

# The Draft Libyan Constitution: Procedural Deficiencies, Substantive Flaws



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# **The Draft Libyan Constitution: Procedural Deficiencies, Substantive Flaws**

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## Executive Summary

Following decades of authoritarian rule in Libya under Moammar Gadhafi – characterised by gross, widespread and systematic human rights violations – sustained protests and a subsequent conflict led to the ousting of Gadhafi in 2011. Transitional institutions were then established and a Constitutional Declaration was promulgated providing for the election of a Constitution Drafting Assembly (CDA), to draft a new constitution for Libya. Since 2011, however, the process of political and institutional reform initiated by the transitional authorities has failed to establish and uphold the rule of law or to address past and continuing human rights violations, as required by international law and standards. The situation in Libya has deteriorated significantly in 2014 and 2015 with the escalation of an ongoing conflict between armed groups culminating in two rival parliaments competing for control over the country and human rights violations continuing unabated. Negotiations on a unity government are ongoing at the time of writing.

Before the latest political and security crisis, national elections were held in Libya to elect the CDA. The election was held in February 2014 and was deemed fair by international observers. The legal process leading to the election was, however, marred by disputes over, among others, the length of time the CDA would be given to write the Constitution and representation for minorities and women on the CDA. Boycotts by some minority groups and security challenges initially left 13 seats vacant and continue to affect the process. Four seats have never been filled; two because of security issues in Derna and two because of a continued boycott by the Amazigh community. Since August 2014, the CDA has faced serious security challenges, which have restricted its members' ability to travel throughout the country and consequently its ability to conduct nationwide consultations. In addition, the current political impasse in Libya has undermined tangible institutional support for the CDA, including financial and logistical support, from relevant government institutions including a parliament with full national support.

The CDA commenced its work in April 2014. One of its first steps was to split into separate committees tasked with writing different sections of the Constitution, including on the formation of the state, on the structure of governance, on rights and liberties, on the judiciary and on the Constitutional Court. In December 2014, the CDA published Proposals for a Draft Constitution with different parts reflecting the work of the separate committees, (the December 2014 Proposals). These Proposals were subject to debate and consultation with various stakeholders. In mid-2015, the CDA formed an internal drafting committee to prepare a comprehensive draft of the Constitution. This committee published a new draft constitution on 6 October 2015, (the Draft Constitution). At the time of writing, this draft of the Constitution has yet to be adopted by the whole of the CDA and is considered by some as an 'outcome document' of the drafting committee. This report refers to it as the Draft Constitution and analyses it in light of international law and standards, making recommendations for reform.

The Draft Constitution represents a reasonable first step towards laying the foundation for the establishment of the rule of law in Libya. However, a significant number of provisions relating to, among others, the formation of the state, the separation of powers, the primacy of the constitution over other aspects of internal law, rights and liberties, the judiciary and the Constitutional Court do not conform to international law and standards.

The Libyan authorities are obliged under international law to ensure that Libya's laws and policies, including its Constitution, conform to the requirements of the human rights treaties it has ratified and customary international law. Given both the historical and more recent pattern of gross human rights violations and widespread impunity in Libya, it is imperative that the Constitution serves as a solid foundation on which the rule of law can be established,

including in terms of providing for the separation of powers, the independence of the judiciary, civilian control of the armed and security forces, a comprehensive bill of rights, and effective enforcement mechanisms for the protection of human rights.

This report analyses the Draft Constitution in light of Libya's international legal obligations and international standards. It analyses key issues including the drafting process itself, the rule of law, the definition and scope of human rights, the judiciary and the Constitutional Court and the provisions on justice for violations by the previous regime, and makes recommendations on how the Draft Constitution can be brought in line with international law and standards, as summarised below.

### *The Constitutional Drafting Process*

In order to comply with international standards, the process of drafting a constitution should be both inclusive and participatory. The process and substance of the constitution should command broad support across the country, thereby bolstering its democratic credentials. The CDA has made efforts to consult the Libyan population since beginning its work, including by holding town hall meetings and meeting with some civil society representatives. The ICJ, however, conducted a number of interviews with civil society organisations who felt almost unanimously that the CDA had not done enough to engage with civil society in the process so far. Whilst the ability of the CDA to interact with a broad range of actors was clearly affected by the security and political situation in Libya, the ICJ believes it should have taken additional steps to provide mechanisms for engagement in a coordinated and structured manner through regular consultations with key stakeholders, including minority groups, women and civil society organizations. The CDA should put such structures in place for the next stage in the drafting process. This includes holding regular consultations with all relevant stakeholders, explaining how suggestions and submissions relating to the constitutional drafting process have been taken into consideration, and making a special effort to reach out to minority groups, women and other marginalised groups to ensure their inclusion in the process.

### *The Constitution and the Rule of Law*

The Draft Constitution provides for a number of important protections and principles that should help to embed the rule of law in the Constitution and the structure of the state. The Draft Constitution provides for the separation of powers, some checks and balances, civilian oversight over the military, and for the right to participate in public affairs, including through regular elections. However, in certain key respects, the Draft Constitution falls short of international standards and should be amended accordingly. In particular, the Constitution must fully embed the rule of law in the framework for the functioning of the state, including by ensuring a clearer attribution of competences, the separation of powers between the legislature, the executive and the judiciary, and adequate checks and balances between the three branches of government.

The primacy of the Constitution over all other aspects of domestic law must be established, as well as the primacy of international human rights law over domestic law. The primacy of the Constitution is a key component of the principle of the rule of law. Of some concern to the ICJ is Article 7 of the Draft Constitution which prescribes *Sharia* as the source of all legislation, reading as follows, "Islam is the religion of the State, and Islamic Sharia is the source of all legislation in accordance with established religious doctrines and jurisprudence, without being bound by a specific doctrinal opinion on matters relating to jurisprudence. The constitutional provisions shall be interpreted and restricted in accordance with the above."

This article appears to place *Sharia* above the Constitution, undermining the primacy of the Constitution. To ensure that the primacy of the Constitution is clearly established as placed above all other aspects of law within the domestic legal framework, the ICJ recommends that

article 7 be removed. In addition, an article should be added that clearly and unambiguously recognises the primacy of the Constitution over all other aspects of domestic law. Civilian oversight over the military and security services must be clearly defined, including by providing for sufficient and effective parliamentary oversight mechanisms and by providing for the accountability of the military and security forces to ordinary courts in cases concerning human rights violations. In addition, the Constitution should provide for effective instruments and mechanisms that guarantee the right of all Libyans to participate in the conduct of public affairs, including their right to vote and to be elected without discrimination. It should be made clear that all organs of government have the same responsibility to respect, protect and fulfil human rights within their sphere of competence, no matter what the system of local governance. Further, the Constitution should provide for an effective and independent national human rights institution to protect and promote human rights with a comprehensive mandate and sufficient guarantees for its independence, in accordance with the Paris Principles relating to the Status of National Human Rights Institutions.

### *Human Rights and International Standards*

In addition to laying the foundations for the establishment of the rule of law, the new Libyan Constitution should provide for a comprehensive set of rights in accordance with universally-recognised human rights standards. This would provide groups and individuals with a comprehensive set of constitutional rights with which to hold public authorities to account and would contribute to the realisation of Libya's obligations under international law to respect, protect, promote and fulfil human rights. The chapter on 'Rights and Liberties' in the Draft Constitution provides for the protection of a wide range of rights. However, the definition and scope of certain rights fall far short of international standards. Provisions relating to human rights in the Libyan Constitution must at a minimum conform to the definition and scope of the rights contained within the human rights treaties to which Libya is a state party. This includes, among others, provisions relating to non-discrimination, the right to life, the right to liberty and security, the prohibition on torture and other cruel, inhuman or degrading treatment or punishment ("other ill-treatment"), the prohibition of the death penalty, the prohibition of slavery and servitude, comprehensive guarantees for fair trial rights, and a range of economic, social and cultural rights.

The scope and definition of these rights are explored in detail in the report. Of particular note, human rights protections in the Constitution must generally extend to all individuals under Libya's jurisdiction and not limit the protection of rights to citizens. The Constitution must include a comprehensive general anti-discrimination clause, covering at least all the grounds covered by the International Covenant on Civil and Political Rights (ICCPR), as interpreted by the UN Human Rights Committee. And, of particular importance, given the history of discrimination against minorities in Libya, the Constitution must fully recognise and protect the right to freedom of thought, conscience and religion, as well as the rights of persons belonging to minorities to enjoy their own culture, to profess and practise their own religion, and to use their own language, in line with Libya's obligations under the ICCPR and the Arab Charter on Human Rights (the Arab Charter), as well as general international law.

The Draft Constitution should also be reformed to expand the provisions relating to economic, social and cultural rights. In particular, it should recognise, guarantee and protect economic, social and cultural rights on an equal footing with civil and political rights and should recognise that Libya is obliged to take steps, as expeditiously as possible, to the maximum of its available resources to progressively achieve the full realisation of the rights outlined in the International Covenant on Economic, Social and Cultural Rights (ICESCR).

Of concern is the fact that the provisions relating to limitations and derogations to rights in the Draft Constitution do not fully conform to the requirements of international law. While



certain rights may be subject to limitations, these must be lawful, reasonable, necessary and capable of being demonstrably justified in a free and democratic society. In addition, while states can derogate from certain rights in times of emergency that threaten the life of the nation, certain rights are absolute and no derogation is permitted, including during a state of emergency, no matter how grave. These include, among others: the right to life; the right to be free from torture and other ill-treatment; the prohibition of arbitrary detention; the right not to be subjected to enforced disappearance; the principle of legality; and the non-derogable aspects of the right to a fair trial. These requirements must be reflected in the Libyan Constitution.

The Constitution should expressly provide that should any conflict arise between provisions of the Constitution in their interpretation and application, the provision or interpretation providing for the greater protection of rights always takes precedence. This principle should in fact be made clearly applicable to all laws, both within the Constitution and to primary and secondary legislation.

### *The Judiciary and International Standards*

An independent and impartial judiciary is necessary for a strong and effective framework of human rights protection and for accountability when human rights have been violated. The right to an independent and impartial judiciary is established in international law. For decades, Libya failed to fully comply with its obligations under international law to respect and observe the independence of the judiciary. Both executive interference in the judiciary and the violation of fair trial rights were common features of the previous judicial system. The drafting of a new Constitution offers the opportunity to bring Libya in line with international law and standards by enshrining the principle of the independence of the judiciary backed up by effective safeguards, ensuring greater protection of fair trial rights and accountability for the future. The Draft Constitution contains some guarantees for the independence of the judiciary but in certain key respects falls short of international standards, including those relating to the Supreme Judicial Council, (SJC) and the Office of the Prosecutor General, (OPG). The provisions relating to the SJC, the body in charge of overseeing the judiciary, should ensure that the SJC is independent, composed of a majority of judges who are elected by their peers, and is fully empowered to oversee the selection, appointment and transfer of, and disciplinary proceedings against judges. It should be granted the necessary authority to promote the efficient functioning of the judiciary and to safeguard its independence. In addition, the Constitution should guarantee the principle of the irremovability of judges and unequivocally ensure that judges may only be removed for reasons of incapacity or behaviour that renders them unfit to discharge their judicial duties, determined in accordance with established standards of judicial conduct.

Prosecutors play a crucial role in the proper functioning of the criminal justice system. They must ensure the proper administration of justice and fully respect the rights of the accused and victims at all stages of criminal proceedings. The prosecution service must be impartial and prosecutors must be able to carry out their professional responsibilities independently. The prosecutorial service in Libya under Gadhafi suffered from the interference of the executive. This affected the independence of prosecutors and their ability to properly investigate and prosecute human rights violations in Libya. To ensure a break from the past, accountability in the future and to conform to international standards, Libya's new Constitution should provide for strong guarantees for an independent and impartial prosecutorial authority. The Draft Constitution provides for certain guarantees in this regard, including by ensuring that it is the SJC that will propose individuals for nomination to the OPG. However, the Draft should ensure its full compliance with international standards, including by providing for effective safeguards for the office of the prosecutor to be free from undue executive control and to enhance its role in fighting impunity and addressing the legacy

of past and present human rights violations in Libya, including those committed by public officials and members of armed groups. In addition, the Constitution should ensure both the actual and perceived independence of the Prosecutor General through his or her appointment by an independent process and should provide that the other prosecutors are appointed by the Prosecutor General. The appointment process of prosecutors should be elaborated in line with the UN Guidelines on the Role of Prosecutors and other international standards.

It is essential that the body that oversees the constitutionality of laws and guards against unconstitutional action by the executive authority is fully independent, has a comprehensive mandate and is accessible to all individuals. An independent Constitutional Court with effective powers of constitutional review and remedy is vital for the protection of constitutional rights. The Draft Constitution goes some way towards meeting international standards in this regard but should enhance provisions relating to the independence of the Court, criteria for appointments to the Court and access to the Court.

The Constitution should also limit the jurisdiction of military tribunals to military personnel for cases involving alleged breaches of military discipline and specify explicitly that civilians can never be tried by military tribunals. Cases involving alleged violations of human rights committed by military personnel and other law enforcement officials should be under the jurisdiction of civilian courts.

#### *Addressing the Legacy of Human Rights Violations*

Under Gadhafi's regime, gross, widespread and systematic human rights violations took place including torture and other ill-treatment, arbitrary detention and unlawful killings. Many of these violations have continued unabated during the transition period. In order to establish the truth about the extent of these violations, bring the perpetrators to justice, ensure remedies and reparations for victims and put in place measures to ensure that these violations do not recur on the same scale again, a comprehensive policy for justice for violations committed by the previous regime and during the transitional period must be devised and implemented. This is required for Libya to fulfil its obligations under international law and meet international standards. Chapter XI, entitled 'Transitional Measures' addresses these issues to some extent but needs some amendments to conform to international standards in this area, as outlined in detail below.

#### **Key Recommendations**

The ICJ calls on the CDA and other Libyan authorities to ensure that the right of all Libyans to participate in the conduct of public affairs is fulfilled, including by ensuring broad participation in the drafting process of the new Constitution and widespread consultation on its content. To this end, the CDA should take concrete steps to improve its outreach to the Libyan population in the next phase of the constitution drafting process. It should seek regular meetings with stakeholders and ensure that all submissions are given full consideration. The CDA should ensure that mechanisms of engagement are available for the general public, including through public meetings and consultations with particular efforts towards including marginalised groups, including minority groups and women.

#### **In light of the above, the CDA should ensure that the Libyan Constitution:**

- i. Fully embeds the rule of law in the framework for the functioning of the state, including by ensuring the separation of powers, attribution of competences and adequate checks and balances between the legislature, the executive and the judiciary;**

- ii. **Clearly and unambiguously recognises the primacy of the Constitution over all other aspects of domestic law, and ensures that domestic laws are adopted and implemented in full compliance with the Constitution. Article 7 of the Draft Constitution must be amended to reflect this;**
- iii. **Asserts the primacy of international human rights law over domestic law. To this end, unequivocally asserts that internal law, including the Constitution, cannot be used as a justification for non-compliance with international human rights conventions and treaties that have been ratified by Libya. Article 16 of the Draft Constitution should be amended to reflect this;**
- iv. **Specifies that parliamentary, presidential or any other form of immunity cannot be used to shield a person accused of gross violations of human rights and serious crimes under international law;**
- v. **Ensures provisions on a state of emergency in the Draft Constitution accord with Libya's obligations under international law, including by incorporating all aspects of article 4 of the ICCPR, as well as the additional non-derogable rights mentioned by the UN Human Rights Committee in its General Comment 29 and the Arab Charter, (Articles 4(2), 13, 14(6) and 20) into article 202 of the Draft Constitution;**
- vi. **Adequately defines the role of the security services and the armed forces and provides that they are accountable and subordinated to a legally constituted civilian authority. This framework should include specific parliamentary mechanisms to oversee their functioning, including by ensuring that they abide by the law and are held to account;**
- vii. **Provides for effective instruments and mechanisms that guarantee the right of all Libyans to participate in the conduct of public affairs, including their right to vote and to be elected without discrimination. Article 38, 70 and 85 must be amended to remove the requirement that all candidates for the House of Representatives, the *Shura Council*, (through article 46), the post of Prime Minister and the post of President must be Libyan Muslims. This clearly discriminates against non-Muslim Libyans in contravention of international law and thus must be removed;**
- viii. **Ensures that no matter what system of local governance is provided for it is clear that all organs of government have the same responsibility to respect, protect and fulfil human rights within their sphere of competence;**
- ix. **Provides for an effective and independent national human rights institution to protect and promote human rights with a comprehensive mandate and sufficient guarantees for its independence, in accordance with the Paris Principles relating to the Status of National Human Rights Institutions;**

***Human Rights and International Standards***

- x. **Includes a comprehensive section on human rights that complies with Libya's obligations under international human rights law and with universally recognised human rights standards;**
- xi. **Ensures human rights protections generally extend to all individuals under Libya's jurisdiction and are not limited to citizens;**
- xii. **Does not contain provisions that appear to subjugate all of the provisions on human rights to domestic laws;**
- xiii. **Includes a comprehensive general anti-discrimination clause, covering at least all the grounds covered by the ICCPR, as interpreted by the UN Human Rights Committee;**
- xiv. **Provides explicitly for the prohibition of all forms of discrimination against women;**

- xv. Ensures there is no discrimination between men and women in so far as automatic passing down of nationality is concerned (the Draft Constitution in article 11(2) currently provides for passage of nationality from a Libyan father but not from a Libyan mother);
- xvi. Enshrines the right to life by providing that the right shall be protected by law and that no one shall be arbitrarily deprived of his life. Article 112 of the Draft Constitution should be amended accordingly;
- xvii. Contains a clear and absolute prohibition on the use of the death penalty.
  - a. If despite this recommendation the Constitution does not explicitly prohibit the death penalty, it must prescribe its possible scope of application and procedural safeguards in terms that strictly comply with international standards;
- xviii. Prohibits all torture and other cruel, inhuman or degrading treatment or punishment and incorporates a definition of torture that covers at least that conduct covered by the definition in article 1 of the UN Convention against Torture;
- xix. Contains a clear prohibition of all forms of corporal punishment, including, among others, flogging, beating, and all forms of bodily mutilation;
- xx. Prohibits slavery and servitude;
- xxi. Proclaims the right to liberty and security in a freestanding article that incorporates the right to liberty and security of person, a prohibition on arbitrary arrest and on arbitrary detention, the prohibition of any deprivation of liberty that is not in accordance with grounds and procedures specified by law, and other fundamental safeguards required by international law;
- xxii. Includes comprehensive guarantees for the right to a fair trial, including, among others, the right of everyone to be tried by an independent, impartial and competent tribunal; the right to be informed promptly and in detail of the nature and cause of the charge against them; to challenge the lawfulness of their detention; to have adequate time and facilities for the preparation of their defence and to communicate confidentially with counsel of their own choosing; to be tried without undue delay; to equality of arms; and the right not to be compelled to testify against themselves or to confess guilt;
- xxiii. Provides for the clear and unequivocal recognition and protection of the right to freedom of thought, conscience and religion, in line with Libya's obligations under the ICCPR and the Arab Charter, as well as general international law;
- xxiv. Contains strong protections for minorities including by asserting the rights of all minorities to enjoy their own culture and to use their own language, to participate in public life, including in the conduct of public affairs, and to participate effectively in all decisions that affect them. The Constitution should include a duty on the state to protect minorities and their identity, including by creating favourable conditions to enable minorities to express their characteristics and to develop their culture, language, religion, traditions and customs;
- xxv. Recognises, guarantees and protects economic, social and cultural rights on an equal footing with civil and political rights and recognises that Libya is obliged to take steps, as expeditiously as possible, to the maximum of its available resources to progressively achieve the full realisation of the rights outlined in the ICESCR;
- xxvi. Describes particular economic, social and cultural rights in terms that are fully in line with Libya's obligations under international law, in particular the ICESCR and to this end expands the existing proposed provisions on the right to health, social and housing assistance, education, and employment;

- xxvii. **Includes the requirement that the state must take the appropriate steps to safeguard the right to work and provides that the state must ensure that conditions of work are "just and favourable";**
- xxviii. **Ensures any scope for limitation of rights conforms to the criteria for such limitations under international law and, in particular, only as are provided for by law, are proportionate, and are demonstrably necessary in a free and democratic society. Limitations must identify the nature of the right to be limited and the nature of the limitation and must not impair the essence of the right;**
- xxix. **Provides that non-derogable rights, including, among others, the right to life, the right to be free from torture or other ill treatment, the right not to be subject to enforced disappearance, the fundamental right to a fair trial, the application of the principle of legality, the prohibition of arbitrary detention and the right to challenge the lawfulness of detention (*habeas corpus*), are rights from which no derogation is accepted, including in times of emergency;**
- xxx. **Provides for the right to effective remedy and reparation to address human rights abuses, including the right to a prompt, thorough, independent and impartial investigation, to know the truth, and to reparation in all its forms;**
- xxxi. **Provides for effective and independent mechanisms to promote and protect human rights, including an independent human rights institution with a comprehensive mandate, and an independent judiciary;**

***The Judiciary and International Standards***

- xxxii. **Incorporates provisions on the judicial system that satisfy international standards of independence, impartiality, effectiveness and accountability;**
- xxxiii. **Provides for judicial review of the compliance of legislative and executive acts with the Constitution, including on application of affected individuals, and, to this end, unequivocally affirms that the decisions of the Constitutional Court are final, cannot be subject to any form of review or appeal, and are binding on, and must be enforced by all public authorities;**
- xxxiv. **Guarantees the principle of the irremovability and security of tenure of judges and unequivocally ensures that judges may only be removed for reasons of incapacity or behaviour that renders them unfit to discharge their judicial duties, determined in accordance with established standards of judicial conduct;**
- xxxv. **Establishes a fully independent body to oversee the judiciary, in accordance with international standards, to carry out or comprehensively control the selection, appointment and transfer of, and disciplinary proceedings against, judges. Provisions on the SJC, as in Chapter III of the Draft Constitution, must be revised to provide effective safeguards for its independence and to establish the mandate and powers to promote the efficient functioning of the judiciary and to secure its independence; and to provide that members of the judiciary are subject to the authority of the SJC, as revised, in relation to professional incapacity or misconduct;**
- xxxvi. **Provides detailed legal and practical guarantees for judicial independence, including as regards selection and appointment procedures and disciplinary and removal procedures, in line with international standards and best practices;**
- xxxvii. **Ensures that the OPG is not subject to undue executive control, has a duty to act impartially and with operational independence, to respect and uphold human rights, and to fight impunity for human rights violations, and is empowered to investigate private and public officials and actions;**

- xxxviii. Includes detailed provisions relating to the competencies, functioning and legal status of the Constitutional Court;**
- xxxix. Enshrines guarantees for the independence of the Constitutional Court, including the independence of its members, as well as independent appointment procedures for the selection of its members;**
  - xl. Ensures that the decisions of the Constitutional Court are binding on the other branches of government and are enforced by public authorities;**
  - xli. Guarantees full access for individuals and interested parties to the Constitutional Court;**
  - xlii. Limits the jurisdiction of military tribunals to cases involving military personnel for alleged breaches of military discipline, and provides that cases involving alleged violations of human rights committed by military personnel and other law enforcement officials should be under the jurisdiction of civilian courts;**

***Addressing the Legacy of Human Rights Violations***

- xliii. Provides for a duty on the Libyan authorities to put in place a comprehensive policy on justice for human rights violations by the previous regime and during the transitional period. As part of that policy, measures should be taken to uphold the right to truth, justice and reparations and steps should be taken to ensure non-recurrence of gross and systematic human rights violations.**

## Introduction

Following decades of authoritarian rule in Libya under Moammar Gadhafi, protests and a subsequent conflict led to the ousting of Gadhafi in 2011. A transitional period followed during which transitional institutions were established and a Constitutional Declaration was promulgated, providing for the election of a Constitution Drafting Assembly, (CDA). The CDA was elected in February 2014, tasked with writing a new constitution for Libya.<sup>1</sup> The drafting process has, however, been hindered by the ongoing political and security crisis in Libya. The peaceful transition to a functioning democracy that the Constitutional Declaration envisaged has not come to pass. Since 2012, Libya has splintered into different factions along political, ideological and tribal lines. These factions are supported by a complex array of militia groups who are fighting for control of the country's future.<sup>2</sup> Libya currently has two parliaments backed by different armed groups.<sup>3</sup> One parliament is recognised by the international community- the House of Representatives, (HoR), based in Tobruk and a second parliament, the General National Congress, (GNC), is based in Tripoli. The HoR was elected in national elections in June 2014. The GNC is in essence a reincarnation of the previous transitional parliament which under the amended Constitutional Declaration should have been replaced by the HoR but reconvened following an escalation of the military conflict and disputes over the legitimacy and jurisdiction of the HoR in August 2014.<sup>4</sup> Both Parliaments currently have control over some state institutions but there is no functioning centralised authority. In some regions, the vacuum of state authority has been filled by armed groups and, in some instances, extremist and terror-linked groups, including groups claiming allegiance to the Islamic State in Iraq and the Levant (ISIL).<sup>5</sup> Violations of international humanitarian and human rights law have been committed across the country during the conflict including indiscriminate shelling, summary executions, abductions, arbitrary detention and torture and other ill treatment.<sup>6</sup> Internally Displaced Persons number over 394,000 and vast numbers of Libyans have left the country.<sup>7</sup> Since August 2014, when a new round of fighting broke out, most international actors including the UN, international NGOs and embassy staff have evacuated and are working from neighbouring countries. UN-facilitated negotiations on a national unity government are ongoing at the time of writing.<sup>8</sup>

Against this background, the CDA is the one popularly-elected institution that maintains at least the ostensible support of all Libyan factions. The election of the CDA in February 2014 was regarded as fair by international observers.<sup>9</sup> The process was provided for by the transitional Constitutional Declaration in 2011 and legally constituted by the national Parliament, which was at that time the GNC. The legal process leading to the election was,

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<sup>1</sup> The Constitutional Declaration was promulgated by the Libyan National Transitional Council and published in the official gazette on 9<sup>th</sup> September 2012. For a copy of the consolidated version in English see: <http://www.security-legislation.ly/node/32001>, for the original in Arabic see:

<http://www.log.gov.ly/downloads/add01.pdf>

<sup>2</sup> See joint report of the United Nations Office of the High Commissioner for Human Rights, (OHCHR) and the United Nations Support Mission in Libya, (UNSMIL), 'Report on the Human Rights Situation in Libya', November 2015, (Joint OHCHR and UNSMIL Report, November 2015), accessed at:

[http://www.ohchr.org/Documents/Countries/LY/UNSMIL\\_OHCHRJointly\\_report\\_Libya\\_16.11.15.pdf](http://www.ohchr.org/Documents/Countries/LY/UNSMIL_OHCHRJointly_report_Libya_16.11.15.pdf) and Report of the OHCHR on the situation of human rights in Libya and on related technical support and capacity-building needs, January 2015, A/HRC/28/51, (OHCHR Report, January 2015).

<sup>3</sup> Ibid

<sup>4</sup> See Report of the Secretary-General on the United Nations Support Mission in Libya, (UNSMIL) to the UN Security Council, S/2015/144, February 2015, (UNSMIL Report, February 2015), accessed at [http://www.securitycouncilreport.org/atf/cf/%7B65BF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s\\_2015\\_144.pdf](http://www.securitycouncilreport.org/atf/cf/%7B65BF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_2015_144.pdf)

<sup>5</sup> Ibid

<sup>6</sup> Ibid

<sup>7</sup> See UNHCR, Factsheet on Libya, February 2015, accessed at <http://www.unhcr.org/4c907ffe9.pdf>

<sup>8</sup> See UNSMIL Report, February 2015, supra 4.

<sup>9</sup> See, for example, the Carter Centre's report: 'The 2014 Constitutional Drafting Assembly Elections in Libya' at: [http://www.cartercenter.org/resources/pdfs/news/peace\\_publications/election\\_reports/libya-06112014-final-rpt.pdf](http://www.cartercenter.org/resources/pdfs/news/peace_publications/election_reports/libya-06112014-final-rpt.pdf)

however, marred by disagreements over the timing of the CDA's work and disputes over the lack of effective measures and mechanisms to ensure adequate representation of minorities in the CDA, leading to its boycott by some minority groups. The process also failed to ensure adequate mechanisms to provide for the structured, timely and meaningful participation of all stakeholders, including civil society organizations, in the drafting process; and failed to provide the legal, professional and expert support an elected constitutional drafting assembly would require to draft a constitution that both adequately reflects the aspirations of the Libyan people and that meets Libya's obligations under international law.

In December 2014, the CDA published proposals for different parts of the Constitution, reflecting separate thematic committees that had been formed within the CDA, (the December 2014 Proposals). These Proposals were subject to debate and consultation with various stakeholders. In mid-2015, the CDA formed an internal drafting committee to prepare a comprehensive draft of the Constitution. This committee published a new draft constitution on 6 October 2015, (the Draft Constitution). At the time of writing, this draft of the Constitution has yet to be adopted by the whole of the CDA and is considered by some as an 'outcome document' of the drafting committee. This report refers to it as the Draft Constitution and analyses it in light of international law and standards, making recommendations for reform. The Draft Constitution represents a reasonable first step towards laying the foundation for the establishment of the rule of law in Libya. However, in certain key respects, the Draft Constitution does not conform to Libya's obligations under international human rights law or to international standards and it does not reflect a number of submissions made to the CDA from stakeholders, including civil society organizations, undermining the participative nature of the process.

This report analyses the constitutional drafting process up to October 2015 and analyses the Draft Constitution against international standards.<sup>10</sup> The report is divided into chapters that broadly reflect the different chapters of the Draft Constitution. It first explores the constitutional drafting process including the previous constitutional framework, the establishment of the CDA, the inclusiveness and transparency of the drafting process and the impact of the political and security situation. It then examines provisions relating to the rule of law including the separation of powers and sources of legislation and constitutional institutions. The third chapter of the report analyses the definition and scope of human rights in the Draft Constitution against the human rights treaties that Libya has ratified and international standards. The proposed part on the judiciary is then examined, including constitutional guarantees for the independence of the judiciary, the formation and functioning of the Supreme Judicial Council, (SJC), military and exceptional courts and the Office of the Prosecutor General, (OPG). This is accompanied by an analysis of the part on the Constitutional Court including issues relating to guarantees of independence, competencies and access. The final section analyses the chapter entitled 'transitional measures' in the Draft Constitution in light of international standards.

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<sup>10</sup> This report is based on an internal ICJ translation of the Draft Constitution published by the CDA on 6 October 2015.



## **I. The Constitutional Drafting Process**

### **A. Establishment of the Constitution Drafting Assembly**

Between 1969 and 2011, there was no clear constitutional framework in Libya. Libya's 1951 Constitution, drawn up following Libya's independence, was annulled by the Union of Free Officers, led by Moammar Gadhafi, following the military coup in September 1969, and replaced with a Constitutional Proclamation. This was to be a temporary document until a formal Constitution was established.<sup>11</sup> In 1977 the Declaration on the Establishment of the Authority of the People was adopted. It consisted of 10 articles and declared the Koran to be the Constitution of Libya.<sup>12</sup> These instruments were later supplemented by Gadhafi in a series of essays known as "The Green Book".<sup>13</sup> In terms of the status of law and the Constitution, the Green Book specifically provided: "The natural law of any society is either tradition (custom) or religion. Any other attempt to draft law for any society, outside these two sources, is invalid and illogical. Constitutions are not the law of the society."<sup>14</sup> This provision both undermined the existing constitutional framework in Libya and blatantly contravened international standards on the rule of law. During the final stages of the initial conflict that deposed Gadhafi in 2011, the Libyan National Transitional Council (NTC), a coalition of anti-government forces, drew up and promulgated a "Constitutional Declaration", (the Constitutional Declaration) to govern the transitional period "until a permanent Constitution is ratified in a plebiscite".<sup>15</sup> This document repealed the Green Book, the Constitutional Proclamation of 1969 and the Constitution of 1951.

Article 30 of the Constitutional Declaration, 2011 provided for the organisation of elections for the GNC and the appointment by the GNC of a body to draft a new Constitution, the CDA. The Constitutional Declaration was subsequently amended numerous times and the process for establishing the CDA was hampered by political infighting, a lack of clarity and consequent delays. The first amendment relating to the work of the CDA provided, among others, for the CDA to be composed of 60 members who were not part of the GNC<sup>16</sup> and for the CDA to be directly elected rather than be appointed by the GNC. The requirement for the CDA to be elected was initially provided for by Constitutional Amendment No. 3, but later replaced by Constitutional Amendment No. 5 following a Supreme Court ruling that Constitutional Amendment 3 had not been legally promulgated.<sup>17</sup>

Constitutional Amendment No. 5 provided that the GNC should ensure representation for distinct "linguistic and cultural components" in the election criteria. In addition, the amendment required the GNC to reconvene the High National Elections Commission, the body that oversaw the GNC elections in order to oversee the elections for the CDA.<sup>18</sup> The promulgation of Law No. 8 of 2013 on the High Commissariat for Elections and Law No. 17 of 2013 provided for the elections of the CDA through legislation.

