

Preliminary Comments on the
Draft Law Criminalising Torture, Enforced Disappearances
and Discrimination

1. Introduction

The draft law criminalising torture, enforced disappearances and discrimination (the **Draft Law**) represents a positive step by the General National Council (the **GNC**) to protect and promote human rights in Libya and to meet the Libyan state's obligation under international law.

Libya's international obligations in relation to the crimes that are the subject of the Draft Law stem primarily from the International Covenant on Civil and Political Rights of 1966 (**ICCPR**), the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 1984 (**UNCAT**), the United Nations Convention on the Rights of the Child of 1989 and the International Convention on the Elimination of All Forms of Racial Discrimination of 1966. Libya has not acceded to the International Convention for the Protection of All Persons from Enforced Disappearance of 2006.

The Draft Law attempts to criminalise three distinct crimes either fully (the first two) or partially (the third) recognised in international treaties: torture, enforced disappearances and discrimination. The goal of covering Libya's international obligations in relation to these three human rights issues in national legislation is encouraging, but to do so in the same piece of legislation risks oversimplification and avoidance of important specific obligations for each of the human rights issues.

Lawyers for Justice in Libya (**LFJL**), REDRESS, DIGNITY and the World Organization against Torture (**OMCT**) (together, the **Authors**) welcome the Libyan initiative and recognise that there are positive elements in the Draft Law, but remain concerned that the Draft Law requires clarification and amendment if it is to be effective and to comply with Libya's international obligations.

Libya is currently in a transitional period where the rule of law is struggling to take hold. With armed militias maintaining de facto control on the ground and revolutionary legitimacy forming the cornerstone of the political dialogue, it is important that the legislation adopted by the GNC reflects basic rule of law principles. These include, among other things, that it must be accessible, implemented mandatorily and not subject to discretion, equally applied and respectful of human rights to ensure the primacy of the rule of law.¹

¹ Tom Bingham, *The Rule of Law* (Penguin Books, 2010).

It is with consideration of these fundamental principles in mind that the Authors provide their preliminary comments on the Draft Law. In particular, considering the need for accessibility to the law – including in its subject matter – the Authors are of the view that each of the three crimes should be the subject of a distinct law addressing the relevant crime. In this document, the Authors, due to the specific nature of the mandate of all of the Authors other than LFJL and OMCT, will focus on the provisions relating to torture.

2. Legislative Framework

Article 2 of UNCAT requires Libya, as a State Party, to adopt legislative measures to prevent torture. A legislative framework preventing torture serves the following important functions:

- (a) at the symbolic level, it reflects a state's commitment to the prohibition of torture;
- (b) at its best, it consists of a coherent set of norms that effectively addresses the multiple aspects of the prohibition of torture;
- (c) it guides all branches of government on standards and expected conduct, thereby serving both as a tool and a yardstick;
- (d) it effectively minimises the risk of torture through setting out a series of rights, obligations and mechanisms;
- (e) it provides the means to ensure accountability of those responsible for torture;
- (f) it gives victims of torture the right to pursue effective remedies and obtain adequate reparation; and
- (g) it helps in ensuring that a state conforms to its international obligations.

A legislative framework can take the form of amendments to existing legislation or the adoption of a specific anti-torture law. By drafting the Draft Law, Libya appears to have elected to adopt specific anti-torture legislation. However, the Draft Law does not deal with a number of important obligations under UNCAT. Whilst it goes some way towards creating a crime of torture, it does not provide a comprehensive anti-torture framework.

The Authors understand the time pressure that the GNC is under in this transitional period and the need to empower the Ministry of Justice and Ministry of Interior to commence investigations into torture cases. With that in mind, the Authors provide commentary on the Draft Law and undertake, with reference to Libya's international obligations, a review of the Draft Law in relation to the provisions dealing with torture and propose amendments with a view to creating a law which sets out the key components of the criminalisation of torture:

- Definition
- Punishment
- Liability
- Aggravating circumstances
- Obstacles to accountability, including amnesties and prescription
- Universal jurisdiction and non- refoulement.

The recommendations provided in this document are on basis that the Draft Law is an interim measure to criminalise torture and will be supplemented in the future with a comprehensive anti-torture law.

