Draft makes provision for a military judicial system in article 145 and provides that its mandate will be over military crimes committed by military persons. The December 2014 Constitutional Recommendations were more explicit in providing protections for civilians with respect to military courts: military courts were expressly prohibited from trying civilians “except for crimes which constitute a direct aggression on military installations or installations of a similar nature”.⁵⁷ The constitution should be amended to specify that the trying of civilians, cases involving civilians, and cases involving human rights violations are prohibited in military or special courts.⁵⁸

iv. National human rights institution

Article 170 of the April 2016 Constitutional Draft now regulates the National Human Rights Council. It shall “strengthen, promote and spread the culture of the values of human rights and public liberties provided for in Islamic Sharia and international conventions”.

The National Human Rights Council’s role is to:

1. “Observe human rights conditions monitor violations thereof. It shall report these violations to the competent national authorities and follow up on this.”
2. “Support the citizens in gaining their rights endorsed by the Constitution and the law.”
3. “Recommend ratification of, or accession to, international covenants of human rights in a way that is not incompatible with the provisions of the Constitution.”
4. “Promote cooperation with national and international human rights organizations.”

The April 2016 Constitutional Draft has therefore remained largely similar to the December 2014 Constitutional Recommendations; the additional inclusion of a duty to work with national and international human rights organisations and to “take care to represent women, youth” and “cultural and linguistic components” are positive steps. However, we are concerned by the decision to remove the right of the National Human Rights Council’s legislature-elected commissioner to challenge the constitutionality of legislation related to human rights and public liberties, or to

⁵⁷ Previously in article 18 in the work of Committee 3.

⁵⁸ Report of the Special Rapporteur on the independence of judges and lawyers, Gabriela Knaut, UN Doc. A/HRC/20/19, 7 June 2012, para. 56.

challenge the rules of procedure and decisions by public and private institutions where they may contradict the future constitution or human rights provisions.⁵⁹

We therefore urge the CDA to reinstate these provisions and additionally continue to recommend the following:

We suggest that it is important to clarify that the National [Human Rights] 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 [Human Rights] 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 [Human Rights] Council to ensure a pluralist representation of actors involved in the promotion and protection of human rights.

We also suggest that the provision is clarified to specify that any individual may complain to the National [Human Rights] Council about violations of personal human rights and that the National [Human Rights] 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.

v. Non-derogation in state of emergency

The April 2016 Constitutional Draft still lacks a clear prohibition of torture during a state of emergency. Article 210 outlines the limitations during a state of emergency, with 210(2) providing that “Taking into account articles 37, 38 and 40, the President of the Republic may not impose restrictions on fundamental rights and liberties during a state of emergency or martial law, except to the necessary extent necessary for maintaining public security and safety of the country.” This has therefore removed the previous reference to remaining “in line with the obligations of the state under international law”.

This is problematic as in order to comply with its international obligations under the ICCPR and UNCAT, Libya cannot derogate from the prohibition of torture under any circumstances, including

⁵⁹ Previously in the work of Committee 8 on Independent Institutions, article 16.

We are concerned by the decision to remove the right of the National Human Rights Council’s legislature-elected commissioner to challenge the constitutionality of legislation related to human rights and public liberties.

In order to comply with its international obligations under the ICCPR and UNCAT, Libya cannot derogate from the prohibition of torture under any circumstances, including during a state of emergency.

during a state of emergency. Our previous recommendations regarding derogation during a state of emergency still therefore apply:

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.⁶⁰

We also recommend that article 74 on "Restrictions on exercising rights and freedoms" is revised to reflect international law, and to provide a list of non-derogable rights, including torture and ill-treatment, that cannot be departed from under any circumstance. Article 74's provision that "Revoking guarantees provided by the law shall be prohibited" must also be amended to remove the caveat "All this shall not contravene with the provisions of this Constitution."

⁶⁰ United Nations Human Rights Committee, General Comment 32, above note 49, para. 6.

ANNEX

Text in black shows original text.

Text in gold shows our suggested amendments.

Text in blue shows items moved.

Article 38

Right to Safety

Every human being has the right to personal, physical, and mental safety. ~~Material gain from a human being and his organs shall not be permissible.~~ The State shall take the necessary measures to compensate victims of calamities for citizens and legal residents.

Article 40

Human Dignity

The State guarantees the right ~~shall be committed to protecting~~ human dignity ~~and preventing all types of violence, torture, inhumane, cruel and humiliating treatment, as well as enforced disappearance.~~ The statute of limitations shall not apply to ~~violations thereof their crimes.~~ All forms of slavery, involuntary servitude, forced labour and human trafficking shall be prohibited, ~~unless out of a necessity or to carry out a punishment according to a court ruling.~~

Article ()

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. No one might be subjected to scientific or medical experiments without their free and informed consent. ~~Material gain from a human being and its organs is not permissible.~~
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 any attempt to commit torture or cruel, inhuman or degrading treatment or punishment, and to any act by any person which constitutes participation, aiding and abetting, inciting, ordering, planning, instigating, 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. No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public

emergency, may be invoked as a justification of torture.

