

Draft of the Law No 29464: the project of the Criminal code of the Republic of Uzbekistan

The World Organisation Against Torture (OMCT) supported by the Kazakhstani NGOs Coalition against Torture, the Coalition Against Torture in Kyrgyzstan and the Civil Society Coalition against Torture and Impunity in Tajikistan welcome the reform of the Criminal code of the Republic of Uzbekistan and the efforts to bring the national legislation in line with the international human rights standards.

We highly appreciate criminalization of torture and inhuman treatment in line with the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the recommendations of the Committee against Torture drawn in its Concluding Observations on the fifth periodic report of Uzbekistan in 2020. The criminalization of torture and ill-treatment is an essential step to eradicate practice of torture and to ensure effective and timely investigation of all incidents.

In order to further improve the provisions on torture and ill-treatment of the current draft Criminal Code, the OMCT and the three Central Asian Anti-Torture Coalitions have prepared the recommendations outlined below, aimed at enabling the Parliament of Uzbekistan to criminalize torture fully in line with the Convention against Torture and other relevant international standards and to promote its effective implementation.

Commentary and Recommendations

Definition of torture (article 169)

In international law the definition of torture is provided by article 1 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UN CAT)¹, and the Committee against Torture recommends domestic legislation to follow, at a minimum, this definition.² The definition has three constitutive elements:

- 1) any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person;
- 2) for purposes such as obtaining from him/her or a third person information or a confession, punishing him/her for an act he/she or a third person has committed or is suspected of having committed, or intimidating or coercing him/her or a third person, or for any reason based on discrimination of any kind;
- 3) 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.³

In terms of criminal legislation, the Convention provides one objective element of the crime of torture (any act by which severe pain or suffering, whether physical or mental is inflicted) and two subjective elements (an act is intentional, and it is committed for specific purposes). The

¹ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT), 1984, <https://www.ohchr.org/en/professionalinterest/pages/cat.aspx>, article 4

² Committee Against Torture (CAT), General Comment N°2: Implementation of Article 2 by States Parties, 2008, UN Doc. CAT/C/GC/2, <https://bit.ly/2RMYN3C>, para 8

³ UNCAT, op. cit.1, article 1

crime also requires a specific actor – a public official or another person acting in an official capacity. The special subjective motive or purpose behind the crime differentiate torture from ill-treatment.

In its current version, article 169 of the draft law of the Criminal Code of Uzbekistan has the following elements:⁴

- 1) getting any information from a person or a third person, getting confession, arbitrary punishment or forcing an offender to commit any action, or any form of discrimination or other unlawful act;
- 2) committed by state official or other person, performing the functions of the state body, or other persons, acting upon guidance, notification or tacit consent of other persons;
- 3) by harassment, beating, torture or other unlawful acts, psychological or physical pressure or other forms of pressure.

In its current version, the crime has two objective elements: (1) getting information/confession/punishment or other (2) by harassment, beating, inflicting pain. This wording could lead to the incorrect interpretation of UN CAT, and inaccurate enforcement of the crime of torture.

We suggest rephrasing the wording of article 169 and making it as close as possible to article 1 of the UN CAT. The crime of torture should have ‘infliction of pain’ as a main objective element, that is the essence of that crime, followed by subjective elements of intention and specific purpose. Moreover, it is important to have non-exhaustive list of possible purposes for torture as provided by the UN CAT and include all modes of liability, including acquiescence and consent. A number of states incorporate direct wording of Article 1 of the UN CAT into their criminal codes, and we endorse this approach as the first step towards the criminalization of torture.

In its Concluding Observations on the report of Uzbekistan in 2020, the Committee against Torture recommended the government to adopt a definition of torture in its criminal code in line with all the elements contained in article 1 of the Convention.⁵

Definition of inhuman treatment (article 170)

The UN CAT defines other acts of cruel, inhuman or degrading treatment or punishment as those that “do not amount to torture as defined in article 1, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.”⁶ International criminal tribunals also define inhuman treatment as an act lacking specific purpose that is a distinctive element of the crime of torture.⁷

In its current version, article 170 of the draft law of the Criminal Code of Uzbekistan includes physical or psychological torture that makes it easy to confuse inhuman treatment with torture, outlined in article 169.