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<sup>11</sup> The Preamble of the Constitutional Proclamation 1969 states: "The present Constitutional Proclamation is made to provide a basis for the organisation of the State during the phase of completion of the national and democratic revolution, until a permanent constitution is prepared, defining the objectives of the Revolution and outlining the future course." This legislation and other past and present legislation relating to the constitutional framework in Libya can be found in Arabic and English at DCAF's website on Libyan Security Sector Legislation: <http://security-legislation.ly/>

<sup>12</sup> Declaration on the Establishment of the Authority of the People (1977), Article 2.

<sup>13</sup> Officially the 'Great Green Charter of Human Rights of the Jamahiriyan Era', (the Green Book), available here: <http://www.security-legislation.ly/node/31865>

<sup>14</sup> The Green Book, Part I, The Law of Society.

<sup>15</sup> 2011 Constitutional Declaration, Preamble.

<sup>16</sup> Constitutional Amendment No. 1 of 13 March 2012.

<sup>17</sup> Constitutional Amendment No. 3 of 5 July 2012.

<sup>18</sup> Constitutional Amendment No. 5 of 9 April 2013, Article 3. Constitutional Amendment No. 4 of 1 September 2012, among other things, extended the time period for the election of the CDA from within 30 days of the GNC's first session to 50 days (Article 2).

Despite the requirement to ensure representation of “linguistic and cultural components” controversy arose over guarantees for sufficient representation of minorities on the CDA and for the protection of minority rights in the decision-making process. The representation of women on the CDA was also controversial. Amina Al Megheirbi, head of the Human Rights Committee of the GNC at the time, confirmed in a meeting with the ICJ that they had attempted to achieve a guarantee for 35% of the CDA to be women. Ultimately, however, the electoral law of 16 July 2013, provided that of a total of 60 seats, only 6 were reserved for women and 6 for three ethnic minority groups: 2 for the Tebu, 2 for the Tuareg and 2 for the Amazigh. In an attempt to address the concerns of minority groups, the GNC adopted Constitutional Amendment No. 7, in which the GNC specifically listed Amazigh, Tuareg and Tebu as “cultural and linguistic components of Libyan society”.<sup>19</sup> The same amendment also alluded to the need for a degree of consensus in the decision making process within the CDA, stating that it was “necessary to come to an agreement with the distinct linguistic and cultural components of Libyan society on provisions that concern them”.<sup>20</sup> However, as a result of their perception that sufficient protections for minorities had not been provided, the Amazigh community boycotted the election process and continues to boycott the constitutional drafting process, leaving their two seats on the CDA empty.

In total, 649 candidates registered to stand in the CDA elections, including 65 women. Voting for the CDA elections took place on 20 February 2014. A turnout of 46% of registered voters was reported. The election was assessed as having been “soundly administered but [it] failed to achieve the desired inclusiveness to have a truly representative body”.<sup>21</sup> Violence at some polling stations prevented voting from taking place in over 80 polling stations, leading to a second round of voting in affected areas on 26 February 2014. Similar blockades and security concerns at voting centres prevented re-runs of the election from taking place in various districts, resulting in 13 seats across Libya initially not being filled.<sup>22</sup> All but four were later filled- the empty seats belonging to the two Amazigh representatives who were boycotting the process and two representatives of the Derna community who continue, at time of writing, to be unable to occupy their seats because of the security situation.<sup>23</sup> The Tebu and Tuareg communities initially boycotted the process but representatives took their seats on the CDA two months after it commenced its work. The CDA met for the first time on 21 April 2014, during which it elected a president and rapporteur.<sup>24</sup> In the beginning of May 2014 it adopted a constitutional map that included general principles and in December 2014 the CDA published its first proposals for a Constitution. Following several months of consultations and workshops with various experts and stakeholders, the CDA elected a twelve person drafting committee, representing the various strands of the CDA, to bring together and update the proposals. This 12 person drafting committee published a Draft Constitution for discussion and adoption by the wider CDA on 6 October 2015. This draft has not yet been adopted by the whole of the CDA. It is this Draft that is the main subject of this report.

### *Timing*

There has been some controversy over the amount of time that the CDA is legally allowed to take to draft the new Libyan constitution. This controversy is tied up with the on-going issue of the legitimacy of public institutions in Libya. Under the 2011 Constitutional Declaration, as

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<sup>19</sup> Constitutional Amendment No. 7 of 11 March 2014, Article 1, amending article 30(10)(b) of the 2011 Declaration.

<sup>20</sup> Constitutional Amendment No. 7 of 11 March 2014, Article 10(b).

<sup>21</sup> See, for example, the Carter Centre’s report: ‘The 2014 Constitutional Drafting Assembly Elections in Libya’ at: [http://www.cartercenter.org/resources/pdfs/news/peace\\_publications/election\\_reports/libya-06112014-final-rpt.pdf](http://www.cartercenter.org/resources/pdfs/news/peace_publications/election_reports/libya-06112014-final-rpt.pdf)

<sup>22</sup> Ibid

<sup>23</sup> OHCHR Report, January 2015, supra 2, para. 76.

<sup>24</sup> Ali Al-Tarhouni was elected president and Ramadan Al Tuwayjer was elected as registrar.

originally enacted, the CDA was to have 60 days from the date of its first session in which to complete and submit a Draft Constitution to the GNC for its approval. If approved, the Draft Constitution was to be submitted to a referendum within 30 days from the date of approval. The Constitution requires the approval of a two thirds majority of voters in order to pass. Following the draft's approval, article 30 of the Constitutional Declaration then requires the CDA to ratify the Constitution and for the parliament to promulgate it. If the Draft Constitution does not obtain a two thirds majority, the CDA is to re-draft it and refer it once again to the people for a referendum within 30 days of the date of the first referendum results. Constitutional Amendment No. 1 extended the timeframe for drafting and adopting the Constitution from 60 days to 120 days and added the requirement that decisions of the CDA require a majority of two-thirds plus one in order to pass.

On 5 February 2014, two weeks before the CDA elections, the GNC acknowledged that the CDA might not have sufficient time within 120 days to complete a Draft Constitution. It adopted Constitutional Amendment No. 6, requiring the establishment of a committee (the "February Committee")<sup>25</sup> to outline a plan for the 'third transitional phase'. The February Committee was tasked with drafting a further constitutional amendment requiring the CDA to submit a report to the GNC within 60 days of its first session indicating whether it would be possible to complete the Draft Constitution within the 120 day deadline.<sup>26</sup> If the CDA decided that it was not possible, the GNC was to hold presidential and parliamentary elections, as provided for in the February Committee's proposals. However, there was no mention of whether an extension to the 120 day deadline would be granted or how. Instead, the 6<sup>th</sup> amendment simply stated that the "third transitional phase shall not exceed eight months from the first session of the CDA. This phase may only be extended by a popular referendum."<sup>27</sup>

Complicating matters further, there is a case on-going at the time of writing, in the constitutional circuit of the High Court, challenging the legitimacy of the CDA's work after August 2014. The plaintiff is seeking to have the work of the CDA conducted after August 2014 annulled as a result of the expiry of the deadline provided for in the amended Constitutional Declaration. The case is pending before the Tripoli High Court.

Against this background, the CDA is continuing its work despite the expiry of its deadline based on different interpretations of the consolidated Constitutional Declaration and the work of the February Committee. In mid-2014, the CDA decided to split itself into a number of different committees that would each have responsibility to draft different sections of the Constitution. As noted above, the CDA published Proposals for a Constitution, reflecting the work of the separate committees, in December 2014. The parallel work by different committees led to internal contradictions and inconsistencies within those proposals and exposed different approaches to key issues within the CDA. In June 2015, the CDA created a new drafting committee to bring the Draft Constitution together into a consolidated draft. This committee met with controversy as the representatives of the Tuareg and Tebu minority groups expressed some concern about the make-up of the committee because it only contained one representative for all minority groups rather than a representative from each group. This led to a period during which both the Tebu and Tuareg boycotted the process once again.<sup>28</sup> The ICJ understands that the CDA then elected a committee to reach out to the

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<sup>25</sup> The February Committee was created by decision 12/2014 of the GNC.

<sup>26</sup> Constitutional Amendment No. 6 of 5 February 2014, Article 1 (amended Article 30(12) of the Constitutional Declaration).

<sup>27</sup> Ibid

<sup>28</sup> <http://www.libyaherald.com/2015/06/28/tuareg-and-tebus-threaten-to-walk-out-of-constitution-drafting-assembly/#axzz3eNt35BsW>, accessed 29 June, 2015.

minority groups and encourage them to participate once again.<sup>29</sup> It is unclear at the time of writing what their position will be for the next stage of the drafting process.

## **B. Inclusiveness and transparency of the drafting process**

In order to comply with international standards, the elaboration and adoption of a constitution should be inclusive, transparent and participative, which also serves to legitimise the constitution as providing the basic framework for democratic governance and the rule of law.

Article 25 of the ICCPR affirms the right of citizens: "(a) To take part in the conduct of public affairs, directly or through freely chosen representatives; (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors."<sup>30</sup> Libya acceded to the ICCPR on 15 May 1970 and is thus bound by its provisions. The UN Human Rights Committee, (the body tasked to oversee the implementation of and interpret the ICCPR), has stated that article 25 guarantees that: "peoples have the right to freely determine their political status and to enjoy the right to choose the form of their constitution or government"; and that: "Citizens also participate directly in the conduct of public affairs when they choose or change their constitution or decide public issues through a referendum or other electoral process."<sup>31</sup>

The UN Human Rights Committee has expressed concern when constitutional review processes seem not to have been "conducted with full inclusiveness or under conditions allowing full freedom of debate", and recently recommended in the case of Sudan that "the State party take all the necessary measures to ensure transparency in all stages of the constitutional review process and to guarantee the effective and meaningful participation of all relevant actors, including representatives of opposition parties and the full range of civil society," and, "The State party should ensure that the text of the new Constitution is fully consistent with the Covenant."<sup>32</sup>

In order to guarantee adequate participation and a consensus-based constitution, sufficient time, opportunity, and transparent procedures for consultations must be established for Libya.<sup>33</sup> In addition, particular measures may be required to ensure that all stakeholders, including sections of the population who have been marginalised, such as women and minorities, are also guaranteed an adequate opportunity to participate. Article 7 of the Convention on the Elimination of Discrimination against Women, (CEDAW), to which Libya is a party, requires States to "take all appropriate measures to eliminate discrimination against women in the political and public life of the country".<sup>34</sup> In relation to ensuring minority groups have the right to participate, the UN Human Rights Committee has noted that article 27 of the ICCPR may require "positive legal measures of protection and measures to ensure the

<sup>29</sup> CDA Decision No. 21 of 2015, see (in Arabic) <http://www.libyaakhbar.com/libya-news/105711.html?source=true>.

<sup>30</sup> International Covenant on Civil and Political Rights, New York, 16 December 1966.

<sup>31</sup> Human Rights Committee, General Comment No. 25, CCPR/C/21/Rev.1/Add.7, paras 2 and 6; see also, Article 21 of the Universal Declaration for Human Rights, 10 December 1948; and see the African Charter on Human and Peoples' Rights, 27 June 1981, Article 13.

<sup>32</sup> Human Rights Committee, Concluding Observations on Sudan, UN Doc CCPR/C/SDN/CO/4, 19 August 2014, para. 6.

<sup>33</sup> See, for example, Guidance Note of the Secretary General, United Nations Assistance to Constitution-making Processes, 2009, Principle 4, available at [http://www.unrol.org/files/Guidance\\_Note\\_United\\_Nations\\_Assistance\\_to\\_Constitution-making\\_Processes\\_FINAL.pdf](http://www.unrol.org/files/Guidance_Note_United_Nations_Assistance_to_Constitution-making_Processes_FINAL.pdf)

<sup>34</sup> This includes the requirement to ensure that women have the right, on equal terms with men, to, among others, "vote in all elections and public referenda and to be eligible for election to all publicly elected bodies" and to "hold public office"; see also the Committee on the Elimination of Discrimination against Women, General Recommendation 23, para. 43, which recommends States to "identify and implement temporary special measures to ensure the equal representation of women in all fields".

effective participation of members of minority communities in decisions which affect them".<sup>35</sup> To ensure such wide ranging participation takes place, the CDA should ensure that adequate time is taken and appropriate mechanisms put in place for consultation with a broad range of stakeholders in Libya. In addition, it must ensure that information regarding the drafting procedure and drafts of the Constitution should be made widely available.

During 2014, the CDA held a number of public meetings to explain the constitutional drafting process to the Libyan public. These included meetings in town halls of up to 400 people and attempts specifically to reach out to different groups including women's groups.<sup>36</sup> However, the meetings were criticised by civil society organisations as inadequate for a number of reasons. First, the meetings were often advertised only a day or two before they took place, or not at all, affecting attendance.<sup>37</sup> Second, they were often attended only by tribal leaders and senior members of society who were specifically invited rather than representing a broad cross section of the population. Third, the meetings often had no planned structure and took the form of lectures rather than informed debates or a survey of views.<sup>38</sup> Fourth, the meetings were limited to certain areas in Libya and large towns such as Tripoli were not visited because of security reasons. It would also appear that the CDA made little active effort to seek out the views of marginalised populations.<sup>39</sup> The CDA also did not engage institutions that arguably were specifically mandated to assist such as the National Council for General Liberties and Human Rights.<sup>40</sup>

In addition to these public meetings, some efforts were made by the CDA to meet with civil society organisations (CSOs), directly. For example, a meeting between civil society groups and the CDA was held in al Bayda in December 2014, where representatives from four CSOs met with 17 members of the CDA and shared views garnered from focus groups held across the country.<sup>41</sup> This meeting represents a positive effort towards engaging the population in the constitutional drafting process. However, many other groups felt excluded both from information about how the CDA was operating and from contributing to the drafting process itself. Certain groups interviewed by the ICJ felt that their attempts to influence the process had been essentially ignored. Lawyers for Justice in Libya (LFJL), for example, conducted a survey across Libya in 2012, interviewing 3,000 people from a wide range of backgrounds from 37 communities, including minority groups, women in isolated areas and children, and submitted a report of their findings to the CDA in March 2014. They received a reply stating that the submission had been received and archived.<sup>42</sup> However, their broad assessment following the publication of the December Proposals in 2014 was that few of the recommendations that had been put forward in their report had been taken on board and

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<sup>35</sup> ICCPR, Article 27 holds: "In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language". See Human Rights Committee, General Comment No. 23, paras 6.2 and 7. See also, the International Convention on the Elimination of Racial Discrimination, Article 5.

<sup>36</sup> This information was shared with the ICJ in a telephone interview with the Rapporteur of the CDA, Ramadan Al Tuwayjer, on 15 May 2015.

<sup>37</sup> Libyan Organisation for Legal Aid, in meeting with ICJ, April 2015 (interviewees' names on file with the ICJ).

<sup>38</sup> Views expressed in meetings with representatives from the Modafe' Network and Libyan Network for Legal Aid, (names on file with the ICJ), May 2015.

<sup>39</sup> View expressed by, among others, Lawyers for Justice in Libya in telephone interview with ICJ, May 2015.

<sup>40</sup> Meeting of secretary general of Libyan National Council for General Liberties and Human Rights with ICJ, April 2015

<sup>41</sup> See <http://www.creativeassociatesinternational.com/feature-story/drafting-new-constitution-libyan-civil-society-speaks/>

<sup>42</sup> See the Destoori Report at <http://www.libyanjustice.org/downloads/Publications/destoori-report-eng.pdf>

those that had been included concerned issues considered by the organisation as “non-controversial,” such as the rights of people with disabilities and the right to education.<sup>43</sup>

Other groups including a loose coalition of Libyan women’s activists known as ‘Women and Dialogue’ met with the CDA in November 2014 and submitted specific suggestions on what should be included in the Constitution in the area of women’s rights but were disappointed that few of these suggestions were reflected in the December 2014 Proposals.<sup>44</sup> This group submitted further recommendations in March 2015 but did not receive an official response to their submission.<sup>45</sup> Because there are no formal mechanisms for making submissions, this group informed the ICJ that their submission was delivered informally by handing it to two members of the CDA on the side-lines of a workshop.<sup>46</sup> The CDA has published a table on its website containing a list of ‘proposals and opinions’ on constitutional issues that it has received from 462 organisations or individuals since the start of its work until 17 November 2014. Unfortunately, the website does not outline the content of these proposals nor the extent to which they were taken on board or discussed by the CDA.<sup>47</sup>

The prevailing view among the CSOs that the ICJ interviewed is that there has been no systematic effort to be transparent and to explain the work of the CDA through the media or otherwise. There was also some criticism that engagement with the media was in general reactive, and generally took the form of a response to other incidents rather than a proactive attempt to engage the population.<sup>48</sup> The CDA’s view, however, is that it was difficult to interest the media in their work because media outlets were more concerned with other issues such as the security situation.<sup>49</sup>

While the ICJ recognizes that the CDA has made some effort to reach out to the Libyan population, the ICJ is concerned, based on a wide survey of stakeholders, that the CDA’s attempts to ensure participation in the process have, thus far, been inconsistent and limited in both reach and substance. With the exception of a number of public meetings in 2014, most interactions with civil society arose at the initiative of the civil society organisation rather than the CDA, or else on the side-lines of other events, usually organised by international actors rather than the CDA, and usually aimed at capacity building rather than encouraging the participation of Libyan civil society in the constitutional drafting process *per se*. Further, many groups or individuals who made oral and written submissions to the CDA felt their views were not taken seriously.<sup>50</sup>

The CDA should take steps to ensure that all stakeholders, including, among others, CSOs, the Bar Association, judges, and victims of human rights violations and their representatives, are given the opportunity to participate meaningfully in all stages of the process of drafting the Constitution, and that all their submissions are given full consideration.

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<sup>43</sup> Issues that did not reflect the LFJL’s findings included the articles on the role of Sharia, women’s rights, freedom of religion, freedom of expression, protections for civil society. Non-controversial issues that were integrated included the articles on economic and social rights, disability rights and environmental rights. (According to views expressed by LFJL in a telephone interview, May 2015).

<sup>44</sup> Views expressed by members of this group and of the Libyan ‘Support and participation of women in decision-making committee’, in meetings with the ICJ, May 2015 (interviewees’ names on file with the ICJ).

<sup>45</sup> Ibid

<sup>46</sup> Ibid

<sup>47</sup> See [http://www.cdalibya.org/assets/files/90\\_1\\_1419109956.pdf](http://www.cdalibya.org/assets/files/90_1_1419109956.pdf), last accessed 25.11.15.

<sup>48</sup> View expressed by the General Secretary for the National Council for Liberties in meeting with ICJ, May 2015.

<sup>49</sup> View expressed by the Rapporteur of the CDA, Ramadan Al Tuwayjer, in telephone interview with the ICJ on 15 May 2015.

<sup>50</sup> This view was expressed to the ICJ by various representatives of civil society organizations in interviews conducted in May 2015.

### **C. *The impact of the security and political situation on the drafting process***

From the commencement of the CDA's work in April 2014 up to the time of writing the security situation in Libya has deteriorated significantly. Different militias currently control different parts of Libya while battles for territory are on-going, particularly in the East and the South. Most international organisations including the UN, NGOs and diplomatic staff left Libya due to security concerns following the bombing of the international airport in August 2014. Libyan politicians, judges and human rights defenders have been targeted during the conflict and many have also left the country.<sup>51</sup> The CDA continues to be based from the town of Al Bayda, which is a comparatively safe area of Libya. However, members of the CDA have reported threats against them and a number of incidents, including a car bomb outside their headquarters, have heightened security concerns surrounding the work of the CDA.<sup>52</sup> The security situation has also affected the CDA's work because the ongoing violence in a number of areas of Libya has meant that the CDA cannot travel or otherwise conduct effective consultative activities there or ensure the participation of those communities in the drafting process. Reports of attempts to influence political and judicial issues through force in Libya are not uncommon.<sup>53</sup>

The political situation in Libya has also affected the work of the CDA, not least because the fact that there have been two parliaments in the country since August 2014, has meant that there is no one clear state authority supporting the work of the CDA, leading, at times, to logistical difficulties including in relation to staffing and funding.<sup>54</sup>

**In light of the above, the ICJ calls on the Libyan authorities, including the CDA, to:**

- i. Ensure that the right of all Libyans to participate in the conduct of public affairs is respected, including by ensuring broad participation in the constitutional drafting process and widespread consultation on the content of the Constitution. To this end, the CDA should take concrete steps to improve its outreach to the Libyan population and provide for effective mechanisms of engagement with the general public in the next phase of the constitutional drafting process;**
- ii. Ensure that the drafts of the Constitution are made public and available on the website of the CDA, and are adequately disseminated, so as to allow for a comprehensive public dialogue about them;**
- iii. Ensure that all stakeholders, including, among others, civil society organisations, the Bar Association, judges, and victims of human rights violations and their representatives, are given the opportunity to participate meaningfully in all stages of the process of drafting the Constitution, and that all their submissions are given full consideration;**
- iv. Provide for specific and concrete measures to ensure women's full and equal representation and participation in the constitutional drafting process;**
- v. Ensure that positive and effective measures are undertaken to ensure the full participation and adequate representation of members of minority communities in the constitutional drafting process;**

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<sup>51</sup> See further joint OHCHR and UNSMIL Report: 'Human Rights Defenders under Attack', March 2015, available at: <http://www.ohchr.org/Documents/Countries/LY/HumanRightsDefendersLibya.pdf>

<sup>52</sup> See the Report of the Secretary-General on the United Nations Support Mission in Libya to the UN Security Council, S/2014/653, September 2014, (UNSMIL Report, September 2014), para. 38, at [http://unsmil.unmissions.org/Portals/unsmil/Documents/Libya%20Report%20final%205%20Sept.%20\(1\).pdf](http://unsmil.unmissions.org/Portals/unsmil/Documents/Libya%20Report%20final%205%20Sept.%20(1).pdf)

<sup>53</sup> See UNSMIL Report, February 2015, supra 4 and joint OHCHR and UNSMIL Report, March 2015, supra 51.

<sup>54</sup> View expressed by the Rapporteur of the CDA, Ramadan Al Tuwayjer, in telephone interview with the ICJ on 15 May 2015.

- vi. **Ensure that special efforts are made to engage populations living in areas of armed conflict.**

## **II. The Constitution and the Rule of Law**

The drafting of a new constitution following a period marred by the abuse of executive power and widespread human rights violations provides a crucial opportunity to mark a departure from the past by creating a new system of government that adheres to the principle of the rule of law and conforms to international human rights law and standards. Providing for the separation of powers and the independence of the judiciary in the new Constitution are essential to ensuring the promotion and protection of human rights and adherence to the rule of law. As has been observed by the UN Human Rights Committee, implementing the rule of law effectively and ensuring the clear separation of the legislative, executive and judicial branches of government is vital for the protection of human rights and the consolidation of democracy.<sup>55</sup> The UN Special Rapporteur on the independence of judges and lawyers has also confirmed that the "Separation of powers, the rule of law and the principle of legality are inextricably linked in a democratic society."<sup>56</sup>

In the context of Libya's transition, enshrining the principles of the rule of law and the separation of powers in the new Libyan Constitution in accordance with international standards takes on particular importance. The Draft Constitution reflects some commitment to adhering to the rule of law. Chapter II on "The System of Governance" addresses the separation of powers and the rule of law to some extent. However, in a number of key respects, the provisions of this Chapter fall short of international standards. This includes issues such as ensuring adequate and appropriate checks and balances between the three branches of government and the hierarchy relating to sources of law. In addition, in order to conform to international standards, the Libyan Constitution must go beyond the Draft Constitution to ensure the primacy of international human rights law, clearer accountability of security and armed forces to civilian authorities and an entrenched right of all Libyan citizens to participate in the conduct of public affairs.

### **A. The Separation of Powers**

The principle of the separation of powers requires that government be divided into three separate and independent branches: the executive, the legislature and the judiciary.<sup>57</sup> An independent and impartial justice system that can oversee and implement the rule of law and supervise the separation of powers is fundamental.<sup>58</sup> An independent judiciary, together with other checks and balances between the branches of government, is indispensable for the protection of human rights, in particular in times of transition following a period of widespread human rights violations carried out through the unchecked power of one or more branches (usually the executive). Following transitions from dictatorial regimes, ensuring an independent judiciary and effective parliamentary oversight of the executive can provide a

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<sup>55</sup> Concluding Observations of the Human Rights Committee on Slovakia, CCPR/C/79/Add.79, 4 August 1997, para. 3

<sup>56</sup> Report of the Special Rapporteur on the independence of judges and lawyers, A/HRC/14/26, 9 April 2010, para.17. See also the former Commission on Human Rights, Resolution 2002/46 on "Further measures to promote and consolidate democracy", E/CN.4/RES/2002/46, 23 April 2002, para. 1.

<sup>57</sup> See, eg, International Congress of Jurists, Declaration of Delhi, 10 January 1959; the Inter-American Democratic Charter, adopted by the OAS General Assembly on 11 September 2001, Articles 3 and 4; and the Latimer House Guidelines for the Commonwealth on the Accountability of and the Relationship between the Three Branches of Government, (as agreed by the Law Ministers and endorsed by the Commonwealth Heads of Government Meeting, Abuja), Nigeria, 2003.

<sup>58</sup> See the Latimer House Guidelines on Parliamentary Supremacy and Judicial Independence, (adopted at a meeting of the representatives of the Commonwealth Parliamentary Association, the Commonwealth Magistrates and Judges Association, the Commonwealth Lawyers' Association and the Commonwealth Legal Education Association), 19 June 1998.



safeguard against the recurrence of repression. The UN Special Rapporteur on the independence of judges and lawyers affirmed that “understanding of, and respect for, the principle of the separation of powers is a *sine qua non* for a democratic State and is, therefore, of cardinal importance for countries in transition to democracy – which heretofore have been typically characterised by precisely the absence of a separation of powers.”<sup>59</sup>

The specific roles and authorities of the different branches of government are set out in Chapter II on the ‘System of Governance’; (the legislature in the form of ‘the *Shura* Council’, and the executive in the form of the “Government”) and Chapter III (on the judiciary).

Article 36 provides that the *Shura* Council is divided into two chambers, the House of Representatives and the Senate. Both chambers have the “authority to legislate, [and to] approve the State’s public policy, the general plan for economic and social development and the State’s public budget.” The two chambers also have the authority to oversee the actions of the executive power “in the form provided for in the Constitution”.

According to article 80, when the House of Representatives is dissolved or when the two chambers are not in session, the President of the State may issue decrees with the force of law. No restrictions on subject-matter are included other than that the decrees cannot address issues within the competence of the Senate. These decrees shall be reviewed within seven days of the beginning of the next session of the House of Representatives and can be either rejected or approved. Such a broad constitutional delegation of law-making power to the executive is difficult to reconcile with the separation of powers, particularly given that decrees are often used by authoritarian regimes as a mechanism to issue laws in contravention of human rights and without parliamentary or democratic oversight. In addition, situations of national emergency are already provided for separately in articles 200-202. The ICJ recommends that article 80 is deleted in its entirety, but if it is retained, the Constitution should explicitly provide that such decrees automatically cease to have effect *unless* they are approved within seven days of the session, and the exceptional circumstances in which such decrees could be issued by the executive should be clearly set out.

Article 51 requires that appointment proposals made by the House of Representatives are subject to the approval of the Senate. While this can be considered an additional check on the lower house of parliament, the article should be amended in at least one key respect. The appointments to be approved currently include judges of the Constitutional Court “selected by the legislative authority”. As will be explained in greater detail below, best practice in relation to safeguarding the independence of the judiciary requires that judicial appointments are made by an independent body and not by either the legislative or the executive branch. The ICJ therefore recommends that a separate independent process for *all* judicial appointments, including the Constitutional Court, be established, as examined in more detail below.<sup>60</sup>

Article 9 of the Draft Constitution refers to the principle of the separation of powers, as follows: “*The political system shall be established on the principles of political pluralism, peaceful alternation of power, separation of powers and balance and complementarity between them, upon the basis of good governance based on transparency, oversight and accountability*”.

The UN Human Rights Committee has stated that the: “lack of clarity in the delimitation of the respective competences of the executive, legislative and judicial authorities may endanger the

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<sup>59</sup> Report of Special Rapporteur on the independence of judges and lawyers, UN document E/CN.4/1995/39, 6 February 1995, para. 55.

<sup>60</sup> See ICJ, International Principles on the Independence and Accountability of Judges, Lawyers and Prosecutors, Geneva, 2007.

rule of law and a consistent human rights policy.”<sup>61</sup> The UN Human Rights Committee has further emphasised the need for a clear distinction between the judiciary and the executive, as follows: “A situation where the functions and competencies of the judiciary and the executive are not clearly distinguishable or where the latter is able to control or direct the former is incompatible with the notion of an independent tribunal.”<sup>62</sup>

Indeed, a fundamental aspect of the principle of the separation of powers is the guarantee of an independent and impartial judiciary.<sup>63</sup> The Draft Constitution goes some way towards ensuring the independence of the judiciary. The chapter entitled ‘*The Judicial Authority*’ provides for the judicial system as an independent branch of government in article 90, which holds that “The Judicial authority shall be independent, its function is the administration of justice, ensuring the rule of law and the protection of rights and liberties. Judges shall be independent in exercising their functions, they shall only be subject to the power of the law and shall abide by the principles of integrity and impartiality, interference in the work of the judiciary is a crime that is not subject to statute of limitations.” Article 91 and 92 provide that decisions regulating their career will be made in accordance with the law and decisions related to their removal or transfer from office will be made by the Supreme Judicial Council, (SJC).

However, measures to ensure an independent and effective justice system in practice must go beyond providing in law that members of the judiciary bodies are to be independent and impartial. It is crucial as well that the bodies overseeing the judiciary are independent and have the power to efficiently administer the judiciary and safeguard its independence. Article 95 provides for the creation of the SJC. While Article 95 confirms that the SJC shall enjoy financial and administrative independence, the Draft does not specify that this body is independent from the executive, (in fact article 97 provides that the legislature shall select two members and the President of the State shall select two members). This provision should be amended to ensure its independence from the executive.

The Judiciary has a key role in securing the rule of law in general, and the separation of powers in particular, and should in this respect have explicit authority to determine and issue effective remedies in situations where either or both of the other two branches of government exceed their legal powers under the Constitution, violate human rights, or otherwise act unlawfully.<sup>64</sup> Article 108 provides that the Constitutional Court “is the sole body authorized with judicial oversight over the constitutionality of legislation, the regulations of the House of Representatives and the Senate, reviewing international conventions and agreements before their ratification, reviewing election laws and referendum laws before their promulgation, reviewing laws declared unconstitutional before they are re-issued, reviewing the constitutionality of constitutional amendment procedures and hearing cases related to the legislative’s non-compliance with its constitutional obligations.”

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<sup>61</sup> Concluding Observations of the UN Human Rights Committee on Slovakia, CCPR/C/79/Add.79, 4 August 1997, para. 3.

<sup>62</sup> UN Human Rights Committee, General comment No. 32, CCPR/C/GC/32, 23 August 2007, (HRC GC No.32) para. 19.

<sup>63</sup> Report of the Special Rapporteur on the independence of judges and lawyers, A/HRC/11/41 (2009), 24 March 2009, para. 18.

<sup>64</sup> See Delhi Declaration, Annex “Report of Committee I, The Legislative and the Rule of Law”, Clause II (2)(d) and “Report of Committee II, The Executive and the Rule of Law”, Clauses II and IV; International Congress of Jurists, Resolution of Rio (1962), Annex “Report of Committee II, Control by the Courts and the Legislature over Executive Action”. Latimer House Guidelines for the Commonwealth on the Accountability of and the Relationship between the Three Branches of Government (2003), Article VII (accountability mechanisms), clause c (judicial review): “Best democratic principles require that the actions of governments are open to scrutiny by the courts, to ensure that decisions taken comply with the Constitution, with relevant statutes and other law, including the law relating to the principles of natural justice.”

Article 118 on the 'Right of Litigation' goes some way towards ensuring that executive decisions are subject to judicial review by stating that, "Every administrative decision shall be subject to judicial review, no act that harms or threatens rights and liberties shall be excluded from judicial jurisdiction". However, article 108 should be expanded to ensure the explicit competence of the Constitutional Court to assess, in particular, the constitutionality of all acts and decisions by the executive.

### **B. *Parliamentary and presidential immunity and impunity***

Article 57 provides that members of the *Shura* Council shall have a form of parliamentary immunity, in that they "shall not be brought to account for any vote they cast or opinion they express or speech they make during the sessions of the Council or of the specialised committees". However, the immunity can be lifted and the person subjected to criminal proceedings in cases where "there is sufficient evidence of committing high treason, a serious breach of the Constitution, or crimes against morals or honour during the exercise of his functions" and where he is referred to the Prosecutor General following a "parliamentary accusation" by "either of the Houses".

