

“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

SUMMARY



“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

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.

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.

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 United Nations Convention against Torture and other Cruel, Inhumane or Degrading Treatment or Punishment (UNCAT) into their own national legal systems, as well as take the adequate legal actions for their implementation.

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”**.

This document is structured into three 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. 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 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

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.

1. Major issues and areas 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. Next are the most prominent United Nations norms about the prevention of Torture and other Cruel, Inhumane or Degrading Treatment or Punishment.

- 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. List of regulations related to the combat against Torture and other Cruel, Inhumane or Degrading Treatment or Punishment

Next the reader may find a specific recount of the most prominent international regulations against torture.

- a. The article 5 of the Universal Declaration of Human Rights of the United Nations (1948).
- b. Articles 7, 9 and 10 of the International Covenant on Civil and Political Rights (1996).
- c. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984).
- d. Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (2002).
- e. Article 37 of the United Nations Convention on the Rights of the Child (1989).
- f. Article 10 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (1990).
- g. Article 15 of the Convention on the Rights of Persons with Disabilities (2006).
- h. Articles 8, 14, and 20 of the Arab Charter of Human Rights (2004).
- i. United Nations Standard Minimum Rules for the Treatment of Prisoners.
- j. Basic Principles for the Treatment of Prisoners.
- k. United Nations Minimum Standards on the Protection of Persons Deprived of Liberty.
- l. United Nations Rules for the Protection of Juveniles Deprived of their Liberty.
- m. 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).
- n. UN Code of Conduct for Law Enforcement Officials.
- o. United Nations Basic Principles on the Use of Force and Firearms.
- p. Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Istanbul Protocol).
- q. United Nations basic principles and guidelines on the right to reparation for victims of human rights violations and serious violations of international humanitarian law.
- r. United Nations Standard Minimum Rules for Non-custodial Measures (The Tokyo Rules).
- s. United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules).
- t. 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.

4.- Rights under Police Custody: Right to a Fair Trial

The right of information in criminal proceedings guarantees that every detainee knows the reason for his detention and the proofs gathered against him or her. Likewise, the information about individual rights in detention as the right to remain silent or the right to an attorney are included.

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.

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.

c. 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.

d. 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.

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 UNCAT provides the essential protection, not only against classic and conventional torture practices, but also against modern and sophisticated tools, which are characterized by reaching the mental suffering sphere.

The OPCAT 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.

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".

b.- Consideration of the Crime of Torture

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

- Multi Offensive crime
- Special crime
- Crime of Result
- Deliberate crime
- Intent Crime
- Omission offence
- Criminal Attempt

- Complicity or Participation
- Due obedience
- Amending circumstances

2.- Obligations Impose on the Members 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).

3. Protection Mechanisms and their implementation

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.

4.- 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.

a. Mechanisms for inspection visits

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.

b. 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.

c. 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;

d. 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

UNIT III

Proposal of regulation against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

This unit is divided into 5 chapters. Each chapter corresponds to a summary of articles proposed for a regulation against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

CHAPTER I.- General rules

This section collects from articles 1 to 6 and refers to the General Rules. It is in this chapter where the prohibition of torture or any other inhuman and degrading treatment is highlighted. It mentions that any statement obtained as a result of torture shall not be invoked as evidence in any proceedings.

Another important issue is related to the definition of torture itself. For the purposes of the law here proposed, the term "torture" means any act by which pain or suffering, whether physical or psychological is intentionally inflicted on a person, for such purposes to obtain information from him or to a third party information or to confession, punishing him for an act he or she has committed a third person, or intimidating or coercing him or her to 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.

CHAPTER II.- Statements of the defendants and isolation

This section includes articles related to the rights of detainees, (articles 7 to 12), which highlights the statements of detainees within 24 hours, and their respective extension. Another issue is referred to the interrogations, which highlights that the statements that are provided have to go to the investigation of the facts by the defendants.

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.

The Examining Magistrate or Court may exceptionally agree, by means of a reasoned decision, the incommunicado detention or imprisonment when any of the following circumstances occur: a) urgent need to avoid serious consequences that may endanger the life, the freedom or physical integrity of a person, or b) urgent need for immediate action by the investigating judges to avoid seriously compromising criminal proceedings.

CHAPTER III.- Offences and sanctions

In this chapter, articles from 19 to 31 include topics related to sanctions that public servants may receive in the event of non-compliance with the law. It highlights issues such as in the case when a public servant or any persons arrests, confines or detains a person under conditions prohibited by law, this public servant should be prosecuted. If the victim suffers a serious injury or has a permanent disability as a result of torture, the sentence will be extended in penalty. This chapter also includes the penalty to be met in the case if the torture led to the death of the victim.

The adoption of measures aimed at combating impunity will acquire the greatest importance, even in relation to torture and cruel treatment, since they are prohibited by any circumstance. The following measures will be adopted: a) Strengthen the independence of the judiciary; b) establish effective and accessible complaint mechanisms; c) Guarantee access to free legal and legal assistance; d) Investigate expeditiously and effectively allegations of torture or cruel treatment; e) Guarantee that those who break the law are punished.

Right to the reparation of the victims is another important issue. The victims of torture and cruel treatment should be offered a full and effective detention, including restitution, compensation, satisfaction, rehabilitation and guarantees that similar acts will not be repeated. Satisfaction may include various measures, such as an official declaration for the dignity of the victim, a public demonstration or a commemoration of a tribute to the victims.

CHAPTER IV.- Protection against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment

Education and information are important aspects to be considered in this new law proposal. States Parties will ensure that education and information regarding the prohibition of torture are fully included in the training of law enforcement personnel, civilian or military forces, medical personnel, public officials and other persons who may be involved in the custody, interrogation or treatment of any person subjected to any form of arrest, detention or imprisonment.

Likewise, another issue to take into consideration is the systematic examination of rules, instructions, methods and practices of interrogation, as well as the arrangements for the custody and treatment of persons subjected to any form of arrest, detention or imprisonment. The participation of civil society organizations is another desirable aspect, where they would have the right to visit any of the places where they have deprived people of their rights.

Procedural measures should provide with guarantees in the process for persons deprived of their liberty. They also should highlight a control mechanism through an effective framework, taking into consideration that the risk of committing acts of torture is always present. Thus, control mechanisms can help identify areas of potential risk and propose possible safeguards.

CHAPTER V: Final norms/Regulations

The last chapter of the normative recommendations considers the right to pecuniary reparation, or the impossibility of pardons, as well as the no prescription of criminal charges.

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.

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.

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

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 State 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.