Finally, the Draft Law needs to address clearly the existing legislation. For example, Article (435) of the Penal Code already criminalises torture but the crime of torture has not been defined. It would therefore be desirable for the Draft Law to state clearly that the definition of torture in the Draft Law shall apply to all references to torture in the Penal Code and ensure that the relevant amendment to the Penal Code is made. A further example is Law 38. Whereas reference is made to the Law and to the amnesty granted under its Article (4), it is not clearly stated that the Article is to be repealed. It is important to draft the law in such a way as to avoid any potential confusion contrary to the intentions of the drafters; to this end, a repeal of that Article should be made directly and not left to the interpretation of law enforcement or the judiciary. The Authors have not been able to conduct a full review of existing Libyan legislation on torture to highlight all the required amendments. **LFJL and OMCT are able to do that if the GNC requires assistance in this regard.**

3. Commentary on Draft – Torture provisions

The Authors highlight the following key changes required to make the Draft Law an effective criminalisation of torture law. The drafting suggestions are included in the version of the Draft Law set out in the Annex.

(a) *Definition*

Article (2) of the Draft Law sets out the crime of torture:

anyone who personally inflicted or ordered another person to inflict severe pain or suffering whether physical or mental, on a detainee under his control for such purposes as obtaining from him a confession for an act he has or hasn't committed, or for any reason based on discrimination of any kind or revenge for any cause.

This definition provides for some of the key elements of the crime of torture, as defined in Article (1) of UNCAT. However, it does not include the requirement that the act be committed “intentionally.” We would therefore recommend that the definition be amended to reflect specific purpose.

The definition in Article 2 of the Draft Law refers to the act being committed by a person “on a detainee under his control.” We assume this is to reflect the de facto situation in Libya that much of the torture is being committed in detention facilities and, in some cases, is committed by non-state actors. With that in mind, we appreciate the need to keep a wide definition beyond that of requiring the involvement of a state official, as set out in Article (1) of UNCAT. Further, the

definition of torture should be defined by the act and not by the identity of the victim. We would therefore recommend that the reference to “detainee” be removed and the application of the crime to any perpetrator be maintained, including non-state actors. We would suggest that the perpetrator of the torture being a public official constitute an aggravating circumstance.

The definition in Article (2) of the Draft Law refers to torture, among other things, as being committed to obtain a confession “for an act he has or hasn’t committed.” This is not relevant and, in fact, may be interpreted as suggesting that torture may be permissible if the relevant person did commit the act. We would therefore recommend removing that qualification.

Finally, we would suggest amending the words “or revenge for any cause” to reflect the wording in UNCAT, as it not only refers to the wider concepts of punishment, intimidation and coercion and also to ensure the inclusion of third parties.

Taking the above observations into consideration, we would suggest that the Article (2) definition in the Draft Law be amended to reflect an amended definition of Article (1) of UNCAT which takes into account both the situation on the ground in Libya where torture is regularly committed by non-state actors, such as the armed militias running illegal prisons, and developments in international law. See the new Article (1) in the amended Draft Law set out in the Annex for proposed changes.

(b) Punishment

Article (2) of the Draft Law states the following in relation to punishment:

- (a) Imprisonment for a minimum period of five years for “any person who personally inflicted or ordered another person to inflict” torture;
- (b) Imprisonment for a minimum period of five years for “any person who conceals the crime of torture despite his ability to stop the act”;
- (c) Imprisonment for a minimum period of eight years if “severe harm” has been inflicted;
- (d) Imprisonment for a minimum period of ten years if “extreme injury” has resulted from the crime; and
- (e) Life imprisonment in the case of the victim’s death.

Torture is one of the most severe human rights violations and must be treated as such when penalising the offence. The practice of the Committee against Torture shows that a custodial sentence of “at least a few years can be considered as an

appropriate penalty which takes the grave nature of torture into account.”² Further, Article 4(2) of UNCAT requires that appropriate penalties are stipulated for all the various acts which should be criminalised by UNCAT, including attempt, instigation etc. It is positive that Article (2) of the Draft Law seeks to set custodial sentences of five years or more for the crimes of torture as well as set out some aggravating circumstances.