These provisions raise some concerns given the lack of a definition for "crimes against integrity or honour". This appears to be a rather sweeping provision and could be manipulated for political purposes. The provisions should therefore be amended to remove this reference or specify what acts and omissions might amount to "crimes against morals or honour" or refer to subsidiary legislation in order to fully comply with international standards.

On the other hand, the article should be amended to clearly specify that parliamentary immunity cannot be used to shield a person accused of serious violations of human rights including, among others, war crimes, crimes against humanity, genocide, torture and enforced disappearance. Providing such a clearly-defined exclusion of immunity for such violations in the Constitution takes on particular importance in light of the current law on parliamentary immunity which provides that a Member of Parliament cannot be prosecuted except with the permission of the Parliament itself.<sup>65</sup> The Parliament also has the right to cease a prosecution of a Member of Parliament until the expiration of his term in office.<sup>66</sup> This risks impunity for any Member of Parliament alleged to have committed serious violations of human rights.

Article 82 is similar to article 57 but refers to the right of the House of Representatives or the Senate, "upon a justified request by a third of the members of each house" to accuse the President of "high treason or of a serious breach of the Constitution or of committing "crimes against honour or integrity" and to refer the case to the Constitutional Court, whereupon, should guilt be proven, the President shall be removed from office. The article further states that "No criminal proceedings infringing upon the President's freedom, or criminal case be brought against him until the end of his term". This article should also be amended to specify what acts may constitute "crimes against honour or integrity" and should specify that the immunity of the President cannot be used to shield him from accountability for serious violations of human rights.

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<sup>65</sup> Resolution No. 62 of 2013 on adopting the General National Congress's amended Rules of Procedures, Chapter (3): Parliamentary Immunity and the Lifting Thereof, article 55. See also Resolution No. (2) of 2014 on establishing a temporary committee to draft the rules of procedure of the House of Representatives, which provides in article 4, that: "Until approval of the HoR rules of procedure, the rules of procedure of the General National Congress (GNC) issued by virtue of Resolution No. (62) of 2013 shall apply, in so far as they do not contravene the provisions of the Amendment No. (7) to the Constitutional Declaration."

<sup>66</sup> Ibid

### C. Sources of legislation and primacy of the Constitution and international law

The rule of law and separation of powers can be most clearly secured by explicitly specifying within the Constitution that it takes precedence over all other aspects of domestic law. The supremacy of the Constitution helps prevent abuse of power within different spheres of the government by binding the legislature and the executive and by providing an interpretative framework for the courts.

Article 7 of Part I provides that: "*Sharia* shall be the source of all legislation in accordance with established religious doctrines and jurisprudence," and "The constitutional provisions shall be interpreted and restricted in accordance with the above." This appears to give *Sharia* precedence above the Constitution. This provision raises concerns as to the ability of Libya to give effect to its international human rights obligations in its internal law, including the Constitution itself, if any such obligations were to be deemed contrary to *Sharia*. Making human rights protected by international treaties subject to any potentially conflicting interpretations of *Sharia* or other religious laws is incompatible with the object and purpose of such treaties.<sup>67</sup> The UN Human Rights Committee, for instance, has expressed concern when there is "lack of clarity on the primacy of the Covenant over conflicting or contradictory national legislation, including both *Sharia* law and matters not based in *Sharia* law";<sup>68</sup> or "reference is made in the State party's system to certain religious tenets as primary norms"; or *Sharia* is used by the judiciary to come to conclusions that are incompatible with the ICCPR; or "the holding of public gatherings and marches as well as the establishment of associations are conditional upon compliance with 'principles of Islam', which are not defined under national legislation."<sup>69</sup>

The problem is exacerbated by the fact that the article does not specify what body will be in charge of interpreting *Sharia*. The fact that this is unclear and the scope of *Sharia* is not clearly defined means that restrictions to rights in contravention of international law cannot be ruled out. In the Libyan context, there is particular reason to fear that unaccountable religious bodies outside of the democratically-elected government may through this and other provisions of the Constitution that refer to *Sharia* claim the authority to interpret *Sharia* and therefore make pronouncements on the validity of law, if not directly than indirectly by putting pressure on both the legislature and the judiciary and undermining the position of an independent and impartial judiciary. This would be fundamentally incompatible with the rule

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<sup>67</sup> See, for example, Pakistan's withdrawal of certain reservations it purported to make on its ratification of the ICCPR, "that the provisions of Articles 3, 6, 7, 18 and 19 shall be so applied to the extent that they are not repugnant to the Provisions of the Constitution of Pakistan and the Sharia laws", after objections by other states that such a reservation was invalid. And see similar reaction to reservations by several states under the CEDAW and CRC. See also HRC General Comment, 24, UN Doc.

CCPR/C/21/Rev.1/Add.6 (1994) for a discussion on when reservations are incompatible with the Covenant. And see the criticisms by the UN Working Group on the issue of discrimination against women in law and in practice, concerning Egypt's draft constitution (14 Dec 2012), <http://www.ohchr.org/RU/NewsEvents/Pages/DisplayNews.aspx?NewsID=12892&LangID=E>

<sup>68</sup> Human Rights Committee Concluding Observations on Kuwait, UN Doc CCPR/C/KWT/CO/2 (18 November 2011), para 6.

<sup>69</sup> Human Rights Committee, Concluding Observations on Iran, UN Doc CCPR/C/IRN/CO/3 (29 November 2011), at para. 5 ("The Committee notes with concern that reference is made in the State party's system to certain religious tenets as primary norms. The State party should ensure that all the obligations of the Covenant are fully respected and that the provisions of its internal norms are not invoked as justification for its failure to fulfil its obligations under the Covenant."), at para. 22 ("The Committee is also concerned that judges have used Sharia law and fatwas to reach a verdict that was in contravention to the rights and principles as laid down in the Covenant (art. 14).[...] The State party should also ensure that judges, in interpreting legislation as well as in relying on religious principles, do not reach verdicts that are in contravention to the rights and principles as laid down in the Covenant"), and at para. 26 ("The Committee is concerned that the right to freedom of assembly and association is severely limited, and notes that the holding of public gatherings and marches as well as the establishment of associations are conditional upon compliance with 'principles of Islam', which are not defined under national legislation.")

of law and Libya's obligations under the ICCPR, as the UN Human Rights Committee has previously stated with respect to similar provisions and practices elsewhere.<sup>70</sup>

In addition, giving *Sharia* such an operative and overriding legal role in the Constitution in this manner appears incompatible with the right to freedom of religion and the prohibition of discrimination on grounds of religion, under articles 2, 18 and 26 of the ICCPR.

The ICJ recommends that article 7 be removed.

Although article 16 of the Draft Constitution holds that "The State shall commit itself to the international treaties and agreements which it ratifies" and that "[t]he state shall take necessary measures in order to implement" such treaties and agreements, this is subject to the condition that "they are not contrary to the constitution." A general rule of international law, codified by the Vienna Convention on the Law of Treaties, is that "[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty."<sup>71</sup> The UN Human Rights Committee has specifically affirmed that under the ICCPR states are prevented from "invoking provisions of the constitutional law or other aspects of domestic law to justify a failure to perform or give effect to obligations under the treaty."<sup>72</sup> The primacy of international human rights law should be proclaimed unequivocally. In ratifying or acceding to international human rights treaties, Libya has voluntarily subjected itself to the international legal obligations stipulated therein. It therefore should make these obligations clearly binding in its national framework. A direct way of doing so would be explicitly to recognise the primacy of international law, or at least international human rights law, within the Constitutional framework. A regional example can be found in article 93 of the Egyptian 2014 Constitution, for example, which holds, "The State shall be bound by agreements, covenants and international human rights conventions ratified by Egypt, and which shall have the force of law after publication in accordance with the prescribed conditions." Similarly, the preamble to the Moroccan Constitution provides for the supremacy of international conventions over national legislation.<sup>73</sup>

The Constitution should contain a clear requirement that the Libyan authorities must ensure that the adoption, implementation and interpretation of the laws of Libya are compliant with Libya's international obligations, in particular when it comes to its obligations under international human rights law.

#### **D. *Civilian oversight over security and armed forces***

The security and armed forces of the state should always ultimately be subject to civilian control by a democratically-elected government. The UN Human Rights Council, has called upon States "to make continuous efforts to strengthen the rule of law and promote democracy" including by ensuring that "the military remains accountable to relevant national civilian authorities."<sup>74</sup> The UN Human Rights Committee has underlined the importance of this issue for the rule of law by expressing its concern at "the lack of full and effective control by

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<sup>70</sup> See UN Human Rights Committee, Concluding Observations on Iran, *supra* 69.

<sup>71</sup> Article 27, Vienna Convention on the Law of Treaties, 1969, acceded to by Libya 22 December 2008; International Court of Justice, *Belgium v Senegal*, 2012, para. 113.

<sup>72</sup> Human Rights Committee, General Comment No. 31, UN Doc. CCPR/C/21/Rev.1/Add.13 (2004), (HRC GC No. 31) para. 4.

<sup>73</sup> The relevant passage of the preamble to the Moroccan Constitution holds: "Grant the international conventions, as duly ratified by Morocco, within the scope of the provisions of the Constitution, the laws of the Kingdom, and respect for its immutable national identity, and upon the publication of these conventions, supremacy over the national legislations, and ensure that these [national] legislations are in compliance with the provisions of such ratification."

<sup>74</sup> Human Rights Council, Resolution 19/36 on "Human Rights, democracy and the rule of law", A/HRC/Res/19/36, 19 April 2012, para. 16(j)(vi).

civilian authorities over the military and the security forces,” in certain states<sup>75</sup> as well as “the lack of a clear legal framework, defining and limiting the role of the security forces and providing for effective civilian control over them.”<sup>76</sup>

The Draft Constitution goes some way towards establishing civilian oversight over the armed forces but should be clearer. Article 78 appoints the President as the Commander-in-Chief of the armed forces, entitled to declare war and conclude peace agreements (“in accordance with the provisions of the Constitution”). This is an important provision, as it invests the civilian president with authority over the armed forces. Article 187 contains an explicit provision that the army “is subject to the Civilian Authority”. However, a clearer framework is needed to comply with international standards on this issue. The framework of oversight should include specific parliamentary mechanisms to oversee the functioning of the security and armed forces, including by ensuring that they abide by the law and are held to account. An example can be found in Tunisia where the Tunisian House of Representatives allocated the responsibility to ensure civilian oversight over armed forces to a specific parliamentary commission.<sup>77</sup>

In addition, provisions stipulating that the members of the security and armed forces are accountable to ordinary courts where human rights violations have occurred should be included in the Constitution.<sup>78</sup> Providing for the accountability of security forces is particularly important in light of current laws in force in Libya which provide for broad immunities for the armed forces. For example, Law no.10 of 1992 on Security and Police provides: “no investigation or criminal action procedure may be undertaken against the member of the police agency for any mistake he commits during the performance of his duties or due to the exercise of his functions unless by the written authorisation of the [Minister of Justice]”.<sup>79</sup> Law No. 7 of 2012 on establishing the Libyan Intelligence Service, holds “Except in cases of *flagrante delicto*, no investigative action may be taken against any employee of the LIS with regard to a felony or a misdemeanour, except with the written permission of the Chief of the LIS.”<sup>80</sup> Such overbroad immunities pose obstacles to justice and accountability for human rights violations that are likely in practice to result in violation of Libya’s obligations under international law to impartially and effectively investigate and prosecute all allegations of serious human rights violations.

#### **E. State of Emergency**

The Draft Constitution provides in article 200 that the President, in consultation with the Prime Minister and the Speaker of the two chambers, may declare a state of emergency “when the country is threatened by national disaster, siege, or a danger which threatens its safety.” The requirement to consult with the Prime Minister and both speakers is positive. However, in the days following the declaration, the Draft Constitution would only require the *Shura* Council to consider the emergency (by meeting in an extraordinary session within three days of a state of emergency being declared to decide whether it should continue or be lifted) “upon the request of the President of the Republic”. Given that the declaration of a state of emergency is often used as a pretext to restrict the exercise of fundamental rights and freedoms, the ICJ recommends that the meeting of the National Assembly should be

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<sup>75</sup> Concluding Observations of the Human Rights Committee: El Salvador, CCPR/C/79/Add. 34, 18 April 1994; part 4.

<sup>76</sup> Concluding Observations of the Human Rights Committee on Romania, CCPR/C/79/Add. 11, 29 July 1999, para. 9.

<sup>77</sup> See Tunisian House of Representatives’ website, Commission of Security and Defense, [http://www.arp.tn/site/dep/AR/liste\\_dep\\_commissions.jsp?cc=621](http://www.arp.tn/site/dep/AR/liste_dep_commissions.jsp?cc=621)

<sup>78</sup> See Principle 9, Draft Principles Governing the Administration of Justice Through Military Tribunals, in UN Doc E/CN.4/2006/58, 13 January 2006.

<sup>79</sup> Law no.10 of 1992 on Security and Police, Article 103.

<sup>80</sup> Law No. 7 of 2012 on establishing the Libyan Intelligence Service, Article 80.

automatic without the President's request to ensure close oversight by parliament of such a measure. The fact that the proposals provide that the state of emergency should not be extended to more than thirty days and is renewable only with the approval of the majority of the present members of the *Shura* Council is positive.

In addition, article 200 provides that "[in] all cases, the declaration of the state of emergency shall state the objective, the region and the duration of the state of emergency in accordance with the law." The specification of these aspects is a basic requirement of international standards in relation to emergencies invoked as the basis for derogating from rights, and should be retained in the Constitution.

Article 201 provides that: "The President of the Republic may, in situations of war or serious threat to the State security, request the *Shura* council to declare the use of martial laws provided that the request is examined within a period of three days, through which the President declares the state of emergency in the specified region."

Article 202 provides that: "1. The law shall provide the reasons for declaring the state of emergency or martial laws, their framework and duration, the rights that may be derogated and the procedures and measures that may be taken; 2. "The President of the Republic may not, during the state of emergency or martial laws, impose restrictions on fundamental rights and liberties unless necessary for preserving general security and safety of the country"; 3. All decisions and actions taken during the state of emergency and martial laws, shall be subject to judicial review."

These provisions should be read with article 151 which is entitled 'Controls over derogations of rights and liberties' and holds, "Any derogation imposed on rights and liberties shall be necessary, clear, precise and proportionate to the protected interest, taking into account the characteristics of a democratic society, without prejudice to Article 7, and it shall be prohibited to revisit guarantees that have been provided by law without prejudice to the provisions of this Constitution." This provision is examined in more detail below.

While welcoming that these provisions aim at preserving the rule of law and human rights protections in times of emergency, the ICJ is concerned that even taken together, they appear not to conform fully to the relevant requirements set out in the ICCPR.

Under the ICCPR, some rights are subject to limitation at any time, if certain circumstances and conditions in the article providing for the right are satisfied.<sup>81</sup> Other rights may only be "derogated" from (i.e. restricted or limited), "[i]n time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed", and even then only "to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin" (article 4).<sup>82</sup> A third set of rights are explicitly excluded from any possibility of derogation at any time, including in emergencies that threaten the life of the nation (and are therefore referred to as "non-derogable" rights).<sup>83</sup>

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<sup>81</sup> See eg ICCPR, Article 19, Article 21 and Article 22. Human Rights Committee, General Comment No. 34, CCPR/C/GC/34, 12 September 2011, (HRC GC No. 34) paras 21-36.

<sup>82</sup> ICCPR, Article 4; Human Rights Committee, General Comment No. 29, CCPR/C/21/Rev.1/Add.1, 31 August 2001, (HRC GC no.29).

<sup>83</sup> ICCPR, Article 4(2); HRC GC no.29, supra 82, See also Arab Charter, Article 4(2), which explicitly includes additional rights as non-derogable.

The relevant articles in the Draft Constitution could be improved in the following ways. First, the threshold for the declaration of emergency should expressly include the requirement that the state of emergency is publicly proclaimed.

Second, outlining what rights should not be subject to derogation is of such fundamental importance that it should be included in the Constitution, rather than left to secondary legislation, as provided for in article 202(1). Non-derogable rights as outlined in the ICCPR include for instance the right to life and the prohibition of torture and other cruel, inhuman or degrading treatment.<sup>84</sup> It should be noted that the Arab Charter also makes additional aspects of certain rights non-derogable, beyond those explicitly mentioned in the ICCPR, and in line with the views of the UN Human Rights Committee: for example, the basic right to a fair trial and the right to challenge the lawfulness of detention.<sup>85</sup> These too should be excluded from the possibility of derogation on grounds of emergency.

Third, the requirements of "strict" necessity and the prohibition of discrimination must be added to these articles.

These concerns should be addressed by incorporating all aspects of article 4 of the ICCPR, as well as the additional non-derogable aspects outlined by the UN Human Rights Committee and the Arab Charter, into article 202 and/or 151.

The ICJ also recommends that the provisions refer only to measures taken in a declared "state of emergency" and does not use the phrase "state of emergency or martial law". While some measures often associated with the concept of "martial law" could be justified depending on the circumstances of a particular emergency, the concept of "martial law" is itself vague and potentially open-ended. This makes inclusion of "martial law" as a broad and undefined legal concept within the Constitution's emergency provisions difficult to reconcile with the international law requirements for strictly limiting derogating measures to the minimum proportionate to each particular situation. As such, article 201 providing for martial law should be removed and its provisions relating to times of 'war and serious threats to state security' should be incorporated into the article on 'State of Emergency'.

Finally, as discussed in more detail below, the clause in article 151 stating "without prejudice to article 7" should be removed.

#### **F. *Federalism and decentralisation***

From an international human rights perspective the internal distribution of governance between central, regional and local authorities is not of any inherent importance. The organs of government collectively have responsibility under international law to ensure rights are respected, protected and fulfilled, and the state is internationally responsible for any violation of its international obligations by any of its organs. This has been affirmed by the International Court of Justice, the UN Human Rights Committee, and the International Law Commission.<sup>86</sup> The ICCPR and the ICESCR both provide that their provisions extend to all

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<sup>84</sup> These include the right to life, prohibition of torture or cruel, inhuman or degrading punishment, or of medical or scientific experimentation without consent, prohibition of slavery, slave-trade and servitude, prohibition of imprisonment because of inability to fulfil a contractual obligation, the principle of legality in the field of criminal law, the recognition of everyone as a person before the law and freedom of thought, conscience and religion, as outlined in Article 4 of the ICCPR. See also additional non-derogable aspects set out by the Human Rights Committee in its HRC GC No. 29, supra 82, paras 13-16.

<sup>85</sup> See eg, Arab Charter, Articles 4(2) 13, 14(6), 20; HRC GC 29, supra 82, paras 13-16.

<sup>86</sup> International Court of Justice, *Belgium v Senegal*, 2012, para. 113; Vienna Convention on the Law of Treaties, 1969, Article 27; HRC GC No. 31, supra 72, para. 4; International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, November 2001, Supplement No. 10 (A/56/10), chp.IV.E.1.



parts of federal States “without any limitations or exceptions.”<sup>87</sup> In addition, all public institutions should ensure that there are mechanisms in place to ensure that they are representative of all components of society. The Inter-Parliamentary Union affirmed in its Universal Declaration on Democracy that “democracy [...] requires the existence of representative institutions at all levels and, in particular, a Parliament in which all components of society are represented and which has the requisite powers and means to express the will of the people by legislating and overseeing government action”.<sup>88</sup>

The UN Committee on Economic, Social and Cultural Rights (the ICESCR Committee), established by the ICESCR to interpret and apply its provisions, has affirmed that all relevant organs of the State should ensure that all individuals have access to their rights<sup>89</sup> and are not subject to direct or indirect discrimination.<sup>90</sup> Local governments are often given responsibility under domestic law for delivery of services that in turn are fundamental to, among others, ensuring access to justice and basic human rights, including housing,<sup>91</sup> education, health, food and sanitation.<sup>92</sup> The ICESCR Committee has emphasised this in its General Comments on the right to food<sup>93</sup> and the right to social security.<sup>94</sup> Enshrining the requirement of all organs of government to comply with these principles and international human rights law in the Constitution would contribute to the protection and promotion of rights at the local level.

Thus, whatever form or structure of local government structure is adopted, the Constitution should specify that all local legislative initiatives and other activities by public authorities must conform to the Libyan Constitution and can be challenged in the Constitutional Court. The Constitution should provide for a constitutional duty of all state institutions to respect human rights, in accordance with Libya’s international obligations, and that all state institutions have a constitutional duty to ensure that they make a positive contribution to the fulfilment of human rights within the areas of their competence.

### **G. Participation in the conduct of public affairs**

Article 25 of the ICCPR ensures citizens’ right to vote and to be elected and requires that their right to participate in the conduct of public affairs be protected by the constitution and other legislation.<sup>95</sup> The UN Human Rights Committee has defined the conduct of public affairs as “the exercise of political power, in particular the exercise of legislative, executive and administrative powers. It covers all aspects of public administration, and the formulation and implementation of policy at international, national, regional and local levels.”<sup>96</sup>

The Draft Constitution contains a number of articles on the right to participate in the conduct of public affairs. Article 37 provides for universal suffrage in relation to elections for the House of Representatives, article 135 provides for the right to vote for every citizen, and

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<sup>87</sup> ICCPR, Article 50; ICESCR, Article 28.

<sup>88</sup> Inter-Parliamentary Union (IPU), Universal Declaration on Democracy, adopted by the Inter-Parliamentary Council at its 161<sup>st</sup> session, Cairo, 16 September 1997, Article 11.

<sup>89</sup> Committee on Economic, Social and Cultural Rights, General Comment No. 19, E/C.12/GC/19, 4 February 2008, para. 9: “all administrative authorities will take account of the requirements of the Covenant in their decision-making”.

<sup>90</sup> Ibid, para. 73.

<sup>91</sup> Annual Report to the Human Rights Council of the UN Special Rapporteur on the Right to Housing, UN Doc. A/HRC/28/62, 22 December 2014.

<sup>92</sup> International Council on Human Rights Policy, Local Government and Human Rights: Doing Good Service, Geneva, 2005, p. 1.

<sup>93</sup> Committee on Economic, Social and Cultural Rights, General Comment 12, U.N. Doc. E/C.12/1999/5 (1999), reprinted in Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.6 at 62 (2003), para. 21.

<sup>94</sup> ICESCR Committee, General Comment 19, E/C.12/GC/19, February 2008.

<sup>95</sup> ICCPR, Article 25.

<sup>96</sup> Human Rights Committee, General Comment No. 25, CCPR/C/21/Rev.1/Add.7, 12 July 1996, (HRC GC No. 25) para. 5.

article 136 provides for the right to join and establish political parties. Article 149 on the 'Rights of Libyans Abroad' states that the State shall undertake measures to ensure their participation in the electoral process.

It is clear that the Draft Constitution goes some way towards enshrining the right to participate. However, a number of articles in the second chapter on the System of Governance restrict the right to an extent not in conformity with international standards. Article 37 states that the election of members of the House of Representatives shall be through free, secret and direct voting and the only requirement is that the voter should be eighteen years old. However, articles 38 and 46 require that the candidate for a member of the House of Representatives and the Senate should be a Libyan Muslim and article 70 and 85 provide that both the President and Prime Minister must be a Libyan Muslim. This expressly contravenes article 2 and 25 of the ICCPR as it discriminates against non-Muslim Libyans on the grounds of religion.<sup>97</sup> Such discrimination is explicitly prohibited by articles 2 and 25 of the ICCPR. The religious requirement must therefore be removed from articles 37, 38, 46, 70 and 85 in order to bring them into conformity with international human rights law.

The ICJ is also concerned that article 197 of the Draft Constitution contravenes international standards. This article holds "All political parties shall be dissolved and the establishment procedures thereof shall be suspended for a period of four years from the entry into force of the constitution, during which a law on their restructuring shall be promulgated". This article is clearly problematic from the perspective of the ICCPR protected right to freedom of association,<sup>98</sup> which the UN Special Rapporteur on the right to freedom of association has affirmed includes political parties.<sup>99</sup> This provision is also in direct contravention of article 136 of the Draft Constitution itself, which reads: "[...] *The State shall guarantee the right to form political parties on the basis of national unity, transparency of funding sources, renouncing violence and hate speech. Every citizen shall have the right to join them or withdraw from them without any discrimination.*" The ICJ recommends that article 197 be removed.

The drafters of the Constitution should also consider including an article providing for the increased participation of women in public life. Article 7 of CEDAW holds: "States Parties shall take all appropriate measures to eliminate discrimination against women in the political and public life of the country and, in particular, shall ensure to women, on equal terms with men, the right: (a) To vote in all elections and public referenda and to be eligible for election to all publicly elected bodies". The CEDAW Committee has highlighted that "while removal of *de jure* barriers is necessary, it is not sufficient."<sup>100</sup> Thus taking positive steps such as quotas are important and measures to address a legacy of discrimination against women in law and practice should be taken with a view to addressing inequality for the long term future. In this regard, the ICJ regrets the removal of an article from the CDA's December 2014 Proposals which provided for a quota of 30% for women in consecutive elections. The ICJ recommends that the Constitution contains a provision requiring the state to undertake positive steps to ensure women's increased participation in public life.<sup>101</sup> A regional example can be found in the Egyptian 2014 Constitution which holds, "The State shall take the necessary measures to

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<sup>97</sup> Ibid, para. 3.

<sup>98</sup> ICCPR, Article 22(1) reads: "Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests."

<sup>99</sup> Report of the Special Rapporteur on the Rights to freedom of assembly and of freedom of association, A/HRC/20/27, 21 May 2012, para. 52.

<sup>100</sup> UN Committee on the Elimination of Discrimination Against Women, CEDAW General Recommendation No. 23: Political and Public Life, 1997, A/52/38, para. 15.

<sup>101</sup> See also Committee on the Elimination of Discrimination against Women, General recommendation No. 23 (1997), on women in political and public life, and General recommendation No. 25 (2004), on article 4 paragraph 1 and Temporary special measures, both available in Arabic in the compilation UN Doc HRI/GEN/1/Rev.9 (Vol.II);

ensure the appropriate representation of women in the houses of representatives, as specified by Law. The State shall also guarantee women's right to hold public and senior management offices in the State and their appointment in judicial bodies and authorities without discrimination."<sup>102</sup>

It is crucial that the Constitution provide adequate measures and safeguards for all Libyans to take part in the conduct of their public affairs, regardless of their religious affiliation. This is particularly relevant because of Libya's recent history of governance by an executive branch wielding an extreme level of power, the lack of citizen institutions and few, if any, opportunities for individuals to participate in key decisions relevant to the running of their country. As such, introducing further safeguards to ensure citizen participation is of particular significance both for the transitional period in Libya and for the long term.

#### **H. *Constitutional Institutions***

One or more national institutions should be established by the Constitution with a specific mandate to protect and promote human rights. Such institutions are considered by the UN as the foundation for any effective national human rights protection system and as an important tool for the implementation of international human rights standards at the national level.<sup>103</sup>

The UN Commission on Human Rights affirmed the important role played by national human rights institutions by, in particular, providing advice to relevant authorities on human rights issues and promoting human rights.<sup>104</sup> In addition, national human rights institutions can complement the work of international mechanisms that lack enforcement powers at the national level. They also "enhance the sustainability of a human-rights based approach to development by identifying and empowering claim-holders to assert their rights and identifying duty-bearers and ensuring that they have the responsibility, authority and resources needed to discharge their duties. This, in turn, assists in developing a culture of human rights."<sup>105</sup> Among their functions is "ensuring effective administration of justice, in particular with regards to access to justice, the judiciary, law enforcement, correctional and detention facilities."<sup>106</sup> To function effectively, national human rights institutions must be independent and autonomous and its membership should be pluralistic; the UN General Assembly has established criteria in this regard (the "Principles relating to the Status of National Institutions (The Paris Principles)").<sup>107</sup>

Chapter VII of the Draft Constitution is entitled Independent Constitutional Bodies and discusses the role, competences and mandate of a number of thematic constitutional bodies. Although most of their mandates have some relevance to human rights, one in particular, the National Council for Human Rights, (the National Council), is to have a specific mandate to address human rights.

The role of the National Council includes, under article 165 of the Draft Constitution, observing the human rights situation and monitoring human rights violations, reporting and following up on violations with the relevant authorities, and recommending the ratification of and adherence to international human rights conventions. It is also to "[provide] assistance to citizens to enable them to obtain their rights by virtue of the Constitution and law". This

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<sup>102</sup> Egyptian 2014 Constitution, Article 11.

<sup>103</sup> UNDP-OHCHR Toolkit for Collaboration with National Human Rights Institutions, December 2010, (UNDP-OHCHR Toolkit), p. 2. See: <http://www.ohchr.org/Documents/Countries/NHRI/1950-UNDP-UHCHR-Toolkit-LR.pdf>

<sup>104</sup> UN Commission on Human Rights, National institutions for the promotion and protection of human rights, E/CN.4/RES/1996/50, 19 April 1996.

<sup>105</sup> UNDP-OHCHR Toolkit, supra 103, p. 1.

<sup>106</sup> Nairobi Declaration: Ninth International Conference of National Institutions for the Promotion and Protection of Human Rights, Nairobi, Kenya, 21-24 October 2008, para. 19.

<sup>107</sup> UN General Assembly, Resolution 48/134 (1993), 20 December 1993, Annex.

provision is however, under-inclusive. Neither article 2 of the ICCPR regarding the right to effective remedy, nor the Paris Principles are restricted in their scope of application to “citizens”, their provisions apply to all “individuals” within the territory or jurisdiction of the state. In principle, then, the National Council should not only support citizens but all individuals in Libya to vindicate their rights. Thus “citizens” should in article 14 be replaced by “individuals”.

The mandate of the Council could be further enhanced to include a quasi-judicial competence to hear individual complaints relating to human rights violations. The Paris Principles note that NHRIs can be given competence “to hear and consider complaints and petitions concerning individual situations.”<sup>108</sup> This additional competence would provide for a robust Council with a strong human rights protection mandate, and align it with most national human rights institutions in the world.<sup>109</sup>

Further, the ICJ regrets the removal of an article from the December 2014 Proposals which gave the Commissioner of the Council the right to challenge the constitutionality of legislation and rules of procedure concerning human rights. The ICJ recommends that this is reintroduced and a right of the Commissioner is added to challenge, on his or her own initiative, the constitutionality of legislation, rules of procedures, and any other exercise of public authority, on the ground that the rule or action in question violates human rights.

The Paris Principles provide that members of a National Human Rights Institution can either be elected or appointed and that the process should be established in a manner that guarantees the pluralist representation of social actors including non-governmental organisations, philosophers, religious scholars, universities and qualified experts, etc.<sup>110</sup> The requirement of a pluralistic membership is, however, not contained within the Draft Constitution and should be added to ensure a broad representation of Libyan society in the National Council.

The ICJ is also concerned that while article 160 provides that the constitutional bodies are to have a separate legal personality and enjoy technical, administrative and financial independence that is to be provided for by law, which is a positive first step, article 162, entitled ‘Control of the Legislative Authority on these Bodies’ goes on to state that all of these institutions: “shall be accountable to the legislative authority.” This requirement undermines their independence and should, at least as regards the institution intended to fulfil the role of a national human rights institution, be removed or significantly revised.

**In light of the above, the ICJ calls on the CDA to ensure that the Constitution:**

- i. Fully embeds the rule of law in the framework for the functioning of the state, including by ensuring the clear separation of powers, attribution of competences and checks and balances between the legislature, the executive and the judiciary;**
- ii. Enshrines the power of judicial review over all legislative and executive acts;**
- iii. Clearly and unambiguously recognises the primacy of the Constitution over all other aspects of domestic law, and ensures that these aspects are adopted and implemented in full compliance with the Constitution. Article 7 of Part I of the Draft Constitution must be amended to reflect this;**
- iv. Asserts the primacy of international human rights law over domestic law. To this end, unequivocally asserts that internal law, including the Constitution,**

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<sup>108</sup> UN General Assembly, Resolution 48/134, 20 December 1993.

<sup>109</sup> UNDP-OHCHR, supra 103, pp 2, 22-23, 32-33, 49, 148-149, 254-255.

<sup>110</sup> UN General Assembly, Resolution 48/134, 20 December 1993.