5. The State is under a duty to promptly and effectively investigate, prosecute and punish all instances of torture and other cruel, inhuman or degrading treatment or punishment.
6. 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.
7. ~~Extraditing, deporting, returning or expelling any person those who are accused or sentenced shall be prohibited~~ in cases where there are substantial grounds for believing that he or she would be in danger of being subjected to ~~torture, or other cruel, inhuman or degrading treatment or punishment.~~

Article 42

Rights of Foreigners

Foreigners ~~who have legal residency shall~~ have the right to movement and ownership of a residence. It shall be prohibited to subject them to mass or arbitrary displacement. ~~In addition, it shall be prohibited to Extradite them if they are expected to face torture,~~ and this shall be subject to judicial guarantees.

The State shall be committed to observing the interest of the Libyan husbands, wives, and children in rulings of deportation, extradition, and granting of visas and residency.

Article 44

Crimes under international law Against Humanity

All ~~patterns of behavior that constitute~~ crimes under international law, including crimes against humanity, war crimes, torture and ill-treatment, and genocide shall be prohibited. The statute of limitations shall not apply to them, and it shall not be permissible to pardon them ~~in contradiction with the provisions of the Constitution.~~ International jurisdiction of the Libyan judiciary shall apply on them.

Article 70

Right to Litigation

The right to ~~effective access to justice litigation~~ shall be guaranteed for all. ~~Every person shall have the right to a fair trial before his natural judge and within a reasonable period in which all guarantees shall be provided. No legislation shall be immune from appeal, and no conduct detrimental or threatening to rights and freedoms may be excluded from judicial jurisdiction.~~

Article 72

Procedural Guarantees

Every individual shall enjoy respect of human dignity, as is his right, ~~in all criminal proceedings. Competent authorities shall justify their orders that affect rights and liberties. There shall be no detention except~~

in places designated for this purpose and for a specific legal period that is proportionate with the accusation, while making this known to the competent judicial body and the family or chosen person of the detained; his place shall be specified and he shall be given enough time and the necessary facilities to prepare his defense; he shall be informed of his right not to be forced to submit evidence against himself and his responsibility for any statements he makes, as well as to utilize an interpreter and to choose and contact an attorney. The State shall guarantee judicial assistance.

Article ()

The right to a fair trial

Every person shall have the right to a fair trial before a competent, independent and impartial court or tribunal established by law for a public hearing his natural judge and within a reasonable time period in which all guarantees shall be provided, including in particular:

1. Every individual has the right of respect to his human dignity in all criminal procedures.
2. Every individual has the right to a counsel of their choosing. The State shall guarantee a counsel for those in hardship in accordance with judicial assistance. Any person accused in a criminal proceeding shall have the right to defend himself or herself in person or through legal assistance of his or her own choosing; to be informed, if he or she does not have legal assistance, of this right; and to have legal assistance assigned to him or her, in any case where the interests of justice so require, and without payment by him or her in any such case if he or she does not have sufficient means to pay for it.
3. Any person has the right to be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him and the arrested person shall be given enough time and the necessary facilities to prepare his defence and to communicate with counsel of his own choosing, and be informed of his right not to be forced to submit evidence against himself, and his responsibility for any statements he makes.
4. The right, and to have information presented in a language that the detainee understands at all times throughout the trial process, including to a free utilize an interpreter.
5. The prohibition 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, except against a person accused of torture as evidence that the torture took place.
6. The right to a public hearing. A trial may only be held in private 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.
7. The right to equality between the parties in respect of access to examine witnesses and the right to legal representation.
8. The right to effective representation, including to be present at trial.
9. 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.
10. The right to appeal before a higher court.
11. The accused shall be innocent until proven guilty by a final court ruling.

12. The 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.
13. No legislation shall be immune from appeal, and no conduct detrimental or threatening to rights and freedoms may be excluded from judicial jurisdiction. The competent authorities courts are required to give reasons for all judgments and sentences, which may not be arbitrary, and shall justify their orders that might affect rights and liberties.
14. In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.
15. Any person subject to miscarriage of justice, reversion of conviction or pardon shall be entitled to compensation.

Article 73

~~Deprivation of freedom~~ **The right to liberty and security of person** Every individual shall enjoy the respect of human dignity, as is his/her right, in all criminal proceedings.