However, the categories above raise some questions. Paragraph (ii)(b) above refers to “any person who conceals the crime of torture despite his ability to stop the act.” It is unclear what this wording is intending to cover. If this wording is intended to reflect command responsibility, it would be better to state this expressly to avoid ambiguity. We would also recommend clear wording to criminalise complicity, instigation and attempted torture.

Further, it is unclear what is meant by the wording in paragraph (ii)(c) which refers to “severe harm” given that the crime of torture is defined as an act resulting in “severe pain or suffering”. It therefore seems redundant and may create ambiguity at the point of application by a judge. More generally, it is unclear what the distinction between “severe harm” and “extreme injury” is, which should be clarified in the interest of the principle of legality

The Authors set out in paragraph (iv) below certain additional factors which should be considered aggravating circumstances and which should be considered by judges at the time of sentencing.

Taking the above into consideration, we would recommend the clarification of the various crimes linked to torture and the adoption of process that enables judges to issue sentences where a conviction is found, as required by Article (4) of UNCAT which includes an obligation to actually punish perpetrators of torture. This is to deal with one of the key facilitators of torture, and an issue of high relevance in Libya at the moment: a culture of impunity. See the new Article (2) in the amended Draft Law set out in the Annex for proposed changes.

(c) *Liability*

Article (8) of the Draft Law provides for the “responsibility of politicians and leaders”. This article attempts to set out the concept of “command responsibility”. However, it is vague in parts, such as the reference to “same penalty” - it is unclear what is meant by that. We would recommend that this article be amended to reflect more closely the wording in Article (28) of the Rome Statute of the International Criminal Court of 1998, which reflects a widely agreed upon definition

² Manfred Nowak and Elizabeth McArthur, *The United Nations Convention Against Torture – a Commentary* (Oxford University Press, 2008), at 230 (para 2) and at 241 (para 34).

of this form of liability. We would also recommend that the scope of the article be expanded to include more broad provisions on liability and accountability. See the new Article (2) and Article (3) in the amended Draft Law set out in the Annex for proposed changes.

(d) Aggravating circumstances

Article (5) of the Draft Law sets out a number of aggravating circumstances which apply to all three crimes being criminalised by the Draft Law. It is clear that this Article is intended to address the apparent blanket amnesty set out in Article (4) of Law 38 of 2011 and granting an amnesty for “acts made necessary by the 17 February Revolution.” However, it is the view of the Authors that it would be preferable simply to repeal Article (4) of Law 38. In addition, the aggravating circumstances set out in the Draft Law should be drafted in a neutral fashion and not be based on revolutionary justifications, even if in the noble attempt to address the previous error in Law 38.

Article (6) of the Draft Law includes “collateral sanctions”, which are effectively further punishments for those convicted of one of the three acts criminalised by the Draft Law, as well as the additional crimes of “seizing or destroying private and public property”. In this Article, the collateral sanctions are for those who commit the identified crimes “in the name of the February 17th Revolution”. Again, this appears to be an attempt to address the amnesty previously granted under Law 3. Further, the proposed sanctions are at best ambiguous and possibly disproportionate and at worst illegal. It is unclear what is meant by “disenfranchisement of his civil and political rights”. On a wide reading, this could mean that those convicted of torture are disenfranchised of their civil and political right to be free of torture. We are sure this is not the intention of the drafters of the Draft Law. We would therefore recommend that Article (6) in its current form be deleted in its entirety.

The mention of revolutionary circumstances in the Draft Law enshrines further the culture of revolutionary legitimacy prevalent in Libya at the moment and potentially undermines the rule of law: the strength of this legislation should be borne out of its legislative authority and not due to a sense of revolutionary contextualisation. With that in mind, we believe that in both Article (5) and Article (6) the February 17th Revolution “contextualisation” is unhelpful and detrimental to the establishment of the rule of law. We therefore recommend that more general aggravating circumstances should be adopted to deal with the concerns which Article (5) is attempting to address. We would also recommend that a new provision be added to incorporate a temporary sanction whereby any person suspected of torture *prima facie* is suspended during the period of investigation. See the new Article (4) and Article (5) in the amended Draft Law set out in the Annex for proposed changes.

