

National Assembly Secretariat  
Parliament House,  
Islamabad – Pakistan

Lahore-Geneva, 26 June 2015

**Re: Draft Torture, Custodial, Death and Custodial Rape Bill**

Dear Members of the National Assembly,

On the occasion of June 26, the International Day in Support of Victims of Torture, the Human Rights Commission of Pakistan and the World Organisation against Torture very much welcome the introduction of anti-torture legislation necessary to implement the UN Convention against Torture (Convention). A comprehensive law on torture is a milestone in the fight against torture and recognizes the rights and values of the Constitution of Pakistan.

On the basis of the Convention and our global experience on anti-torture legislation, we would like to take the opportunity to comment on the Draft Torture, Custodial, Death and Custodial Rape Bill (Draft Bill). While the Draft Bill contains many important provisions, several draft clauses risk to frustrate the very purpose of the law. The latter include provisions on the special protection of the army and intelligence agencies, malafide complaints, and the supremacy of extradition treaties over non-refoulement provisions.

**Criminalization of Torture and Cruel, Inhuman, and Degrading Treatment and Punishment**

Article 4 of the Convention requires state parties to “ensure that all acts of torture are offences under its criminal law”. State parties are further obliged to inflict appropriate penalties which take into account the grave nature of the act. We thus welcome the criminalization and punishment of torture, custodial death and custodial rape in the draft Clauses 3 to 7.

At the same time, we regret that other forms of cruel, inhuman and degrading treatment (CIDT) are not regulated in the draft law. Articles 16 and 12 of the Convention, require member states to promptly and impartially investigate complaints of torture as well as CIDT. Torture and CIDT are interdependent, indivisible and interrelated and the threshold between them is often not clear.<sup>1</sup> In addition, torture and CIDT are both absolutely prohibited.<sup>2</sup> Our experience further shows that the conditions under which torture occur also facilitate CIDT. The Committee against Torture (Committee) has thus repeatedly raised concerns over the lack

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<sup>1</sup> General Comment No. 2, Implementation of article 2 by States parties, UN Doc. CAT/C/GC/2, 24 January 2008, para. 3.

<sup>2</sup> See e.g. Concluding Observation on Zambia, UN Doc. CAT/C/ZMB/CO/2, 26 May 2008, para. 5.

of criminal responsibility for CIDT.<sup>3</sup>We therefore propose to extend the application of all the clauses to CIDT.

### Prompt and Impartial investigations

In Article 12, the Convention requests prompt and impartial investigation. The Committee has further specified that such investigations should not be undertaken by or under the authority of the police but by an independent body.<sup>4</sup> We thus very much welcome that the draft bill authorized the National Commission for Human Rights to investigate complaints. However, the National Commission for Human Rights is not yet functional. Although established by a Bill in 2012, no commissioner has been selected. This means that in the meantime the jurisdiction to investigate rests with the Federal Investigation Agency (FIA). The FIA, a counter-intelligence and security agency, has been widely criticized for its covert operations related to political groups and parties on behalf of the government. By attributing jurisdiction to the FIA, the impartiality and independence of torture investigations is jeopardized. We thus urge the National Assembly to put pressure on the government to finally establish a functional National Commission.

In the context of prompt and impartial investigations, we are also concerned about draft Clause 15 that requires the FIA to seek instruction and direction from the Federal Government when receiving a complaint against a member of the armed forces or the intelligence agencies. Various UN treaty bodies have condemned requirements to seek permission from the government before investigating offences against army personnel. The Human Rights Committee, for instance, urged India to abolish the prerequisite that “criminal prosecutions or civil proceedings against members of the security and armed forces, acting under special powers, may not be commenced without the sanction of the central Government”.<sup>5</sup> These type of clauses contribute to a climate of impunity and deprive people of remedies. We thus strongly suggest omitting Clause 15.

### Inadmissibility of statements that have been obtained through the use of torture

Under Article 15 of the Convention against Torture, evidence obtained as a result of torture shall not be invoked as evidence in any proceedings. The Committee against Torture has emphasized that such provisions are especially important where a criminal justice system relies heavily on obtaining confessions for instituting prosecutions.<sup>6</sup> We therefore welcome draft Clause 9 that makes statements extracted through torture inadmissible.

It is important to add that this prohibition also applies to CIDT and not only to torture. The Committee has stated that States need to ensure that any statement or confessions made by persons in custody ascertained to have been made as a result of torture or ill-treatment should not be admissible as evidence against the person.<sup>7</sup>

### No exceptional circumstance may be invoked to justify torture

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<sup>3</sup> See e.g. Concluding Observations on Mongolia, UN Doc. CAT/C/MNG/CO/1, 20 January 2011, para. 9.