Every individual shall have the right to personal freedom 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 enforced disappearance and secret imprisonment.
 - 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 detainee's detention shall be made known to the competent judicial body and the family or chosen person of the detained.
5. The right of every person to know the identity of the person in charge of their arrest and the person conducting the investigation.
6. The right of all detainees to be brought before a judge promptly to have the legality of his or her detention determined (*Habeas corpus*).
7. 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.
8. There shall be no deprivation of freedom except in the case of insufficient measures, procedures, or alternative penalties.
9. Any person who is deprived of his freedom unlawfully as a precaution or in implementation of a sentence has the enforceable right shall be entitled to proper reparations, including rehabilitation, upon an order that there is no cause for prosecution, or a judgement of acquittal due to the lack of a crime or evidence based on the regulations of the law.

Article 74

Controls over Restrictions on Exercising Rights and Freedoms

Any restriction of rights and liberties must be provided by law, pursue a legitimate aim, necessary, clear, defined, and proportionate to the interest to be protected and the characteristics of democratic society. Revoking guarantees provided by law shall be prohibited. ~~All this shall not contravene with the provisions of this Constitution. Non derogable rights cannot be derogated from under any circumstances. Non derogable rights are: the right to life, the prohibition of torture, cruel, inhuman or degrading treatment or punishment; medical or scientific experimentation without consent; the prohibition of slavery, the slave trade and servitude; the prohibition; the prohibition of imprisonment because of inability to fulfil a contractual obligation; the principle of legality in the field of criminal law; and the right to freedom of thought, conscience and religion.~~

Article 117

Special Amnesty

~~Special amnesty shall be by a decree of the President of the Republic after considering the opinions of the Prime Minister and President of the Higher Judicial Council in a manner that does not contravene with the provisions of this Constitution.~~

Article 131

Members of the Judiciary

The members of the Judiciary shall be the judges and the members of the public prosecution office. ~~They shall be appointed and regulated according to principles of independence and transparency requirements for their appointment and promotion shall be defined by law,~~ ensuring selection and promotion of the best efficient and capable. Their rights, duties, and other functional affairs shall be regulated by law.

Article 133

Mandate of the Courts

The courts shall have the power to hear petitions from, and grant redress to, any natural person alleging that his or her fundamental rights and freedoms as protected by this constitution have been, are being, or are likely to be violated in relation to himself or herself by any person or entity. The various types and levels of courts shall adjudicate disputes and offenses in accordance with the system of judicial jurisdiction to meet the requirements of justice. Hearings shall be public ~~except in juvenile courts, or when the court decides to hold private hearings in observance of public order and morals.~~ A trial may only be held in private 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. In all cases, delivery of judgment shall be public and in accordance with the law.

Article 135

Prohibition of Secret special Courts

Establishment of Secret special courts shall be prohibited.

Article 145

Military Judicial System

The military judiciary shall be competent with military offenses committed by military persons in accordance with the actions defined by law, in a manner that ensures fair trial. This shall include the right to

appeal according as specified by. ~~Civilians, cases involving civilians, and cases involving human rights violations are prohibited from being tried in military courts.~~

Article 170

Human Rights National Council

The National Council for Human Rights shall strengthen, promote and spread the culture of the values of human rights and public liberties provided for in Islamic Sharia and international conventions. It shall also:

1. Observe human rights conditions and monitor violations thereof and express its views on any human rights violations that it chooses of its own violation, including where these relate to the State. It shall report these violations to the competent national authorities and follow up on this including by publishing its reports and making recommendations.
2. Support the citizens in gaining their rights endorsed by the Constitution and the law.
3. Recommend the ratification of, or accession to, international covenants of human rights in a way that is not incompatible with the provisions of the Constitution.
4. Promote cooperation with the national and international human rights organizations.
5. Challenge the constitutionality of legislation related to human rights and public liberties.
6. 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.

The Council shall consist of nine members where representation of cultural and linguistic components as well as women and youth shall be taken into account. They shall carry out their duties for one term of six years. The legislative authority shall elect the president with the capacity of commissioner and a deputy from among those members.

Article 174

Other Bodies

The law shall establish bodies for administrative oversight, transparency and anti-corruption, statistics, military and police oversight, higher council for the media and press, and a council for science, technology, and innovation. The law shall determine their composition, competencies and regulations, and shall guarantee their independence and impartiality of their members in accordance with what is stipulated in this chapter.

Article 192

State Monopoly of Armed Forces

The State shall monopolize the creation of armed forces and security forces, which shall be subject to democratic and civil control. This shall be in accordance with the rule of law, democracy, human rights and fundamental freedoms, the constitution and the principles of international law which regulate the use of force and for the benefit of the people. Transparency and accountability shall be ensured. Individuals, parties, and groups shall be prohibited from forming military or paramilitary groups.