(e) *Obstacles to accountability, including amnesty and prescription*

Article (7) of the Draft Law states that “punishments for crimes stated in this law shall not be subject to amnesty.” This is a welcome provision and prevents the granting of future amnesties as well as addressing past amnesties, including the one granted by Law 38. This means that investigations into past torture can be undertaken. We would recommend that Article (7) be expanded to include immunities and pardons as well as to disapply any statutes of limitation. See the new Article (6) in the amended Draft Law set out in the Annex for proposed changes.

(f) *Universal Jurisdiction and Non-refoulement*

We would recommend that provisions are included in this Draft Law effectively to allow for universal jurisdiction, basically stating that anyone within the Libyan state’s jurisdiction suspected of torture, even where committed abroad, should be prosecuted if he or she is not extradited (see Articles 5-8 of UNCAT). On a related note, we further recommend that a clear provision is included which prevents the extradition of any person to another state where there are substantial grounds for believing that he would be in danger of being subjected to torture, as required by Article (3) of UNCAT. See the new Article (7) and Article (8) in the amended Draft law set out in the Annex for proposed changes.

Annex

Law No (...) of year (...)

~~Criminalizing Torture, Enforced Disappearances and Discrimination~~

The National General Congress,

After looking at:

- The Interim Constitutional Declaration and its amendments;
- The Penal Code and its amendments;
- The Code of Criminal Procedures and its amendments;
- The Military Penal Code and Military Code of Criminal Procedures;
- The Law Number 38 of 2012 on Procedures Relating to the Transitional Period;

Considering this law as a means of partially fulfilling Libya's obligations under the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, to criminalise torture and to prevent refoulement, particularly in relation to Articles 3, 4, 5 and 7 thereof;

Without prejudice to enacting further legislation that implements the entire UN Convention against Torture

Issued the following law:

~~Article (1)~~

~~Enforced Disappearances~~

~~Any person, who has arrested, detained, abducted another person followed by the refusal to acknowledge the detention or to give any information regarding the person's fate and whereabouts with the intent of placing the victim outside the protection of law is punished by imprisonment.~~

Article (21)

Definition of Torture

"Torture" means any act by which imprisonment for a minimum period of five years shall apply to anyone who personally inflicted or ordered another person to inflict severe pain or suffering, whether physical or mental, is intentionally inflicted on a person on a detainee under his control for such purposes as the purpose of obtaining from him or a third person

~~information or a confession for an act he has or hasn't committed, 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 or revenge for any cause.~~

~~Anyone who conceals the crime of torture despite his ability to stop the act shall face the same punishment.~~

~~The perpetrator of torture shall be punished by imprisonment for a minimum period of eight years if severe harm has been inflicted to the detainee, of ten years in case the detainee has been subjected to extreme injury and life imprisonment in case of the detainee's death as a result of the torture.~~

Article (3)

~~Without prejudice to any harsher punishment, anyone who deprives a human being of any of his rights based on his belonging to a specific group, community or region, or on the basis of sex or color is punished by imprisonment.~~

Article (24)

Offences and penalties

(1) Any public person servant who:

(a) -cCommits torture;

(b) attempts to commit torture;

(c) incites, instigates, orders or procures any person to commit torture,

is guilty of the offence of torture and is on conviction liable to imprisonment, including imprisonment for life.

(2) Any person who participates in torture, or who conspires with another person to aid or procure the commission of or to commit torture, is guilty of an offence of torture and is liable on conviction to imprisonment, including imprisonment for life.

(3) The fact that an accused person –

(a) Is or was a head of state or government, a member of a government or parliament, an elected representative or a government official; or

(b) Was under a legal obligation to obey a manifestly unlawful order of a government or superior,

Is neither a defence to a charge of committing an offence referred to in this Article, nor a ground for any possible reduction of sentence, once that person has been convicted of such offence.

(4) A state of war, threat of war, internal political instability or any other public emergency may not be invoked as a justification for torture.

(5) No one shall be punished for disobeying an order to commit torture.