- cannot be used as a justification for non-compliance with human rights conventions and treaties that have been ratified by Libya;
- v. Specifies that parliamentary, presidential or any other form of immunity cannot be used to shield a person accused of gross violations of human rights and serious crimes under international law. Article 57 and article 82 of the Draft Constitution should be amended to reflect this;
  - vi. Reflects the deletion of article 80, or, at a minimum, an amendment to define the circumstances in which, absent a declaration of emergency, the President can issue decrees on matters otherwise within the competency of Parliament, and to provide that all such decrees issued by the President automatically cease to operate unless approved by the *Shura* Council within 7 days;
  - vii. Adequately defines the role of the security services and the armed forces and provides that they are accountable and subordinated to a legally constituted civilian authority. This framework should include specific parliamentary mechanisms to oversee their functioning, including by ensuring that they abide by the law and are held to account;
  - viii. Further limits the powers of the President or Legislature to adopt measures, in situations of emergency, that might infringe on human rights. In particular, the existing provisions on emergencies in the Draft Constitution require amendment to accord with Libya's obligations under international law, including by incorporating all aspects of article 4 of the ICCPR, as well as the additional non-derogable rights mentioned by the UN Human Rights Committee in its General Comment 29 and the Arab Charter (Articles 4(2), 13, 14(6) and 20) into article 202 and 151 of the Draft Constitution. This includes the requirement to list non-derogable rights and to add the requirement of strict necessity and the prohibition of discrimination;
  - ix. Provides for effective instruments and mechanisms that guarantee Libyans' right to participate in the conduct of public affairs, including their right to vote and to be elected without discrimination. Article 38, 70 and 85 must be amended to remove the requirement that all candidates for the House of Representatives, the *Shura Council*, (through article 46), the post of Prime Minister and the post of President must be Libyan Muslims. This clearly discriminates against non-Muslim Libyans in contravention of international law and thus must be removed;
  - x. Provides that particular measures should be taken to ensure women's participation in public life;
  - xi. Ensures that no matter what system of local governance is provided for it is clear that all organs of government have the responsibility to respect, protect and fulfil human rights;
  - xii. Provides for an effective and independent national human rights institution to protect and promote human rights with a comprehensive mandate and sufficient guarantees for its independence, in accordance with the Paris Principles on National Human Rights Institutions, including the following:
    - a. The mandate of the National Council should be extended so that it not only supports citizens but all individuals in Libya to vindicate their rights. Thus "citizens" should in article 165 be replaced by "individuals".
    - b. The mandate of the National Council should be further expanded to include a quasi-judicial competence to hear individual complaints relating to human rights violations.
    - c. The Chief Commissioner of the National Council should have the right to challenge, on his or her own initiative, the constitutionality of legislation, rules of procedure, and any other exercise of public authority, on the ground that the rule or action in question violates

**human rights in order to invest the position with meaningful powers of oversight.**

**d. The requirement of a pluralistic membership for the National Council should be added to ensure a broad representation of society in the institution.**

**xiii. Article 162 should be revised to remove the requirement that the constitutional institutions: "are subject to the oversight of the legislative authority" because it undermines their independence.**

### **III. Human Rights and International Standards**

Chapter V on 'Rights and Liberties' in the Draft Constitution provides for the constitutional protection of a wide range of human rights. This is positive given that enshrining human rights in the Constitution makes them clearly justiciable in national courts, thereby increasing access to justice and enhancing rights protection at the national level. However, the definition and scope of a number of fundamental rights in the Draft Constitution, including the right to life, the prohibition of discrimination, the rights of minorities, the prohibition on torture and ill-treatment, the prohibition of slavery and servitude, the right to a fair trial, and others, fall short of international standards.

Libya is a State party to the ICCPR,<sup>111</sup> the ICESCR,<sup>112</sup> the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment<sup>113</sup> (CAT), the Convention on the Elimination of Discrimination against Women<sup>114</sup> (CEDAW) the Convention on the Elimination of Racial Discrimination<sup>115</sup> (CERD), the Convention on the Rights of the Child<sup>116</sup> (CRC) and the International Convention on the Protection of the Rights of all Migrant Workers and Members of their Families.<sup>117</sup> It has ratified the first Optional Protocol to the ICCPR and the Optional Protocol to the CRC on the involvement of children in armed conflict. Libya is also a State party to the African Charter on Human and Peoples' Rights, (the African Charter) as well as to the Maputo Protocol on the African Charter on Human and Peoples' Rights on the Rights of Women in Africa.<sup>118</sup> It ratified the Arab Charter on Human Rights, (the Arab Charter) which came into effect in 2008. In 2008, Libya signed the Convention on the Rights of Persons with Disabilities, but has not yet ratified it.<sup>119</sup>

Under international law, Libya is bound by the provisions of the treaties it has ratified and must perform its duties in good faith.<sup>120</sup> It must take the necessary steps to give effect within its domestic legal order to the rights recognised in human rights treaties, including for instance by adopting laws in accordance with its constitutional processes.<sup>121</sup> The protection of

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<sup>111</sup> Acceded to on 15 May 1970.

<sup>112</sup> Acceded to on 15 May 1970.

<sup>113</sup> Acceded to on 16 May 1989.

<sup>114</sup> Acceded to on 16 May 1989.

<sup>115</sup> Acceded to on 3 July 1968.

<sup>116</sup> Acceded to on 14 April 1993.

<sup>117</sup> Acceded to on 18 June 2004.

<sup>118</sup> Adopted by the 2nd Ordinary Session of the Assembly of the Union, Maputo, September 13, 2000, CAB/LEG/66.6, entered into force November 25, 2005, ratified by Libya May 23 2004.

<sup>119</sup> See [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=iv-15&chapter=4&lang=en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=iv-15&chapter=4&lang=en)

<sup>120</sup> Vienna Convention on the Law of Treaties, 1969, Article 26.

<sup>121</sup> See, eg, ICCPR, Article 2(1) and (2), which reads: "Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. 2. Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognised in the present Covenant."

rights and liberties in the Libyan Constitution should therefore conform, at a minimum, to the definition and scope of the rights contained within the above treaties. Any scope for limitation of a right under the Libyan Constitution should not exceed the permissible scope for limitation under international law.

To achieve this, the Chapter on 'Rights and Liberties', in the Draft Constitution, should be subjected to thorough and systematic review against the treaty provisions. Clearly, significant amendments will be required. It is beyond the scope of this report to do a comprehensive assessment, but some of the changes needed are explained below. The issues and areas for amendment highlighted in this report are not, it must be stressed, exhaustive.

The Constitution should expressly provide that should any conflict arise between provisions of the Constitution in their interpretation and application, the provision or interpretation providing for the greater protection of rights always takes precedence. This principle should in fact be made clearly applicable to all laws, both within the Constitution and to primary and secondary legislation.

Economic, social and cultural rights should be recognised, guaranteed and protected by the Libyan Constitution on an equal footing with civil and political rights.<sup>122</sup> The Constitution should recognise that Libya is obliged to take steps, as expeditiously as possible, to the maximum of its available resources to progressively achieve the full realisation of the rights outlined in the ICESCR.<sup>123</sup> At the same time it should provide that Libya must satisfy what the ICESCR Committee has referred to as immediate obligations, including those related to non-discrimination, and "a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights", with such minimum core obligations applying irrespective of the overall availability of resources or any other factors and difficulties.<sup>124</sup>

Further, as examined in detail above, provisions appearing to subjugate all of the human rights protections in the Constitution to *Sharia*, are incompatible with Libya's obligations under international law and should, therefore, be removed or substantively amended.

## A. **The Definition of Rights**

### 1. *The right to equality and non-discrimination*

#### (a) Need for General Non-discrimination Provision

Non-discrimination and the right to equality are fundamental requirements of human rights law.<sup>125</sup> All constitutions should enshrine the right to equality between men and women and protection against discrimination of all kinds, in conformity with international standards.

Under article 2 of the ICCPR, for instance, states must guarantee the rights recognised in the ICCPR "without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status." Article 2 of the ICESCR is to similar effect.<sup>126</sup> Article 26 of the ICCPR further provides as follows:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination

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<sup>122</sup> Vienna Declaration and Programme of Action, adopted by the World Conference on Human Rights in Vienna on 25 June 1993, para. 5

<sup>123</sup> ICESCR, Article 2.

<sup>124</sup> ICESCR Committee, General Comment No. 3, (1990), contained in document E/1991/23, paras 9 to 11.

<sup>125</sup> See, among others, ICCPR, Articles 2(1), 3, 4(1) and 26; ICESCR, Articles 2(2) and 3.

<sup>126</sup> See also CESCR, General Comment No. 20, E/C.12/GC/20, 2 July 2009.

and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.<sup>127</sup>

There is no equivalent general non-discrimination provision in the Draft Constitution. The ICJ strongly recommends the inclusion of a comprehensive general anti-discrimination clause, covering at least all the grounds covered by the ICCPR as interpreted by the UN Human Rights Committee. This is particularly important given the history of discrimination in Libya against minorities and women in particular, as discussed in more detail below. Regional examples of comprehensive non-discrimination articles can be found in the respective preambles to the Lebanese Constitution<sup>128</sup> and the Moroccan Constitution.<sup>129</sup> Article 29 of the Algerian 1996 Constitution holds: "All citizens are equal before the law. No discrimination shall prevail for reasons of birth, race, sex, opinion or any other personal or social condition or circumstance."

#### (b) Restriction of Rights to Citizens

A number of provisions in the Chapter on Rights and Liberties refer to "citizens" and could therefore be interpreted as excluding non-citizens, who are nevertheless under the jurisdiction of Libya, from the scope of their protection. Such restriction of the scope of these rights is inconsistent with the ICCPR, ICESCR, CEDAW and other human rights treaties, which generally apply to everyone, not only citizens. The UN Human Rights Committee has confirmed that under the ICCPR, "the general rule is that each one of the rights of the Covenant must be guaranteed without discrimination between citizens and aliens."<sup>130</sup> The only exception in the ICCPR is in article 25, which explicitly applies to "citizens", in relation to the rights to take part in the conduct of public affairs, to vote and be elected in elections, and to have equal access to public services. The UN Human Rights Committee has specifically noted that this aspect of article 25 is "[i]n contrast with other rights and freedoms recognised by the Covenant (which are ensured to all individuals within the territory and subject to the jurisdiction of the State)".<sup>131</sup> The ICESCR Committee has emphasised that:

The ground of nationality should not bar access to Covenant rights, e.g. all children within a State, including those with an undocumented status, have a right to receive education and access to adequate food and affordable health care. The Covenant rights apply to everyone including non-nationals, such as refugees, asylum-seekers, stateless persons, migrant workers and victims of international trafficking, regardless of legal status and documentation.<sup>132</sup>

The only exception with respect to non-nationals under the ICESCR is article 2(3) which states that, "[d]eveloping countries, with due regard to human rights and their national economy,

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<sup>127</sup> See also Human Rights Committee, General Comment No. 18, 10 Nov 1989. The UN Human Rights Committee, the ICESCR Committee, the UN High Commissioner for Human Rights, and others have interpreted these provisions to include sexual orientation and gender identity. See eg CESCR, General Comment No. 20, E/C.12/GC/20, 2 July 2009, para. 32. Human Rights Committee, *Toonen v. Australia*, Communication No 488/1992 (1994), para. 8.7; UN High Commissioner for Human Rights, Report on Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity, UN Doc A/HRC/19/41 (17 November 2011), paras 5-7.

<sup>128</sup> Paragraph 3 of the preamble to the Lebanese 1926 Constitution holds: "Lebanon is a parliamentary democratic Republic based on respect for public liberties, especially the freedom of opinions and belief, and respect for social justice and equality of rights and duties among all citizens without discrimination."

<sup>129</sup> The preamble of the Moroccan 2011 Constitution holds that the state shall "[Prohibit and combat all forms of discrimination, for reasons of sex, color, belief, culture, of social or regional origin, language, handicap or any personal circumstance, of any sort."

<sup>130</sup> Human Rights Committee, General Comment No. 15, U.N. Doc. HRI/GEN/1/Rev.1 (1994) 30 Sep 1986, para. 2.

<sup>131</sup> Human Rights Committee, General Comment No. 25, supra 96, para. 3.

<sup>132</sup> CESCR, General Comment No. 20, U.N. Doc. HRI/GEN/1/Rev.1 30 Sep 1992, para. 30.



may determine to what extent they would guarantee the economic rights recognised in the present Covenant to non-nationals.”<sup>133</sup>

Consequently, the reference to “citizens” should be deleted in the articles relating to: the right to health (Article 114); the right to education, (Article 128); the right to “drink and food”, (article 113); the right to security and peace, (article 116); right to freedom of movement and residency, (article 144). Provisions relevant to the right to work and other economic rights should be reviewed to ensure they conform to the ICESCR article 2(3).

The ICJ is also concerned by article 12 of the Draft, which provides that Libyan nationality may be withdrawn for a period of 20 years following naturalisation, without providing any limits to or specific requirements for the withdrawal of nationality.<sup>134</sup> This provision provides for a broad power that may lead to discriminatory practices. The provision also does not specify any particular decision-maker, or a fair process in which the affected person could contest the issue. For this and other reasons, it could lead to violations of the right to nationality and the prohibition of statelessness, in contravention of Libya’s obligations under international human rights law. Article 15 of the Universal Declaration of Human Rights, for instance, provides:

- (1) Everyone has the right to a nationality.
- (2) No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality.<sup>135</sup>

Under the 1961 Convention on the Reduction of Statelessness, among other things:

A Contracting State shall not deprive a person of its nationality if such deprivation would render him stateless.<sup>136</sup>

This article should, therefore, be removed or substantially revised.

Article 13 is also of concern. Article 13(1) provides “Enacted law regulating naturalisation shall take into account national interest considerations, maintenance of demographic structure and ease of integration within the Libyan society.” The requirement to maintain ‘demographic structure’ is open to a broad interpretation and could give rise to discrimination against those deemed not to fit in with a preconceived notion of the proper ‘demographic structure’ of the country. Discriminatory decisions on this basis would contravene Libya’s obligation under, among others, article 2 of the ICCPR and this article should therefore be removed.

Article 198, which outlines provisions related to naturalisation and nationality, is also problematic from the perspective of international standards. It reads:

1. All naturalisation procedures shall be suspended for 10 years, from the date of entry into force of the Constitution,
2. The State shall decide on the requests for nationality regarding returnees, submitted before 17 February 2011, the State shall regulate the situations of holders

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<sup>133</sup> Some of the articles of the Arab Charter refer only to “citizens” in relation to rights that, under the ICESCR, must be applied to everyone. However, Article 43 of the Arab Charter expressly provides that none of its provisions can be used to narrow the scope of rights protected by other treaties to which a state is party.

<sup>134</sup> The full article reads: “Deprivation of Libyan nationality for any reason whatsoever shall be prohibited. It may be withdrawn within twenty years following naturalization. Cases of withdrawal and their consequences shall be established by law.”

<sup>135</sup> See also, e.g., ICCPR art 24(3).

<sup>136</sup> Convention on the Reduction of Statelessness, 989 UNTS 175, article 8(1). Libya acceded to the Convention in 1989.

of Arab nationalities in accordance with what was applicable prior to the law regulating it. This shall all be within five years of the date of entry into force of the law on nationality issued pursuant to the constitution.

3. All naturalisation decisions issued as of 15/02/2011 which violated the provisions of the applicable Nationality Law at the time of their issuance shall be annulled.

The suspension of naturalisation procedures for 10 years seems unnecessary and may have a discriminatory effect against those who would otherwise qualify for naturalisation during this period. As noted above in relation to article 12 and 13, this provision also does not specify any particular decision-maker, or a fair process in which the affected person could contest the issue. It could lead to violations of the right to nationality and the prohibition of statelessness, in contravention of Libya's obligations under international human rights law. This article should, therefore, be removed or substantially revised.

(c) Equality between men and women

The only articles in the Draft Constitution specifically addressing women's rights are first, article 117, entitled: "Supporting Women's Rights", which reads:

*Women are men's sisters; the State shall provide support and care to the woman and pass legislation that ensure her protection, the elevation of her role in society and the eradication of the negative culture and social customs that impair her dignity. The State shall also take all necessary measures to prevent all forms of violence against her, and shall ensure the creation of opportunities for her in various areas.*

And second, article 8, which holds: "Citizens, men or women, are equal by law and before law, without any discrimination among them in reduction, limitation or privation, according to the provisions of this Constitution".

The Draft Constitution does not therefore fully reflect international standards requiring the explicit prohibition of all discrimination against women. Comprehensive provisions on discrimination against women in the Constitution are necessary and take on particular importance in the context of the history of inequality in law and in practice between men and women in Libya both under Gadhafi and during the transitional period, which has, in fact, seen legal challenges to existing protections for women in the law through both Court challenges and through new legislation that weakens women's rights, (as referred to below).

The Committee on the Elimination of Discrimination against Women (the CEDAW Committee) and the UN Human Rights Committee highlighted systematic discrimination against women in Libya in their Concluding Observations of 2009<sup>137</sup> and 2007<sup>138</sup> respectively. In particular, both Committees held that women were discriminated against in the areas of nationality, marriage, divorce and inheritance. Libya currently has a reservation to CEDAW in which it states: "[Accession] is subject to the general reservation that such accession cannot conflict with the laws on personal status derived from the Islamic Sharia". The ICJ recommends the removal

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<sup>137</sup> "The Committee further calls upon the State party to intensify its efforts to amend its legislation governing child custody expeditiously, in order to ensure that women have the same right as men to travel with their children abroad. The Committee recommends that the State party introduce legislative reforms to provide women with equal rights in marriage, divorce and inheritance. It calls upon the State party to end the practice of polygamy in accordance with the Committee's general recommendation No. 21, on equality in marriage and family relations." CEDAW's Concluding Observations on Libyan Arab Jamahiriya, CEDAW/C/LBY/CO/5, February 2009, para. 18.

<sup>138</sup> "The State party should review its laws in order to ensure equality between men and women in matters of personal status, in particular regarding divorce and inheritance. The State party should furthermore guarantee that equality is ensured in law and in practice", para. 11, HRC CO 2007, CCPR/C/LBY/CO/4, 15 November 2007.

of this reservation for the reasons outlined above in relation to article 7 of the Draft Constitution and, in particular, in order to ensure that inequality or discrimination against women in domestic laws cannot be justified by reference to a subjective interpretation of Sharia.

The transitional period since 2011 has thus far seen the perpetuation of discrimination against women both in law and in practice and certain protections previously provided for women in the law are being dismantled or challenged. For example, Law no.8 of 1989 which provides that "Women are entitled to hold judicial posts, and posts in the Public Prosecution, and the Litigation Administration, under the same conditions as men" is currently being challenged in the Supreme Court in two separate cases.<sup>139</sup> Further, the GNC has promulgated a number of worrying new laws this year which restrict women's rights in marriage, including in relation to financial matters and the right to divorce.<sup>140</sup> The ongoing conflict has also seen the targeting of women who participate in public life, including human rights defenders.<sup>141</sup>

Strong provisions on equality are therefore necessary in the new Constitution, which should ensure that both direct and indirect discrimination against women are prohibited in line with the CEDAW Committee's recommendation to Libya in 2009.<sup>142</sup> In order to ensure conformity with CEDAW's recommendations, language should be introduced that follows the "effect or purpose" language of article one of CEDAW which reads: "discrimination against women shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field."<sup>143</sup>

The Constitution should also explicitly provide that women have equal rights to men in relation to child custody, inheritance and the right to pass their nationality to their children, especially given the fact that elsewhere in the Draft Constitution the right to pass on Libyan nationality is restricted to men only. Article 11(2) provides that: "Whosoever is born to a Libyan father [shall be a Libyan national]." This clearly violates international law on non-discrimination and thus must be removed. In addition, it may constitute a violation of the right of the child to his or her nationality, as protected under article 8 of the Convention on the Rights of the Child.<sup>144</sup>

Similarly, article 119(6) not only confirms the exclusion of the children of Libyan women from the right to Libyan nationality but also violates their political rights. The article reads: "[t]aking into account Article 11(2), and with the exception of political rights, children of Libyan women shall enjoy all rights of Libyan citizens." This exception should be removed. In addition, article 13(3) holds that "preference in naturalisation shall be given to *sons* of Libyan women", (emphasis added). Again, this clearly discriminates against the daughters of Libyan women and should therefore be removed.

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<sup>139</sup> Constitutional Challenge No. 10/60(judicial year) of 2012 and Constitutional Challenge No.14/60 (judicial year) of 2013.

<sup>140</sup> GNC Law No.14 of 2015.

<sup>141</sup> See Amnesty International, Human Rights Abuses Continue as Country Descends into Chaos, Submission for Libya's Universal Periodic Review, May 2015, p.6 available at <https://www.amnesty.org/download/Documents/MDE1900032015ENGLISH.pdf>, (AI May 2015), and see Human Rights Watch, 'A Revolution for All: Women's Rights in the New Libya', 2013, accessed at [http://www.hrw.org/sites/default/files/reports/libya0513\\_brochure\\_LOWRES.pdf](http://www.hrw.org/sites/default/files/reports/libya0513_brochure_LOWRES.pdf)

<sup>142</sup> "The Committee calls upon the State party to take urgent steps to incorporate into domestic legislation a prohibition of discrimination against women that encompasses both direct and indirect discrimination, in line with article 1 of the Convention," CEDAW's Concluding Observations on Libyan Arab Jamahiriya, supra 137, February 2009, para 10.

<sup>143</sup> CEDAW, Article 1.

<sup>144</sup> See Convention on the Rights of the Child, Article 8.

The Constitution should also enshrine the duty of the state to actively counter discrimination, including potentially by providing for the adoption of a national strategic plan to bring about “change in the widely accepted stereotypical roles of women and men, thereby promoting equal sharing of family responsibilities between women and men and the equal status and responsibilities of women and men in the private and public spheres,”<sup>145</sup> and by providing that a specific mechanism should be put in place to combat discrimination.<sup>146</sup> This is particularly important in light of the statement by the CEDAW Committee in 2009 that it remains “concerned about the persistence [in Libya] of entrenched, traditional stereotypes regarding the roles and responsibilities of women and men in the family and in society at large, which are reflected, in part, in women’s educational choices, their situation in the labour market and their low participation in political and public life.”<sup>147</sup>

In fact, article 31 on the ‘Family’ appears to enshrine such stereotypes by stating that “The State shall [...] support and encourage marriage, and protect maternity and child care, and shall ensure the harmonization of the woman’s duties and her work.” This provision could be interpreted as implying that women have greater duties towards their family than men. In light of the fact that the CEDAW Committee has made clear that the State should promote the equal sharing of family responsibilities, the ICJ recommends that this article be amended along the following lines: “The State shall ensure maternity and child care, shall promote the equal sharing between men and women of family responsibilities, and shall ensure that conditions for paid employment accommodate family responsibilities in a manner that ensures that men and women have equal access to paid employment.”

Violence against women continues to be a pervasive issue in Libya; both domestic violence and violence in conflict.<sup>148</sup> Article 117 of the Draft Constitution reads: “*The State shall also take all necessary measures to prevent all forms of violence against [women].*” This is positive language but it should be strengthened by specifically providing for the prohibition of all forms of violence against women and for redress when it occurs. In addition, the Constitution should provide for a requirement that the government draft legislation that explicitly criminalises domestic violence.<sup>149</sup> While article 17 of Law no.10 of 1984 states that: a woman “has the right to expect her husband to ... refrain from causing her physical or psychological harm” this falls short of criminalising domestic violence or providing effective enforcement mechanisms.

Other laws currently in force in Libya and relevant to the issue of violence against women are also problematic. For example, article 375 of the penal code contains significantly lower sentences for perpetrators of “honour” crimes,<sup>150</sup> which gravely undermines recognition of the harm caused to women by such crimes. In addition, in part 3 of volume 3 of the Libyan penal

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<sup>145</sup> CEDAW’s Concluding Observations on Libyan Arab Jamahiriya, supra 137, para. 22

<sup>146</sup> A regional example where a Constitution requires the State to create a mechanism to combat discrimination can be found in Article 19 of the Moroccan Constitution, which holds: “An Authority for equality and to combat against all forms of discrimination shall be created.”

<sup>147</sup> CEDAW’s Concluding Observations on Libyan Arab Jamahiriya, supra 137, para. 22

<sup>148</sup> See CEDAW’s Concluding Observations on Libyan Arab Jamahiriya, supra 137, para. 22, para. 23 and 24; see HRW: A Revolution for all, May 2013, supra 141 and see OHCHR Report, January 2015, supra 2.

<sup>149</sup> There are a number of precedents for including such a requirement in the Constitution of a country which has previously faced high levels of violence against women. For example, the Constitutions of Colombia and Malawi reference ‘family’ or domestic violence. See HRW: A Revolution for All, supra 141, p. 24 for full references.

<sup>150</sup> Article 375 of the Libyan Penal Code states, “A man who finds by surprise his wife or daughter or sister or mother in flagrante committing adultery or illegal intercourse, and kills her or her partner or both of them as a response to the violation caused to his or his family’s honour, shall be sentenced to detention [not exceeding three years]. If the act has led to serious or grave damage to the above mentioned individuals in the said circumstances, he shall be sentenced to detention for a period not exceeding two years. He shall not be punished for mere beating or causing minor injury in such circumstances.”

code, sexual violence is classified as a crime against honour rather than a crime against an individual.<sup>151</sup> As Human Rights Watch has noted: "By focusing on a victim's honor, this law perpetuates the notion that a rape survivor has lost her honor, and thereby may serve to undermine justice by leading courts to focus on examining a woman's sexual history rather than the alleged violence committed against her by the accused."<sup>152</sup>

CEDAW has specifically defined gender based violence (comprising violence against women because of their gender or violence disproportionately affecting women), as a form of discrimination and has affirmed that: "States parties have a due diligence obligation to prevent, investigate, prosecute and punish [...] acts of gender-based violence".<sup>153</sup> This underlines the need for stronger protections against all forms of violence against women in the Constitution.

Finally, article 119 on the 'right to a decent life' should be amended in relation to the reference to "women who are late in marriage." An unmarried woman should not be singled out for special treatment on the basis of stereotypes about marriage status. If unmarried women are in fact less likely to be economically secure by reason of being unmarried, for instance due to societal or government discrimination in employment or otherwise, it is this factor that should be addressed, for instance by replacing this reference with a new sub-clause stating that the state must "ensure that women's enjoyment of a decent level of life does not depend on marriage."

## 2. *Minority rights*

Including strong protections for minority rights in the new Libyan Constitution is of crucial importance given the history of state sanctioned discrimination against minorities in Libya during the Gadhafi era. The Amazigh, Tuareg and Tebu communities, as well as other minorities, faced discrimination, marginalisation and the violation of a range of their rights.<sup>154</sup> Law No. 24 of 1369 (2001),<sup>155</sup> for example, banned the use of any language other than Arabic in official documents, banners, streets and names of public and private institutions. Non-Arabic names were forbidden and official documents would not be issued to those with non-Arabic names.<sup>156</sup> The Amazigh community, which has boycotted the Constitutional Drafting process from the outset, is the largest minority group in Libya and suffered severe discrimination during the Gadhafi period. The Committee on CERD in its Concluding Observations in 2004 found that "there is no recognition of Amazigh language and culture in the Libyan Arab Jamahiriya and Amazighs are impeded from preserving and expressing their cultural and linguistic identity".<sup>157</sup> In addition, the Tebu and Tuareg communities suffered

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<sup>151</sup> See paragraphs 407 and 408 of Part 3 of Volume 3 of the Libyan Penal Code.

<sup>152</sup> Human Rights Watch, 'A Revolution for All: Women's Rights in the New Libya', 2013, p.26, accessed at [http://www.hrw.org/sites/default/files/reports/libya0513\\_brochure\\_LOWRES.pdf](http://www.hrw.org/sites/default/files/reports/libya0513_brochure_LOWRES.pdf),

<sup>153</sup> See CEDAW, General Recommendation No. 28, The Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women, CEDAW/C/GC/28 (2010). In addition, Article 4 of the Maputo Protocol requires States parties, such as Libya, to adopt all necessary measures for the prevention, punishment, and eradication of all forms of violence against women.

<sup>154</sup> Minority Rights Group International, *State of the World's Minorities and Indigenous Peoples 2014 – Libya*, 3 July 2014, (MRGI, 2014) available at <http://www.refworld.org/docid/53ba8de3f.html>

<sup>155</sup> Law No. (24) of 1369 P.D. (2001) on the prohibition of the use of non-Arabic languages and figures in all transactions.

<sup>156</sup> Ibid

<sup>157</sup> Committee on CERD, Concluding Observations on the Libyan Arab Jamahiriya, CERD/C/64/CO/4, 10 May 2004. See also the ICESCR Committee in 2006 stating that it was "concerned that the teaching of Amazigh language in school is prohibited, as well as the use of this language in public, including in the media and in the relationship with the administration. Amazigh cultural associations and institutions are furthermore reported to not be allowed to operate freely in the country." ICESCR Committee, Concluding Observations on the Libyan Arab Jamahiriya E/C.12/LYB/CO/2, 25 January 2006

discrimination including that they were “assimilated as foreigners [...] without citizenship or other associated rights.”<sup>158</sup>

During the transitional period, efforts have been made to recognise the rights of minority groups in Libya, including through a law passed in June 2013, which recognised the existence of the Tebu, Tuareg and Amazigh as minority groups and recognised their languages, enabling the creation of media outlets in minority languages and the teaching of minority languages in schools.<sup>159</sup> However, during the recent conflict, minority groups have found themselves targeted again, including through xenophobic rhetoric, attacks, internal displacement, arbitrary arrest and detention.<sup>160</sup> There are also reports that minorities have been refused the renewal of identification documents, driving licenses and passports under the transitional government.<sup>161</sup> This underlines the importance of providing adequate protections for minorities within the new Constitution.

Article 2 of the ICCPR requires states to ensure there is no “distinction of any kind” in the enjoyment by individuals of rights recognized by the Covenant, including on grounds “such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status”. This provides important basic protection against discrimination for ethnic, religious, linguistic and other such minorities.

Article 27 of the ICCPR provides for additional specific protections for minority groups: “In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.” The UN Human Rights Committee stated in its General Comment 23 that article 27 requires state authorities to:

“ensure that the existence and the exercise of this right are protected against their denial or violation. Positive measures of protection are, therefore, required not only against the acts of the State party itself, whether through its legislative, judicial or administrative authorities, but also against the acts of other persons within the State party”.<sup>162</sup>

The Committee further stated that “positive measures by States may also be necessary to protect the identity of a minority and the rights of its members to enjoy and develop their culture and language.”

Article 15 of the ICESCR protects the right of everyone to, among other things, “take part in cultural life”. The 2001 Durban Declaration affirms that “the ethnic, cultural, linguistic and religious identity of minorities, where they exist, must be protected and that persons belonging to such minorities should be treated equally and enjoy their human rights and fundamental freedoms without discrimination of any kind.”<sup>163</sup> The United Nations Minorities Declaration<sup>164</sup> proclaims for minorities, among others, the right to participate effectively in

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<sup>158</sup> MRGI, 2014, supra 154.

<sup>159</sup> Ibid

<sup>160</sup> See Amnesty International, press release at <https://www.amnesty.org/en/press-releases/2012/04/libya-central-government-must-protect-kufra-residents-militia-clashes-2012/> and see MRGI 2014, supra 154.

<sup>161</sup> Ibid and see Amnesty International, Annual Report 2014, Libya, available at <https://www.amnesty.org/en/countries/middle-east-and-north-africa/libya/report-libya/>

<sup>162</sup> UN Human Rights Committee, General comment 23, UN Doc. HRI/GEN/1/Rev.1 at 38 (1994), para 6.1.

<sup>163</sup> World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, Declaration, Durban, 2001 (the Durban Declaration), para 66.

<sup>164</sup> Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, GA Resolution 47/135, 1992.

cultural, religious, social, economic and public life (art. 2 (2)); the right to participate effectively in decisions which affect them on the national and regional levels (art. 2 (3)); and the requirement for states to create favourable conditions to enable minorities to express their characteristics and to develop their culture, language, religion, traditions and customs (art. 4 (2)).

As such, international law and standards provides for general and specific protections for minorities that must be reflected in the Constitution, in particular given the history of discrimination against minorities in Libya.

The Draft Constitution addresses these obligations and standards to some extent in articles 30 and 134. Article 30 holds: "The languages spoken by a part of the Libyan people shall be considered national languages and a part of their cultural and linguistic heritage; they shall also be a common property to all Libyans. The Arabic language shall be the official language". Article 134 states: "Every person is entitled to the right to use and learn national languages and to participate in cultural life individually or collectively, the State shall protect them and provide necessary outlets to learn and use them in media outlets. It shall also ensure the protection of national cultures, heritage, customs, literature, arts, as well as the development thereof and the distribution of cultural services."

While the recognition of "languages spoken by a part of the Libyan people" as "national languages" is positive, this is rather vague wording and, given the history of discrimination against minorities in Libya, risks an interpretation that includes only certain 'parts of the Libyan people'. The same is true for the use of the term "national languages" in article 134. The ICJ recommends that these articles be redrafted to be clearer that they are providing for the rights of minorities in Libya to use their language and enjoy their culture. This could be achieved by directly invoking the existing legal terminology in article 27 of the ICCPR, as further elaborated though the UN Minorities Declaration. To better ensure that articles 30 and 134 are understood in a manner consistent with these international obligations and standards, the Constitution should explicitly provide that *minorities* have enforceable rights to use and learn their language, to enjoy their own culture and to participate in cultural, religious, social, economic and public life and to participate effectively in decisions that affect them. The inclusion of minority languages in the education curriculum should also be affirmed.