⁴ Translation is unofficial

⁵ Committee Against Torture, Concluding observations on the fifth periodic report of Uzbekistan, 2020, <https://bit.ly/2QpwtE3>, para 22

⁶ UNCAT, op. cit.1, article 16

⁷ Rome Statute of the International Criminal Court, A/CONF.183/9, 1998, <https://www.icc-cpi.int/resource-library/documents/rs-eng.pdf>, article 8(a) (ii)

We recommend defining inhuman treatment clearly, referring to acts that do not amount to torture and lack specific purpose such as getting information, confession, punishment or discrimination.

Grave nature of the crime of torture (article 169)

Article 4 of the UN CAT obliges States-parties to “make these offences punishable by appropriate penalties which take into account their grave nature.”⁸ The penalties for torture provided in the national legislation should reflect the extreme gravity of the crime and classify the crime as serious. The Committee against Torture recommended sentences of between six and twenty years of imprisonment for the crime of torture or to be equal to that of the most serious offences in that jurisdiction, except the death penalty.⁹

In the current version of the draft Criminal Code of Uzbekistan, the crime of torture is punished by imprisonment from three to five years, that classifies torture as a minor crime. Such classification is not in line with the international standards.

In its Concluding Observations on the report of Uzbekistan, the CAT has also provided the recommendation to ensure that both the crime of torture and the attempt to commit such a crime are punishable with appropriate penalties.¹⁰

We recommend changing the punishment for torture for the crime to be defined as grave or particularly grave crime and for the punishment to reflect the gravity of the crime.

Exemption from Liability (statute of limitations, amnesties and other forms) (articles 75, 77-78)

The Committee against Torture considers that amnesties violate the non-derogable nature of the prohibition of torture: “The Committee considers that amnesties or other impediments which preclude or indicate unwillingness to provide prompt and fair prosecution and punishment of perpetrators of torture or ill-treatment violate the principle of non-derogability”.¹¹ Human Rights Committee also provides that: “Amnesties are generally incompatible with the duty of States to investigate such acts; to guarantee freedom from such acts within their jurisdiction; and to ensure that they do not occur in the future”.¹² The Committee against Torture has also repeatedly taken the position that there should be no statutes of limitations for the crime of torture.¹³

⁸ UNCAT, op. cit.1, article 4

⁹ Committee against Torture, Summary Report of the 93rd Meeting of the Committee, UN Doc. CAT/C/SR.93, <https://digitallibrary.un.org/record/138027>; Manfred Nowak and Elizabeth McArthur (eds.). The United Nations Convention Against Torture, A Commentary (Oxford University Press, Oxford: 2008), p. 250

¹⁰ Committee Against Torture, Concluding observations on the fifth periodic report of Uzbekistan, 2020, op. cit. 5, para 24

¹¹ CAT, General Comment N°2, op. cit. 3, para 5

¹² Human Rights Committee, General Comment No. 20, https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=INT%2fCCPR%2fGEC%2f6621&Lang=en, para. 15

¹³ Committee against Torture, General Comment N°3, <https://bit.ly/3gvcr5P>, para 38

In the current version of the draft Criminal Code of Uzbekistan, an act of amnesty is applicable to any crimes, including torture, inhuman treatment and other international crimes, except for Article 168 (“Illegal placement in a psychiatric institution”). Other forms of exemption from criminal liability are also applicable to the crime of torture in accordance with the current version of the Criminal Code. Article 77 provides for exemption from criminal liability if an offender is remorseful in a non-serious crime (that includes torture and inhuman treatment under the current version) committed for the first time. Reconciliation, provided in Art. 78, while is not applicable to the crime of torture, is still provided for inhuman and degrading treatment (Art. 170).