~~ted discrimination on a regional, tribal, racial, mental or any other basis for such purposes as depriving other persons of the services or benefits they are entitled to, or preventing them from obtaining them or violating the right of priority in obtaining them shall face a minimum sentence of one year in prison.~~

Article (3)

The Responsibility of Commanders and Other Superiors

(1) A military commander or person effectively acting as a military commander shall be criminally responsible for crimes defined in this Law committed by forces under his effective command and control, or effective authority and control as the case may be, as a result of his failure to exercise control properly over such forces, where:

(a) that military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and

(b) that military commander or person failed to take all necessary and reasonable actionable measures within his power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

(2) With respect to superior and subordinate relationships not described in paragraph (1), a superior shall be criminally responsible for crimes defined in this Law committed by subordinates under his or her effective authority or control, as a result of his failure to exercise control properly over such subordinates; where:

(a) The superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes;

(b) The crimes concerned activities that were within the effective responsibility and control of the superior; and

(c) The superior failed to take all necessary and reasonable measures within his power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

Article (54)

Aggravating Conditions Factors

If a person is convicted of an offence under this Law, the court that imposes the sentence may consider, but is not limited to the following aggravating factors:

- (1) whether the convicted person was a public official;
- (2) racial discrimination against the complainant;
- (3) the state of the complainant's mental health;
- (4) whether the complainant had any physical disability;
- (5) whether the complainant was under the age of 18 years;
- (6) whether the complainant was raped or indecently assaulted;
- (7) the use of any kind of weapon to harm the complainant;
- (8) the infliction of serious physical harm to the complainant;
- (9) the conditions in which the complainant was detained;
- (10) the role of the convicted person in the offence;
- (11) previous convictions relating to the offence of torture or related offences;
- and
- (12) the physical and psychological effects the torture had on the complainant.

~~The punishment is aggravated by one third of the sentence in case the perpetrator has committed, in the name of the revolution, such acts that violate the text of the article 4 of law 38 of 2012, as arresting other persons, entering and searching residences, covering persons in the degree needed to protect and give success to the revolution.~~

~~The punishment will be aggravated by two thirds of the sentence in case the perpetrator has used his belonging to the revolution to commit such crimes that violate the article 4 as killing, inflicting torture, enforced disappearances and seizing or destroying properties.~~

Article (65)

Collateral Sanctions Suspension

Any public official against whom there are reasonable grounds to believe that he or she has committed an act of torture shall be suspended with immediate effect for the duration of the investigation into the same.

~~Anyone who is convicted of committing such crimes as enforced disappearances, torture, seizing or destroying private and public properties, deprivation of rights and discrimination against Libyans in the name of the February 17th revolution shall face disenfranchisement of his civil and political rights for a period that is equivalent to double the term of the~~

~~punishment. In all cases, the perpetrator shall also face the permanent deprivation of the right to take public office.~~

Article (76)

Amnesty exclusion

Persons who have committed any act of torture shall not benefit from any specific Punishments for crimes stated in this law shall not be subject to amnesty law, immunities, pardons or any similar measures that will the effect of exempting them from any criminal proceedings or sanctions.

Article (8)

The Responsibility of Politicians and Leaders

~~The same penalty shall apply to any political, executive or administrative official or military leader or any person performing the military leader's duties who has committed the crimes stated in the previous articles or it has been proved that the crimes have been committed by any forces under his control or employees working under his supervision without him taking the necessary measures to prevent the crimes from happening, or to reveal them, or prevent them from being submitted to the authorities responsible for discipline, investigation or trial.~~

Article (7)

Universal Jurisdiction

A Libyan court has jurisdiction in respect of an committed outside Libya which would have constituted an offence under Article (2) had it been committed in Libya, regardless of whether or not the act constitutes an offence at the place of its commission, if the person to be charged –

- (1) is a Libyan national;
- (2) is ordinarily resident in Libya;
- (3) is, after the commission of the offence, lawfully present in Libyan territory, or in its territorial waters or on board of a ship, vessel, off-shore installation, a fixed platform or aircraft registered or required to be registered in Libya and that person is not extradited pursuant to Article 8 of the UN Convention against Torture; or
- (4) has committed the offence against a Libyan national or against a person who is ordinarily resident in Libya.

Article (8)

Non-refoulement

No person will be expelled, returned or extradited to another state where there are substantial grounds to believe that such person will be in danger of being subjected to torture.

Article (9)

This law shall be published in the official gazette and shall come into force on the date of its publication.

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The General National Congress