Given the history of discrimination against minorities in Libya, the Constitution should affirm, in line with the Durban Declaration, that all members of minorities should be treated equally and should be free to enjoy all of their human rights and fundamental freedoms without discrimination of any kind.<sup>165</sup>

### 3. *The right to life*

Article 6 of the ICCPR and article 5 of the Arab Charter provide: "Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life." The right to life has been referred to by the UN Human Rights Committee as "the supreme right".<sup>166</sup> No derogation is permitted, even in the most extreme times of emergency.<sup>167</sup>

Article 112 of the Draft Constitution on the right to life reads: "Every individual is entitled to the right to life, the State shall guarantee their protection and shall take the necessary measures in order to compensate nationals and legal residents who are victims of disasters"

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<sup>165</sup> As per para 66 of the Durban Declaration, supra 190.

<sup>166</sup> Human Rights Committee, General Comment No. 6, 16<sup>th</sup> Session, 1982, para. 1.

<sup>167</sup> See ICCPR, Article 4(2); Arab Charter, Article 4(2).

and, "The State shall pay the blood money in case the perpetrator is unknown, as regulated by law."

To better ensure that this article is interpreted and applied consistently with international law, it should be amended to include an explicit prohibition of arbitrary deprivation of life.

The requirement to prohibit the arbitrary deprivation of life has been described by the UN Human Rights Committee as "of paramount importance". The prohibition on the arbitrary deprivation of life takes on a particular significance in the Libyan context given the widespread instances of arbitrary deprivation of life both under Gadhafi and since the transitional period began by both state and non-state actors.<sup>168</sup> Given this context, the ICJ recommends that the Constitution should include a further explicit provision that "the law must strictly control and limit the circumstances in which a person may be deprived of his life by the state authorities" and that "in the course of law enforcement, authorities may intentionally deprive a person of life only when strictly unavoidable in order to protect life". This would incorporate the interpretation of the ICCPR by the UN Human Rights Committee, the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, and other international standards<sup>169</sup> and would complement article 140 in the Draft Constitution on the 'right of assembly, association and demonstrations'.<sup>170</sup>

The requirement to prohibit the arbitrary deprivation of life is also relevant to the availability and use of the death penalty. The ICJ opposes the death penalty unconditionally and in all circumstances and considers that its imposition in all cases is a violation of the right to life and the prohibition of torture and other cruel, inhuman or degrading treatment or punishment.

The UN Human Rights Committee has stated that abolition is desirable and that all measures of abolition should be "considered as progress in the enjoyment of the right to life".<sup>171</sup> There is a world-wide trend towards abolition and the UN General Assembly has repeatedly called by increasingly large majorities on States which retain the death penalty to impose a moratorium, with a view to the abolition of capital punishment.<sup>172</sup> At its 56th session, the African Commission on Human and Peoples' Rights adopted a draft Protocol to the African Charter for the abolition of the death penalty in Africa.

The Draft Constitution currently does not prohibit the death penalty. The ICJ strongly recommends the addition of a clear and absolute prohibition on the use of the death penalty. If, contrary to ICJ's fundamental recommendation, the Constitution does not prohibit the use of the death penalty, strict requirements in the application of the death penalty must be reflected in the Constitution to conform to international standards on its use. The UN Human Rights Committee has held that, in those countries where it has been for the moment retained, the use of the death penalty must be abolished for anything other than "the most serious crimes" and its use should be "exceptional". In 2007, the UN Special Rapporteur on extrajudicial, summary or arbitrary executions, following an exhaustive study of the jurisprudence of UN bodies, clarified that this should be understood to mean that crimes

<sup>168</sup> See recent OHCHR and UNSMIL Reports at supra 2, supra 4 and supra 52.

<sup>169</sup> Human Rights Council, General Comment No. 6, 16<sup>th</sup> Session, 1982, para. 3 ; UN Basic Principles on the Use of Force and Firearms by Law Enforcement officials, adopted by the 8<sup>th</sup> United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Cuba September 1990, available at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/UseOfForceAndFirearms.aspx>

<sup>170</sup> Subsection 6 of this article reads: "The use of force shall be prohibited except at a minimum and if necessary." This language is analysed in more detail below.

<sup>171</sup> Human Rights Council, General Comment No. 6, 16<sup>th</sup> Session, 1982, para. 6. The first part of Article 40 of the ICCPR reads: "The States Parties to the present Covenant undertake to submit reports on the measures they have adopted which give effect to the rights recognised herein and on the progress made in the enjoyment of those rights".

<sup>172</sup> Eg UN General Assembly Resolution 67/167, para. 4(d).



punishable by death must be limited to those in which it is proved that "there was an intention to kill and which resulted in the loss of life".<sup>173</sup>

Limiting the application of the death penalty to serious crimes takes on particular importance in light of the current legal framework in Libya which allows for the application of the death penalty for numerous crimes including those relating to drug offences<sup>174</sup> and acts that could be considered to be protected by the right to freedom of expression and the rights to freedom of assembly and of association. For example, article 206 of the Penal Code provides for the death penalty for the crime of "establishing or participating, or inciting or assisting to establish or participate in unlawful organisations." Article 207 of the Penal Code provides for the application of the death penalty for those convicted of the crime of: "Promoting any views or principles that aim to overthrow the political, social or economic order of the state." The application of the death penalty for such broadly-defined offences clearly violates international law and standards. The Constitution must ensure that the death penalty is abolished for anything other than "the most serious crimes".

#### 4. *The prohibition of torture and other cruel, inhuman or degrading treatment or punishment*

Torture was widely used under Gadhafi's regime and accompanied by impunity.<sup>175</sup> Further, there are widespread allegations of torture in detention sites used currently by various actors across Libya. Kidnappings, hostage taking and arbitrary detention have been rife during the recent conflict and thousands of people are believed to be detained in sites beyond the rule of law.<sup>176</sup> Given this history, both past and more recent, a clear and comprehensive prohibition on torture and other ill treatment in the Libyan Constitution is crucial.

The prohibition of torture in the Draft Constitution does not fully conform to Libya's obligations under international human rights law. Article 121 of the Draft Constitution contains an obligation on the state to "combat" torture and prohibits "all forms of [...] ill treatment". Article 7 of the ICCPR reads "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation."<sup>177</sup> Similar provisions are found in articles 8 and 9 of the Arab Charter. No derogation from any part of these articles is permitted under any circumstances.<sup>178</sup>

The ICJ recommends that the draft is amended to bring its wording more precisely in line with the absolute prohibition on torture and other cruel, inhuman and degrading treatment or punishment as set out in article 7 of the ICCPR and CAT, including a definition of torture that

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<sup>173</sup> Special Rapporteur on extrajudicial, summary or arbitrary executions, UN Doc. A/HRC/4/20(2007) paras 53, 65.

<sup>174</sup> Law no. 7 of 1990

<sup>175</sup> From 2007 to 2014, the Human Rights Committee found Libya to have violated its obligations under Article 7 of the ICCPR in 14 separate views. See Redress, Lawyers for Justice in Libya: 'Comments on the prohibition of torture and inhuman, cruel, or degrading treatment or punishment in Libya's Draft Constitutional Recommendations', published April 2015, (Redress, LFJL, April 2015) accessed here: <http://www.libyanjustice.org/downloads/Publications/anti-torture-commentary---final---pdf.pdf>, for full references.

<sup>176</sup> See further Redress, LFJL, April 2015; See in addition, Danish Institute Against Torture, Consequences of Torture and Organised Violence – Libya Needs Assessment Survey, October 2014; and The United Nations Support Mission in Libya, Torture and Deaths in Detention in Libya, October 2013. See also "The Endless Wait" Long term Arbitrary Detentions and Torture in Western Libya', Human Rights Watch, December 2015, available at:

[https://www.hrw.org/sites/default/files/report\\_pdf/libya1215\\_4up\\_1.pdf](https://www.hrw.org/sites/default/files/report_pdf/libya1215_4up_1.pdf)

<sup>177</sup> ICCPR, Article 7.

<sup>178</sup> See ICCPR, Article 4(2); Arab Charter, Article 4(2).

is at least as broad as the definition enshrined in article 1 of CAT.<sup>179</sup> The CAT Committee has expressed concern when “serious discrepancies between the Convention’s definition and that incorporated into domestic law create actual or potential loopholes for impunity. In some cases, although similar language may be used, its meaning may be qualified by domestic law or by judicial interpretation and thus the Committee calls upon each State party to ensure that all parts of its Government adhere to the definition set forth in the Convention for the purpose of defining the obligation of the State.”<sup>180</sup> The fact that the prohibition on torture and other cruel, inhuman or degrading treatment or punishment is non-derogable, even in times of emergency should be explicitly specified in the Constitution.

Given the culture of impunity for torture and the many victims of torture who have yet to see justice either for violations that occurred during the Gadhafi era or during the transitional period, the ICJ recommends including a number of additional elements in relation to the prohibition of torture in the Libyan Constitution. The first is an explicit requirement for the state to criminalise torture in national legislation in line with the express obligations under article 4 of CAT and article 8 of the Arab Charter.<sup>181</sup> The second is a provision stating that victims of torture and other cruel, inhuman or degrading treatment or punishment are entitled to redress as well as an enforceable right to compensation, in line with article 14 of CAT and article 8 of the Arab Charter.<sup>182</sup>

Torture is currently criminalized in Libyan law but its provisions do not meet international standards. Article 435 of the Libyan Penal Code provides that “Any public official who orders accused persons to be tortured or who tortures them himself shall be sentenced to three to ten years of imprisonment.” This provision is supplemented by Law no.10 of 2013 which criminalises torture, forced disappearance and discrimination and provides for a minimum five year prison sentence for “anyone who inflicts or orders another person to inflict physical or mental pain on a detainee under his control in order to extract a confession for any act that such detainee has or has not committed, or because of discrimination, regardless of its type, or revenge, regardless of its motive.” These provisions fall short of international standards because, among others, the definition of torture is limited to the infliction of pain in order to extract a confession, on the basis of discrimination or for revenge. This does not fully reflect the definition contained in article 1 of CAT. The ICJ strongly recommends that the Constitution include a prohibition on torture and ill treatment that fully reflects the elements in Article 7 of the ICCPR and the definition contained in article 1 of the CAT and contains a requirement for the legislature to criminalise torture in keeping with that definition, as well as to legislate for an obligation on public officials that is fully consistent with Libya’s obligations

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<sup>179</sup> Article 1 of CAT states: “(1). For the purposes of this Convention, the term “torture” means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as 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, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions. (2). This article is without prejudice to any international instrument or national legislation which does or may contain provisions of wider application.”

<sup>180</sup> Committee against Torture, General Comment No. 2, CAT/C/GC/2, 24 January, para. 9.

<sup>181</sup> CAT, Article 4 reads: “1. Each State Party shall ensure that all acts of torture are offences under its criminal law. The same shall apply to an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture. 2. Each State Party shall make these offences punishable by appropriate penalties which take into account their grave nature.”

<sup>182</sup> See also Committee against Torture, General Comment No. 3, UN Doc CAT/C/GC3, 19 November 2012. There are precedents for a more detailed and prescriptive prohibition on torture in a new Constitution, especially in contexts where the Constitution is being drafted following a period marked by the widespread use of torture and impunity. See further the report by Redress and Lawyers for Justice in Libya.

under CAT to investigate all allegations of torture and refer all such cases to prosecution authorities.<sup>183</sup>

The Draft Constitution in article 121 states that torture is not subject to any statute of limitations. This is positive and should be retained.

The Constitution should specify that specific elements needed for full redress and compensation for torture and other ill-treatment should be further recognised in ordinary legislation. (Within the Constitution, the right to redress and compensation could be provided for either in the article concerning torture, or in a more general Constitutional provision for remedy and redress as discussed below, although the specific elements needed for full redress and compensation for torture and other ill-treatment would in either event further need to be recognised in ordinary legislation).

The Constitution should contain a clear prohibition of all forms of corporal punishment, including, among others, flogging, beating, and all forms of bodily mutilation. The UN Human Rights Committee has held that "corporal punishment, including excessive chastisement ordered as punishment for a crime or as an educative or disciplinary measure" is prohibited by article 7 of the ICCPR.<sup>184</sup> The CAT Committee has held that "sentencing to, and imposition of, corporal punishments by judicial and administrative authorities, including, in particular, flogging" are not in conformity with CAT.<sup>185</sup> The need for an explicit prohibition of corporal punishment in the Constitution is underlined by the fact that existing laws provide, for example, for lashing as a punishment for certain crimes.<sup>186</sup>

Article 115 in the Draft Constitution prohibits: "scientific and medical experiments for reasons other than their therapeutic interest". This does not conform to Article 7 of the ICCPR or the Arab Charter because the exception does not include the key requirement of *consent* to such experiments.<sup>187</sup> This requirement must be added.

The reference to combating torture is currently contained in article 121, entitled "Human Dignity" which, in the same sentence, prohibits forced disappearance, human trafficking and forced labour. The ICJ recommends that in the interest of clarity and accessibility, as well as to reflect the importance of these rights, each prohibition is addressed in separate articles. This would better reflect the approach of relevant international human rights treaties.

The provision that addresses *non-refoulement*, currently included in article 148, entitled 'Rights of Foreigners', is also relevant. The article states that "arbitrary and collective deportation shall be prohibited, defendants and convicted persons who are expected to be subjected to torture shall not be handed over, and this shall be subject to judicial guarantees." While this is a positive inclusion, it should be revised in two key respects to fulfil Libya's obligations under article 3 of CAT and article 7 of the ICCPR. First, article 3 of CAT and the equivalent protection under article 7 of the ICCPR applies to anyone, not only foreigners, and applies to any form of transfer for any reason, not only defendants and convicted persons" who may be "handed over". Second, the prohibition of *refoulement* has also been held to apply to transfers that risk forms of cruel, inhuman or degrading treatment or punishment other than torture as well as other types of irreparable harm such as risk of

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<sup>183</sup> CAT, articles 7 and 12.

<sup>184</sup> UN Human Rights Committee, General Comment 20, U.N. Doc. HRI/GEN/1/Rev.1 at 30 (1994) para 5.

<sup>185</sup> Conclusions and recommendations of the Committee against Torture: Saudi Arabia. 06/12/2002. CAT/C/CR/28/5, paras. 4, 8.

<sup>186</sup> See, for example, Law No. 52 of 1974.

<sup>187</sup> Article 7 of the ICCPR states: "[...] [N]o one shall be subjected without his free consent to medical or scientific experimentation."

enforced disappearance or violation of the right to life.<sup>188</sup> Finally, the CAT Committee has emphasised that the threshold of probability in article 3 (“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”) is a low one, and involves establishing “a real and personal risk” which must go beyond “mere theory or suspicion” but need not approach a high probability.<sup>189</sup> The language “expected to be subjected to torture” in the Constitutional provision could be interpreted as establishing a higher threshold of certainty than that prescribed by article 3 of the Convention against Torture, and should, for instance, be replaced by language that corresponds more exactly with the language of the Convention. The article should be revised in line with these elements.

#### 5. *The prohibition on slavery and servitude*

The prohibition of slavery is a fundamental tenet of international law. It is enshrined in article 8 of the ICCPR, which reads: “1. No one shall be held in slavery; slavery and the slave-trade in all their forms shall be prohibited. 2. No one shall be held in servitude.” Article 10 of the Arab Charter is to similar effect. The CDA’s December 2014 Proposals had a specific provision prohibiting “slavery and semi-slavery”. This was removed in the current draft and the only relevant provision that remains is found in article 121 which holds that: “All forms of human trafficking and ill-treatment shall be prohibited, as well as forced labour unless necessary or as an implementation of a penalty”. While the prohibition of human trafficking and forced labour is positive, the ICJ recommends that a provision is added that explicitly prohibits “slavery and the slave-trade in all their forms”, in line with the requirements of international law.

Article 121 also prohibits “forced labour, unless necessary or as an implementation of a penalty”. While it is positive that forced labour is prohibited, the exceptions should be narrower and defined to be no broader than the narrow exceptions provided for in article 8(3)(b) and (c) of the ICCPR<sup>190</sup>, as well as in conformity with article 6 of the ICESCR as elaborated upon by the ICESCR Committee in General Comment No. 18, as well as relevant ILO Conventions.<sup>191</sup>

#### 6. *The right to liberty and security of person*

Article 9(1) of the ICCPR provides that: “Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established

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<sup>188</sup> Human Rights Committee, General Comment No. 20, 30 Sep 1992, para. 9 and HRC GC No. 31, supra 72, para. 12.

<sup>189</sup> Committee against Torture, General Comment no 1 (1998), para 6; *Aemei v Switzerland*, Comm no 34/1995 (1997), para 9.5.

<sup>190</sup> ICCPR, Article 8(3)(a) No one shall be required to perform forced or compulsory labour; (b) Paragraph 3 (a) shall not be held to preclude, in countries where imprisonment with hard labour may be imposed as a punishment for a crime, the performance of hard labour in pursuance of a sentence to such punishment by a competent court; For the purpose of this paragraph the term “forced or compulsory labour” shall not include: (i) Any work or service, not referred to in subparagraph (b), normally required of a person who is under detention in consequence of a lawful order of a court, or of a person during conditional release from such detention; (ii) Any service of a military character and, in countries where conscientious objection is recognized, any national service required by law of conscientious objectors; (iii) Any service exacted in cases of emergency or calamity threatening the life or well-being of the community; (iv) Any work or service which forms part of normal civil obligations.

<sup>191</sup> Eg, ILO Convention No. 29 concerning Forced or Compulsory Labour, 1930; ILO Convention No. 105 concerning the Abolition of Forced Labour, 1957, both of which Libya has ratified. The ILO defines forced labour as “all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily.”

by law".<sup>192</sup> Other important clauses within article 9 of the ICCPR provide for specific procedural safeguards and other measures to secure the right to liberty:

2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.
3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled 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 other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement.
4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.
5. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.

Similar provisions are included in the Arab Charter on Human Rights.<sup>193</sup> The Arab Charter also expressly designates the right to challenge lawfulness of detention before a court as non-derogable, even in situations of the most extreme emergency.<sup>194</sup>

Article 115 of the Draft Constitution states: "Every individual is entitled to the right of personal liberty, and to physical, corporal and mental integrity". Article 124 and article 125 provide additional protections, including the following:

Every person is entitled to the right to respect for his human dignity in all criminal proceedings. The competent authorities shall justify their orders affecting rights and liberties. No arrest shall be made unless in designated places, and for a legally determined period that is proportionate to the charges; competent authorities shall be informed of the arrest, as well as the family of the arrested person or a person he chooses, his location shall be specified and he shall be provided with sufficient time and facilities to prepare his defence; he shall also be informed of his right against self-incrimination, his accountability for what he states, his right to choose and communicate with counsel and his right to an interpreter.

Article 125 goes on to provide that:

Deprivation of liberty shall only be used in case of insufficiency of alternative measures or procedures or penalties. Those who have been deprived of their liberty, temporarily or as an implementation of a court order, are entitled to compensation if the case was closed or in case of acquittal because the crime has not been committed or due to lack of evidence, as prescribed by law.

Both article 124 and article 125 are positive additions to the Draft Constitution, going further than the December 2014 Proposals in their protections against the arbitrary deprivation of liberty, and should be retained. However, these articles mix protections related to the right to liberty with guarantees of a fair trial and do not fully address the requirements of the ICCPR and the Arab Charter. The ICJ recommends that these elements are separated out into two

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<sup>192</sup> See also Article 6 of the African Charter of Human and Peoples' Rights; Article 17(2) of the Convention on Enforced Disappearance, Article 37(b) of the Convention on the rights of the Child, Article 16(4) of the Migrant workers convention, and section M(1)(b) of the Principles on Fair Trial in Africa. See also Human Rights Committee, General Comment No. 35, CCPR/C/GC/35, 16 December 2014, (HRC GC No. 35).

<sup>193</sup> Arab Charter, Article 14.

<sup>194</sup> Arab Charter, Articles 4(2).

separate articles and are expanded to include the constituent elements of each right, as required by international law and standards.

Given the fundamental nature of this right, the right to liberty and security of person should be expressly proclaimed, together with the three elements contained in article 9(1) of the ICCPR: the right to liberty and security of person, the prohibition of arbitrary arrest and of arbitrary detention and the prohibition of any deprivation of liberty that is not in accordance with grounds and procedures specified by law.

As for incorporating the fundamental guarantees and other measures set out in ICCPR articles 9(1) to 9(5) and Arab Charter articles 14(3) to (7), the provision should be expanded to include, in particular, an explicit prohibition of arbitrary arrest and detention and the requirement that anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and any charges against him.

In addition, the current provision allows for the person who is under arrest to be "informed of the competent judicial authority" but this must be expanded to expressly recognise the fundamental right to *habeas corpus*, that is the entitlement of any person deprived of liberty for any reason to take proceedings before a court, "in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful", as well as the additional right of "anyone arrested or detained on a criminal charge" to be "brought promptly before a judge or other officer authorized by law to exercise judicial power" and to be "entitled to trial within a reasonable time or to release."<sup>195</sup>

Further, in relation to persons under provisional criminal detention the UN Human Rights Committee has repeatedly over many years held that the "prompt" requirement in article 9(3) of the ICCPR "applies even before formal charges have been asserted, so long as the person is arrested or detained on suspicion of criminal activity", that a Prosecutor cannot qualify as a judicial officer for the purposes of article 9(3) of the ICCPR, and that:

While the exact meaning of "promptly" may vary depending on objective circumstances, delays should not exceed a few days from the time of arrest. In the view of the Committee, 48 hours is ordinarily sufficient to transport the individual and to prepare for the judicial hearing; any delay longer than 48 hours must remain absolutely exceptional and be justified under the circumstances. Longer detention in the custody of law enforcement officials without judicial control unnecessarily increases the risk of ill-treatment. Laws in most States parties fix precise time limits, sometimes shorter than 48 hours, and those limits should also not be exceeded. An especially strict standard of promptness, such as 24 hours, should apply in the case of juveniles.<sup>196</sup>

The Draft Constitution should therefore be revised and supplemented by further provisions in order to incorporate all of the guarantees and other measures required by article 9 ICCPR and article 14 of the Arab Charter.

Finally, given the prevalence of arbitrary detention in Libya during the transitional period<sup>197</sup>, the ICJ recommends that the Constitution provides for the creation of a national prevention mechanism, which is entitled to visit and inspect all places where persons are detained. The

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<sup>195</sup> ICCPR, article 9(4) and article 9(3), respectively.

<sup>196</sup> HRC GC no.35, supra 192, paras 32 and 33.

<sup>197</sup> See, for example, "The Endless Wait" Long term Arbitrary Detentions and Torture in Western Libya', Human Rights Watch, December 2015, available at: [https://www.hrw.org/sites/default/files/report\\_pdf/libya1215\\_4up\\_1.pdf](https://www.hrw.org/sites/default/files/report_pdf/libya1215_4up_1.pdf)

ICJ also strongly recommends that Libya ratifies the Optional Protocol to CAT as soon as possible.

### 7. *The right to a fair trial*

The right to a fair trial is recognised in numerous international and regional human rights treaties, and includes safeguards not only during the conduct of a trial itself, but also during the investigation phase.<sup>198</sup> The essence of the right to a fair trial by an independent, impartial and competent court constituted by law is also non-derogable in situations of emergency.<sup>199</sup>

Article 118 in the Draft Constitution, entitled 'Right of Litigation' read with article 120 and article 124 provide for some important elements of the right to a fair trial but do not fully conform to Article 14, ICCPR. Article 118 currently reads as follows:

Everyone is entitled to the right to access justice, and every individual has the right to a fair trial, before his ordinary judge, within reasonable timing and in which all guarantees are ensured. Every administrative decision shall be subject to judicial review, no act that harms or threatens rights and liberties shall be excluded from judicial jurisdiction.

Article 120 "The Principle of Legality and the Presumption of Innocence" states, in part, that the "*accused shall be innocent until proven guilty.*" Article 124, entitled 'Procedural Guarantees' provides:

Every person is entitled to the right to respect for his human dignity in all criminal proceedings. [...] [H]e shall be provided with sufficient time and facilities to prepare his defence; he shall also be informed of his right against self-incrimination, his accountability for what he states, his right to choose and communicate with counsel and his right to an interpreter.

In the interest of clarity and accessibility, the ICJ recommends that there should be a freestanding article on the right to a fair trial with all guarantees, required by international law, addressed in the same article. Further provisions outlining key aspects of the right to a fair trial must be added in order to conform to the requirements of international law, including article 14, ICCPR and articles 12, 13 and 16 of the Arab Charter.

First, it is crucial in order to conform to international standards on both the right to a fair trial and on the independence of the judiciary that the provision specifies that all individuals have the right to be tried by an *independent, impartial and competent* tribunal, with its independence secured by legal guarantees (such as could be provided for in Chapter III of the draft, which addresses the independence of the judiciary).<sup>200</sup> The article should provide that all individuals are equal before the courts and tribunals.<sup>201</sup> Additional minimum guarantees should be added, including: 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";<sup>202</sup> to be tried in his

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<sup>198</sup> For a comprehensive analysis of international standards on the right to a fair trial see Amnesty International, *Fair Trial Manual*, 2<sup>nd</sup> ed., 2014, available at [amnesty.org/fairtrials](http://amnesty.org/fairtrials).

<sup>199</sup> See Arab Charter, Articles 4(2) and 13. HRC GC No. 32, supra 62, para. 6; HRC GC No. 29, supra 82, para. 11.

<sup>200</sup> See ICCPR, Article 14; HRC GC No.32, supra 62; UN Basic Principles on the Independence of the Judiciary, Adopted by the 7<sup>th</sup> UN Congress on the Prevention of Crime and the Treatment of Offenders, 1985, endorsed by UNGA Resolutions 40/32, November 1985 and 40/146, December 1985, (UN Basic Principles on the Independence of the Judiciary); Arab Charter, Articles 12 and 13.

<sup>201</sup> ICCPR, 14(2); Arab Charter, Article 12.

<sup>202</sup> ICCPR, Article 14(3)a, Arab Charter, Article 16(1).

presence, and the right to examine witnesses or to have them examined on behalf of the defendant, as well as the right to have his own witnesses attend and be examined.<sup>203</sup>

The ICJ also recommends the explicit exclusion of any possibility of the use of evidence that may have been obtained through torture, ill treatment or similar unlawful means. Additionally, the article on the right to a fair trial should add the protective principle that a defendant should not be compelled to either confess guilt or provide evidence against himself.<sup>204</sup> Finally, reflecting the provisions related to a fair trial in the CRC (as well as related provisions in article 14(4) of the ICCPR, article 17 of the Arab Charter and article 146 of the Draft Constitution on the "Rights of the Child"), the Constitution should provide that all trials should take account of the age of a juvenile person and all decisions should be made with the best interests of the child as a primary consideration, including ensuring respect for their dignity, and their rehabilitation should be the key aim of the judicial processes concerning them.<sup>205</sup>

#### 8. *Freedom of opinion and expression*

Article 132 on 'the right to expression and publication' states: "Honesty and freedom of speech go hand in hand, the State shall ensure the right to expression and publication, it shall take necessary measures to protect private life and prohibit defamation, libel, incitement of hatred, racism, violence, declaring others as infidels and imposition of ideas by force."

This article is inconsistent with international standards in several respects. Article 19 of the ICCPR provides:

1. Everyone shall have the right to hold opinions without interference.
2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
  - (a) For respect of the rights or reputations of others;
  - (b) For the protection of national security or of public order (ordre public), or of public health or morals.

First, article 132 omits explicit recognition of the right to freedom of opinion, as affirmed by article 19(1) of the ICCPR (and the similar provision in article 32 of the Arab Charter).<sup>206</sup>

Second, the affirmation that freedom of expression is correlated to "honesty" risks being interpreted as limiting the scope of freedom of expression. While some forms of untrue expression may be subject to limitation if the requirements of article 19(3) of the ICCPR are met, in general untrue expression is also protected by freedom of expression.<sup>207</sup>

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<sup>203</sup> ICCPR, Article 14 (3)(e); Arab Charter, Article 16(5).

<sup>204</sup> ICCPR, Article 14(3)(f), Arab Charter, Article 16(6).

<sup>205</sup> CRC, Articles 3, 37, 40.

<sup>206</sup> See also HRC GC No. 34, supra 81, paras 9 and 10.

<sup>207</sup> Ibid 34, para 11; Concluding Observations on Cameroon (1999), UN Doc CCPR/C/79/Add.116, para 24.



Third, international standards suggest that defamation and libel should not be subject to criminal prohibitions.<sup>208</sup>

Fourth, the language on prohibition of incitement to hatred, racism and violence in article 132 risks being in some respects overbroad and in others under-inclusive, when compared to the similar provision in Article 20 of the ICCPR, which reads: "*Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.*"

Fifth, the prohibition of "declaring others as infidels" [Takfir] makes some sense in the specific cultural context of Libya, where such a declaration is frequently a prelude to or invoked as a justification for violence against such persons, however, this phrase lacks precision and may be open to broad interpretation. Therefore, the ICJ recommends that consideration be given to rewording the article in a manner that follows ICCPR article 20 more closely.

The ICJ therefore recommends the inclusion of the express recognition of freedom of opinion; the deletion of the phrase "Honesty and freedom of speech go hand in hand"; the replacement of "prohibition of defamation and libel" with "the provision of civil remedies for defamation and libel"; and replacing "prohibit...incitement of hatred, racism, violence, declaring others as infidels" with "prohibit any advocacy of national, racial or religious hatred, that constitutes incitement to discrimination, hostility or violence".

Article 133, entitled 'Press and Media' states: "The State shall guarantee the freedom, pluralism and independence of the press and media, as well as the right of the individual to own [press and media] outlets. They shall be organised on the basis of a democratic society and the specific Libyan context. They shall not be suspended unless by a court order or dissolved unless by court judgment. There shall be no provisional detention in press related cases."

The requirement that press outlets be organised taking into account the specific Libyan context contravenes the broad right to freedom of expression. In addition, the provision allowing a court order to dissolve a media outlet is too broad. These aspects do not comply with the requirements of article 19(3) of the ICCPR.

The prohibition of provisional detention in 'media cases' is positive but must not be interpreted as implying that other types of detention are necessarily acceptable in 'media cases'. Cases relating to the right to freedom of expression and the media should, except in cases with an obvious criminal character falling within the scope of article 19(3) of the ICCPR, be dealt with in the civil courts and not in criminal courts.

Also relevant to the right to freedom of expression is article 150 on "Transparency and the Right to Information", which holds that "The State shall provide the necessary measures for transparency, it shall guarantee the freedom to receive, transfer, exchange and access information, as well as multiplicity of its sources, without prejudice to military secrets, public security secrets, administration of justice, inviolability of private life, what has been agreed upon with another State to maintain as confidential, while protecting the source of the information."

The right to freedom of expression, as outlined in the ICCPR, includes "*freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.*" This right is subject only to the restrictions contained in article 19(3), as outlined above.

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<sup>208</sup> HRC GC No 34, supra 81, para 47.

Some aspects of the scope for restrictions in both article 123 and article 150 appear to exceed what is permitted under article 19 ICCPR: for instance, potentially restricting the right of private individuals to “receive, transfer, exchange and access” information relating to “inviolability of private life”, “administration of justice” or “what has been agreed upon with another State to maintain as confidential.” While some restrictions in some circumstances might be justified on facts related to these grounds, the wide and unconditional phrasing of these exceptions appears overbroad, presenting a risk of violations of rights.<sup>209</sup> The ICJ recommends that the drafters either delete the potentially overbroad exceptions to freedom of expression, or incorporate language more closely based on articles 19 and 20 of the ICCPR.

#### 9. Freedom of thought, conscience and religion

The ICJ strongly recommends the addition of an article protecting the right to freedom of thought, conscience and religion, in line with article 18 of the ICCPR (and the similar provision in article 30 of the Arab Charter). Article 18 provides in part as follows:

1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.
2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.
3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.

The omission of any explicit mention of the right to freedom of religion from the Draft Constitution is striking and of the deepest concern.

Not only do both the ICCPR and the Arab Charter expressly affirm freedom of religion, in both cases it is expressly made non-derogable, including the most extreme emergencies, and both treaties explicitly prohibit any emergency measure that involves discrimination on grounds of religion.<sup>210</sup> Of note, the 1951 Constitution of Libya contained the right to freedom of belief.<sup>211</sup> Regional examples of Constitutions that contain the right to freedom of belief include the Tunisian 2014 Constitution<sup>212</sup> and the Lebanese Constitution.<sup>213</sup> Protecting this right is crucial given the history of discrimination against, and marginalisation of religious minorities in Libya both previously under the Gadhafi regime and during the ongoing conflict, including attacks

<sup>209</sup> See *Ibid*, paras 21- 52. See also the Global Principles on National Security and the Right to Information (The Tshwane Principles) published by Open Society Justice Institute in June 2013.

<sup>210</sup> ICCPR, Articles 4(2) and 18; Arab Charter, Articles 4(2) and 30. See further HRC General Comment No. 22, U.N. Doc. HRI/GEN/1/Rev.1 at 35 (1994) and HRC General Comment No. 24, CCPR/C/21/Rev.1/Add.6, 11 April 1994.

