“Strengthening Support of UNCAT & OPCAT in Palestinian Authority Legislation to Stimulate a Human Rights-Oriented Palestinian Society”

Amendments and Legislative regulations and public policies and criminal policy required for the effective implementation of the UNCAT and OPCAT

“Torture prevention is not about asking what happened and how it happened, but asking why it happens and how we can stop it happening.”

V. Rodriguez, UN Subcommittee on Prevention of Torture

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FOREWORD

Torture has always constituted the abuse of power in every aspect: physical, economic, authoritarian, or of political hegemony, and, though we may think that it is not necessary to talk about it in the XXI century, now more than ever its presence and the need to combat it is, actually, more latent. Even more, as people are still being tortured in every corner of the planet and it is being practiced through the most aberrant abuse of power.

Torture has been found to be an appropriate method to obtain confessions, the ultimate proof determining the defendants' guilt where the disregard for the human condition stands out. However, torture, harassment, and other cruel, inhumane or degrading treatment or punishment cannot be used as penalty.

In our recommendations for this particular case, we want to focus on the Palestinian territories and raise the awareness of the Palestinian National Authority (ANP) and of the whole Palestinian people about torture as a crime that undermines the structures of the society.

Combating torture, and on top of that, the fact that the case is located in the State of Palestine, is an important challenge, as torture is, from a qualitative perspective, not only undignified but also inhuman. Besides, as it is practiced by representatives of the State's power, it affects the democratic systems' budgets, which are based on the dignity of the people. The dual interests involved in the practice of torture (the individual and the State's own foundations) implies that its prohibition is of interest to the criminal law, and essentially to the international criminal law, through a dual approach: as a crime against eminently personal judicial assets, and as denial of the foundations of the Law of a social and democratic state, as the State of Palestine expects to reach.

As a consequence of thinking that torture is a vestige of the past or just an isolated incident resulting from the sadism of certain individuals, the negative appreciation of this practice frequently leads to its denial. However, current facts show that torture is still being practiced in the XXI century. The acts denounced by the national (like TRC (Treatment and Rehabilitation Center for Victims of Torture)) and international NGOs (like Amnesty International, Human Rights Watch, among many others), as well as the torture victims' own testimonies[1] justify all the commitment and effort put into finding the most efficient mechanisms to eradicate it once and for all.

The Palestinian National Authority is committed to several international Human Rights tools that link together several engagements related to the prohibition of Torture and other Cruel, Inhumane or Degrading Treatment or Punishment. The State of Palestine acceded to the United Nations Convention against Torture and other Cruel, Inhumane or Degrading Treatment or Punishment (UNCAT) in April 2014.

The accession to these commitments means that the Member States, the State of Palestine among them, must integrate the legal principles and provisions related to the UNCAT into their own national legal systems, as well as take the adequate legal actions for their implementation.

The Treatment and Rehabilitation Center for Victims of Torture (TRC) has been working on topics related to Torture and other Cruel, Inhumane or Degrading Treatment or Punishment trough work meetings and interdisciplinary panels of experts. Its aim is to help the competent and pertinent Palestinian authorities in the review of their norms and regulations, complying with the United Nations' norms against torture, as well as suggesting some recommendations.

[1] As shown in the collection of testimonies gathered in the updated database of the TRC Treatment and Rehabilitation Center for Victims of Torture NGO in the State of Palestine. For more information, please, check: www.trc.org

In this sense, TRC and the NGO Rescate International work together on some amendments and a legislative package that would help combat Torture and other Cruel, Inhumane or Degrading Treatment or Punishment, but, above all, on adjusting the Palestinian regulation to the International one, in order to strength the Human Rights of the Palestinian people: **"Strengthening Support of UNCAT & OPCAT in Palestinian Authority Legislation to Stimulate a Human Rights – Oriented Palestinian Society".**

In response to the need to integrate an anti-torture framework in the Palestinian judicial system, the following lines will mainly offer some judicial recommendations about the crime of torture and other inhuman treatment. These will be based in previous deliberations from public and criminal policies perspectives. Indeed, the legal response is extremely important but the public and criminal policies should not be left out.

The document is structured into three big units.

The first one relates to Public and Criminal Policies from a Human Rights' perspective. The aim is to present the United Nations actions related to the international regulations that can be used to combat Torture and other Cruel, Inhumane or Degrading Treatment or Punishment. However, we still have to keep in mind the principles of Justice, Truth, Reparation and Guarantee of Non-repetition, as essential principles to be respected in order to bring justice and reparation's tools to the victims of offences and power abuse. Besides, another "key" issue in deprivation of liberty situations will be explained: the right to a fair trial, and the subsequent right under police detention.

The second unit is focused on the international standards, in which the United Nations Convention against Torture and other Cruel, Inhumane or Degrading Treatment or Punishment (UNCAT) and the Optional Protocol to the Convention against Torture (OPCAT) are highlighted. Within those standards, we can stress the international concept of torture (in the UNCAT), the visits' mechanisms of the OPCAT, the criminal analysis of torture at a doctrinaire glance, the obligations imposed to the member states, the protection and implementation tools, and the prevention through monitoring and guarantee procedures from the Member States.

Finally, the third unit set forth a normative proposal related to torture, in order to favor the development of the State of Palestine's own regulation on torture as a crime against humanity.

We understand that the opportunities given to the Palestinian National Authority, to rely on recommendations for the creation of an anti-torture legal and regulatory system, to be able to sign the United Nations' OPCAT Protocol, and to incorporate supranational regulations, as the UNCAT and the OPCAT, to the Palestinian legal order, is a big step in the fight against torture and other Cruel, Inhumane or Degrading Treatment or Punishment committed under public authority. These opportunities also allow a strengthening of the Democracy in the State of Palestine and a pacification of the society. The need is pressing and the response has to be immediate.

UNIT I:

Perspective of Public and Criminal Policies. The prohibition of torture from a Human Rights Approach. The importance of the international tools to combat Torture and other Cruel, Inhumane or Degrading Treatment or Punishment

1.Introduction

As a preliminary step, the accurate understanding of the Human Rights legal phenomenon requires the delimitation of the parameters through which the principles related to ethics materialize into positive Law. These are integrated into a valid and obligatory legal order and, therefore, with a claim of efficacy.

From this point of view, three different validities can be distinguished in the process: the philosophical legitimacy and validity as the legal value dimension, overlooked by the idea of Justice; the dogmatic legitimacy and validity as determining the existence of the legal norm in accordance with its belonging to a certain positive judicial system; as well as the sociologic efficacy and validity as the turning point when, through its implementation, the Law becomes the social life's effective order and is established as legal order.

This Human Rights' triple dimension (philosophical fundaments, positive regulations and guarantees' system) has to also be reflected in the study about torture. As a preliminary step to its adequate comprehension, the introduction of the concept of torture, its prohibition in the legal documents (international, constitutional and criminal), and the internationally established guarantees system require an analysis of the prohibition's legitimacy from a historico-phisolophical approach that allows the understanding of the continuing existence of torture and the reasons for its prohibition.

The need to connect the concrete legal regulation of torture with the philosophical fundaments of its prohibition lays in the fact that, although "rights" only reach this status when they are integrated in the legal order, which is the only way to be effective in social life, we cannot forget that they also have a moral root reached through its rationale. Hence, it would be meaningless to look for a "right" that is not subject to integration in the positive order, as well as to use a concept of Law without an ethical root related to the central dimensions of human dignity.

2. United Nations' Areas and Issues of Major Importance related to the Prevention of Torture and other Cruel, Inhumane or Degrading Treatment or Punishment

One of the most pressing challenges for the current societies is the defense of the Human Rights. In this sense, the United Nations Organization has been working for several years on the combat against one of the most severe violations of Human Rights, which is Torture and other Cruel, Inhumane or Degrading Treatment or Punishment and has been elaborating international norms on the topic.