<sup>4</sup> See e.g. Concluding Observations on Kyrgyzstan, UN Doc. CAT/C/KGZ/CO/2, 20 December 2013, para. 6d; Concluding Observations on Yemen, UN Doc. CAT/C/YEM/CO/2Rev.1, para. 16.

<sup>5</sup> HRC, Concluding Observation on India, UN Doc. CCPR/C/79/add.81, 4 August 1997, para. 21.

<sup>6</sup> See e.g. Concluding Observation on Japan, UN Doc. CAT/C/JPN/CO/2, 28 June 2013, para. 11

<sup>7</sup> Concluding Observations on Mongolia, UN Doc. CAT/C/MNG/CO/1, 20 January 2011, para. 18.

The Convention states in Article 2 that “no exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.” This stipulates the absolute prohibition of torture. Article 2 also applies to threat of terrorist acts, violent crimes, and international or non-international armed conflicts.

Draft Clause 24 is thus an important provision that reflects Pakistan’s obligations under Article 2 of the Convention.

#### Preclude Malafide complaints

Draft Clauses 12 and 13 of the draft bill provide that torture complaints with malafide intentions are punishable with imprisonment or a fine. Provisions on malafide complaints have proven to constitute serious obstacles for torture victims as they strongly discourage victims to come forward. A torture complaint as such already brings the risk of reprisals, especially if brought by victims who belong to the underprivileged and poor. In addition, provisions on malafide complaints are often abused in cases in which a torture complaint has been rejected for the lack of evidence and not because of ill intent. We therefore propose to omit Clauses 12 and 13.

#### Prohibit expulsion to States where the person is at risk of being tortured

Article 3 of the Convention states that “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.” The Draft Bill implements Article 3 of the Convention by providing an almost identical provision in Draft Clause 22 paragraph 2 Sentence 1.

However, sentence 2 of the same Clause has a limitation in favor of extradition treaties. Such a limitation is not compatible with Article 3 of the Convention. The Committee has repeatedly stated that non-refoulement is absolute.<sup>8</sup> This means that the balancing of interests between the individual’s rights not to be subjected to torture by means of expulsion/extradition and the compliance with international expulsion treaty obligations are not permissible. In other words, if an individual would be in danger of being subjected to torture if extradited, said individual cannot be extradited regardless of extradition treaties or similar obligations *vis-à-vis* an inter-governmental organization. We therefore propose to omit the second sentence of Draft Clause 22 paragraph 2.

#### Meaningful redress including compensation and rehabilitation

The Draft Bill does not provide for meaningful redress. Compensation is the sole form of redress foreseen in the Draft Bill. In addition, compensation is only granted if the torture perpetrator is found guilty and fined according to draft Clause 4 paragraph 3. Since it is the actual fine that is transferred to the victim, the victim is only compensated if the perpetrator pays the fine. This is not compatible with the Convention that requires prompt, fair and adequate compensation regardless whether the perpetrator is found guilty and pays a fine. When a representative of the state inflicts torture, it is the primary responsibility of the state to compensate the victim.

Furthermore, it is important to stress that compensation for torture and the criminal responsibility of the perpetrator are not necessarily connected. It might be established that

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<sup>8</sup>Concluding Observations on Japan, UN Doc. CAT/C/JPN/CO/2, 28 June 2013, para. 9.

torture was inflicted, but the perpetrator cannot be held responsible for procedural reasons such as a statutory period of limitation. The system of compensating thus needs to be detached from awarding of fines.

Moreover, compensation alone is not sufficient redress for a victim of torture. The Committee has repeatedly stated that Article 14 of the Convention requires member states to enact other forms of redress including restitution, rehabilitation, satisfaction and guarantees of non-repetition.<sup>9</sup>We thus propose to include a Clause in the Draft Bill that enables torture victims to seek full redress.

On this day dedicated to the victims of torture, we would like to remind the National Assembly of its promise to eradicate torture and to implement the Convention against Torture. In the light of the above we ask you to pass the Draft Bill with the proposed amendments.

We thank you for your attention to this important matter.

Yours sincerely,



Gerald Staberock, Secretary General OMCT



Zohra Yusuf, Chairperson  
of the HRC

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<sup>9</sup> General Comment No. 3, Implementation of Article 14 by State parties, UN Doc. CAT/C/GC/3, 13 December 2012.