<sup>211</sup> Article 21 of the 1951 Constitution of Libya reads: “Freedom of belief shall be absolute. The State shall respect all religions and faiths and shall ensure to Libyans and to foreigners residing in its territory freedom of belief and the liberty to practice religious rites so long as this does not prejudice public order and morality.” Translation by DCAF, available here: [http://www.security-legislation.ly/sites/default/files/files/lois/13-%20Constitution%20of%201951\\_EN.pdf](http://www.security-legislation.ly/sites/default/files/files/lois/13-%20Constitution%20of%201951_EN.pdf)

<sup>212</sup> Article 6 of the Tunisian 2014 Constitution reads: “*The state is the guardian of religion. It guarantees freedom of conscience and belief, the free exercise of religious practices and the neutrality of mosques and places of worship from all partisan instrumentalisation.*”

<sup>213</sup> Article 9 of the Lebanese 1926 Constitution reads “*There shall be absolute freedom of conscience. The state in rendering homage to the Almighty shall respect all religions and creeds and shall guarantee, under its protection, the free exercise of all religious rites provided that public order is not disturbed. It shall also guarantee that the personal status and religious interests of the population, to whatever religious sect they belong, shall be respected.*”

on Sufi religious sites and attacks against Christian groups.<sup>214</sup> The right to freedom of thought, conscience and religion must therefore be fully recognised and protected in the new Libyan Constitution, in line with Libya's obligations under the ICCPR and Arab Charter, as well as general international law.

As was discussed more generally earlier, a number of articles of the Draft Constitution, referring to an operative and potentially overriding role within the Constitution for *Sharia*, in particular article 7, appear incompatible with the right to freedom of religion and prohibition of religious discrimination under the ICCPR and the Arab Charter. The UN Human Rights Committee has said:

The Committee observes that the freedom to "have or to adopt" a religion or belief necessarily entails the freedom to choose a religion or belief, including, *inter alia*, the right to replace one's current religion or belief with another or to adopt atheistic views, as well as the right to retain one's religion or belief. Article 18(2) bars coercions that would impair the right to have or adopt a religion or belief, including the use of threat of physical force or penal sanctions to compel believers or non-believers to adhere to their religious beliefs and congregations, to recant their religion or belief or to convert.

...

The fact that a religion is recognised as a State religion or that it is established as official or traditional or that its followers comprise the majority of the population, shall not result in any impairment of the enjoyment of any of the rights under the Covenant, including articles 18 and 27, nor in any discrimination against adherents of other religions or non-believers. In particular, certain measures discriminating against the latter, such as measures restricting eligibility for government service to members of the predominant religion or giving economic privileges to them or imposing special restrictions on the practice of other faiths, are not in accordance with the prohibition of discrimination based on religion or belief and the guarantee of equal protection under article 26.<sup>215</sup>

As noted above, the ICJ recommends substantial amendment to article 7.

#### 10. *The right to health*

The right to health is a fundamental right that is indispensable for the enjoyment of other rights.<sup>216</sup> The Draft Constitution addresses the right to health in article 114, as follows:

Health is a right to every individual and an obligation upon the State and Society. The State shall provide, to all citizens, a full health care, of quality, and provide preventive service therefore. It shall also provide them with therapeutic services of all stages, pursuant to a suitable collective system. It shall guarantee just geographic distribution of health facilities. It shall be prohibited to refuse to provide any form of medical treatment to any individual at times of emergency or danger to life.

Article 12(1) of ICESCR provides for "the right of everyone to the enjoyment of the highest attainable standard of physical and mental health". Similar provisions are found in the African Charter (article 16) and Arab Charter (article 39). It is positive that article 114 recognises the right of every individual to health. However, the focus of the rest of the article is on the

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<sup>214</sup> See eg <http://www.hrw.org/world-report/2014/country-chapters/libya?page=3> and <https://www.amnesty.org/en/articles/news/2015/05/libya-horrific-abuse-driving-migrants-to-risk-lives-in-mediterranean-crossings/>

<sup>215</sup> Human Rights Committee, General Comment No. 22, CCPR/C/21/Rev.1/Add.4, 30 July 1993, paras 5 and 9.

<sup>216</sup> Committee on Economic, Social and Cultural Rights, General Comment No. 14, E/C.12/2000/4, 11 Aug 2000, (CESCR GC No.14), para. 1.

provision of healthcare. While this is a constitutive element of the right to health, it does not fully reflect the scope of the right.

The ICESCR Committee, tasked with authoritatively interpreting and assessing state parties' compliance with the Covenant, has specifically stated that the right to health is not limited to the right to health care.<sup>217</sup> It has established that the right to health involves both freedoms, such as the right to control one's health and body and the right to be free from interference or mistreatment in any form,<sup>218</sup> and entitlements regarding access to adequate health facilities, goods, services and information. Article 12(2) of the ICESCR outlines positive steps to ensure the full realisation of the right, demonstrating clearly that the right goes beyond providing health care.<sup>219</sup> The right to health embraces numerous other factors that promote conditions in which all people can lead a healthy life, including ensuring the actual practical availability and accessibility of health care, as well as the underlying determinants of health such as food, housing, water, safe working conditions and a healthy environment.<sup>220</sup>

The Constitution should therefore include an expanded definition and scope of the right to health, reflecting the requirements of article 12 of the ICESCR and its interpretation by the ICESCR Committee.

The ICJ also recommends that article 113 on 'the right drink and to food' which reads: "The State shall guarantee, to every citizen, the right to healthy and sufficient drink and food, and shall establish necessary policies in order to ensure water and food security" should be expanded to enshrine the right to *safe drinking water* and *sanitation*, reflecting international standards on this issue.<sup>221</sup>

#### 11. *The right to work and related rights*

The right to work, recognised by article 6 of the ICESCR, article 15 of the African Charter, and article 34 of the Arab Charter, is also considered a fundamental right, essential for realising other rights and important for human dignity.<sup>222</sup> It is both an individual and a collective right and can play a fundamental contributing factor to the survival of the individual and his/her family.<sup>223</sup> It is complemented by the right to just and favourable conditions of work (article 7 ICESCR, article 15 African Charter, article 34 Arab Charter), and the right to form trade unions and to strike (article 8 ICESCR, article 22 ICCPR, article 35 Arab Charter).

The Draft Constitution includes a provision on the 'Right to Employment', (article 141). This article fails to meet international standards in a number of ways. First, article 141 refers only to the rights of citizens. As discussed earlier, rights protected in the ICESCR extend to all individuals without discrimination under the jurisdiction of the state.<sup>224</sup> While acknowledging potential limiting aspects provided for by Article 2(3) of the ICESCR, it is important to note

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<sup>217</sup> Ibid, para. 4.

<sup>218</sup> Ibid

<sup>219</sup> ICESCR, Article 12(2) reads: "2. The steps to be taken by the States Parties to the present Covenant to achieve the full realisation of this right shall include those necessary for: (a) The provision for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child; (b) The improvement of all aspects of environmental and industrial hygiene; (c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases; (d) The creation of conditions which would assure to all medical service and medical attention in the event of sickness." The ICESCR Committee has confirmed in its General Comment 14 (E/C.12/2000/4, 11 Aug 2000) that these steps are non-exhaustive.

<sup>220</sup> CESCR GC No.14, supra 216, para. 4.

<sup>221</sup> See, for example, article 14(2) CEDAW and article 24, CRC.

<sup>222</sup> Committee on Economic, Social and Cultural Rights, General Comment No. 18, E/C.12/GC/18, 6 February 2006, (CESCR GC No. 18), para. 1.

<sup>223</sup> Ibid, paras 1, 6.

<sup>224</sup> See ICESCR, Article 2(2).

that article 6 of ICESCR specifically refers to the right of “everyone” to work and the ICESCR Committee has specifically stated that, “The labour market must be open to everyone under the jurisdiction of States parties”.<sup>225</sup> Thus ‘citizens’ should be changed to ‘all individuals’ or ‘everyone’.

Article 6 of the ICESCR provides that, “States parties to the present Covenant recognise the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right.” In order to conform to article 6, the article should include the requirement that the state must take the appropriate steps to safeguard the right to work, (and not just to “ensure the enhancement of its quality and provision of job opportunities to job seekers”). In order to reflect article 7 of ICESCR, the requirement that the State must ensure that the conditions of work are “just and favourable” should be added.<sup>226</sup> In particular, the Constitution should require, as specifically set out in the ICESCR, that workers are entitled to: “fair wages and equal remuneration for work of equal value without distinction of any kind” that permit them to earn a: “decent living for themselves and their families; “safe and healthy working conditions”; the “equal opportunity for everyone to be promoted in his employment to an appropriate higher level, subject to no considerations other than those of seniority and competence”; and “rest, leisure and reasonable limitation of working hours and periodic holidays with pay, as well as remuneration for public holidays.”<sup>227</sup> The ICESCR Committee has underlined that protecting these rights helps ensure respect for the physical and mental integrity of the worker in the exercise of his employment.<sup>228</sup>

Article 141 also provides that “the right to syndicates shall be guaranteed”. This is a positive inclusion and should be retained. The scope of the right, however, should be expanded to more closely conform to Article 8 of the ICESCR and article 22 of the ICCPR, including by enshrining the right of workers to form and join trade unions. The provision should expressly recognise that workers have the right to use associations and unions “for the promotion and protection of” the worker’s “economic and social interests”, including economic, social, cultural, civil and political rights.<sup>229</sup> The Constitution should protect the right of trade unions to establish national federations or confederations and their right to join international trade union organisations.<sup>230</sup>

In addition, this right should explicitly apply to all individuals and should not be limited to “citizens” for the reasons outlined above and, in particular, to ensure that labour rights apply to migrant workers.

## 12. *The right to education*

The right to education is, like others, a right that plays a crucial role in the realisation of other human rights.<sup>231</sup> Article 13 of the ICESCR provides for the right to education and that education “shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms”; that it is to “enable all persons to participate effectively in a free society”; that it should “promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups”; and that it should “further the activities of the United Nations for the maintenance of peace.” Related provisions are found in articles 17(1) and 25 of the African

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<sup>225</sup> CESCR GC No. 18, supra 222, para. 12(b).

<sup>226</sup> ICESCR, Article 7.

<sup>227</sup> Ibid, Article 7(a)(1),(c),(d).

<sup>228</sup> CESCR GC No. 18, supra 222, para. 7.

<sup>229</sup> Ibid, Article 8(1)(a).

<sup>230</sup> Ibid, Article 8(1)(b).

<sup>231</sup> Committee on Economic, Social and Cultural Rights, General Comment No. 13, E/C.12/1999/10, 8 December 1999, (CESCR GC No. 13).

Charter and article 41 of the Arab Charter. The Draft Constitution recognises and specifies a number of elements of the right to education under article 128, 'The Right to Education', article 129, 'Tertiary Education', article 130 on 'Technical Education' and article 131, 'Priority of Education and Scientific Research'. However, these articles do not fully meet the requirements of the ICESCR. Key concerns of the ICJ include the provisions relating to the "academic curricula" and to ensuring access to education.

Of concern is the inclusion in the article on the right to education that, "academic curricula shall be built on [...] the teachings of the Islamic religion and values", (article 128). This could be interpreted as requiring mandatory religious instruction. As such, it is inconsistent with article 13(3) of the ICESCR, which provides that parents and guardians have the right "to ensure the religious and moral education of their children in conformity with their own convictions",<sup>232</sup> as well as freedom of religion under article 18 of the ICCPR, and the non-discrimination provisions of the ICCPR and the ICESCR. This provision should therefore be removed or revised, for instance by including a provision for unrestricted non-discriminatory exemptions from religious instruction upon simple request, or similar alternatives that would "accommodate the wishes of parents and guardians."<sup>233</sup> Another approach would be to provide for the curricula, instead of being built on "teachings of the Islamic religion and values", to include education on the factual and philosophical history of all religions, without discrimination. The ICESCR Committee has noted that article 13(3) "permits public school instruction in subjects such as the general history of religions and ethics if it is given in an unbiased and objective way, respectful of the freedoms of opinion, conscience and expression."

Accessibility and availability are fundamental tenets of the right to education. This includes, amongst others, economic accessibility.<sup>234</sup> Article 13(2) of the ICESCR outlines that for the full realisation of the right, the state should ensure that primary education is "compulsory and available free to all", secondary education shall be made "generally available and accessible to all by every appropriate means, and, in particular by the progressive introduction of free education" and higher education shall be made "equally accessible to all" including "the progressive introduction of free education". The ICESCR Committee has stated that economic accessibility entails an education that is affordable for all.<sup>235</sup>

Article 128 of the Draft Constitution provides that: "Education is an inviolable right; the State shall ensure the elevation of its value, and its provision to every citizen in accordance with his mental and scientific capacity, without discrimination. It is compulsory until the age of eighteen, and free at all stages in public education institutions." The provision for free education at all stages is a positive inclusion and should be retained. However, reflecting the earlier discussion on the obligation of Libya to ensure rights to all those under its jurisdiction, the reference to 'citizens' in this article should be changed to individuals. As noted above, the ICESCR Committee has specifically stated that: "The ground of nationality should not bar access to Covenant rights, e.g. all children within a State, including those with an undocumented status, have a right to receive education".<sup>236</sup> The article could also be improved by providing that fundamental education shall be encouraged or intensified for persons who have not completed primary education, reflecting article 13(2)(d) of ICESCR.

### 13. *The right to participate in cultural life and to benefit from scientific progress*

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<sup>232</sup> Ibid, para. 28.

<sup>233</sup> Human Rights Committee, General Comment No. 12, 12 Apr 1984; Human Rights Committee, General Comment No. 22, CCPR/C/21/Rev.1/Add.4, 27 September 1993, para. 6.

<sup>234</sup> CESCR GC No.13, para. 6(b).

<sup>235</sup> Ibid, para. 6(b).

<sup>236</sup> ICESCR Committee, General Comment No. 20, U.N. Doc. HRI/GEN/1/Rev.1 30 Sep 1992, para. 30.

Article 15 of the ICESCR protects the right of everyone to: “take part in cultural life”; “enjoy the benefits of scientific progress and its applications” and to “benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.” Related provisions are found in article 17(2) of the African Charter and article 42 of the Arab Charter.

The Draft Constitution includes provisions relevant to the rights contained in ICESCR article 15 in three articles: article 134 on ‘Languages and National Cultures’, article 127 on ‘The Right to Intellectual Property’ and article 131, “Priority of Education and Scientific Research” which reads “Priority shall be given to education in all its stages and scientific research, in the rates of distribution of national income and in a progressive manner in order to comply with international standards.”

Article 134 states: “Every person is entitled to the right to use and learn national languages and to participate in cultural life individually or collectively, the State shall protect them and provide necessary outlets to learn and use them in media outlets. It shall also ensure the protection of national cultures, heritage, customs, literature, arts, as well as the development thereof and the distribution of cultural services.” Article 134 is analysed above in the context of minority rights; in order to conform to article 15 of the ICESCR more fully, the Constitution should additionally recognise the right of everyone to “freely choose their own cultural identity, to belong or not to belong to a community, and have their choice respected” as well as the right not to be discriminated against on the basis of their cultural identity.<sup>237</sup>

Article 127 on the right to intellectual property, holds, “The State shall ensure the protection of material and moral rights of all forms of intellectual property and in all areas. The State shall also support it, as prescribed by law”. This article is problematic to the extent that by focusing on intellectual property *per se*, the provision does not recognise the broader features of the human right outlined in article 15 of ICESCR, which seeks to “encourage the active contribution of creators to the arts and sciences and to the progress of society as a whole”.<sup>238</sup> The ICESCR Committee has explained that intellectual property rights are generally of a temporary nature and can be “revoked, licensed or assigned to someone else”, while human rights, including those set out in article 15 of the ICESCR, are “timeless expressions of fundamental entitlements of the human person”. The Committee has consequently stated that, on the one hand “the human right to benefit from the protection of the moral and material interests resulting from one’s scientific, literary and artistic productions safeguards the personal link between authors and their creations and between peoples, communities, or other groups and their collective cultural heritage, as well as their basic material interests which are necessary to enable authors to enjoy an adequate standard of living.” On the other, “intellectual property regimes primarily protect business and corporate interests and investments.” The Committee has also made clear that States parties must strike an adequate balance between: “the effective protection of the moral and material interests of authors and the State party’s obligations in relation to the other rights recognised in the Covenant”,<sup>239</sup> which would include for instance the right of others to “enjoy the benefits of scientific progress and its applications”, “the freedom indispensable for scientific research and creative activity”, and the right to take part in cultural life, itself. The ICJ therefore recommends that this article in the Draft Constitution be reworded to better reflect article 15 of ICESCR, remove the exclusive emphasis on intellectual property rights and meet the requirements by the ICESCR Committee, as outlined above.

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<sup>237</sup> Committee on Economic, Social and Cultural Rights, General Comment No. 21, E/C.12/GC/21, 21 December 2009, para. 49.

<sup>238</sup> Committee on Economic, Social and Cultural Rights, General Comment No. 17, E/C.12/GC/17, 12 January 2006, para. 1.

<sup>239</sup> Compilation Of Guidelines On The Form And Content Of Reports To Be Submitted By States Parties To The International Human Rights Treaties UN Doc HRI/GEN/2/Rev.6, 3 June 2009, Article 71(d).

#### 14. Article 10, ICESCR and related rights

Article 10 of the ICESCR outlines a number of provisions in relation to the family including that “marriage must be entered into with the free consent of the intending spouses”. Article 23(3) of the ICCPR holds that “[n]o marriage shall be entered into without the free and full consent of the intending spouses”. The ICJ regrets the removal of the provision in the December 2014 Proposals which prohibited forced marriage and strongly recommends that the Constitution includes a provision requiring that marriage can only be entered into with the free and full consent of both spouses.

The definition of “family” in article 31 of the Draft Constitution is inconsistent with the scope of the references to “family” in articles 17 and 23(1) of the ICCPR. The UN Human Rights Committee has held that the term “family” in those provisions is not restricted to families “formed by legal marriage between a man and a woman” and would generally, for instance, include the relationship between an unmarried mother and her child.<sup>240</sup> The ICJ therefore recommends that, if article 31 is retained in some form, the phrase “formed by legal marriage between a man and a woman” be deleted.

#### 15. “The Rights of Foreigners” and the right to asylum

While some aspects of article 148, entitled ‘The Rights of Foreigners’ in the Draft Constitution are positive, other aspects of the article are of concern from a human rights perspective. As discussed earlier, State parties to human rights treaties are required to ensure that the rights contained within human right treaties, with the exception of narrowly defined political rights, are extended to all individuals under their jurisdiction. The inclusion of an article specifically on the ‘rights of foreigners’ may be open to the interpretation that the rest of the rights protected by the Constitution do not apply to foreigners, in direct contravention of international law. To protect against this interpretation this article should be renamed ‘additional rights of foreigners’.

The ICJ recommends that the right to *non-refoulement* should be expanded to adhere to all individuals in Libya, along the lines outlined earlier in this report.

Article 17 of the Draft Constitution provides for a right to political asylum. The ICJ strongly recommends that the right to asylum is expanded to conform to Libya’s obligations under the Organisation of the African Union Convention Governing the Specific Aspects of Refugee Problems in Africa, which Libya ratified in 1981. In particular, the grounds for refugee status should include at least the grounds outlined in the Convention, including persons facing persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion, as well as every person who, “owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality.”

### **B. Derogations and Permissible Limitations on Rights**

#### *Derogations*

As discussed above in relation to the draft article on States of Emergency in Chapter XII, under international human rights law, states can derogate from certain rights in times of emergency but when doing so must comply with strict conditions, as outlined in article 4 of

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<sup>240</sup> See e.g. Human Rights Committee, *Tcholatch v Canada*, UN Doc CCPR/C/89/D/1052/2002 (3 May 2007), para 8.2; *Santacana v Spain*, UN Doc CCPR/C/51/D/417/1990 (27 July 1994).



the ICCPR and article 4 of the Arab Charter. A very high threshold of “threat to the life of the nation” is set before any derogation can be justified. The public emergency must be publicly declared, the derogation must be urgently necessary and proportionate, the measures must be consistent with other obligations under international law and must not involve discrimination on certain grounds including race, colour, sex, language, religion or social origin. The ICCPR and Arab Charter specify that no derogation is ever permissible in relation to a number of rights.

Article 151 of the Draft Constitution holds that: “Any derogation imposed on rights and liberties shall be necessary, clear, precise and proportionate to the protected interest, taking into account the characteristics of a democratic society, without prejudice to Article 7, and it shall be prohibited to revisit guarantees that have been recognised or established by law without contravening the provisions of this Constitution.”

This does not fully reflect the ICCPR or the findings of the UN Human Rights Committee, as outlined below.

On key points it would be preferable to actually incorporate the relevant provisions of the treaties into the Constitution. For instance, the Constitution must include language specifying certain rights as non-derogable in keeping with the ICCPR and the Arab Charter, and must incorporate the higher threshold of the existence of a demonstrable “threat to the life of the nation” before any rights are to be derogated from, and that any derogations must be publicly declared, and the Constitution must incorporate other conditions for any derogation, as was described earlier in more detail.

The ICJ expresses its concern that this article provides for derogations in a democratic society, “without prejudice to article 7”. This suggests that where an interpretation of Sharia may provide for narrower protections for human rights than may be expected in a democratic society the narrower protections will prevail. The ICJ recommends that this clause be removed.

The phrase “it shall be prohibited to revisit guarantees that have been recognised or established by law without contravening the provisions of this Constitution” appears to provide that should certain rights that are derogable under the Constitution be considered in domestic law as non-derogable, the provision providing for the greater protection of rights shall take precedence. This is positive but the wording is somewhat ambiguous and, if this is indeed what the drafters intended, the meaning of the provision should be made clearer.

### *Permissible Limitations*

Some human rights can be subject to restrictions, even in the absence of derogations in times of emergency. These limitations, however, must also be clearly defined and must meet a number of criteria. Limitations must be lawful, reasonable and capable of being demonstrably justified in a democratic society. Limitations should be clear and accessible and not be “arbitrary or unreasonable”. In addition, they must clarify the nature of the right to be limited, the extent to which the right can be limited, the relation between the limitation and its purpose and why it is necessary to limit the right rather than use less restrictive means to achieve the purpose (i.e. including an element of proportionality).<sup>241</sup>

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<sup>241</sup> See eg HRC GC No. 31, supra 72, para. 6; HRC GC No.34, supra 81, paras 21-36. Siracusa Principles on the Limitation and Derogation of provisions in the ICCPR, UN Economic and Social Council, UN Sub/Commission on Prevention of Discrimination and Protection of Minorities, E/CN.4/1984; paras 15-17.

It must be made clear that (absent derogation in time of emergency, for those rights that are subject to derogation) no restrictions are permissible in relation to articles providing for, for instance:

- The right not to be arbitrarily deprived of one's life;
- The prohibition of torture and other cruel, inhuman or degrading treatment or punishment, as well as of non-consensual scientific or medical experiments;
- The prohibition of slavery, the slave-trade or the holding of persons in servitude;
- The prohibition of arbitrary deprivation of liberty and associated rights and guarantees;
- The right of all persons deprived of their liberty to be treated with humanity and with respect for the inherent dignity of the human person, and associated rights and guarantees;
- The prohibition of imprisonment on the ground of inability to fulfil a contractual obligation;
- The prohibition of arbitrary deprivation of the right to Libyans to enter Libya;
- The right to fair trial and associated rights and guarantees;
- The prohibition of retroactive offences and requirement of legality (see article 15 ICCPR, e.g.);
- The right of everyone to recognition everywhere as a person before the law;
- The prohibition of arbitrary or unlawful interference with privacy, family, home or correspondence;
- The right to marry;
- Children's rights including to nationality and birth registration;
- Equality and non-discrimination rights.

(Certain rights that are qualified by reference to "arbitrary" interference or "arbitrary" deprivation are obviously not without limits, but rather than speaking of "restrictions" *per se*, the question is whether a particular interference or deprivation is "arbitrary" or not.)

Articles providing for restrictions in relation to each separate article on human rights in the Constitution should be reviewed and revised to ensure that they are entirely consistent with the limited scope for restrictions under the parallel provisions of the ICCPR and Arab Charter as well as other relevant international standards. Some of the restrictions on rights provided for in the Draft Constitution, within each article proclaiming the right, are vague and unclear or do not meet the criteria provided for in international law and standards. A comprehensive article-by-article review of such restrictions clauses is required, especially in relation to article 121 on 'Human Dignity', article 126 on 'The Inviolability of Private Life', article 140 on 'The Right of Assembly, Association and Demonstration' and article 150 on 'Transparency and the Right to Information'.

### **C. Human Rights Protection**

The right to effective remedy and reparation is a fundamental right under international human rights law. It is important that the right to a remedy, as well as the duty of the state to ensure that a remedy is enforced, is enshrined in the Constitution, reflecting, in particular, article 2(3) of the ICCPR.<sup>242</sup> Article 12 of the Arab Charter requires States parties to "guarantee every person subject to their jurisdiction the right to seek a legal remedy before

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<sup>242</sup> ICCPR, Article 2(3) reads in full: "Each State Party to the present Covenant undertakes: (a) To ensure that any person whose rights or freedoms as herein recognised are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity; (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy; (c) To ensure that the competent authorities shall enforce such remedies when granted."

courts of all levels” and article 2(3) of the ICCPR requires States parties “to ensure that any person whose rights or freedoms as herein recognised are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity.” The Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, adopted by the African Commission on Human and Peoples’ Rights, also affirms that, “Everyone has the right to an effective remedy by competent national tribunals for acts violating the rights granted by the constitution, by law or by the Charter” and that this right includes, among other things, enforceable judicial remedies.<sup>243</sup>

Article 118, ‘Right of Litigation’, holds in part that “Everyone is entitled to the right to access justice”. This inclusion of a right to access justice is positive. It should, however, be expanded to fully reflect the right to an effective and enforceable remedy as recognised under international law and standards. In addition, the Constitution should provide for reparation to address human rights abuses, including the right to a prompt, thorough, independent and impartial investigation, to know the truth, and to reparation in all its forms, in order to meet international standards. Additional detail and possible language that could be adapted for incorporation in the Constitution may be found in the UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law<sup>244</sup> and Human Rights Committee General Comment no 31 on article 2 of the ICCPR.<sup>245</sup>

The ICJ notes that article 110 provides for direct access to the Constitutional Court by individuals, as follows: “Any individual, of direct personal interest, shall seize the Constitutional Court, either directly or through genuine challenge of constitutionality in a court case as regulated by the law.” The inclusion of direct access for individuals is a very positive inclusion and should be retained. The ICJ recommends, however, that access to the Constitutional Court is expanded beyond those with a “direct personal interest” to include individuals or organisations interested in the constitutional validity of any piece of legislation or any executive action, with the courts expressly empowered to issue any form or declaration or order necessary to correct the violation of the constitution. This should include the right of those not directly affected to join proceedings as interested parties or to submit amicus curiae briefs, third party interventions or expert opinions.

**In light of the above, the ICJ calls on the CDA to ensure that the Constitution:**

- i. Includes a comprehensive section on rights that complies with Libya’s obligations under international human rights law and with universally recognised human rights standards;**
- ii. Expressly provides that should any conflict arise between provisions of the Constitution in their interpretation and application, the provision or interpretation providing for the greater protection of rights always takes precedence. This principle should be made clearly applicable to all laws, both within the Constitution and to primary and secondary legislation;**
- iii. Recognises, guarantees and protects economic, social and cultural rights on an equal footing with civil and political rights and recognises that Libya is obliged to take steps, as expeditiously as possible, to the maximum of its available resources to progressively achieve the full realisation of the rights outlined in the ICESCR;**

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<sup>243</sup> Principles and Guidelines on the Right to Fair Trial and Legal Assistance in Africa, *infra* 281, Part C.

<sup>244</sup> Adopted and proclaimed by General Assembly Resolution 60/147 of 16 December 2005, (the UN Basic Principles on Remedy and Reparation).

<sup>245</sup> UN doc CCPR/C/21/Rev.1/Add.13 (2004), paras 15-20.

- iv. **Includes a comprehensive general anti-discrimination clause, covering at least all the grounds covered by the ICCPR as interpreted by the UN Human Rights Committee;**
- v. **Ensures human rights protections generally extend to all individuals under Libya's jurisdiction and are not limited to citizens;**
- vi. **Ensures that both direct and indirect discrimination against women are prohibited in line with CEDAW's recommendation to Libya in 2009. In this regard, the ICJ strongly recommends that article 11(2) of the Draft Constitution which provides for the automatic passing down of nationality from a Libyan father but not from a Libyan mother be amended;**
- vii. **Enshrines the duty of the state to actively counter discrimination against women and ensures that no language in the Constitution perpetuates stereotypes in relation to women, including on the basis of their role within the family and marriage status. Articles 31 and 119 should be amended respectively;**
- viii. **Provides for the prohibition of all forms of violence against women and for redress when it occurs;**
- ix. **Contains a requirement that domestic violence is criminalised in national legislation;**
- x. **Contains strong protections for minorities including by asserting the rights of all minorities to enjoy their own culture and to use their own language, to participate in public life, including in the conduct of public affairs, and to participate effectively in all decisions that affect them. The Constitution should include a duty on the state to protect minorities and their identity, including by creating favourable conditions to enable minorities to express their characteristics and to develop their culture, language, religion, traditions and customs;**
- xi. **Enshrines the right to life by providing that the right shall be protected by law and that no one shall be arbitrarily deprived of his life. Includes an explicit provision that "the law must strictly control and limit the circumstances in which a person may be deprived of his life by the state authorities" and that "in the course of law enforcement, authorities may intentionally deprive a person of life only when strictly unavoidable in order to protect life". Article 112 on the right to life should be amended accordingly;**
- xii. **Contains a clear and absolute prohibition on the use of the death penalty.**
  - a. **If despite this recommendation, the Constitution does not explicitly prohibit the death penalty, its possible scope of application and procedural safeguards must be prescribed in terms that strictly comply with international standards;**
- xiii. **Absolutely prohibits torture and other cruel, inhuman or degrading treatment or punishment and incorporates a definition of torture that reflects the comprehensive definition enshrined in article 1 of the Convention against Torture;**
- xiv. **Contains a clear prohibition of all forms of corporal punishment, including, among others, flogging, beating, and all forms of bodily mutilation;**
- xv. **Requires consent for medical or scientific experiments;**
- xvi. **Requires the Libyan authorities to criminalise torture in national legislation and provides that victims of torture are entitled to redress as well as an enforceable right to compensation;**
- xvii. **Prohibits the return of any individual to another country where that individual is at risk of torture or other ill treatment or similar irreparable harm;**
- xviii. **Explicitly prohibits slavery and servitude;**

- xix. Proclaims the right to liberty and security in a freestanding article (given the fundamental nature of this right) that incorporates the right to liberty and security of person, a prohibition on arbitrary arrest and on arbitrary detention and the prohibition of any deprivation of liberty that is not in accordance with grounds and procedures specified by law, as well as other fundamental safeguards required by international law such as the right to challenge the lawfulness of detention before a court;
- xx. Includes comprehensive guarantees for the right to a fair trial, including, among others, the right to be tried by an independent, impartial and competent tribunal; the right to equality before the courts; the right of defendants to be informed promptly and in detail of the nature and cause of the charge against them; to challenge the lawfulness of their detention; to have adequate time and facilities for the preparation of their defence and to communicate freely and in confidence with counsel of their own choosing; to be tried without undue delay; to equality of arms; and the right not to be compelled to testify against themselves or to confess guilt; trials should take account of the age of a juvenile person, all decisions should be made with the best interests of the child as a primary consideration, including ensuring respect for their dignity and their rehabilitation should be the key aim of judicial processes concerning them;
- xxi. Excludes any possibility of the use of evidence that may have been obtained through torture, ill treatment or similar unlawful means;
- xxii. Introduces a right to freedom of opinion and expression, in line with article 18 of the ICCPR with restrictions that conform to article 20 of the ICCPR;
- xxiii. Provides for the clear and unequivocal recognition and protection of the right to freedom of thought, conscience and religion, in line with Libya's obligations under the ICCPR and the Arab Charter, as well as general international law;
- xxiv. Includes an expanded definition and scope of the right to health, reflecting the requirements of article 12 of the ICESCR;
- xxv. Recognises the right to safe drinking water and sanitation;
- xxvi. Includes the requirement that the state must take the appropriate steps to safeguard the right to work. In order to reflect article 7 of ICESCR, the proposals should add the requirement that the state must ensure that conditions of work are "just and favourable";
- xxvii. Includes the right to join and form trade unions, in line with article 12, ICESCR;
- xxviii. Contains a right to education that fully conforms to article 13 of the ICESCR;
- xxix. Ensures that the right to participate in cultural life and to benefit from scientific progress conforms to article 15 of the ICESCR;
- xxx. Prohibits forced marriage and includes the requirement of the consent of both spouses to marriage;
- xxxi. Sets an age limit or limits on the employment of children in line with Libya's obligations under the International Labour Organisation (ILO) Minimum Age Convention, 1973 (No. 138);
- xxxii. Contains a right to asylum that conforms to Libya's obligations under the Organisation of the African Union Convention Governing the Specific Aspects of Refugee Problems in Africa;
- xxxiii. Ensures any scope for limitation of rights conforms to the criteria for such limitations under international law and, in particular, only as are provided for by law, are proportionate, and are demonstrably necessary in a free and democratic society. Limitations must identify the nature of the right to be limited and the nature of the limitation and must not impair the essence of the right;

- xxxiv. **Includes, for those rights that can be subject to limitation, the specific grounds and restrictions applicable, (in conformity with international law), within each relevant article; and ensures that other rights are not subject to any restriction in the absence of a valid derogation in times of emergency;**
- xxxv. **Specifically recognises each of the non-derogable rights, including, among others, the right to life, the right to be free from torture or other ill treatment, the right not to be subject to enforced disappearance, aspects of the right to a fair trial, the application of the principle of legality, and the right to challenge the lawfulness of detention (*habeas corpus*), as being rights from which no derogation is accepted, including in times of emergency;**
- xxxvi. **Provides for the right to effective remedy and reparation to address human rights abuses, including the right to a prompt, thorough, independent and impartial investigation, to know the truth, and to reparation in all its forms;**
- xxxvii. **Includes an expanded provision for access to a constitutional remedy and reparations, before the courts, for anyone affected or otherwise interested in the constitutional validity of any piece of legislation or any executive action, with the courts expressly empowered to issue any form or declaration or order necessary to correct the violation of the Constitution.**

#### **IV. The Judiciary and International Standards**

##### **A. *Constitutional guarantees for the independence of the judiciary***

The right to an independent and impartial judiciary is established in international law. It is a constituent part of the right to a fair trial under article 14 of the ICCPR.<sup>246</sup> In addition, an independent and impartial judiciary is necessary for a strong and effective framework of human rights protection and accountability when human rights have been violated. The Arab Charter, in addition to referring to the right to an independent, impartial and competent tribunal in relation to fair trial, separately provides (in article 12): "The States parties shall guarantee the independence of the judiciary and protect magistrates against any interference, pressure or threats." Numerous other international standard setting bodies and instruments have affirmed the obligation of states to guarantee in law, and secure in practice, an independent and impartial judiciary, including the Human Rights Council, the Special Rapporteur on the Independence of Judges and Lawyers<sup>247</sup> and regional human rights courts.<sup>248</sup> Of particular assistance in explaining what this right consists of are the UN Basic Principles on the Independence of the Judiciary.<sup>249</sup>

The UN Human Rights Committee has explained the importance of an independent judiciary, as follows: "A situation where the functions and competencies of the judiciary and the executive are not clearly distinguishable or where the latter is able to control or direct the former is incompatible with the notion of an independent tribunal."<sup>250</sup> The Committee has held that article 14 of the ICCPR imposes on States the obligation to take measures guaranteeing the independence of the judiciary "through the constitution or adoption of laws establishing clear procedures and objective criteria for the appointment, remuneration, tenure, promotion,

<sup>246</sup> Libya has been a party to the ICCPR since 15 May 1970.