We believe that these issues are of outstanding importance for the work we do and to be able to understand the magnitude of the problem we are facing. In this context, and being aware of the importance of gathering these international norms, we will then lay out in a clear way the most prominent United Nations norms about the prevention of Torture and other Cruel, Inhumane or Degrading Treatment or Punishment. All this in attempt to give the document the normative support we aspire to.

a. Major issues and areas related to the Prevention of Torture and other Cruel, Inhumane or Degrading Treatment or Punishment

I. The respect for the guarantees of the people deprived of liberty (guaranties during detention, reception measures in detention centers, services provided to detainees, protection, control, treatment, registration and disciplinary measures, among others).

a. Deprivation of liberty should be the last resource vis-à-vis the detainees' controlled conditions (as *ultima ratio*).
b. A medical examination should be conducted whenever the person deprived of liberty asks for it or has claimed abuse.
c. Review of the procedures and norms for the investigation and interrogatory.
d. Analyze the review of the procedures and norms for the detention.
e. Condemnation of torture and other cruel treatment and not of its inclusion by amnesty or prescription, and it does not avoid the execution of the penalty.
f. Prohibition of any justification for torture or cruel treatment.
g. Consideration of the jurisdiction in trials for crimes of torture and cruel treatment.
h. Fair treatment for victims of torture or cruel treatment (in criminal, civil or administrative procedures, etc.).
i. Consideration of the principle of non-refoulement.
j. Guaranties for juvenile justice.
k. Protection of vulnerable groups (infants, young people, children accompanying their detained mothers, women, elderly people, foreigners, migrant workers and persons sentenced to death) from violence, exploitation and abuse, and the respect of the international detention norms.
l. Training of people related to detainees, in accordance to their jobs.
m. Inspection of detention place (unannounced inspections by international experts groups).
n. Proof of the procedures in order to demonstrate torture and cruel treatment.

o. Independent, impartial and quick (deadline achievement) investigation of the allegations of torture and cruel treatment.
p. Free assistance to victims of torture and cruel treatment.
q. The non-use of violence in law enforcement operations, except as permitted by international norms.
r. Creation of a national registry of allegations of torture and cruel treatment.
s. Constitution of basic principles related to the prohibition of torture and other cruel, inhumane or degrading treatment or punishment.

2- Articles in United Nations' Norms to Combat Torture and other Cruel, Inhumane or Degrading Treatment or Punishment

In an attempt to come closer to the internationally spread answer, and on the road to end Torture and other Cruel, Inhumane or Degrading Treatment or Punishment, we have tried to expose an interesting proposal, in which a specific recount of the most prominent international regulations will be done.

a. List of United Nations' regulations related to the combat against Torture and other Cruel, Inhumane or Degrading Treatment or Punishment

1. The article 5 of the Universal Declaration of Human Rights of the United Nations (1948).
2. Articles 7, 9 and 10 of the International Covenant on Civil and Political Rights (1996).
3. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984).

4. Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (2002).
5. Article 37 of the United Nations Convention on the Rights of the Child (1989).
6. Article 10 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (1990).
7. Article 15 of the Convention on the Rights of Persons with Disabilities (2006).
8. Articles 8, 14, and 20 of the Arab Charter of Human Rights (2004).
9. United Nations Standard Minimum Rules for the Treatment of Prisoners.
10. Basic Principles for the Treatment of Prisoners.
11. United Nations Minimum Standards on the Protection of Persons Deprived of Liberty.
12. United Nations Rules for the Protection of Juveniles Deprived of their Liberty.
13. Principles of Medical Ethics relevant to the Role of Health Personnel, particularly Physicians, in the Protection of Prisoners and Detainees against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Istanbul Protocol).
14. UN Code of Conduct for Law Enforcement Officials.
15. United Nations Basic Principles on the Use of Force and Firearms.
16. Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Istanbul Protocol).
17. United Nations basic principles and guidelines on the right to reparation for victims of human rights violations and serious violations of international humanitarian law.
18. United Nations Standard Minimum Rules for Non-custodial Measures (The Tokyo Rules).
19. United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules).
20. United Nations basic principles and guidelines for improving access to legal aid in the criminal justice system.

3- International Standards from the International Law and the International Criminal Law to consider: Principles of Justice, Truth, Reparation and Guarantee of Non-Repetition

The search for truth, the justice initiatives, the reparation and the guarantees of non-repetition are, originally, post-authoritarian practices and experiences, as the ones, for instance, in some Latin-American countries of the Southern Cone and in a lesser extent in Central and Eastern Europe, as well as South Africa.

The Special Rapporteur for Human Rights considers that those four components (truth, justice, reparation and guarantees of non-repetition) constitute a series of interrelated action areas. These areas can be mutually reinforcing in the process of healing the effects of the Human Rights abuse and massive violation. Healing the wounds of the abuses mean, in the first place, to give effect to the Human Rights rules that have been systematically and manifestly violated. The resolution (of the Special Rapporteur for Human Rights) considers that the action areas are also adequate for healing the effects of severe violations of the International Humanitarian Law.

There are four aims of the search for truth, the justice initiatives, the reparation and the guarantees of non-repetition: to provide recognition to the victims, to foster trust, and to contribute to reconciliation and to the consolidation of the Rule of Law. Below, we will proceed to describe each of these four objectives:

a. **Acknowledgement**

Almost with no exception, one of the victims' first claims is to recognize the harm that has been done to them. However, what does this acknowledgement imply?[2] It is a complex issue. To recognize the suffering and strength of the victims is important

[2] About the concept of acknowledgement, refer to (among others): Axel Honneth, *The Struggle for Recognition: The Moral Grammar of Social Conflicts* (Cambridge and Malden, Polity Press, 1995) and Disrespect: *The normative Foundations of Critical Theory* (Policy Press, 2007)

but not sufficient. There are some features that these victims share with, for instance, victims of natural hazards but the violation of rights has specific characteristics that differentiate them. Therefore, it is essential to acknowledge the aggrieved victims, which can only be done resorting to the rules[3]. The essential, and what the measures of *transitional justice* seek, is the acknowledgement of the victim as holder of rights. This not only implies the right to look for ways of reparation that can reduce suffering, but also the restoration of the victim's brutally violated rights, as well as the acknowledgement of his status of person with rights to make claims or demands concerning his rights, and not only due to aroused empathy or any other way of consideration. As an example, in order to appreciate the criminal law actions as an attempt to offer the proper credit to the victims, the implicit superiority of the offender has to be denied in a sentence that reaffirms the importance of rules ensuring equality of rights for all[4]. Furthermore, although the search for truth seldom reveals new and unknown facts, it is still a milestone in the process of public and official acknowledgment of the facts[5]. The acknowledgement is relevant because it constitutes a way of admitting the value an importance of the persons as individuals, victims and holders of rights. The reparation can promote trust highlighting the integrity of the institutions against the rights violations. Trust is strengthened when, even through scarcity and fight for resources, the State complies with its obligation to finance programs for victims of exclusion and abuses[6].

[3] Joel Feinberg, for instance, contends that there are two ways of understanding the concept of "harm": harm as damage caused to interests and harm as grievance to someone else. Only the latest concerns the law. Refer to Feinberg, *Harm to Others,* vol. I, *The Moral Limits of the Criminal* (New York and Oxford, Oxford University Press, 1984), pages 31 to 36. To acknowledge victims as right holders obviously stresses the normative dimension of the recognition.

[4] Refer to Jean Hampton, "A New Theory of Retribution" en *Liability and Responsability: Essays in law and morals,* R. G. Frey and Christopher W. Morris, eds (Cambridge University Press, 1991).

[5] Lawrence Weschler, "Afterword" in State Crimes: *Punishment or Pardon* (Aspen Institute report).

[6] Vid. De Greiff, Pablo "Justice and Reparations" United Nations' Document.

4.2 Trust

In this context, trust is understood as the one both between individuals and the State's institutions. As it is stated in the United Nations resolution 18/7, the aim of the measures is the "restoration of State institutions". Trust is not an issue of simple predictability or empirical regularity, but it implies the expectation of compliance with a common norm and, therefore, is originated by a feeling of commitment to those shared norms and values. To trust the institutions means to know and recognize as legitimate the institutions' values and norms, as well as to consider that the institutional structure based on them is convincing enough for a decent amount of people in order to motivate their constant and active support and the enforcement of the subsequent norms and values. The well functioning of institutions generates a virtuous circle: they appear convincing to actors that, in turn, support and respect the institutional prescriptions[7]. As a conclusion, to trust an institution equates to know that its members or participants share and consider its constitutional rules, values and norms as binding.

a. Reconciliation

The idea of reconciliation had an important role in some contexts in the world. Some of the *truth commissions* in several countries mention the concept of *reconciliation* in their names or objectives[8]. In the international experience, a coherent concept of reconciliation can be applied as the circumstance in which holders of equal rights can regain mutual trust.

