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Treatment and Rehabilitation Center For Victims Of Torture

Presents:

Comprehensive Study on the issue of harmonization of applicable domestic laws and rules with the obligations and rules of The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT)

Under the EU funded project:

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

❖ Introduction:

Since its establishment, the Palestinian Authority (“hereinafter: PA”) has always been working to ensure the rule of law and the respect of human rights whether administratively or in its legislative and judiciary systems, including the establishment of the Independent Commission for Human Rights (“hereinafter: ICHR”), and through the upgrading of its status in the United Nations (hereinafter: UN), nowadays the non-Member Observer State of Palestine (“hereinafter: Palestine”) shares the same interest in respect of human rights and international law and customs, and as a part of its commitment toward a human rights-oriented Palestinian Government and Society, the State of Palestine presented by its President Mahmoud Abbas (Whom is also the Chairman of the Executive Committee of the Palestine Liberation Organization) signed, ratified and acceded to several multilateral human rights treaties including ICCPR, ICESCR, UNCAT, ICEAFRD, CEDAW, CRPD and CRC.

In order to fulfill its obligations under these international instruments, Palestine by its governmental bodies and in cooperation with its civil society organizations has been working on several domestic legislative amendments to ensure the effective implementation of the rules of these treaties.

In this context and in particular, several civil society organizations along with other International human rights organizations expressed their displeasure due to the lack of a comprehensive mechanism that led to an effective implementation of UNCAT, which Palestine acceded to in the 2nd of April 2014.

The lack of a comprehensive mechanism that should ensure the prevention of torture and effective implementation of UNCAT is a result of the lack of several legal principles in the Palestinian laws, these principles are essential for the

implementation of the UNCAT, also, the existence of few articles, rules, laws and acts which are incompatible with UNCAT just made things worse.

Therefore, this study will discuss several legislative amendment which are essential to ensure the effective implementation of UNCAT within the Palestinian territories as long as it is under its jurisdiction. As it will review the legal gaps and issues within the Palestinian laws and provide legal recommendation to fill these legal gaps and to solve these legal issues.

First of all, it must be stressed that Palestine may not invoke the provisions of its internal law as a justification for its failure to perform UNCAT or any obligation under UNCAT, unless such an obligation contradicts with an internal rule of a fundamental importance.¹

The State of Palestine acceded to UNCAT without making any reservation or declaration. Therefore it is now bound by all the articles of the UNCAT and has to stand for the following obligations:

- **Article 2:**

- a. The obligation to take effective legislative, administrative and judiciary measures of prevention with respect to torture.
- b. The obligation to ensure that neither exceptional circumstances whatsoever nor any other argument may be invoked as a justification of torture. (*non-derogable right*)

- **Article 3:**

- a. The obligation of *non-refoulement*.

¹ Vienna convention on law of treaties, 1969, Articles 27 and 46.

- **Article 4:**

- The obligation to adopt a definition of torture that contain provisions identical to the definition set in article 1 or of a wider application.
- The obligation to criminalize all forms of torture and other cruel, inhuman or degrading treatment or punishment, including the criminalization of any conduct, attempt, commit or complicity in committing torture.
- The obligation to make these offences punishable by appropriate penalties.

- **Article 5:**

- The obligation to ensure that Palestinian national Courts possess jurisdiction over the offences referred in article 4 if the offences are committed in any territory under its jurisdiction or if the alleged offender has a Palestinian nationality.
- To obligation to ensure that Palestinian national Courts posses jurisdiction over such offences if the alleged offender is present in any territory under its jurisdiction and further not to extradite him pursuant to article 8 to any of the States whom posses jurisdiction over these offences. (Universal reaction, not universal jurisdiction nor universal jurisdiction *in absentia*).

- **Article 6:**

- The obligation to undertake inquires into allegations of torture and to take suspected persons into custody and to provide then with all the legal rights provided in the Palestinian domestic laws and

including the right to make a call to his State representatives in Palestine and to submit suspected torturers to the prosecuting authorities.

- **Article 7 & 8:**

- The obligation to either prosecute or extradite the suspected torturers and to make sure the suspected person is getting a well-treatment, fair prosecution and a fair trial.

- **Article 9:**

- The obligation to assist other States parties in criminal proceeding concerning torture.

- **Article 10:**

- The obligation to disseminate information on the prohibition of all forms of torture through media and education, and to provide trainings for the law enforcement agents (whether militaries or civilians) including the militaries medical services and the public employees on subjects related to the prevention of torture.
- To obligation to ensure that it is prohibited under all circumstances and under all authorities to conduct or commit any form of torture by any public employee.

- **Article 11:**

- The obligation to continually review the domestic interrogation rules and the arrangements for custody and further to make sure detainees and suspects are being treated in an appropriate way in order to prevent any commit of torture.

- **Article 12:**

- The obligation to start a prompt and impartial investigation where there are reasonable grounds to believe that torture has been committed in a territory under the Palestinian jurisdiction.

- **Article 13:**

- The obligation to allow all detainees and prisoners to submit a complaint to the authorized bodies in regard of any suspect of torture, and that such a complaint shall be reviewed quickly and impartially, and will never affect negatively on the way he is being treated.
- The duty to protect those who submit complaints in regard of torture.