<sup>247</sup> See in particular the Special Rapporteur's report to the Human Rights Council in 2009, where the then rapporteur focused on measures to ensure the independence of the judiciary: A/HRC/11/41 <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G09/125/63/PDF/G0912563.pdf?OpenElement>

<sup>248</sup> For a comprehensive overview of international standards see the International Commission of Jurists, Practitioners Guide No. 1 on 'International Principles on the Independence and Accountability of Judges, Lawyers and Prosecutors', Geneva 2007, (ICJ Practitioner's Guide No. 1).

<sup>249</sup> See supra 200.

<sup>250</sup> HRC GC No.32, supra 62, para. 19.

suspension and dismissal of the members of the judiciary and disciplinary sanctions taken against them.”<sup>251</sup> Article 12 of the Arab Charter is to similar effect.

For decades, Libya failed to fully comply with its obligations under international law to respect and observe the independence of the judiciary, including under article 14 of the ICCPR. Both executive interference in the judiciary and the violation of fair trial rights were common features of the previous system.<sup>252</sup> The drafting of a new constitution offers the opportunity to bring Libya in line with international law and standards by enshrining the independence of the judiciary, ensuring greater protection of fair trial rights and accountability for the future.

Certain safeguards and guarantees were provided for by the 2011 Constitutional Declaration and other pieces of legislation with a view to ensuring judicial independence, including the prohibition of exceptional courts (Article 32 of the Constitutional Declaration) and the end of the control of the executive over the Supreme Judicial Council.<sup>253</sup> The section on the judiciary in the Draft Constitution would enhance some of these guarantees but in certain important respects fall short of international standards, including those relating to the SJC, the OPG and Military Courts.

Article 90 of the Draft Constitution provides for judicial independence as follows: “The Judicial authority shall be independent, its function is the administration of justice, ensuring the rule of law and the protection of rights and liberties. Judges shall be independent in exercising their functions, they shall only be subject to the power of the law and shall abide by the principles of integrity and impartiality, interference in the work of the judiciary is a crime that is not subject to statute of limitations.”

Article 92 adds that: “a member of the judiciary shall not be removed from office, or dismissed, transferred or subjected to disciplinary sanctions unless by justified decision by the Supreme Judicial Council in accordance with the guarantees and cases provided by law.” Article 96, further mandates the SJC with the competence “to appoint, promote, transfer and discipline the members of the judiciary, and over their career affairs (...).”

These articles represent a positive effort towards enshrining the independence of the judiciary. However, article 96 should explicitly specify that issues of professional incapacity or misconduct by members of the judiciary are exclusively within the mandate of the SJC (with the composition and competencies of the SJC revised in line with international standards, see below). Second, in relation to article 90, a broad criminalisation of “interfering with the work of the judiciary” is worded in an imprecise fashion that could be interpreted in a way that would lead to vexatious litigation or improperly suppressing criticism of the courts by private citizens, a recognised aspect of freedom of expression. The ICJ recommends changing this sentence to incorporate language from article 4 of the UN Basic Principles on the Independence of Judges, restricting its application to “inappropriate or unwarranted” interference.

The Constitutional provisions should also provide more detailed legal and practical guarantees for judicial independence, including as regards selection and appointment procedures and disciplinary and removal procedures, in line with international standards and best practices, as explored in more detail below.

## **B. *Formation and functioning of the Supreme Judicial Council***

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<sup>251</sup> Ibid

<sup>252</sup> See eg Report of the Human Rights Committee - Volume I - 103rd session (17 October–4 November 2011) - 104<sup>th</sup> session (12–30 March 2012), A/67/40/VOL. I.

<sup>253</sup> See the Constitutional Declaration.

Articles 95 to 97 of the Draft Constitution provide for the SJC. These articles do not meet international standards in certain respects. The body in charge of overseeing the judiciary must be truly independent and granted the necessary authority to promote the efficient functioning and accountability of the judiciary and to safeguard its independence. Judicial councils must be both able to act independently and they must have the ability to ensure that the judiciary as a whole as well as each judge is truly independent.<sup>254</sup>

### *Composition, Competencies and Independence*

Judicial councils should be independent bodies consisting of a majority of judges. The UN Special Rapporteur on the independence of judges and lawyers has affirmed that the composition of a judicial council “matters greatly to judicial independence as it is required to act in an objective, fair and independent manner when selecting judges”, and it “should preferably be composed entirely of judges, retired or sitting, although some representation of the legal profession or academia could be advisable. No political representation should be permitted.”<sup>255</sup> Under article 97 of the Draft Constitution, the SJC would consist of:

- The President of the Court of Cassation, as President;
- The Prosecutor General, as Vice-President;
- The Head of the Judicial Inspection Body, as member;
- Presidents of the Courts of Appeal, as member;
- The most senior Attorney General, as member;
- The most senior head of a court of first instance for each Court of Appeal, as members;
- Professors of Law in Libyan universities and a lawyer accredited before the Cassation Court, both members selected by the Legislative;
- Professors of Law in Libyan universities and a lawyer accredited before the Court of Appeal, both members selected by the President of the Republic.

Thus four members from outside the judiciary are to be appointed by the President of the Republic and the Legislative. In line with the recommendations of the UN Special Rapporteur on the Independence of Judges and Lawyers, the ICJ recommends that no appointments to the SJC should emanate from the executive or the legislative power, and that the SJC is guaranteed to be composed of a majority of judges. The article should also be amended to provide for a pluralistic and representative membership of the SJC. In particular, the ICJ recommends that the Constitution should provide a requirement for adequate gender representation on the Supreme Judicial Council. An example can be found in article 115 of the Moroccan Constitution, which holds, “Representation of female judges shall be ensured [in the Supreme Judicial Council], amongst the ten elected members, in proportion with their presence in the Judicial body”.

The UN Human Rights Committee has recommended the establishment of “an independent body charged with the responsibility of appointing, promoting and disciplining judges at all levels.”<sup>256</sup> The UN Special Rapporteur on the independence of judges and lawyers has made

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<sup>254</sup> See, amongst others, the UN Basic Principles on the Independence of the Judiciary, *supra* 200, and the African Principles and Guidelines on the Right to a Fair Trial, *infra* 281.

<sup>255</sup> Report of the Special Rapporteur on the Independence of Judges and Lawyers, UN Doc A/HRC/26/32, 28 April 2014, para. 126.

<sup>256</sup> Concluding Observations of the Human Rights Committee on Tajikistan, UN Doc. CCPR/CO/84/TJK, para. 17. See also Concluding Observations of the Human Rights Committee on Honduras, UN Doc. CCPR/C/HND/CO/1, para. 16 and the Concluding Observations of the Human Rights Committee on the second periodic report of the Congo, UN Document CCPR/C/79/Add.118, para.14. See similarly European Charter on the Statute for Judges, Principle 1.3.



similar recommendations.<sup>257</sup> The European Charter on the Statute for Judges states that, "In respect of every decision affecting the selection, recruitment, appointment, career progress or termination of office of a judge, the statute envisages the intervention of an authority independent of the executive and legislative powers within which at least one half of those who sit are judges elected by their peers following methods guaranteeing the widest representation of the judiciary."<sup>258</sup> The Council of Europe has recommended that: "The authority taking the decision on the selection and career of judges should be independent of the government and the administration. In order to safeguard its independence, rules should ensure that, for instance, its members are selected by the judiciary and that the authority decides itself on its procedural rules."<sup>259</sup>

As noted above, article 92 of the Draft Constitution holds that: "a member of the judiciary shall not be removed from office, or dismissed, transferred or subjected to disciplinary sanctions unless by justified decision by the Supreme Judicial Council." This goes some way towards meeting the requirement of irremovability under international standards.<sup>260</sup> The article should, however, be expanded to include the requirement of security of tenure, which is a cornerstone for the independence of judges at the individual level as it provides them with full protection when exercising their duties.

The Constitution should also provide that judges may only be removed for reasons of incapacity or behaviour that renders them unfit to discharge their duties, and that all disciplinary, suspension or removal proceedings shall be determined in accordance with established standards of judicial conduct.<sup>261</sup> In keeping with the UN Basic Principles and the African Union Principles and Guidelines on the Right to a Fair Trial, judges facing disciplinary, suspension or removal proceedings should be entitled to guarantees of a fair hearing including the right to be represented by a legal representative of their choice and to an independent review of decisions of disciplinary, suspension or removal proceedings.<sup>262</sup>

The promotion of judges should be constitutionally-mandated to be merit based, in particular on "ability, integrity and experience."<sup>263</sup> It is positive that article 92 provides that judges "may not be [...] transferred unless by justified decision by the Supreme Judicial Council". However, a requirement that judges be consulted before being transferred should be included in this article.

### *Financial Independence*

According to article 95 of the Draft Constitution: "[The Supreme Judicial Council] shall enjoy legal personality and administrative and financial independence, it shall prepare its budget law for discussion before the legislative authority." This is a positive inclusion and reflects international standards that emphasise the importance of judicial participation in budget discussions and independent decision making on budget matters. The article should, however, be amended to include the requirement that the judiciary be allocated sufficient funds, which are protected from misuse and cannot be used to exercise control over the judiciary. International standards hold that "the State has the duty of ensuring that judges have the

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<sup>257</sup> See eg report of the UN Special Rapporteur on Independence of Judges and Lawyers, UN Doc A/HRC/11/41 24, March 2009, paras 97 and 98.

<sup>258</sup> European Charter on the Statute for Judges, Principle 1.3. See similarly, Council of Europe Committee of Ministers Recommendation (2010)12, adopted 17 November 2010, para. 46.

<sup>259</sup> The Council of Europe, Recommendation No. R (94) 12, Principle I.2.c.

<sup>260</sup> UN Basic Principles on the Independence of the Judiciary, supra 200, Principle 12.

<sup>261</sup> Ibid, Principles 18 and 19.

<sup>262</sup> Ibid, Principles 17-20. The African Principles and Guidelines on the Right to a Fair Trial, infra 281, 4(q).

<sup>263</sup> UN Basic Principles on the Independence of the Judiciary, supra 200, Principle 13.

means necessary to accomplish their tasks.”<sup>264</sup> Furthermore, the Latimer House Guidelines provide that “such funds, once voted for the judiciary by the legislature, should be protected from alienation or misuse. The allocation or withholding of funding should not be used as a means of exercising improper control over the judiciary.”<sup>265</sup>

### **C. *Military and exceptional courts***

According to international standards, the jurisdiction of military tribunals should be limited to cases involving military personnel and for alleged breaches of military discipline. Cases involving alleged violations of human rights committed by military personnel and other law enforcement officials should be under the jurisdiction of civilian courts. The UN draft Principles Governing the Administration of Justice through Military Tribunals, (the Decaux Principles) provide that: “In all circumstances, the jurisdiction of military courts should be set aside in favour of the jurisdiction of the ordinary courts to conduct inquiries into serious human rights violations such as extrajudicial executions, enforced disappearances and torture, and to prosecute and try persons accused of such crimes.”<sup>266</sup> The Updated Set of Principles for the protection and promotion of human rights through action to combat impunity, (Principle 29), states that serious violations of human rights should not be tried by military courts. The UN Human Rights Committee expressed the view in concluding observations on Colombia that cases of human rights violations must be removed from military courts’ jurisdiction and investigations carried out by civilian prosecutors.<sup>267</sup> Both the European Court of Human Rights and the Inter-American Court of Human Rights have emphasised that military judges cannot be considered independent and impartial in such cases because they are part of the hierarchy of the army.<sup>268</sup>

Article 103 of the Draft Constitution entitled ‘Military Justice’ reads as follows: “Military Courts are specialised to hear cases of military crimes committed by military personnel, in accordance with the procedures prescribed by law and ensuring the guarantees of fair trial.”

There is a clear problem with this article from the perspective of international standards. The definition of “military crimes” is unclear and could be used to potentially cover violations of human rights, whether perpetrated in the form of war crimes or otherwise, which should be tried in civilian courts. This article should be amended to limit military jurisdiction to “alleged breaches of military discipline”. In addition, the article should explicitly specify that civilians should never be subject to the jurisdiction of military tribunals.

Article 94 holds that: “Establishing exceptional courts is prohibited”. This is a positive proposal. As noted by the UN Human Rights Committee, special or exceptional courts are often used to circumvent fair trial protections provided by article 14 of the ICCPR.<sup>269</sup> The ICJ recommends that this language is thus retained in the draft Constitution.

### **D. *The Office of the Prosecutor General***

Prosecutors play a crucial role in the administration of justice and in the proper functioning of the criminal justice system. They must ensure that public order is protected while fully

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<sup>264</sup> European Charter on the Statute for Judges, operative para. 1.6.

<sup>265</sup> Latimer House Guidelines for the Commonwealth on Parliamentary Supremacy and Judicial Independence, adopted on 19 June 1998, Guideline II.2.

<sup>266</sup> E/CN.4/2006/58, 13 January 2006 at Principle 9.

<sup>267</sup> Human Rights Committee, Concluding Observations on Colombia, CCPR/C/79/Add.76, para. 34.

<sup>268</sup> Findlay v. United Kingdom, 110/1995/616/706, European Court of Human Rights, Judgment of 25 February 1997; Incal v. Turkey, 41/1997/825/1031, European Court of Human Rights, Judgment of 9 June 1998; and Inter-American Court of Human Rights, Radilla-Pacheco v. Mexico. Judgment of 23 November 2009.

<sup>269</sup> HRC GC 32, supra 62. See also UN Basic Principles, Principle 5.

respecting the rights of the accused and victims at all stages of criminal proceedings. Only an impartial prosecutor able to conduct cases in an independent manner is properly equipped to perform such duties fairly.

The prosecutorial service in Libya under Gadhafi suffered from the interference of the executive. This affected its independence and ability to properly investigate and prosecute human rights violations in Libya. To ensure a break from the past, accountability in the future and to conform to international standards, Libya's new constitution should provide for strong guarantees for an impartial prosecutorial authority.

In recognition of different systems throughout the world, international law does not expressly require that prosecutorial authorities be institutionally independent. Institutional independence is however preferable as the best way to protect prosecutors from undue executive pressure.<sup>270</sup> The UN Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence has stated that in order to "shield prosecutors from political influence, the relationship between prosecutorial services and ministries of justice has to be arranged in ways that do not make the former subservient to the latter. This is manifested in the relationship between the institutions, (including power over the disposition of budgets); the procedures of appointment and removal of prosecutors, especially chief prosecutors."<sup>271</sup>

The UN Guidelines on the Role of Prosecutors provide detailed standards for "securing and promoting the effectiveness, impartiality and fairness of prosecutors in criminal proceedings",<sup>272</sup> as do the Standards of Professional Responsibility and Statement of the Essential Duties and Rights of the Prosecutor.<sup>273</sup>

Even when the prosecution service is not an entirely independent institution, the State has a duty to provide for certain safeguards to protect the ability of the prosecutorial service to work independently and impartially. The UN Guidelines on the Role of Prosecutors encourage States to "ensure that prosecutors are able to perform their professional functions without intimidation, hindrance, harassment, improper interference or unjustified exposure to civil, penal or other liability."<sup>274</sup> This is of particular importance given the targeting of lawyers and judges during the recent conflict in Libya and, especially, in light of the killing of the former Prosecutor General in early 2014.<sup>275</sup> The Standards of Professional Responsibility affirm the need to maintain actual and perceived prosecutorial independence in the conduct of cases, as well as impartiality.

International standards hold that the office of the prosecutor should be separated from judicial functions.<sup>276</sup> Article 91 of the Draft Constitution states that: "Members of the judiciary are judges, public prosecutors and the law shall regulate the conditions of their appointment." Best practice standards require that members of the Public Prosecution should not be considered members of the judiciary to uphold the independence of both institutions. They

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<sup>270</sup> See eg ICJ Practitioner's Guide 1, supra 248, p. 71; Inter-American Commission on Human Rights, Report on the situation of Human Rights in Mexico, OEA/Ser.L/V/II.100, Doc. 7 rev. 1, 24 September 1998, paras 372 and 381.

<sup>271</sup> Special Rapporteur on truth, justice, reparation and guarantees of non-recurrence; Report to the Human Rights Council, A/HRC/27/56, August 2014, para. 78.

<sup>272</sup> UN Guidelines on the Role of Prosecutors, adopted by the Eighth United Nations Congress on the Prevention of Crime and Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990, (UN Guidelines on the Role of Prosecutors), Preamble.

<sup>273</sup> Drafted by the International Association of Prosecutors, and endorsed by the UN Commission on Crime Prevention and Criminal Justice, resolution 17/2 (1999), Annex

<sup>274</sup> UN Guidelines on the Role of Prosecutors, supra 272 Guideline 4.

<sup>275</sup> See eg <http://www.aljazeera.com/news/middleeast/2014/02/libya-former-prosecutor-general-shot-dead-2014290574354444.html>

<sup>276</sup> See ICJ Practitioner's Guide no. 1, supra 248, p. 75.

perform two separate functions and this should be reflected in the Constitution. The inclusion of 'members of the Public Prosecution' in this article should therefore be removed.

Article 100 holds: "The Prosecutor General shall be appointed by the President of the State upon the nomination of the Supreme Judicial Council..." To ensure both the actual and perceived independence of the Prosecutor General, the ICJ recommends that he or she instead be appointed by an independent process and that other prosecutors be appointed by the Prosecutor General. The appointment process of prosecutors should be elaborated in line with the UN Guidelines, which provide in the relevant part:

1. Persons selected as prosecutors shall be individuals of integrity and ability, with appropriate training and qualifications.
2. States shall ensure that:
  - (a) Selection criteria for prosecutors embody safeguards against appointments based on partiality or prejudice, excluding any discrimination against a person on the grounds of race, colour, sex, language, religion, political or other opinion, national, social or ethnic origin, property, birth, economic or other status, except that it shall not be considered discriminatory to require a candidate for prosecutorial office to be a national of the country concerned;
  - (b) Prosecutors have appropriate education and training and should be made aware of the ideals and ethical duties of their office, of the constitutional and statutory protections for the rights of the suspect and the victim, and of human rights and fundamental freedoms recognised by national and international law.<sup>277</sup>

The removal of what was article 6 in Part III of the December 2014 Proposals is regrettable. This article stated that: "The courts shall not admit any evidence extracted under coercion or through illegal measures." As discussed above and, in line with an earlier ICJ recommendation on the prohibition of torture, a similar provision should be reintroduced into the Constitution and should be expanded to include the duty of prosecutors to ensure that no evidence is used or taken into account that "they know or believe on reasonable grounds was obtained through recourse to unlawful methods or [...] abuses of human rights."<sup>278</sup> The Constitution should also enshrine the requirement set out in paragraph 13(a) of the UN Guidelines that prosecutors must carry out their duties in an impartial and objective manner and without political, social, religious, racial, cultural, sexual or any other kind of discrimination.<sup>279</sup>

## **E. *The Constitutional Court***

The primacy of the Constitution is a cornerstone of the principle of the rule of law and separation of powers. It is important that the Constitution itself clearly and unambiguously recognises the primacy of the Constitution over all aspects of domestic law. Additionally, it is essential that the body that oversees the constitutionality of laws and the executive authority is fully independent, has a comprehensive mandate, is accessible to all individuals and has the legal and practical resources needed to conduct an effective review of legislation and executive action. Further, a strong independent Constitutional Court is vital for the protection of constitutional rights.

The Draft Constitution outlines the conditions for the establishment of a Constitutional Court in article 105. Article 108 provides that "The Constitutional Court is the sole body competent with judicial oversight over the constitutionality of legislation and the regulations of the House

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<sup>277</sup> UN Guidelines on the Role of Prosecutors, supra 272, Guideline 1 and 2

<sup>278</sup> Ibid Guideline 16.

<sup>279</sup> ICJ Practitioner's Guide No. 1, supra 248, p. 74.

of Representatives and the Senate, to review international conventions and agreements before their ratification [...].” While article 111 states that “The Court’s decisions shall be final and binding on all”, provisions should be added to explicitly state that rulings by the Constitutional Court cannot be subject to any form of national review or appeal, and should specify that they are binding on, and must be enforced by all public authorities, including judicial ones.

Article 106 provides that the composition of the Constitutional Court shall contain twelve judges: six counsellors nominated by the SJC, three nominated by the President of the Republic, and three members nominated by the legislative authority. In order to ensure the independence and the impartiality of the judiciary, international law requires that judges are selected on the basis of transparent criteria and that they meet the requirements of professional qualifications and personal integrity.<sup>280</sup> Article 106 of the Draft Constitution provides that the nominees of the President of the Republic and the legislative authority shall be: “highly qualified and competent in the law, Islamic Sharia or political science, should not be members of the judiciary, with at least fifteen years of practical experience in their fields of expertise.” Article 107 outlines ‘Membership Criteria’.

Article 106 goes some way towards conforming to international standards by requiring substantial qualifications and experience from the nominees. However, the ICJ is concerned by the absence of a requirement of personal integrity, as well as the fact that a person could theoretically be eligible for appointment to the Constitutional Court, who has no qualification or competency in law *per se*.

The requirement of personal integrity is contained in numerous international and regional instruments including the African Principles and Guidelines on the Right to a Fair Trial, which hold that judges should be selected for: “reason of integrity, appropriate training or learning and ability.”<sup>281</sup> Principle 10 of the UN Basic Principles on the Independence of the Judiciary stipulates that “Persons selected for judicial office shall be individuals of integrity and ability with appropriate training or qualifications in law.” It also states that, “In the selection of judges, there shall be no discrimination against a person on the grounds of ... religion”; this is consistent with the prohibition of discrimination on grounds of religion as concerns public service, in articles 2, 25 and 26 of the ICCPR and articles 3(1) and 24 of the Arab Charter.

The ICJ recommends that qualification and competency in *Sharia* be removed as potential criteria for the selection of judges. This provision could allow for the favouring of a background of a judge with a particular religious conviction over another in contravention of international standards that prohibit discrimination on the grounds of religion, (explored in detail above). It is certainly possible that a person with such expertise would also be “highly qualified and competent in the law” *per se*, but expertise in *Sharia* should not be presented as a substitute for qualification in law *per se*. On the other hand, a provision should be included to explicitly prohibit discrimination on any ground, in keeping with the UN Basic Principles, in the selection and appointment process. Of note in relation to minorities, the UN Human Rights Committee has previously recommended that “measures should be taken to improve the independence and technical competence of the judiciary, including the appointment of qualified judges from among [...] members of minorities.”<sup>282</sup>

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<sup>280</sup> Ibid p. 41.

<sup>281</sup> Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, 2003, (African Principles on the Right to a Fair Trial), Principle A, paragraph 4(i) and (k), available at <http://www.achpr.org/instruments/principles-guidelines-right-fair-trial/>.

<sup>282</sup> Concluding Observations of the Human Rights Committee on Sudan, UN document CCPR/C/79/Add.85, para. 21.

The possibility for someone to be appointed without any qualification or competency in law, i.e. based solely on expertise in political science, also appears inconsistent with Principle 10 of the Basic Principles on the Independence of the Judiciary. The concern is deepened by the provision that nominees of the President and Legislature should “not be members of the judiciary”, implying that half of the judges of the Constitutional Court would be required by law not to have immediate past experience as a judge. The purported reason for such a restriction is unclear.

Article 106 would give the President of the State and the legislative power the authority to nominate six counsellors out of twelve in the Constitutional Court. The UN Special Rapporteur on the independence of judges and lawyers has repeatedly raised concerns about politicisation when legislative or executive authorities select and appoint members of the judiciary, and has recommended the establishment of pluralistic independent selection and appointment bodies for all courts, in which some legislators might participate but which would have substantial, if not a majority, representation of judges.<sup>283</sup> The Council of Europe has recommended that: “The authority taking the decision on the selection and career of judges should be independent of the government and the administration. In order to safeguard its independence, rules should ensure that, for instance, its members are selected by the judiciary and that the authority decides itself on its procedural rules.”<sup>284</sup> The African Guidelines state: “[t]he process for appointments to judicial bodies shall be transparent and accountable and the establishment of an independent body for this purpose is encouraged. Any method of judicial selection shall safeguard the independence and impartiality of the judiciary”.<sup>285</sup>

Concerns about the impact of the Presidential and Legislative appointment powers are deepened by the provision that Presidential and Legislative nominees must not be members of the judiciary. As such, to ensure that “political considerations do not play any role in the proceedings,”<sup>286</sup> rather than dividing the Constitutional Court into groups of judges appointed by different bodies, the ICJ recommends that selection and appointment of all Constitutional Court judges be conducted either by the SJC or by an independent selection and appointment body that is pluralistic, with a majority of its members being judges.

Article 105 ensures that the Court “shall enjoy administrative and financial independence, and shall present its draft budget to the legislative authority.” International standards stress that the judiciary should be allocated adequate funds to perform its functions and that this, preferably, is provided for in legislation.<sup>287</sup> This requirement should be added to the Draft Constitution.

As discussed above, the ICJ recommends that article 110 is revised to expand access to the Constitutional Court beyond those with a “direct personal interest” to include individuals or organisations interested in the constitutional validity of any piece of legislation or any executive action.

**In light of the above, the ICJ calls on the CDA to ensure that the Constitution:**

- i. Brings the whole judicial system in line with international standards of independence, impartiality and accountability;**

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<sup>283</sup> Report of the Special Rapporteur on Independence of Judges and Lawyers, UN Doc A/HRC/11/41 (24 March 2009), paras 23-34, 97.

<sup>284</sup> The Council of Europe, Recommendation No. R (94) 12, Principle I.2.c.

<sup>285</sup> African Principles on the Right to a Fair Trial, supra 281 Principle A, paragraph 4(h).

<sup>286</sup> ICJ Practitioner’s Guide no.1, p. 49.

<sup>287</sup> Ibid, p. 35.

- ii. Enables judicial review over the compliance of legislative and executive acts with the Constitution and, to this end, unequivocally affirms that the decisions of the Constitutional Court are final, cannot be subject to any form of review or appeal, and are binding on, and must be enforced by all public authorities;
- iii. Provides that the SJC is a truly independent body, granted the necessary authority to promote the efficient functioning of the judiciary and to safeguard its independence, including by providing that a majority of members of the SJC are judges elected by the judiciary;
- iv. Provides that no appointments to the SJC should emanate from the executive or the legislative power;
- v. Provides for a pluralistic and representative membership of the SJC, including adequate gender representation;
- vi. Provides that members of the judiciary are subject to the authority of the SJC, in relation to professional incapacity or misconduct;
- vii. Provides detailed legal and practical guarantees for judicial independence, including as regards security of tenure, selection and appointment procedures, transfer and disciplinary and removal procedures, in line with international standards and best practices;
- viii. Provides that judges may only be removed for reasons of incapacity or behaviour that renders them unfit to discharge their duties, and that all disciplinary, suspension or removal proceedings shall be determined in accordance with established standards of judicial conduct;
- ix. Includes a provision to explicitly prohibit discrimination of any kind in the selection and appointment process of judges;
- x. Contains a requirement that the judiciary be allocated sufficient funds, which are protected from misuse and cannot be used to exercise control over the judiciary;
- xi. Limits the jurisdiction of military tribunals to alleged breaches of military discipline. Cases involving alleged violations of human rights committed by military personnel and other law enforcement officials should be under the jurisdiction of civilian courts;
- xii. Specifies that civilians can never be subject to the jurisdiction of military courts;
- xiii. Ensures both the actual and perceived independence of the Prosecutor General through his or her appointment by an independent process and that the other prosecutors are appointed by the Prosecutor General. The appointment process of prosecutors should be elaborated in line with the UN Guidelines on the Role of Prosecutors;
- xiv. Ensures that the OPG is not subject to undue executive control, has a duty to act impartially and with operational independence, to respect and uphold human rights, and to fight impunity for human rights violations, and is empowered to investigate private and public officials and actions;
- xv. Provides for detailed provisions relating to the competences, formation, functioning and legal status of the Constitutional Court;
- xvi. Provides for the financial independence of the Constitutional Court, including the requirement that it be allocated sufficient funds to perform its functions;
- xvii. Enshrines guarantees for the independence of the Constitutional Court, including the independence and immunity of its members, as well as an independent appointment procedure for the selection of its members;
- xviii. Provides for personal integrity as an additional requirement for the appointment of judges to the Constitutional Court;

- xix. **Removes qualification or competency in *Sharia* or political science as a substitute for qualification and competency in law among the criteria for the selection of judges to the Constitutional Court;**
- xx. **Ensures that the decisions of the Constitutional Court are binding on the other branches of government and are enforced by public authorities;**
- xxi. **Guarantees full access for individuals and anyone affected or otherwise interested in the constitutional validity of any piece of legislation or any executive action to the Constitutional Court.**

## **V. Addressing the Legacy of Human Rights Violations**

Under Gadhafi's regime, gross, widespread and systematic human rights violations took place.<sup>288</sup> During the transitional period, gross human rights violations have continued.<sup>289</sup> In order to establish the truth about the extent of these violations, bring the perpetrators to justice, ensure remedies and reparations for victims and put in place measures to ensure that these violations do not recur on the same scale; a comprehensive policy on justice for gross human rights violations must be put in place.

First, the values and rights contained within the section on rights and liberties in the Constitution can influence the justice process positively by ensuring that each transitional measure conforms to human rights standards, in line with Libya's obligations under international law.<sup>290</sup> Of particular relevance are the right to information, the right to a fair trial and the right to remedy and reparations. By enshrining these rights using clear and unambiguous language and providing for strong protections for these rights within a section on rights, the Constitution has the potential to contribute significantly to a fair and just accountability process for past violations. At the same time, the Constitution could also play a key role in the transitional justice process by enshrining a duty on the state to implement appropriate measures that are in line with international standards on the right to truth, justice, reparations and guarantees of non-recurrence.