[7] Claus Offe, "How Can We Trust Our Fellow Citizens?", in *Democracy and Trust*, Mark Warren, ed.(Cambridge University Press, 1999), pags. 70 and 71

[8] For instance, the Truth and Reconciliation Commission in South Africa, the National Commission on Truth and Reconciliation in Chile, the Truth and Reconciliation Commission in Peru and the Equity and Reconciliation Commission in Morocco, among others.

b. **Strengthening of the Rule of Law**

One of the objectives frequently attributed to the transitional justice measures is the consolidation of the Rule of Law. In fact, almost every truth commission create until now has used this concept with an explanatory function (the violation of the Rule of Law principles is one of the elements leading to the violation of the said rights), and as one of its objectives (its recommendations look for the strengthening of the Rule of Law).

4- Rights under Police Custody[9]: Right to a Fair Trial

"The right to a fair trial is one of the cornerstones of a just society. Without fair trials, innocent people are convicted and the rule of law and public faith in the justice system collapse." **Fair Trials**

The right to information in criminal proceedings guarantees that every detainee knows the reason for his detention and the proofs gathered against him (to have access to the cases files'). Likewise, the information about individual rights in detention as the right to remain silent or the right to an attorney, are included. Without that information, no one would be able to defend himself or herself and to appeal the detention. We raise a proposal that guarantees **the access to written information of their rights, by a simple and accessible** Bill of Rights, to every suspect or detained person.

We must not forget **that if the people do not know their rights, they will not be able to exercise them**. Even more, as **detention is a very stressful situation and complex and technical language is frequently used**, despite being informed about those rights, many people are not able to understand them.

[9] European Union's template for the Bills of Rights: "Know your rights".

"When someone finds himself under arrest he cannot challenge his detention if he does not understand why he should do so or even that he has the right to do it. To acknowledge ones' detention rights is vital for a fair trial" **Expert in simple language, Hungary**

Likewise, police authorities, very often, try to convince the people deprived of liberty to give up their rights. Indeed, numerous detainees have declared that police officers try to deter them from consulting a lawyer and from remaining silent, pleading that the exercise of these rights would discredit them and slow down the process.

"Frequently, police authorities try to persuade detainees to renounce their rights, most notably the right to consult a lawyer" **Criminal defense lawyer, Bulgaria**

a. Where is works still needed?

- In practice, the Bill of Rights is not always handed in to all the relevant persons.
- Whenever the Bill of Rights is handed in, people are not given enough time to read and understand them or to ask their lawyer about it.
- In some cases, the information about the right to free legal assistance is not given and in some countries it does not even exist.
- People that do not understand the national language are not always given written translations of the Bill of Rights.
- The law enforcement authorities still try to persuade people not to exercise the rights established by the Bill of Rights, notably the right to an attorney and to remain silent. Unfortunately, in several countries, there are not enough safeguards to avoid it.
- However, the biggest challenge is the accessibility to the Bill of Rights. In a majority of countries, the documents use legal terms, complex sentences and unclear formats. Therefore, civilians have a difficult time understanding their rights. On the contrary, in other countries, the Bill of Rights is too simple and does not contain sufficient information.

"To be detained as a suspect is stressful for everyone. The emotional state of the suspect does not necessarily allow him to become aware of everything said orally. The Bill of Rights enables to delve into more detail, mostly during breaks, and to alter a previous and rushed decision (the right to remain silent, to an attorney, to contact family members, etc.)" **Police officer**

b. Content of the Human Rights Declarations

- To guarantee that the Bill of Rights encompasses at least every right included in national and international legislations.
- To use explanatory language about the rights to remain silent and to an attorney, including information related to the possible consequences and the risks of giving them up.
- To use the methodology described in the national regulation, to integrate stakeholders and to elaborate and establish the Bill of Rights.
- To erase overly technical terms and legal phrasing with the help of simple language experts and the integration of groups of people with low educational levels.
- To use a format that highlights key information. To better use bullet points, bold types and other methods as well as a clearer and visually attractive format that helps the understanding of the rights' information.

i. Notification of the Human Rights Declarations

- To ensure that every suspect or investigated person receive a Bill of Rights, regardless of the national rule.

- To provide the Bill of Rights at the moment of the detention, with sufficient notice with regard to the first interrogation, in order to give the detainees enough time to read and understand it.
- To give the suspect the opportunity to consult someone outside the investigation about the Bill's content and enough time to prepare the initial interviews with the attorneys (if any).
- To guarantee that the suspects and defendants can keep the Bill of Rights through their deprivation of liberty so that they can read and go over it in situations of less pressure.
- To make the Bill of Rights available and easily accessible to the public.
- To consider the possibility of appoint a neutral person to communicate and explain the rights at the police station.
- To ensure the setting up of a procedure to check, as a routine, if the suspect has truly acknowledged his rights.

ii. Preventive Resources and Measures

- To make the Bill of Rights legally binding and enforceable in the national legislation.
- To guarantee the existence of an option in the national legislation for those not provided with a simple and accessible Bill of Rights.
- To provide **training for the police** about the importance of communicating the rights and raise awareness about the mutual benefits of it to both the suspect and the criminal process as a whole.

UNIT II:

International Perspective: International Standards. The United Nations Convention against Torture and other Cruel, Inhumane or Degrading Treatment or Punishment (UNCAT) **and the** Optional Protocol to the Convention against Torture **(OPCAT). An analysis for their incorporation and implementation in the State of Palestine**

The Human Rights, as an authentic ethical viewpoint of humanity, has become one of the core issues of the international agenda of the 21st century. Since the creation of the United Nations, in 1945, the international protection of Human Rights has improved significantly, both from the regulatory perspective and from the instauration of pertinent mechanisms for the population.

The importance of the **Convention against Torture**: the Convention against torture was approved after several discussions and amendments made to exposed projects and as an answer to doctrinarian issues. The Convention is a milestone in the fight against torture and clearly exposes the three defining elements of an act of torture: a) it should cause a severe physical or mental suffering; b) it should be intentional; and c) it should aim the acquisition of information or confessions, the punishment, and the intimidation or coercion of the victim. It is important to note that the Convention has adopted an autonomous definition of torture in which mental suffering is equated with physical suffering. This way, the Convention provides the essential protection, not only against classic and conventional torture practices, belonging to the Middle Ages, but also against modern and sophisticated tools, which are characterized by reaching the mental suffering sphere.

The Convention adopts the classical formula, according to which the act of torture is the act perpetrated by a civil servant or anyone exerting public functions. However, the Convention's text suggest that an act can be qualified as torture even when it has been committed by an individual external to the State's administration in

case he acts under instigation or consent of a public agent. Thus, acts perpetrated by individuals or private groups acting with the government's support, as with paramilitary organizations, can be considered within the sphere of the Convention.

The **Optional Protocol** provides an innovative perspective in the Universal Human Rights System in the combat against torture. This system, traditionally focused on reactive action, establishes an international organism (the Subcommittee on the Prevention of Torture) and independent national organisms (national prevention mechanisms), which will carry out regular visits to the places of liberty deprivation.

1. Under the protection of the UNCAT (United Nations Convention against Torture)

In December 10th, 1984 (International Human Rights Day), the United Nations adopted the Convention against Torture and other Cruel, Inhumane or Degrading Treatment or Punishment (UNCAT), subsequently prohibiting its practice anytime, anywhere.

In relation to the punitive deprivation of liberty, the prohibition of Torture and other Cruel, Inhumane or Degrading Treatment or Punishment is contemplated in Rule 31 of the Minimum Standards of Treatment of Prisoners, both from Geneva (UN, 1955) and Strasbourg (Council of Europe, 1973). In the Palestinian case, it was adhered in 2014.

a. International Definition of Torture

The article 1.1 defines what has to be understood by the concept of torture (for the said UNCAT Convention). In this sense it can be separately noted that the different assumptions that can lead to this crime: “the term 'torture' means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person”. This general statement is specified when requiring intent, which can be:

- “in order to obtain from that person or from another information or a confession”;
- “in order to punish said person for an act committed by him or which he is suspected of having committed”;
- “to intimidate him or subject him to duress”;
- “or for any reason involving some type of discrimination”.