Article 75 of the current version of the draft Criminal Code of Uzbekistan provides statutes of limitations to crimes, including the crimes of torture and inhuman treatment. None of them is exempted from application of the statute of limitations.

In its Concluding Observations on the report of Uzbekistan in 2020, the Committee against Torture has expressed its concern about amnesties and status of limitations applicable to the crimes of torture and recommended to refrain from granting amnesties to perpetrators of torture, abstain from issuing pardons to persons found guilty of committing acts of torture and ensure that crime of torture is in the list of articles for which there is no statute of limitations.¹⁴

We highly recommend excluding torture and inhuman treatment (article 169 and 170) from any modes of exemption of liability, including statute of limitations, remorse, reconciliation and amnesties.

Jurisdiction over the crime of torture (articles 15-16)

The UNCAT obliges state-parties to establish its jurisdiction over the crime of torture not only when it is committed in the territory of the member-state, but also:

- When the alleged offender is a national of that State;
- When the victim is a national of that State
- Where the alleged offender is present in any territory under its jurisdiction and is not extradited.¹⁵

Due to the grave nature of the crime of torture, all countries have an obligation to ensure that perpetrators do not escape justice. States are recommended to investigate and prosecute torture not only when it is committed on its territory, but also when it is committed in other states and is not investigated there. The UNCAT provides additional establishment of jurisdiction over the torture cases when the alleged perpetrator or the victim are nationals of the considered state and also in the cases when the alleged offender is not a national of the considered state, but he/she is present in any territory under its jurisdiction and is not extradited to his/her country of origin (universal jurisdiction).

We recommend Uzbekistan to amend Article 15 or add a new article in Chapter II “Sphere of territorial and temporal application of criminal legislation”, that will enable additional modes for exercising jurisdiction over the crime of torture when the offender or the victim are nationals of Uzbekistan or when the alleged perpetrator is present in the territory of Uzbekistan.

¹⁴ CAT, Concluding observation, op. cit. 2, para 26

¹⁵ UNCAT, op. cit.1, article 5

Other international crimes (article 191 and others)

While it is essential to criminalize torture as a separate crime, torture also forms part of other international crimes – enforced disappearance, war crimes, and crimes against humanity.

We welcome the criminalization of war crimes in article 191 of the draft Criminal Code. Together with that, *we recommend providing in this article direct reference to the Geneva Conventions of 1949 and the Additional Protocol of 1977, and to the Rome Statute of International Criminal Court (ICC)*. These international treaties provide extensive lists of war crimes and their constitutive elements. Reference to those international treaties in the Criminal Code will enable the accurate interpretation of the international crimes during their implementation.

We also recommend criminalizing crimes against humanity in the same chapter. Crimes against humanity could take place during the armed conflict as well during peace and represent an essential element of international crimes together with genocide, war crimes and aggression.

According to the Rome Statute of ICC, ‘crime against humanity’ means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack: (a) murder; (b) extermination; (c) enslavement; (d) deportation or forcible transfer of population; (e) imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; (f) torture; (g) rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity; (h) persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court; (i) enforced disappearance of persons; (j) the crime of apartheid; (k) other inhuman acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.¹⁶

We recommend using the wording of the Rome Statute in the Criminal Code of Uzbekistan to outline the crimes against humanity.

We also recommend criminalizing enforced disappearance in line with the definition provided by the International Convention for the Protection of All Persons from Enforced Disappearance. According to article 2 of the Convention, "enforced disappearance" is considered to be the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law.¹⁷

¹⁶ Rome Statute, op. cit. 6, article 7

¹⁷ International Convention for the Protection of All Persons from Enforced Disappearance, 2006, <https://www.ohchr.org/en/hrbodies/ced/pages/conventionced.aspx>, article 2