Article 193

Admission in Army and Police

Discrimination shall be prohibited to those who wish to join army and police forces. Recruitment shall reflect the diversity of the Libyan

people in fair and equal proportions and ensure equal opportunities. Recruits must have a clean record in respect of committing past human rights violations. The law shall stipulate the conditions for cases that require special qualifications, skills, or knowledge. Army and police personnel shall not be allowed to join or belong to political parties.

Article 194

Army

The army is a national, armed military force based on discipline and rank, and it is formed and organized structurally in accordance with the law. It shall be obliged to observe complete neutrality, and shall be subject to democratic and civilian authority. It shall have no role in the peaceful transition of power nor shall it interfere in political life. The law shall stipulate the necessary measures for that and national service shall be regulated by the stipulations and conditions of a law.

Article 195

Duties of the Army

The Army shall assume the task of defending the homeland and its independence, unity, and territorial integrity. It shall support security agencies in accordance with the constitution and the principles of international law which regulate the use of force. The Army shall be prohibited from undermining the constitutional system and State institutions or obstructing their activity or restricting the freedoms and rights of citizens.

Article 196

Police

The police is a systematic, civilian, technical, disciplined, hierarchical professional and specialized body. It shall be structured to function and national, regional and local levels, and its mission shall be to combat crime, preserves public safety and peace, maintain order, respect the law, and protect the rights, freedoms, security, and property of persons. Police personnel shall receive training in respect to human rights and methods to prevent and discover crimes.

Article 197

Transitional Justice Measures

The State shall be committed to adopt the following measures:

1. Preserve national memory through uncovering and documenting human rights violations including linguistic and cultural violations, crimes of corruption, the fate of missing persons, victims, and persons harmed by violations, military operations and armed conflicts on the individual and regional level.
2. The State shall commit to compensate victims and persons harmed by systematic violations to human rights and fundamental freedoms a compensation proportionate to the harm. Compensation may be financial or symbolic and may be individual or collective. Treatment of the psychological and social effects and rehabilitation of victims, while taking into consideration the administrative and judicial measures that have already been taken, without prejudice to the right of the State to prosecute persons who committed these violations.
3. Ensure the rights of persons whose property and movable assets were violated or seized provided that the State shall ensure the rights of the original owner by restitution or compensation, taking into consideration the financial status of the occupant of the property and the construction added to it, the previous administrative and judicial measures in accordance with the

law.4. Return the remains of war victims from abroad.

5. Prosecute criminally all those who had a role in human rights violations and corruption crimes provided that all of this is in accordance with international standards and national reconciliation requirements within the framework of the Islamic Sharia. Legal provisions that are in conflict with the mechanisms of transitional justice shall not be applied.
6. A body for transitional justice and reconciliation shall be established for the implementation of the programs of transitional justice. The law shall regulate its structure and the duration of its work. Programs on truth, justice and reconciliation shall be designed in accordance with the rules of effectiveness and comprehensiveness and to represent the components of the Libyan people in a way that guarantees impartiality, independence and efficiency.

Article 210

Restrictions during the State of Emergency and Martial Law

1. The law shall specify the reasons for declaring a state of emergency and martial law and their respective range, extent, and duration and the rights, which may be constrained, and the measures and procedures, which may be taken.
2. Taking into account Articles 37, 38, and 40, the President of the Republic may not impose restrictions on fundamental rights and liberties during a state of emergency or martial law, except to the extent necessary to for maintaining public security and safety of the country, 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:
 - A) The right to life;
 - B) The prohibition of torture, cruel, inhuman or degrading treatment or punishment ;
 - C) Medical or scientific experimentation without consent;
 - D) The prohibition of slavery, the slave trade and servitude;
 - E) The prohibition of imprisonment because of inability to fulfil a contractual obligation;
 - F) The principle of legality in the field of criminal law;
 - G) The right of everyone to recognition as a person before the law; and
 - H) The right to freedom of thought, conscience and religion.
3. All decisions and actions during a state of emergency or martial law shall be subject to the oversight of the judiciary.
4. The military judiciary may not consider civil proceedings during a state of emergency or martial law.
5. Elected councils may not be dissolved during a state of emergency or marital law.
6. When the declaration of a state of emergency or martial law takes place at the end of the session of any elected council, it [council] shall extend its terms until their [the state of emergency or martial law] end.
7. During a state of emergency or martial law, the State shall commit to respect the principle of lawfulness and shall not obstruct State institutions.
8. The Constitution may not be amended nor its provisions obstructed during a state of emergency or martial law. In addition, elections may not be held, the election laws may not be amended, nor shall the established guarantees of the Shura Council be touched.