Some specific characteristic of the author is an essential requisite in other to typify such acts as constituent elements of the offence of torture. Indeed, and without limiting the following statements about the active subject, it has to be:

a) “a civil servant”; or
b) “someone at the instigation of or with consent or acquiescence of a public official or other person acting in an official capacity”.

b. Consideration of the Crime of Torture

The characteristic features of the international classification of the crime of torture are the following:

a) ***Multi offensive crime***

"From the legally protected assets' perspective, torture is presented, firstly, as a multi offensive crime, as long as it attacks a plurality of assets worth of criminal guardianship." Judicial assets that, for the international legal penal doctrine, are "personal, physical and mental integrity", "life", "human dignity" and "honor". Furthermore, the criminal international doctrine understands torture also as "power abuse" from the State, pointing out that this international doctrine is as well the concept that helps to a complete characterization of the crime. Thus, "we are entitled to talk about torture in relation to detainees or people deprived of liberty", whether it is legitimate or not.

b) ***Special crime***

The features of the active subject characterize the special crime. In fact, it is highlighted that "for the Convention against torture, the latest cannot be perpetrated by anyone, but, in principle, only by a limited and reduced circle of possible authors: civil servant and other person acting in official capacity". This delimitation of possible perpetrators has been subject to several criticisms that, essentially, lament the said restriction. These criticisms point out that torture has been practiced by others (different from the ones stated in the UN Convention), such as doctors, military officers, secret squads, para-police forces, etc. The doctrine indicates that the criticisms do not stand because, in the case of torture, the condition of civil servant "is inherent to tortures perpetrated by members of para-military groups that are as well

contemplated by the UN Convention". This conclusion is extracted from the obligations imposed by the Member States to intervene as well in those cases (criminally typifying this kind of conduct) as, otherwise, "tolerance" would incur.

c) **Crime of *Result***

This result consists in inflict to a person "severe pain or suffering, whether physical or mental, in all its forms". The usual criticism is that the pain or suffering has to be "severe". This term, which will be used to distinguish torture from cruel treatment or punishment, is vague and can lead to arbitrariness. Hence, part of the international criminal doctrine underlines that the UN Convention does not clearly establish the distinction between those conducts.

d) ***Deliberate crime***

A feature of an intentional crime is the "requirement that the severe mental and physical sufferings are willfully caused, which excludes the commission of negligence". The reference to the "intent" would comprehend any type of willful intent

e) ***Intent Crime***

The UN Convention, in addition to the stated previously, stipulates that torture has to pursue "a series of aims and objectives through the infliction of severe physical and mental pain and suffering". In fact, we can even talk of "transcendental intent". These "goals" would be: 1) obtain information or a confession from that tortured person or from another; 2) punish said person for an act committed by him or which

he is suspected of having committed; 3) intimidate him or subject him to duress. Besides, it should be noted that, in addition to those three goals, the Convention adds that: "for any reason involving some type of discrimination".

f) **Omission offence**

Part of the doctrine considers this concept as possibly included in the concept of torture. On the one hand, there is no obstacle in the definition to that. On the other hand, the article 1 itself contemplates the act of torture "with consent or acquiescence" of a public official.

g) ***Criminal Attempt***

The article 4 contemplates that States should criminally punish "any attempt to commit torture".

h) ***Complicity or Participation***

The article 4 also contemplates that States should criminally punish "complicity or participation". The doctrine signalizes, for instance, that the Convention does not contemplate the concealment, though it can be understood that "the willing for inclusion can be detached from the preparatory work".

i) ***Due obedience***

The article 2.3 of the Convention establishes that "an order from a superior officer or a public authority may not be invoked as a justification of torture".

j) ***Amending circumstances***

The amending circumstances of criminal responsibility can be discusses by the doctrine if **malice aforethought** or **viciousness** are inherent to torture or, on the contrary, **exacerbates** it. Another part of the doctrine states, with nuances, that: "is drawn to understand that such circumstances are inherent to the offense". From that the distinction between **cruel treatment and torture** can be detached.

3. Obligations Imposed on the Member States

The article 2 of the Convention, sections 1 and 2, contains compulsory provisions for the Member States. In this sense, as domestic obligations, it is mandated that the Member States have to adopt ***"legislative, administrative, judicial or other effective measures, to prevent all acts of torture in any territory under its jurisdiction".*** Furthermore, it adds that such measures shall never be terminated, neither because of any "exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency". Finally, the third section of the article 2 proclaims the inadmissibility of **due diligence** as justification for torture, as mentioned previously. (Refer to the report sent to the team of Advocacy Coordinator/TRC/september 2017).

In line with the mandates established by the Convention for the Member States, several provisions are recapped as follows:

a) Prohibition of the extradition, return or expulsion of a person to a State where he or she would be in danger of being subjected to torture (article 3) (Refer to the report sent to the team of Advocacy Coordinator/TRC/september 2017);

b) Obligation to typify in the various national legislations, both the crime of torture and the variety of forms of participation (complicity) or implementation (attempt) (article 4);
c) Obligation to establish its jurisdiction over these crimes when the offences are committed on board a ship or aircraft registered in that Member State of the Convention (article 5.1.a); when the alleged offender is a national of that State (article 5.1.b); or when the victim is a national of that State if that State considers it appropriate (article 5.1.c);
d) Obligation to detain those responsible for the crime or "take other legal measures to ensure his presence" in order to allow criminal or extradition proceedings to go ahead (article 6.1), with all the penal and procedural guarantees to which the alleged perpetrator has the right to;
e) Obligation to review and revise, regularly, interrogation rules, instructions, methods and practices as well as arrangements for the custody and treatment of persons subjected to any form of arrest, detention or imprisonment (article 11);
f) Obligation to guarantee the rights to complaints or appeals to those considered to be victims of torture (article 13), with sufficient guarantees to not being abused or intimidated (extensive to witnesses);
g) Obligation to comply to the right to redress and compensation for the victims of torture (article 14 of the Convention against Torture).

As far as the *international obligations*, to which the Member States are compelled to by the Convention, are concerned, the most relevant ones are the following:

a) Obligation to not proceed with the extradition, refoulement or expulsion of an individual for fear that the person concerned would be tortured. (article 3);

b) Obligation of the State to establish its jurisdiction over acts of torture in a case in which the offences are committed in any territory under its jurisdiction or against it (if deemed appropriate), or in which the alleged perpetrator is present in any territory under its jurisdiction (article 5). In such situations, the State is obliged to prosecute the perpetrator and grant his extradition (article 7), as well as take him into custody, make an inquiry of the facts and submit the case to the competent States for the purpose of prosecution (article 6);

c) Obligation, among States, to provide mutual judicial assistance (article 9) in order to expedite extradition procedures (article 8).

- **Protection Mechanisms and their Implementation**

The Convention has created a "Committee against Torture" composed by ten members who exercise their functions in their personal capacity for a period of four years.

The Committee met for the first time in April 1988 in Geneva. The States parties shall submit periodic reports to the Committee (within one year of the entry into force of the Convention and every four years thereafter, and further whenever the Committee requests), about the measures taken by the State party. These reports shall be analyzed by the Committee, which can make comments regarding its content, which, in turn, can be answered by the State. It is as well the role of the Committee to investigate the reliable data related to the systematic practice of torture in the territory of a State Party. The investigation results can be made public in the annual report presented by the Committee to the States parties and to the General Assembly of the United Nations, prior consultation with the State concerned.

Regarding the States and the Committee's means of Access, the Committee itself will make available its "good practices" in order to reach an "amicable solution", even creating an "*ad hoc* Conciliation Commission". When claims come from individuals, it should not be examined under another investigation and only after exhaustion of all other internal avenues (unless "unjustifiably" prolonged). In both cases, the process will be terminated with the delivery of the Committee's formal provision to the State and to the individual concerned.

Varied criticisms on this implementation's mechanism have been formulated. Primarily, the timidity of the established system is questioned (the sole issue of reports and, at best, the publication of the annual report). While it is true that the article 20.3 of the Convention mentions the possibility to perform a visit to the territory under its jurisdiction", this should be done "in accordance to that State party" and solely in case of "systematic practice" of torture.

5. OPCAT (Optional Protocol to the Convention Against Torture) 2002

The General Assembly of the United Nations adopted, on December 18th, 2002, the Optional Protocol to the Convention against Torture and other Cruel, Inhumane or Degrading Treatment or Punishment. The aim of this tool is to prevent torture and inhumane or degrading treatment or punishment from happening through a system of regular inspection visits by international and national independent organisms to the detention places.