### **A. *The right to truth***

Chapter XI of the Draft Constitution is entitled 'Transitional Measures' and article 190 is entitled "Transitional Justice Measures". The first paragraph of this article reads as follows:

The State shall take the following measures:

- 1- Revealing and documenting the truth on human rights violations and crimes of corruption, and revealing the fate of missing persons, victims and affected persons due to violations, military operations, and armed conflicts on a personal and regional level.

The right to truth is an established concept rooted in international human rights law and considered a key pillar of justice, particularly for widespread and systematic or otherwise

<sup>288</sup> See for example, <https://www.hrw.org/news/2010/11/17/libya-carry-out-un-calls-reform>; <http://www.reuters.com/article/2011/02/22/us-libya-protest-abuses-idUSTRE71L1NH20110222>; Report of the International Commission of Inquiry on Libya, 2 March 2012, A/HRC/19/68, Summary, p. 2.

<sup>289</sup> See UNSMIL and OHCHR Reports at supra 2, supra 4, supra 52 and 'Overview of Violations of international human rights and international humanitarian law during the ongoing violence in Libya' September 2014, available here: <http://unsmil.unmissions.org/Portals/unsmil/Human%20Rights%20Report%20on%20Libya%2004.09.14%20English.pdf> and see

<sup>290</sup> As noted above, Libya is a party to the ICCPR, CEDAW, the CRC, ICESCR, amongst others.



gross violations.<sup>291</sup> The duty to respect the right to truth has been interpreted to require the State to establish institutions, mechanisms and procedures that can lead to the uncovering of the truth about human rights violations.<sup>292</sup> The right to truth is particularly relevant to transitional processes when considered in the context of addressing impunity, as noted by the Human Rights Council,<sup>293</sup> the Office of the UN High Commissioner for Human Rights,<sup>294</sup> a number of treaty bodies,<sup>295</sup> as well as Special Procedures.<sup>296</sup>

It is positive that the Draft Constitution contains a duty on the state to “reveal and document” human rights violations. Rather than leaving the article open to all human rights violations, in order to assist in the prioritisation of what violations should be addressed, the article should specify that it applies, in particular, to “serious violations of human rights and serious violations of international humanitarian law”.<sup>297</sup> This is in line with international standards and is particularly relevant given the fact that the International Commission of Inquiry (CoI), established by the UN Human Rights Council, found that “crimes against humanity and war crimes, were committed by Gadhafi forces in Libya.”<sup>298</sup> In particular, the CoI reported that: “Acts of murder, enforced disappearance, and torture were perpetrated within the context of a widespread or systematic attack against a civilian population. The Commission found additional violations including unlawful killing, individual acts of torture and ill-treatment, attacks on civilians, and rape.”<sup>299</sup> The CoI also found that anti-Gadhafi forces “committed serious violations, including war crimes and breaches of international human rights law.”<sup>300</sup> These violations included “unlawful killing, arbitrary arrest, torture, enforced disappearance, indiscriminate attacks, and pillage” and found there was “targeting” of the “Tawergha and other communities.”<sup>301</sup> In addition, recent reports by UNSMIL and the OHCHR have documented serious human rights violations during the transitional period, which should also be addressed.<sup>302</sup>

## **B. Justice and accountability**

Article 190(5) on Transitional Justice Measures provides that:

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<sup>291</sup> See eg Report of the Independent Expert Diane Orentlicher, “Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity,” 8 February 2005, E/CN.4/2005/102/Add.1 [hereinafter UN Updated Set of Principles], Principle 4 and sources cited in following footnotes.

<sup>292</sup> See the report on truth commissions by the Special Rapporteur on truth, justice, reparations and guarantees of non-recurrence, A/HRC/24/42, 2013, p. 6.

<sup>293</sup> Human Rights Council Resolutions 12/12, para. 1; and 9/11, para. 1.

<sup>294</sup> See UN Commission on Human Rights, Study on the Right to the Truth, Report of the Office of the United Nations High Commissioner for Human Rights, 8 February 2006, E/CN.4/2006/91; Human Rights Council, Right to the truth, Report of the Office of the High Commissioner for Human Rights, 7 June 2007, A/HRC/5/7.

<sup>295</sup> Eg CAT/C/COL/CO/4 (2010), para. 27.

<sup>296</sup> Human Rights Council, Report of the Working Group on Enforced or Involuntary Disappearances, 26 January 2011, A/HRC/16/48, para. 39; Human Rights Council, Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, 1 March 2013, A/HRC/22/52, paras. 23-26, 32-34; Human Rights Council, Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Mission to Paraguay, 1 October 2007, A/HRC/7/3/Add.3, para. 82; Human Rights Council, Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, 20 April 2010, A/HRC/14/23, para. 34.

<sup>297</sup> See for example the wording in the Basic Principles and Guidelines on the Right to a Remedy and Reparation, supra 244, and the Human Rights Council Resolution creating the mandate of the Special Rapporteur on truth, justice, reparation and guarantees of non-recurrence.

<sup>298</sup> Report of the International Commission of Inquiry on Libya, 2 March 2012, A/HRC/19/68, Summary, p. 2.

<sup>299</sup> Ibid

<sup>300</sup> Ibid

<sup>301</sup> Ibid

<sup>302</sup> See OHCHR Report, January 2015, supra 2, and UNSMIL Report, February 2015, supra 4, as well as the joint OHCHR and UNSMIL report on human rights violations in Libya of 15 November 2015, supra 2.

The State shall take the following measures:

(...)

5- Criminal prosecution of all contributors to violations of human rights and corruption crimes, provided that it is in accordance with international standards and within the framework of Sharia. Any legal provision incompatible with transitional measures mechanisms shall not be applicable.

The provision for prosecutions and accountability in the Constitution takes on particular importance given the prevalence of immunities in the Libyan legal framework. Of particular concern is Law No. 38 of 2012 on special procedures for the transitional period. Article 4 of this law provides: "There shall be no penalty for acts deemed necessary for the 17 February Revolution in terms of military, security or civil acts carried out by revolutionaries to protect or bring about the success of the revolution." This appears to grant broad immunity for any act that can be deemed 'necessary' for the 'success' of the revolution, including serious human rights violations, criminal acts and violations of international humanitarian law. As such, the Constitution must specify that all violators of serious human rights that took place both during the Gadhafi era and during the transitional phase must be held accountable.<sup>303</sup>

In fact, numerous laws that are still in force in Libya grant broad immunity to public officials that can only be lifted through a specified procedure; for example for members of the Security and Police and the Libyan Intelligence Service, (as referred to above), as well as for members of the Administrative Control Authority<sup>304</sup> and the National Anti-Corruption Commission.<sup>305</sup> This underlines the importance of including a strong provision on accountability in the Constitution.

In order to strengthen article 190(5), the ICJ recommends that the caveat that crimes should be prosecuted within the framework of Sharia is removed. There is a clear legal basis in international law for the requirement to prosecute, found in both treaty law and normative documents.<sup>306</sup> Under the ICCPR, CAT and numerous other human rights treaties, Libya has an obligation to investigate and prosecute human rights violations that constitute crimes under international or national law.<sup>307</sup> These obligations should be fully incorporated and reflected in the article without any caveat relevant to the domestic framework.

The ICJ recommends that the article be expanded to include an explicit requirement to prosecute any individual who commits, aids, abets or otherwise assists in the commission of a crime for the purpose of facilitating the commission of the crime, reflecting the Rome Statute and CAT.<sup>308</sup> This is more precise than the reference to "contributors to crimes".

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<sup>303</sup> This law has been extensively criticised by human rights organisations, including the following: International Crisis Group, *Trial by Error: Justice in Post-Qadhafi Libya*, 17 April 2013, page iv, pp 28, at: <http://www.crisisgroup.org/en/regions/middle-east-north-africa/north-africa/libya/140-trial-by-error-justice-in-post-qadhafi-libya.aspx>; Human Rights Watch, *Libya: Amend Special Procedures Law*, 11 May 2012, at: <https://www.hrw.org/news/2012/05/11/libya-amend-new-special-procedures-law>; Amnesty International, *Libya: Human Rights abuses continue as country descends into chaos*, Amnesty International Submission to the UN Universal Periodic Review, May 2015, February 2015, at: <https://www.amnesty.org/download/Documents/MDE1900032015ENGLISH.pdf>, pp 6-7; Lawyers for Justice in Libya, *LFJL strongly condemns new laws breaching human rights and undermining the rule of law*, 7 May 2012, at: <http://www.libyanjustice.org/news/post/23-lfjl-strongly-condemns-new-laws-breaching-human-rights-and-undermining-the-rule-of-law>;

<sup>304</sup> Law No. 20 of 2013 on the establishment of the Administrative Control Authority, Article 13

<sup>305</sup> Law No. 11 of 2014 on establishing the National Anti-Corruption Commission, Article 19

<sup>306</sup> See the Basic Principles and Guidelines on the Right to a Remedy and Reparation, supra 244, and the "Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity," 8 February 2005, UN Doc E/CN.4/2005/102/Add.1.

<sup>307</sup> See for example HRC GC No.31, supra 72, paras 15 and 18; CAT, Article 12.

<sup>308</sup> The Rome Statute of the International Criminal Court, (the Rome Statute), article 25; Convention against Torture, article 4(1).

The ICJ also recommends that the article is made more precise by referring to human rights violations 'of a criminal character under national or international law'. (Human rights violations of a non-criminal character should still be subject to individual accountability as well as effective remedy and reparations). Any article in the Constitution referring to criminal trials should reaffirm that all trials should conform to the right to a fair trial as enshrined in the Constitution in conformity with Libya's international obligations, in particular under article 14 of the ICCPR.

Article 123 provides that: "All patterns of conduct constituting crimes against humanity, or war crimes, or genocide, shall be prohibited; they shall not be subject to statute of limitation or amnesty, without prejudice to the provisions of the Constitution." The prohibition of these crimes and of amnesties in addition to the fact that they shall not be subject to any statute of limitation is positive. However, the clause "without prejudice to the provisions of the Constitution" is unnecessary and may open the provision to interpretations incompatible with Libya's obligations under international human rights and humanitarian law. The criminalisation of such conduct without limitation or amnesty should be absolute. The reference to 'patterns of conduct' may also have a limiting effect given that individual incidents could be interpreted as falling outside such a definition. As such, the wording "All patterns of conduct that are considered as crimes against humanity, or war crimes, or genocide, shall be prohibited" should be changed to "All conduct constituting crimes against humanity, or war crimes, or genocide *under international law* shall be prohibited", (italics added for emphasis).

### **C. *The right to effective remedy and reparations***

Article 190(2) refers to the duty of the state to provide victims with reparations, as follows:

"The State shall provide victims and affected parties with appropriate reparations compared to the damage, and reparations vary between, material, symbolic, individual and collective, [they also include] treating the psychological and social effects and rehabilitating the victims, taking into account the administrative and judicial procedures that were previously undertaken, without prejudice to the State's right to prosecute the perpetrators."

The inclusion of such a duty represents an important step towards meeting Libya's obligations under CAT, which includes an obligation to provide rehabilitation for victims of torture and other ill-treatment,<sup>309</sup> as well as the ICCPR and other human rights treaties.<sup>310</sup> The ICJ recommends that this is retained in the Constitution but that it should place the state duty in the context of a victim's right to remedy and reparation, in accordance with international standards, as outlined above.

### **D. *Guarantees of non-recurrence***

Article 191 is entitled 'Guarantees of Non-Recurrence' and provides for measures such as vetting, institutional reform, disarmament and fact finding. This goes some way towards addressing measures generally considered under the pillar 'guarantees of non-recurrence' though some additional elements could be added to enhance its comprehensiveness, as discussed below.<sup>311</sup>

Article 191 provides that:

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<sup>309</sup> CAT, Article 14, and Article 16 as interpreted by the Committee against Torture (See General Comment no. 3).

<sup>310</sup> See eg HRC GC No. 31, supra 72, para. 16.

<sup>311</sup> See also Report of the Special Rapporteur on truth, justice, reparations and guarantees of non-recurrence on Guarantees of Non-Recurrence, A/HRC/30/42, September 2015.

“The State shall take the following measures:

1. Vetting public institutions for their structural reform and for filtering out contributors to human rights violations, corruption crimes and unqualified individuals, reviewing the extent of merit in ranks, grades, and posts therein in accordance with the law, and dissolving [institutions] that contravene the Constitution.
2. Disarmament and dismantling all armed organisations, and conducting psychological and professional rehabilitation for their members.
3. Reveal the truth on collective conflicts, stating their causes and radically addressing them in order to achieve national reconciliation”

The ICJ has some concerns about Article 191(1), which appears to provide a very broad scope for a vetting process for ‘public institutions’. The provision should specify what institutions in particular it envisages. The use of the term “contributors” to human rights violations is too vague and should be narrowed to those who collaborated in the commission of gross and systematic human rights violations. In addition, conflating the removal of “unqualified” individuals with a vetting process for those who have committed human rights violations is not recommended as these are two separate issues.

The requirement of, “[d]issolving [institutions] that contravene the Constitution” could also be problematic because it is extremely vague, not specifying what institutions might fall within its scope, which authority would decide upon such dissolution after what form of fair process, or what criteria should be used to make this assessment. This could be subject to a wide interpretation that would render it open to misuse. As such, this provision should be removed.

In relation to the security sector, in line with the recommendation of the UN Special Rapporteur on truth, justice, recommendations and guarantees of non-recurrence, vetting in security institutions should be targeted at particular ranks or units.<sup>312</sup>

The ICJ also regrets the removal of a provision that was in the December 2014 Proposals that required “transparency, integrity and accountability” in the vetting process. The ICJ recommends the reintroduction of these requirements, as well as a requirement of fairness.

Paragraph 3 of Article 191 provides that the state shall: “reveal the truth on collective conflicts, stating their causes and radically addressing them in order to achieve national reconciliation”. As included in the UN Basic Principles on Remedy and Reparation, this article should address other elements that can be considered as contributing to reconciliation within the concept of ‘guarantees of non-recurrence’. This includes the requirement to provide human rights and humanitarian law education on a “priority and continued basis” to all sectors of society and, in particular, for law enforcement officials and military and security forces.<sup>313</sup> Provision should also be made for memorialisation, including memorials dedicated to victims of human rights violations.<sup>314</sup> Provision for institutional building should also be made including, amongst others, a requirement to promote specific preventive and monitoring mechanisms to address situations that may lead to social conflicts and contribute to their early resolution.<sup>315</sup>

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<sup>312</sup> Report of the Special Rapporteur on truth, justice, reparations and guarantees of non-recurrence on Guarantees of Non-Recurrence to the General Assembly, A/70/438, October 2015.

<sup>313</sup> See Report of the Special Rapporteur on truth, justice, reparations and guarantees of non-recurrence on Guarantees of Non-Recurrence, A/HRC/30/42, September 2015 and UN Basic Principles on Remedy and Reparation, supra 244, Article 23(e).

<sup>314</sup> Ibid

<sup>315</sup> Ibid, Article 23(g), reads: “Promoting mechanisms for preventing and monitoring social conflicts and their resolution”.

**In light of the above, the ICJ calls on the CDA to ensure that the Constitution:**

- i. Provides for a duty on the Libyan authorities to put in place a comprehensive policy on justice for gross human rights violations by the previous regime and for gross human rights violations committed during the transitional period. As part of that policy, measures should be taken to uphold the right to truth, justice and reparations and that steps are taken to ensure non-recurrence of systematic human rights violations;**
- ii. Enshrines the right to a fair trial and the right to a remedy using clear and unambiguous language and providing for strong protections for these rights within its section on human rights;**
- iii. Includes the requirement on the state to ensure accountability for perpetrators of serious human rights violations, ensure reparations for victims of serious human rights violations, and to ensure that perpetrators of human rights violations of a potentially criminal character are brought to justice;**
- iv. Does not contain the caveat that criminal prosecutions should be in accordance with the framework of Sharia. Article 190(5) should be amended accordingly;**
- v. Prohibits amnesties for gross violations of human rights and serious violations of international humanitarian law. (Article 123 should therefore be retained);**
- vi. Defines vetting procedures narrowly and ensures that vetting procedures conform to standards of fairness and transparency;**
- vii. Reflects the expansion of measures to ensure non-recurrence to include the provision of human rights and humanitarian law education on a "priority and continued basis" to all sectors of society and, in particular, for law enforcement officials and military and security forces;**
- viii. Provides for memorialisation and institutional building, including, amongst others, a requirement to create specific preventive and monitoring mechanisms to address situations that may lead to social conflicts and contribute to their early resolution.**

## **VI. Recommendations**

### ***The Constitutional Drafting Process***

**In light of the above, the ICJ calls on the Libyan authorities, including the CDA, to:**

- i. Ensure that the right of all Libyans to participate in the conduct of public affairs is respected, including by ensuring broad participation in the constitutional drafting process and widespread consultation on the content of the Constitution. To this end, the CDA should take concrete steps to improve its outreach to the Libyan population and provide for effective mechanisms of engagement with the general public in the next phase of the constitutional drafting process;**
- ii. Ensure that the drafts of the Constitution are made public and available on the website of the CDA, and are adequately disseminated, so as to allow for a comprehensive public dialogue about them;**
- iii. Ensure that all stakeholders, including, among others, civil society organisations, the Bar Association, judges, and victims of human rights violations and their representatives, are given the opportunity to participate meaningfully in all stages of the process of drafting the Constitution, and that all their submissions are given full consideration;**
- iv. Provide for specific and concrete measures to ensure women's full and equal representation and participation in the constitutional drafting process;**
- v. Ensure that positive and effective measures are undertaken to ensure the full participation and adequate representation of members of minority communities in the constitutional drafting process;**
- vi. Ensure that special efforts are made to engage populations living in areas of armed conflict.**

### ***The Constitution and the Rule of Law***

**In light of the above, the ICJ calls on the CDA to ensure that the Constitution:**

- vii. Fully embeds the rule of law in the framework for the functioning of the state, including by ensuring the clear separation of powers, attribution of competences and checks and balances between the legislature, the executive and the judiciary;**
- viii. Enshrines the power of judicial review over all legislative and executive acts;**
- ix. Clearly and unambiguously recognises the primacy of the Constitution over all other aspects of domestic law, and ensures that these aspects are adopted and implemented in full compliance with the Constitution. Article 7 of Part I of the Draft Constitution must be amended to reflect this;**
- x. Asserts the primacy of international human rights law over domestic law. To this end, unequivocally asserts that internal law, including the Constitution, cannot be used as a justification for non-compliance with human rights conventions and treaties that have been ratified by Libya;**
- xi. Specifies that parliamentary, presidential or any other form of immunity cannot be used to shield a person accused of gross violations of human rights and serious crimes under international law. Article 57 and article 82 of the Draft Constitution should be amended to reflect this;**
- xii. Reflects the deletion of article 80, or, at a minimum, an amendment to define the circumstances in which, absent a declaration of emergency, the President can issue decrees on matters otherwise within the competency of Parliament,**

- and to provide that all such decrees issued by the President automatically cease to operate unless approved by the *Shura* Council within 7 days;
- xiii. Adequately defines the role of the security services and the armed forces and provides that they are accountable and subordinated to a legally constituted civilian authority. This framework should include specific parliamentary mechanisms to oversee their functioning, including by ensuring that they abide by the law and are held to account;
  - xiv. Further limits the powers of the President or Legislature to adopt measures, in situations of emergency, that might infringe on human rights. In particular, the existing provisions on emergencies in the Draft Constitution require amendment to accord with Libya's obligations under international law, including by incorporating all aspects of article 4 of the ICCPR, as well as the additional non-derogable rights mentioned by the UN Human Rights Committee in its General Comment 29 and the Arab Charter (Articles 4(2), 13, 14(6) and 20) into article 202 and 151 of the Draft Constitution. This includes the requirement to list non-derogable rights and to add the requirement of strict necessity and the prohibition of discrimination;
  - xv. Provides for effective instruments and mechanisms that guarantee Libyans' right to participate in the conduct of public affairs, including their right to vote and to be elected without discrimination. Article 37, 38, 46, 70 and 85 of Part II must be amended to remove the requirement that all candidates for the House of Representatives and the *Shura* Council must be Libyan Muslims as it is a discriminatory provision contrary to Libya's obligations under international human rights law;
  - xvi. Provides that particular measures should be taken to ensure women's participation in public life;
  - xvii. Ensures that no matter what system of local governance is provided for it is clear that all organs of government have the responsibility to respect, protect and fulfil human rights;
  - xviii. Provides for an effective and independent national human rights institution to protect and promote human rights with a comprehensive mandate and sufficient guarantees for its independence, in accordance with the Paris Principles on National Human Rights Institutions, including the following:
    - a. The mandate of the National Council should be extended so that it not only supports citizens but all individuals in Libya to vindicate their rights. Thus "citizens" should in article 165 be replaced by "individuals".
    - b. The mandate of the National Council should be further expanded to include a quasi-judicial competence to hear individual complaints relating to human rights violations.
    - c. The Chief Commissioner of the National Council should have the right to challenge, on his or her own initiative, the constitutionality of legislation, rules of procedure, and any other exercise of public authority, on the ground that the rule or action in question violates human rights in order to invest the position with meaningful powers of oversight.
    - d. The requirement of a pluralistic membership for the National Council should be added to ensure a broad representation of society in the institution.
  - xix. Article 162 should be revised to remove the requirement that the constitutional institutions: "are subject to the oversight of the legislative authority" because it undermines their independence.

### ***Human Rights and International Standards***

- xx. Includes a comprehensive section on rights that complies with Libya's obligations under international human rights law and with universally recognised human rights standards;**
- xxi. Expressly provides that should any conflict arise between provisions of the Constitution in their interpretation and application, the provision or interpretation providing for the greater protection of rights always takes precedence. This principle should be made clearly applicable to all laws, both within the Constitution and to primary and secondary legislation;**
- xxii. Recognises, guarantees and protects economic, social and cultural rights on an equal footing with civil and political rights and recognises that Libya is obliged to take steps, as expeditiously as possible, to the maximum of its available resources to progressively achieve the full realisation of the rights outlined in the ICESCR;**
- xxiii. Includes a comprehensive general anti-discrimination clause, covering at least all the grounds covered by the ICCPR as interpreted by the UN Human Rights Committee;**
- xxiv. Ensures human rights protections generally extend to all individuals under Libya's jurisdiction and are not limited to citizens;**
- xxv. Ensures that both direct and indirect discrimination against women are prohibited in line with CEDAW's recommendation to Libya in 2009. In this regard, the ICJ strongly recommends that article 11(2) of the Draft Constitution which provides for the automatic passing down of nationality from a Libyan father but not from a Libyan mother be amended;**
- xxvi. Enshrines the duty of the state to actively counter discrimination against women and ensures that no language in the Constitution perpetuates stereotypes in relation to women, including on the basis of their role within the family and marriage status. Articles 31 and 119 should be amended respectively;**
- xxvii. Provides for the prohibition of all forms of violence against women and for redress when it occurs;**
- xxviii. Contains a requirement that domestic violence is criminalised in national legislation;**
- xxix. Contains strong protections for minorities including by asserting the rights of all minorities to enjoy their own culture and to use their own language, to participate in public life, including in the conduct of public affairs, and to participate effectively in all decisions that affect them. The Constitution should include a duty on the state to protect minorities and their identity, including by creating favourable conditions to enable minorities to express their characteristics and to develop their culture, language, religion, traditions and customs;**
- xxx. Enshrines the right to life by providing that the right shall be protected by law and that no one shall be arbitrarily deprived of his life. Includes an explicit provision that "the law must strictly control and limit the circumstances in which a person may be deprived of his life by the state authorities" and that "in the course of law enforcement, authorities may intentionally deprive a person of life only when strictly unavoidable in order to protect life". Article 112 on the right to life should be amended accordingly;**
- xxxi. Contains a clear and absolute prohibition on the use of the death penalty.
  - a. If despite this recommendation, the Constitution does not explicitly prohibit the death penalty, its possible scope of application and****



**procedural safeguards must be prescribed in terms that strictly comply with international standards;**

- xxxii. Absolutely prohibits torture and other cruel, inhuman or degrading treatment or punishment and incorporates a definition of torture that reflects the comprehensive definition enshrined in article 1 of the Convention against Torture;**
- xxxiii. Contains a clear prohibition of all forms of corporal punishment, including, among others, flogging, beating, and all forms of bodily mutilation;**
- xxxiv. Requires consent for medical or scientific experiments;**
- xxxv. Requires the Libyan authorities to criminalise torture in national legislation and provides that victims of torture are entitled to redress as well as an enforceable right to compensation;**
- xxxvi. Prohibits the return of any individual to another country where that individual is at risk of torture or other ill treatment or similar irreparable harm;**
- xxxvii. Explicitly prohibits slavery and servitude;**
- xxxviii. Proclaims the right to liberty and security in a freestanding article (given the fundamental nature of this right) that incorporates the right to liberty and security of person, a prohibition on arbitrary arrest and on arbitrary detention and the prohibition of any deprivation of liberty that is not in accordance with grounds and procedures specified by law, as well as other fundamental safeguards required by international law such as the right to challenge the lawfulness of detention before a court;**
- xxxix. Includes comprehensive guarantees for the right to a fair trial, including, among others, the right to be tried by an independent, impartial and competent tribunal; the right to equality before the courts; the right of defendants to be informed promptly and in detail of the nature and cause of the charge against them; to challenge the lawfulness of their detention; to have adequate time and facilities for the preparation of their defence and to communicate freely and in confidence with counsel of their own choosing; to be tried without undue delay; to equality of arms; and the right not to be compelled to testify against themselves or to confess guilt; trials should take account of the age of a juvenile person, all decisions should be made with the best interests of the child as a primary consideration, including ensuring respect for their dignity and their rehabilitation should be the key aim of judicial processes concerning them;**
  - xl. Excludes any possibility of the use of evidence that may have been obtained through torture, ill treatment or similar unlawful means;**
  - xli. Introduces a right to freedom of opinion and expression, in line with article 18 of the ICCPR with restrictions that conform to article 20 of the ICCPR;**
  - xlii. Provides for the clear and unequivocal recognition and protection of the right to freedom of thought, conscience and religion, in line with Libya's obligations under the ICCPR and the Arab Charter, as well as general international law;**
  - xliii. Includes an expanded definition and scope of the right to health, reflecting the requirements of article 12 of the ICESCR;**
  - xliv. Recognises the right to safe drinking water and sanitation;**
  - xlv. Includes the requirement that the state must take the appropriate steps to safeguard the right to work. In order to reflect article 7 of ICESCR, the proposals should add the requirement that the state must ensure that conditions of work are "just and favourable";**
  - xlvi. Includes the right to join and form trade unions, in line with article 12, ICESCR;**
  - xlvii. Contains a right to education that fully conforms to article 13 of the ICESCR;**

- xlvi. Ensures that the right to participate in cultural life and to benefit from scientific progress conforms to article 15 of the ICESCR;
- xlix. Prohibits forced marriage and includes the requirement of the consent of both spouses to marriage;
  - i. Sets an age limit or limits on the employment of children in line with Libya's obligations under the International Labour Organisation (ILO) Minimum Age Convention, 1973 (No. 138);
  - ii. Contains a right to asylum that conforms to Libya's obligations under the Organisation of the African Union Convention Governing the Specific Aspects of Refugee Problems in Africa;
  - iii. Includes, for those rights that can be subject to limitation, the specific grounds and restrictions applicable, within each relevant article, in conformity with international law; and ensures that other rights are not subject to any restriction in the absence of a valid derogation in times of emergency;
  - liii. Specifically recognises each of the non-derogable rights, including, among others, the right to life, the right to be free from torture or other ill treatment, the right not to be subject to enforced disappearance, aspects of the right to a fair trial, the application of the principle of legality, and the right to challenge the lawfulness of detention (*habeas corpus*), as being rights from which no derogation is accepted, including in times of emergency;
  - liv. Provides for the right to effective remedy and reparation to address human rights abuses, including the right to a prompt, thorough, independent and impartial investigation, to know the truth, and to reparation in all its forms;
  - lv. Includes an expanded provision for access to a constitutional remedy and reparations, before the courts, for anyone affected or otherwise interested in the constitutional validity of any piece of legislation or any executive action, with the courts expressly empowered to issue any form of declaration or order necessary to correct the violation of the Constitution;

#### ***The Judiciary and International Standards***

- lvi. Brings the whole judicial system in line with international standards of independence, impartiality and accountability;
- lvii. Enables judicial review over the compliance of legislative and executive acts with the Constitution and, to this end, unequivocally affirms that the decisions of the Constitutional Court are final, cannot be subject to any form of review or appeal, and are binding on, and must be enforced by all public authorities;
- lviii. Provides that the SJC is a truly independent body, granted the necessary authority to promote the efficient functioning of the judiciary and to safeguard its independence, including by providing that a majority of members of the SJC are judges elected by the judiciary;
- lix. Provides that no appointments to the SJC should emanate from the executive or the legislative power;
  - ix. Provides for a pluralistic and representative membership of the SJC, including adequate gender representation;
- lxi. Provides that members of the judiciary are subject to the authority of the SJC, in relation to professional incapacity or misconduct;
- lxii. Provides detailed legal and practical guarantees for judicial independence, including as regards security of tenure, selection and appointment procedures, transfer and disciplinary and removal procedures, in line with international standards and best practices;

- lxiii. Provides that judges may only be removed for reasons of incapacity or behaviour that renders them unfit to discharge their duties, and that all disciplinary, suspension or removal proceedings shall be determined in accordance with established standards of judicial conduct;**
- lxiv. Includes a provision to explicitly prohibit discrimination of any kind in the selection and appointment process of judges;**
- lxv. Contains a requirement that the judiciary be allocated sufficient funds, which are protected from misuse and cannot be used to exercise control over the judiciary;**
- lxvi. Limits the jurisdiction of military tribunals to alleged breaches of military discipline. Cases involving alleged violations of human rights committed by military personnel and other law enforcement officials should be under the jurisdiction of civilian courts;**
- lxvii. Specifies that civilians can never be subject to the jurisdiction of military courts;**
- lxviii. Ensures both the actual and perceived independence of the Prosecutor General through his or her appointment by an independent process and that the other prosecutors are appointed by the Prosecutor General. The appointment process of prosecutors should be elaborated in line with the UN Guidelines on the Role of Prosecutors;**
- lxix. Ensures that the OPG is not subject to undue executive control, has a duty to act impartially and with operational independence, to respect and uphold human rights, and to fight impunity for human rights violations, and is empowered to investigate private and public officials and actions;**
- lxx. Provides for detailed provisions relating to the competences, formation, functioning and legal status of the Constitutional Court;**
- lxxi. Provides for the financial independence of the Constitutional Court, including the requirement that it be allocated sufficient funds to perform its functions;**
- lxxii. Enshrines guarantees for the independence of the Constitutional Court, including the independence and immunity of its members, as well as an independent appointment procedure for the selection of its members;**
- lxxiii. Provides for personal integrity as an additional requirement for the appointment of judges to the Constitutional Court;**
- lxxiv. Removes qualification or competency in *Sharia* or political science as a substitute for qualification and competency in law among the criteria for the selection of judges to the Constitutional Court;**
- lxxv. Ensures that the decisions of the Constitutional Court are binding on the other branches of government and are enforced by public authorities;**
- lxxvi. Guarantees full access for individuals and anyone affected or otherwise interested in the constitutional validity of any piece of legislation or any executive action to the Constitutional Court;**

***Addressing the Legacy of Human Rights Violations***

- lxxvii. Provides for a duty on the Libyan authorities to put in place a comprehensive policy on justice for gross human rights violations by the previous regime and for gross human rights violations committed during the transitional period. As part of that policy, measures should be taken to uphold the right to truth, justice and reparations and that steps are taken to ensure non-recurrence of systematic human rights violations;**
- lxxviii. Enshrines the right to a fair trial and the right to a remedy using clear and unambiguous language and providing for strong protections for these rights within its section on human rights;**

- lxxix. Includes the requirement on the state to ensure accountability for perpetrators of serious human rights violations, ensure reparations for victims of serious human rights violations, and to ensure that perpetrators of human rights violations of a potentially criminal character are brought to justice;**
- lxxx. Does not contain the caveat that criminal prosecutions should be in accordance with the framework of Sharia. Article 190(5) should be amended accordingly;**
- lxxxi. Prohibits amnesties for gross violations of human rights and serious violations of international humanitarian law, (Article 123 should therefore be retained);**
- lxxxii. Defines vetting procedures narrowly and ensures that vetting procedures conform to standards of fairness and transparency;**
- lxxxiii. Reflects the expansion of measures to ensure non-recurrence to include the provision of human rights and humanitarian law education on a "priority and continued basis" to all sectors of society and, in particular, for law enforcement officials and military and security forces;**
- lxxxiv. Provides for memorialisation and institutional building, including, amongst others, a requirement to create specific preventive and monitoring mechanisms to address situations that may lead to social conflicts and contribute to their early resolution.**

## Commission Members

November 2015 (for an updated list, please visit [www.icj.org/commission](http://www.icj.org/commission))

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