2.2. Mechanisms for inspection visits

As discussed, the Protocol establishes a system of regular inspection visits to the detention places by international and national independent organisms that will act

complementarily. Upon ratification or adhesion, the States parties accept that the performance of unannounced inspection visits by those entities to any detention place. The major changes stand with the establishment of two different tools:

- *An International Subcommittee.* Indeed, through this path, a new international organism is created: **the "Subcommittee" against Torture**. This organism, constituted by a multi-disciplinary team of ten independent experts, will perform regular inspection visits to detention places in every State party.
- ***National prevention tools.*** Upon the Protocol's entry into force, and within a year of its ratification or adhesion, the States parties will **create or appoint one or several national mechanisms authorized to perform inspection visits to detention places**. The text does not specify the kind of tool by which the Human Rights commissions, and non-governmental associations or organisms could be appointed in order to discharge this function. However, the State parties must ensure that these national entities work free of any interference from State authorities. (In the Palestinian case, for instance: "The Palestinian Independent Commission for the Rights of the Citizen")

The profound significance of the new tools for the combat against torture is clear. Both international and national organisms will have to perform regular inspection visits to any deprivation of liberty place and will be able to privately interview anyone detained there. As the Association against Torture highlights "experience has shown that the visits to places of detention are one of the most effective methods for the prevention of torture […]. On the one hand, the visits have a deterrent character and, on the other hand, they allow independent experts to examine the treatment given to the persons deprived of their liberty" (year 2005).

2.3. The Objectives, Prevention through Monitoring

The ultimate gain of the Optional Protocol is to prevent **torture and other cruel, inhumane or degrading treatment or punishment.** In other words, the inspection visits' system will address both the treatment given to persons deprived of liberty and the conditions of their detention. The prevention will be reached through a system of inspection visits to the places of detention. In order to have a preventive effect, it is imperative that the visits are regular and unannounced.

In compliance with the Optional Protocol, the inspection visits will be performed by an international organism, composed by experts, created within the United Nations system. Furthermore, each Member State will appoint or create an independent national entity for this purpose, such as "The Palestinian Independent Commission for the Rights of the Citizen", mentioned before.

The Optional Protocol visits' organisms will have the possibility to visit every place where persons are deprived of their liberty. It is important to note that the Optional Protocol adopts a broad definition addressing any form of private or public detention, incarceration or custody. This definition is not limited to detention facilities, but can also include psychiatric hospitals, detention centers for immigrants and police stations, among others.

The protection of persons deprived of their liberty is achieved through a process of dialogue and collaboration between the competent authorities and the experts that perform the visits. Upon the performance of the visits, the latest issue a series of precise recommendations, based on the observation of reality in order to in order to improve the treatment and the conditions of the persons deprived of liberty.

Let's not forget that the preventive system lies upon the pillar of this constructive collaboration.

2.4. The Performance, twin pillar of Prevention

The text of the Optional Protocol defines some guarantees that the States parties have to provide, within the territory of their jurisdiction, in order to ensure an effective functioning of the system. The visits' organisms must have:

- Access to all the information related to the number of persons deprived of their liberty, the amount of places of detention and their location;
- Access to all the information related to the treatment and detention conditions of the persons deprived of their liberty;
- Access to all places of detention, their facilities and their services;
- The possibility to interview with the persons deprived of their liberty without witnesses (in private) and with any other person of interest;
- The freedom to choose the places of detention they want to inspect and the people they want to interview.

Furthermore, the States have the obligation to examine the recommendations made by the visiting organisms, to dialogue about the possible implementation tools and to take action to prevent reprisals against those who collaborate with the prevention measures.

The articles 11 to 16 of the Optional Protocol establish the specific functions of the International Subcommittee for the Prevention. It will be established within the Office of the High Commissioner for Human Rights of the United Nations as a mandate to visit centers of detention and issue recommendations to the competent authorities. The Subcommittee will be composed of ten independent experts (the number will

increase to 25 after the 15 ratifications) chosen by the States party based on moral integrity and expertise. In principle, it is a confidential system. However, the reports of the Subcommittee may be published in two cases: if the State party explicitly authorizes it or if it refuses to cooperate.

The articles 17 to 23 of the Optional Protocol define the functions of the national mechanisms of prevention, the most innovative tool. Each State member has the obligation to maintain, design or create one or several independent national prevention mechanisms, at most within a year of the entry into force of the Optional Protocol or its ratification. In addition to perform the visits and issue recommendations, the national prevention mechanism(s) will be have the capacity to make proposals and observation draft laws. Contrarily to the International Subcommittee, the national system will not be based on confidentiality. The State party will, otherwise, have to publish and publicize its annual reports and the mechanism will have the option to publish other reports, whether they are thematic, periodic or of each visit.

The text of the Optional Protocol contemplates some additional guarantees to ensure the effective functioning of the national prevention mechanism.

2.5. Guarantees provided by the Member States

- The functional independence of the mechanism and its personnel;
- The integration of experts with capacities and relevant knowledge;
- The gender balance;
- The adequate representation of ethnical and minority groups.

The Optional Protocol refers to the "Principles relating to the status of national institutions for the promotion and protection of human rights" (called "Paris Principles") that include some additional guarantees for this kind of institution.

Apart from the defined guarantees, the text leaves freedom of interpretation to the Member State in order to determine the kind of national prevention mechanism it would like to appoint. As per its context, we can point out some examples that give an account of the variety of possible options. The United Kingdom has decided to appoint more than a dozen of existing mechanisms, at the local, regional and national levels, foreseen a modality to coordinate among themselves. For instance, in Switzerland, consultations of the federal government with the cantonal authorities have lead to the creation of a Committee of federal experts with cantonal representation. In some countries, such as Mexico and Paraguay, the establishment of a "mixed" mechanism, meaning that it integrates both the public sector and the civil society, is being analyzed. In several contexts, the Ombudsman Office will exert a central function in the national prevention mechanism. This is the case in the majority of Central American countries. Other countries, such as Argentina and Uruguay, have a penitentiary ombudsman that will probably have a central role in the national implementation of the Optional Protocol. Regardless of the chosen model, it is strongly recommended that the process defines and designates the national prevention mechanism for each country should be transparent and participatory, including the participation of the civil society. The work of the national prevention mechanisms and of the International prevention Subcommittee will be complementary. The text of the Optional Protocol predicts coordination and collaboration modalities with other entities for the inspection visits to the places of detention, both regional and with the International Committee of the Red Cross (CICR). Finally, a Voluntary Fund will be established in order to implement the recommendations of the International Prevention Subcommittee and the educational programs of the national prevention mechanisms.

UNIT III:

PROPOSAL OF REGULATION against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

The United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment is the broadest International Treaty related to torture. It contains a series of important provisions related to the absolute prohibition of torture and it establishes the Committee against Torture in order to supervise the individual claims as well as the implementation by the Member States.

Within the UNCAT's regulatory catalogue, one of the most important topics for this third unit is the issue related to the necessary preventive measures against acts of torture, including the legal, administrative and judicial ones, as well as any other pertinent measure, in compliance with the article 2 of the Convention.

The obligations under the treaty are legally binding and, therefore, when the States hand their reports in to the Committee against Torture, they will have to explain what measures have been taken in order to comply with these obligations. The concept of torture and the importance of the presence of a civil servant, if applicable, should be highlighted.

Conversely, the article 2.2 of the Convention establishes that "no exceptional circumstances whatsoever maybe invoked" as a justification of torture. These circumstances include war, the threat of war, internal political instability, public emergency, or an order from a superior officer or public authority. The law enforcement officials and the prison staff should receive clear training that emphasizes their obligation to decline this kind of offers.

Additionally, the article 3 of the Convention establishes the essential principle of non-refoulement. This principle urges States not to expel, return (refouler), extradite or transfer in any other way a person to another State where there are "substantial grounds" for believing that the person would be in danger of being subjected to torture. The non-refoulement principle illustrates the absolute prohibition of torture and other cruel, inhuman or degrading treatment or punishment.

However, it is also true that in recent years this principle has been undermined by some States that try to obtain diplomatic assurances when there are grounds for believing that a person may be subject to torture or cruel, inhuman or degrading treatment. This terminology has been used in the context of the so-called war on terror and the sending State tries to obtain assurances from the receiving State assuring that a person will not be tortured or be subject to other cruel, inhuman or degrading treatment or punishment. This practice is considered to violate the principles of non-refoulement and it is not acceptable.

Other important issues in this section are the NHRI (National Human Rights Institutions). Indeed, the NHRI are an essential part of the reinforcement of the national human rights protection systems and play a main role in the connection of international and domestic Human Rights systems. Their mission entails that they can collaborate with all the pertinent agents at the national level and that they can interact with international mechanisms in order to contribute to the prevention against torture. Even though the NHRI hold an extensive mandate that authorize them to protect and foster everyone's, currently, there are convincing arguments that suggest that the NHRI devote a special attention to the prevention against torture. Let us not forget that torture is one of the most horrific human rights abuses. It constitutes an attack to the very essence of the dignity of the person. Despite this, even though torture is absolutely prohibited in international law, it is still widely practiced all over the world.

As a consequence, the combat against torture has to actively gather many agents, including NHRI. Being objective, the prevention perspective can register as many problems as opportunities for the NHRI.

These topics, among others, will be discussed in the following section, through regulatory contributions in this third unit.

1. Proposed regulation:

Explanatory memorandum:

A fair justice, besides ensuring the respect of everyone's fundamental rights and ease social peace, constitutes as well a strategic element for the economic activity of a country and directly contributes to the strengthening of the legal security. Hence, the Palestinian current society demands a higher standard of efficiency and dynamism in the legal system.

The legal structures require an adaptation to the current economic, social and legal realities. These structures have to be geared to the achievement of objectives, such as working under pressure and in the path of the specialization, particularly in the processes of the crimes against humanity as the crime of torture and other cruel, inhuman or degrading treatment or punishment, for instance.

Accordingly, a proposal of regulation about the fight against torture and other cruel, inhuman or degrading treatment or punishment should delve into the search for solutions of problems such as the delay in dispute resolutions, the treatment given to subjects of active processes of torture, the protection mechanisms for the victims, in order to avoid helplessness, and the right to self-defence.

Likewise, this legal framework tries to offer better knowledge an understanding to the crime of de torture and other cruel, inhuman or degrading treatment or punishment, and to expose a severe problem affecting the Palestinian people, the consequences of the lack of "regulatory package" on the fight against torture and other cruel, inhuman or degrading treatment or punishment.

Correspondingly, this new proposal of Palestinian Regulation on the fight against torture and other cruel, inhuman or degrading treatment or punishment does not only contain a global proposal, anticipating a transposition of international laws into national ones, but also contains a structural, in which a major shift is proposed with its own regulation and a regulation focused on the fight against torture and other cruel, inhuman or degrading treatment or punishment.

Thus, to put it in a nutshell, the proposed document is structured into five chapters. This chapters underscores issues linked to the conceptualization of the crime of torture, to the importance of unannounced inspection visits to places of detention in order to check *in situ* the detainees conditions, for instance.

Chapter one concerns general issues related to key topics as the concepts of torture under the international rule and civil servant, as well as the implementation of the law and the non-justification of torture, for instance.

In chapter two, a key aspect of the procedural perspective is mentioned, the Statement of the Defendants, as well as important topics as the interrogations, the crime's notification to the defendant, the defendants' confession and issues related to the isolation of the defendant and the appropriate solutions for each of the situations.

Chapter three gathers proposals related to offences and sanctions.

Besides, Chapter four analyses issues relevant to the protection against torture and other cruel, inhumane or degrading treatment or punishment, in which the systematic inspections are highlighted with some interesting proposals, as the Palestinian case with the participation of inspections' mechanisms as the NHRI and the "Palestinian Independent Commission for the Rights of the Citizen".

Finally, the fifth chapter gathers closing issues to give complete meaning to this proposal.

Development of the draft regulation[10]:

CHAPTER I.- General rules

Article 1.- Concept of Torture:

1. For the purposes of this law, the term "torture" means any act by which pain or suffering, whether physical or psychological is intentionally inflicted on a person, for such purposes as obtaining information 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.
2. It does not include pain, or suffering arising only inherent in or incidental **to** lawful sanctions.
3. What is meant by the "inhuman or degrading treatment" is all actions that can be described as brutal and violent against a person outside the cases assigned by the law, committed by a

[10] This section has been written hand in hand with the important regulatory proposal of the document "Palestinian Independent Commission for the Rights of the Citizen" and with the support of the expert Bahaaeldin Sadi (Human Rights Officer/OHCHR-Opt)

public servant, or anyone in his capacity, whether he did it while in his post, or because of it, or based on his authority.

Article 2.- Concept of Civil Servant:

I. For the purposes of this law, the term "public servant" means any person who works in the law enforcement or judicial system, or any person who works for governmental departments, institutions, or services affiliated to the government.

II. Those considered to be "Public Servants" include:

A.- Head and members of the Ministers' Council

B.- Heads and members of the general prosecution councils, and workers in them

C.- Heads and members of the local councils, and workers in them.

D.- Heads and members of companies, organizations and institutions in which the State has a share, and workers in them.

E.- Persons delegated with an official duty, for the duration of that official duty.

III. It is irrelevant whether the job or service is permanent or temporary, paid or unpaid, voluntary or an obligation. The end of job or service does not and should not hinder the implementation of the articles of this law, when any of the crimes mentioned herein occur during the time when the person who committed it was acting in an official capacity.

Article 3.- The non-justification for torture:

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.

Article 4.- Implementation of this Law:

This law is without prejudice to the general articles and rules mentioned in the first chapter of the penal code which will be applied regarding the crimes mentioned herein. (contrasting if ther has been any change in the Criminal code).

Article 5.- Prohibition of Torture

I. It is prohibited to torture any person, or commit any inhuman or humiliating act upon him to force him to confess to committing a crime.

II. Each state party shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made.

Article 6.- Deprivation of liberty

For purposes of this law, what is meant by detention, imprisonment, or confinement is the deprivation of freedom, and that includes any kind of confinement of a person, or placing him in a public or private place without allowing him to leave it when he wishes, pursuant to an administrative or judicial body, or any other authority.

CHAPTER II.- STATEMENTS OF THE DEFENDANTS AND ISOLATION

Article 7.- Statement

In the case that the defendant in detained, his first statement will be made within twenty four hours.

This timeframe could be extended to forty eight hours in case of force majeure, which would be expressed in the agreed providence.

Article 8.- Interrogatory

The questions asked in every statement made should be geared to the investigation of the facts and the participation of the defendant and any other person that may have been involved in their perpetration or concealment.

The questions will be direct; in any case they can be made in a leading or suggestive manner.

Nor any kind of coaction of menace can be used with the defendant.

Article 9.- Notification of the offense to the defendant

All objects composing the corpus delicti, and other objects deemed appropriate by the Judge, will be brought upon the defendant in order to be recognized by him.

He will be interrogated about the origin of these objects, their destination and the reason why they are in his possession, and, in general, about any other circumstance leading to the clarification of the truth.

The Judge can command, without any kind of coaction, to write, in his presence, some words or sentences when deemed useful to clarify any doubt about the legitimacy of any document attributed to him.

Article 10.- Acquittal

The defendant will be allowed to express himself when deemed important for its acquittal and the explanation of the facts, urgently performing meetings or other proceedings for the verification of the statements, if deemed conducive by the judge.

In any case indictments or counterclaims cannot be made, nor it will be read in the summary anything else than his previous statements, if requested, unless otherwise authorized by the Judge about its publicity of a part or the whole of it.

Article 11.- Confession of the defendant

The defendant's confession will not release the investigating judge from performing all the necessary proceedings in order to acquire the certainty of the truth of the confession and the existence of the crime.

In this sense, the investigating judge will interrogate the confessed defendant in order to explain all the circumstances of the offence everything that will help demonstrate his confession, if he was acting as perpetrator of accomplice and if he can bring witnesses of people with knowledge of the fact.

Article 12.- Isolation of the defendant

Concerning the isolation of the defendants, refer to the articles (incorporate a couple of articles referring to the proposal of the article 13).

Proposal of articles (related to isolation):

Article 13.-Isolation

1. The decision rendered about the personal situation of the defendant or culprit will be adopted as a writ. The writ that accords custody or an extension of the detention will express the motives by which this measure is considered necessary and proportionate to its objectives.

2. Where secrecy of proceedings has been ordered, the provisional detention order shall include details of the case that must then be omitted, for reasons of confidentiality, from the copy to be issued. Under no circumstances a comprehensive description of the accusation and what goal(s) can be achieved with the incarceration

will be omitted in the. Whenever the secrecy is lifted, the defendant or culprit will be immediately notified about the complete order.

3. The writs related to the personal situation of the defendant or culprit will be brought to the knowledge of the directly offended or injured by the offense whose security could be affected by the court ruling.

Article 14.- Isolation

1.- An appellate procedure, that will get preferential treatment, can be exerted against the writs that enact, extend or deny custody or that accord the freedom of the defendant or culprit. The appeal against the order of arrest should be resolved within 30 days **(as this is only a proposal, the dates can be modified).**

2.- When, as set out in the section 2 of the previous article, the order of arrest is not completely notified to the defendant or culprit, he could as well appeal the whole writ upon notification.

Article 15.- Isolation (Exceptions)

The judge or the tribunal can reach an agreement through which the custody of the defendant or culprit can be exert at his home, providing the necessary surveillance measures, in case the defendant suffers an illness that could be severely aggravated by the imprisonment. The defendant or culprit can leave his home during the hours needed for the treatment of his illness, with the precise surveillance, in case the judge or tribunal allows it.

Article 16.- Isolation (Exceptions)

1. The investigating judge or the tribunal can exceptionally agree, through a reasoned decision, to incommunicado confinement of incarceration in the following circumstances:

a) The urgent need to avoid severe consequences that can threaten life, freedom or the physical integrity of a person;

b) The urgent need for immediate action of the investigating judges in order to avoid jeopardizing the criminal proceedings.

2.- The isolation will only last the strictly necessary time to urgently perform the procedures in order to avoid the risks referred to in the previous section. The isolation should not last longer than five days. The isolation could be extended up to **XX** years in cases when prison sentence is agreed for any of the crimes referred to in the **article XX** or any other offence committed in an organized way by two or more people **(Proposal: "In case of a defendant holding public office and been related to a bill of indictment and been decreed pre-trial detention for a crime committed through a person integrated or related in armed groups, terrorist individuals or rebels may be automatically suspended in the exercise of his functions during the imprisonment").**

3. The decision in which incommunication is ordered or, as appropriate, extended must state the reasons for which the measure was adopted.

4. It is expressly forbid the use of incommunicado detention for minors under sixteen years of age.

Article 17.- Isolation

1. The *incommunicado* detainee will be allowed to attend, with the necessary precautions, to the procedures permitted by law, whenever his presence does not undermine the aim of the isolation.

2. The detainee will be allowed to have his own items provided that they do not undermine the aim of the isolation, as deemed by a judge or tribunal

3. Detainees may not communicate or receive any communication. Nevertheless, the judge or tribunal may authorize communications that do not frustrate the aim of the incommunicado detention and may adopt, when applicable, the pertinent measures.

4. A prisoner being held incommunicado shall have the right to be examined, at their request, by a second forensic doctor appointed by the judge or court hearing the case.

Article 18.- Isolation

1. Two warrants will be sent in order to implement the order of arrest: one to the judicial police or bailiff, if applicable, and another to the receiving detention centre.

The warrant will include the personal information of the defendant or culprit, the processes offense and whether the condition of *incommunicado* detention has to be put in place.

2. The centres' directors will not receive anyone as detainee without receiving a warrant at the prison.

3. Upon issue of the order granting the release of the detainee, a warrant will be immediately issued to the director of the centre.

CHAPTER III. - OFFENCES AND SANCTIONS

Article 19.- To civil servants

Any public servant, or anyone in his capacity, who commits an offense as defined in this law, and was sentenced according to that official offense, must be dismissed from his post by force of the law.

Article 20.- To civil servants

Any public servant who arrested, confined or detained a person in conditions prohibited by this law, or without taking in consideration the measures prohibited by the law, will be prosecuted.

Article 21.- To civil servants (person acting in an official capacity)

If the arrest, confinement or detention -mentioned in the previous article- was carried out by a person who wrongly claimed to be acting in an official capacity, or claimed he had an official order, will be punished with temporary confinement. This punishment will also be applied against any person who prepared a place for arrest or confinement illegally, or offered it or rented for that purpose, without taking part in the arrest, confinement or detention.

Article 22.- To civil servants (Kidnapping to torture and pecuniary extortion, etc.)

Any public servant, or anyone acting in official capacity, who kidnapped a person or detained, confined or arrested him illegally, and threatened to kill him, or tortured him physically or Psychologically, and asked for a monetary sum, or any other personal interest, will be sentenced for a minimum period of **XX** years.

If the victim suffered a serious injury, or has a permanent disability, as a result of the torture, then the sentence will be extended to a minimum of **XX** years.

If the torture led to the death of the victim, then the sentence will be. **(Here, life sentence should be avoided. Indeed, a country pretending to provide all possible guarantees and live by the rule of law should try not to imprison for life. However, this is only a proposal and it should be discussed among legislators and jurists, and included in the country's Criminal Policy.)**

Article 23.- Sanction of XXX years to anyone committing a cruel act (not necessarily referring to a civil servant nor to a person acting in an official capacity)

Anyone who committed an act that can be described as cruel and violent, outside the cases assigned by the law, will receive a sentence of **XX** year**(s)** imprisonment.

Article 24.- Torture: in case of death

Any public servant, or anyone acting in an official capacity, which ordered the torture of a person, or encouraged or approved it, or neglected its occurrence, will be sentenced to a maximum period of **XX** years.

If the victim had a serious injury, or a permanent disability, as a result of the torture, then the sentence will be **XX** years minimum.

If the torture led to the death of the victim, then the sentence will be **XX. (Here, life sentence should be avoided. Indeed, a country pretending to provide all possible guarantees and live by the rule of law should try not to imprison for life. However, this is only a proposal and it should be discussed among legislators and jurists, and included in the country's Criminal Policy.)**

Article 25.- Sanction

Any public servant, or anyone in an official capacity, who ordered the torture of a person who was sentenced legally, or tortured him by himself, with a more severe punishment, or with a penalty that was not legal, will be sentenced to a maximum period of **xx years.**

Article 26.- Abuse of authority

Any public servant, or anyone acting in an official capacity, which used force against a person based on his official authority, by humiliating that person, or causing physical pain to him, will be **XX years.**

Article 27.- Under compulsion

Any public servant, or anyone acting in an official capacity, which coerced another person to perform a job beyond what is required by law, or used that person as a slave, will be sentenced to a maximum period of **XX years.**

Article 28.- Abuse of authority

Any public servant, or anyone acting in an official capacity, who used his authority to force a person illegally to sell his property, or use it, or abandon his right, for the interest of the public servant, or anyone acting in an official capacity, or any other person, will be imprisoned, and fined a minimum

of a thousand Jordanian Dinars, or its equivalent, and not more than the amount of money involved in the offense, and will be **XX years.**

Article 29.- Investigation and penalty

The allegations of torture have to be investigated in an effective, impartial and expeditious manner, even in the absence of formal complaint, and "the examination of the alleged facts should be oriented to determining their nature and circumstance, as well as de identity of the possible people involved". Failure to comply with the law will be sanctioned accordingly. When this is not done, a culture of impunity grows and could even undermine both the strength of the law and its implementation.

Article 30.- Fight against impunity

The adoption of measures planned to fight impunity gains major importance, even in relation to torture and other cruel inhumane or degrading treatment or punishment as they are absolutely prohibited under any circumstance.

The following measures should be adopted:

i. To strengthen the Independence of the judiciary;
ii. To stablish effective and accessible reporting mechanisms;
iii. To ensure the access to free legal assistance and aid;
iv. To effectively and expeditiously investigate the allegations of torture or other cruel inhumane or degrading treatment or punishment;
v. To ensure the punishment of those who break the law.

Article 31.- Right to reparation of the victims

a.- It should be (and will be) offered to the victims of torture and other cruel inhumane or degrading treatment or punishment a full and effective reparation, and even restitution, compensation, satisfaction, rehabilitation and assurances of non-repetition of a similar situation **(Right to NON-Repetition).**

b.- It should be (and will be) offered monetary compensation for all the economically quantifiable damage. The provided satisfaction can include several measures, such as an official

statement in order to re-establish the victim's dignity, a public apology or a commemoration or a tribute to the victims **(it is extremely important as it reinforces the Right to Reparation).**

CHAPTER IV.- PROTECTION AGAINST TORTURE AND OTHER CRUEL, INHUMANE OR DEGRADING TREATMENT OR PUNISHMENT

Article 32.- Obligations

- Each State Party shall ensure that education and information regarding the prohibition against torture are fully included in the training of law enforcement personnel, civil or military, medical personnel, public officials and other persons who may be involved in the custody, interrogation or treatment of any individual subjected to any form of arrest, detention or imprisonment.

2- Each State Party shall include this prohibition in the rules and instructions issued in regard to the duties and functions of any such person.

Article 33. - Systematic review

- Each State party shall keep under systematic review interrogation rules, instructions, methods and practices as well as arrangements for the custody and treatment of persons subjected to any form of arrest, detention or imprisonment in any territory under its jurisdiction, with a view to preventing any cases of torture.
- Each State Party shall ensure that its competent authorities proceed to a prompt and impartial investigation, wherever there is reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction.

Article 34.- A regulatory proposal (to discuss with the working team: The Palestinian Independent Commission for the Rights of the Citizen).

The Palestinian Independent Commission for the Rights of the Citizen shall have the right to visit any of the places where persons have been deprived from their freedom, in order to prevent torture or any form of inhuman and degrading treatment from occurring.

Article 35.- A regulatory proposal: unannounced reviews

2 The relevant law enforcement authorities, referred to in **Article 33 (obligations),** must allow the Palestinian Independent Commission for the Rights of the Citizen to carry out regular visits to the places under their authority in which people have been confined or deprived from their freedom, either pursuant to an order by a public legal or administrative authority, or following notification or approval by one of those authorities.

3 The visits referred to in the previous paragraph shall be carried out whenever necessary to ensure the protection of the persons referred to, from torture and other forms of inhuman and degrading treatment.

Article 36.- Proposal: The Palestinian Independent Commission for the Rights of the Citizen.

The Palestinian Independent Commission for the Rights of the Citizen, referred to in **Article 33 (obligations)**, will:

I. Carry out regular studies of the treatment of people in custody in their places of confinement, in order to –when necessary- ensures that they are not subjected to torture and other forms of inhuman and degrading treatment.
II. Present recommendations to the relevant authorities in order to improve the treatment of people deprived of their liberty, and to prevent torture or other forms of inhuman and degrading treatment, taking in consideration relevant international standards.

Article 37.- Proposal: The Palestinian Independent Commission for the Rights of the Citizen.

The relevant authorities must enable the Palestinian Independent Commission for the Rights of the Citizen to:

A. Obtain all information related to the persons who are confined as stated in **Article (6)** in addition to information regarding the number of such places of confinement and their locations.
B. Obtain all information regarding the treatment of those people in custody and their conditions of confinement.
C. Visit all places of confinement, and all sections and facilities.

D. Have the opportunity to meet with persons in custody in privacy, and interview them either personally or –when necessary- through a translator, as well as any other person the Commission considers might have helpful information.

E. Have the freedom to choose the places it wishes to visit, and the persons it wishes to meet.

Article 38.-

1- To relevant authorities, or officials working for them, are prohibited from issuing any order punishing any person who works for the commission referred to in **Article (32),** or from imposing any punishment against such person, or acquiescing in such punishment, because the Commission has reported about information -whether right or wrong- . The commission, or persons working for it, will not be harmed as a result of the performance of their duties in any way.

Article 39.- Review of the produced recommendations

The relevant authorities will discuss all recommendations produced by the Commission referred to in **Article (32)** and consider measures to implement its recommendations.

Article 40.- Education and training

The different actors involved in the implementation of the legal framework, and particularly those in the criminal judicial system (such as law enforcement officers, judges, and authorities responsible for the detentions), will need an adequate capacitation (initial and continuing) related to the regulatory framework and the development of operational practices that comply with these regulations.

Article 41.- Procedural measures

Procedural safeguards should be put in place and implemented according to their purpose, particularly in case of persons deprived of their liberty. For instance, the records of the detention places should be duly maintained and the codes of conduct of the police should be examined regularly.

Article 42.- Monitoring mechanisms

Besides an effective legal framework, it is also necessary to establish monitoring mechanisms, as the risk of torture can be found in every country. The monitoring mechanisms can help identify the potential risk spheres and to suggest possible safeguards.

Article 43.- Internal mechanism of administrative monitoring

The internal mechanisms of administrative monitoring are established in the institutions as police or detention centres' inspection services, and they contribute to the supervision of the State institutions functioning and to their respect of the legal norms and regulations. Despite their value, the internal monitoring mechanisms are not, themselves, sufficient for the prevention work. As a consequence, we suggest establishing independent mechanisms to perform the inspection visits of the detention places.

Article 44.- Independent organisms

To introduce participation policies in independent organisms able to enter detention centres at any time can exert a powerful deterrent effect. These inspection visits do not have the objective of documenting torture cases of denounce the situation to the authorities. Instead, its aim is to analyse the overall functioning of the detention centres and give constructive recommendations geared to improve the conditions of and the treatment given to the detainees.

Article 45.- The relevance of torture prevention for the NHRI

Some of the contributions of the NHRI could be:

a) To urge the State to ratify the pertinent international treaties on human rights;

b) To advocate for legal reforms geared to make torture a criminal offense and prevent its use by civil servants.

c) The NHRI can contribute to the implementation of a legal framework through:

1- The examination of the detention procedures;
2- The investigation of allegations of torture;
3- The contribution to capacitation programs focused on the pertinent civil servants;
4- The NHRI can contribute to monitoring mechanisms and cooperate with international organisms;
5- The monitoring of detention places;

6- The promotion of public awareness.

CHAPTER V: FINAL NORMS/REGULATIONS

Article 46.- Right to pecuniary compensation

Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependents shall be entitled to compensation.

Article 47.- Impossibility to pardon

There shall be no special pardons for crimes of torture or other forms of inhuman or degrading treatment referred to in this law.

Article 48.- No limitation period

Criminal charges and / or civil claims resulting from any of the crimes / offenses referred to in this law will not be dismissed because of statute of limitation problems, and the National Authority (PNA) will ensure fair compensation to all victims.

Article 49.- Entry into force

This Law shall enter into force the moment it is published in the official newspaper, without any breaching to the Penal Code.

Article 50.- Publication of the law

All relevant authorities must implement the articles of this law. It must be published in the official newspaper.

FINAL THOUGHTS

Torture and other cruel, inhumane or degrading treatment or punishment should be studied and analysed from a perspective of protection of human rights and fundamental freedoms. As it has been said, torture does not respond just to the brutality of some people, instead, it is a regulated practice mostly exerted by the power and for the power. Let us not forget that torture is one of the most barbarous practices of the human kind; to which, nevertheless, most of the known civilizations have been drawn to throughout history.

Torture techniques are, unfortunately, one of the optimal methods to inflict greater suffering from the human being. Unsurprisingly, the highest knowledge about physical and psychical mechanisms of pain and fear has been found through a sophistication of techniques geared to get the physical and moral pain that constitute torture.

Along with physical torture techniques, and those cases oriented to a general fear of the population, a new method of torture is introduced in the XX century: the systematic practice of psychological torture. Although this new sophisticated technique appears to be less severe than the traditionally known, it principally impinges on the individual's personality, even consequently causing irreversible severe mental illnesses or personality disorders[11].

Regarding the Optional Protocol, and contrasting it with existing human rights mechanisms, it is important to point out that the most innovative aspect of it are the regular inspection visits to the places of detention, in its preventive approach (to

[11] One of the most common consequences for the victims of psychological torture is the feeling of a change of identity. Following the experience, there can also be symptoms of fatigue, depression and irritability, which cause anxiety. Another important consequence is the self-isolation of the victims of torture, as they lose their autonomy and trust in others Cfr. Jacobnsen.L/Vesti, P. *Torture survivors – a new group of patients-,* Denmark, 1992, pags.22-24.

prevent better than cure) rather than its reactive approach (to act once the violation is already been performed).

The advocacy strategy is based in the collaboration and the dialogue with authorities rather than in the complaints and their public condemnation. The system is more focused on structural aspects and less in individual cases. Finally, it combines, for the first time, an international human rights tool with a complementary national component.

We consider that the performance of national, independent and effective prevention mechanisms sets up a great opportunity as well as a major challenge of the Optional Protocol. To open the door of all detention centres to an external look constitutes a tremendous impact in the protection of everyone deprived of their liberty.

In order to achieve peace in the country, it is indispensable that the citizens' human rights ensure their dignity, based on truth, justice and reparation. That is to say, the States has to appoint administrative and legal resources; in other words, to adequate a package of national implementation measures on this matter, in compliance with the obligations undertaken under the signed and ratified Human Rights and International Humanitarian Law.

There will only be guarantees of non-repetition once the State expresses through facts, not only words, a true political will that reconciles citizens with the institution, recovers the confidence of the damaged social fabric, and provides the right conditions for the fundamental rights to be an important part of the public policy, acknowledgement and compromise agenda of every Palestinian citizen.

We understand that the opportunity offered to the Palestinian National Authority to be included in the international regulation against torture and other cruel, inhumane or degrading treatment or punishment and adapt its own national regulation to it is both timely and a major achievement for the reinforcement of the Rule of Law and the good governance of the State of Palestine.

The Prevention Integrated Strategy can be illustrated as a house in which the legal framework is the foundation, the framework's implementation is the wall and the monitoring mechanisms are the protective roof.