- **Article 14:**

- The obligation to ensure that domestic rules provide an effective mechanism that redress (rehabilitate) and compensate each and every victim of any form of torture in which it is responsible of. And further to compensate the dependents of the victim in case he dies because of torture.

- **Article 15:**

- The obligation to prohibit the use of any evidence obtained through torture.

- **Article 16:**

- The obligation to prevent public officials and employees from committing or acquiescing in any act of torture or cruel, inhuman, or degrading treatment.

- **Article 19:**

- The obligation to submit a report on the measures that were taken by the State of Palestine to ensure an effective implementation of UNCAT, within 1 year after the entry into force.
- The obligation to submit periodical reports on all issues regarding the implementation of UNCAT

These obligations require the State of Palestine to adopt some legislative amendments that will affect several constitutional documents and laws including the following:

1. The Palestinian Basic Law of 2003.
2. Criminal Procedures Law no. (3) of 2001 and its Amendments.
3. Penal Code no. (16) of 1960 and its Amendments.
4. Mandatory Penal Code no. (74) of 1936 and its Amendments.
5. PLO's Revolutionary Penal Code of 1979.
6. PLO's Revolutionary Correctional Facilities Law of 1979.
7. Palestinian Correctional Facilities Law no. (6) of 1998.
8. Law on amending the Law on the suits brought against the Government of 1958 no. (18) of 2014
9. Act on the Service in the Palestinian Security Forces no. (8) of 2005.
10. Palestinian Intelligence Law no. (17) of 2005.
11. Palestinian Protection Forces Law no. (11) of 2007.
12. Palestinian Children Protection Law no. (4) of 2016.
13. Crimes preventing Act no. (7) of 1954.
14. Crimes preventing Act no.(48) of 1933.
15. Law concerning Electronic Crimes no. (17) of 2017.
16. Law on the civil responsibility of wrongful acts no. (36) of 1944.

First: The Palestinian Basic Law of 2003:

Article 32 is consistent with article 14 of the convention.

Article 13 is consistent with article 15 of the convention.

Articles 13/1 and 29/3 is incompatible with article 1 of the convention.

Articles 42, 11 and 112 are inconsistent with article 2 of the convention.

Article 28 is inconsistent with article 8 of the convention.

Second: Criminal Procedures Law no. (3) of 2001 and its Amendments:

Articles 56, 99,100, 102, 105, 107, 125 are consistent with article 6 of the convention.

Articles 127 and 128 are consistent with article 11 of the convention.

Articles 55, 52, 474, 105, 107 are consistent with article 12 of the convention.

Articles 214 and 215 are consistent with article 15 of the convention.

Article 123 is consistent with article 13 of the convention.

Articles 415, 278, 29, 114, 86, 243, 269, 402, 403, 272, 404, 274 are consistent with article 16 of the convention.

Article 29 is incompatible with article 1 of the convention.

Article 427 is incompatible with article 2 of the convention.

Third: Penal Code no. (16) of 1960 and its Amendments:

Articles 92, 14 are consistent with article 16 of the convention.

Articles 208, 333, 334, 335, 336, 337 are incompatible with article 1 of the convention.

Articles 51, 11, 47 are incompatible with article 2 of the convention.

Article 178 is incompatible with article 11 of the convention.

Article 308 is incompatible with article 13 of the convention.

Fourth: Penal Code no.(74) of 1936:

Article 37 is compatible with article 16 of the convention.

Articles 108, 250, 251, 238 are incompatible with article 1 of the convention.

Articles 6 and 7 are incompatible with article 5 of the convention.

Fifth: PLO's Revolutionary Penal Code of 1979:

Articles 384, 384, 386 are incompatible with article 4 of the convention.

Sixth: PLO's Revolutionary Correctional Facilities Law of 1979:

Articles 62, 63, 37 are consistent with article 1 of the convention.

Seventh: Palestinian Correctional Facilities Law no. (6) of 1998:

Articles 6, 10, 11, 12, 18 are consistent with article 11 of the convention.

Articles 13/2, 14, 15/1, 37 (except paragraph 11) are consistent with article 16 of the convention.

Article 48 is incompatible with with article 2 of the convention

Article 62/2 is incompatible with article 4 of the convention.

Article 37/11 is inconsistent with articles 1 and 4 of the convention.

Eighth: Law on amending the Law on the suits brought against the Government of 1958 no. (18) of 2014:

Article 2 is inconsistent with articles 5, 12 and 14 of the convention.

Ninth: . Act on the Service in the Palestinian Security Forces no. (8) of 2005:

Article 90 is incompatible with article 4 of the convention.

Tenth: Palestinian Intelligence Law no. (17) of 2005:

Article 13 is consistent with article 1 of the convention.

Article 16 is consistent with articles 5 and 8 of the convention.

Articles 12, 26, 33 are consistent with articles 6 and 12 of the convention.

Article 25/9 is consistent with article 11 of the convention.

Eleventh: Palestinian Protection Forces Law no. (11) of 2007:

Article 8 is consistent with article 1 of the convention.

Article 12 is consistent with articles 6 and 12 of the convention.

Article 9 is consistent with article 11 of the convention.

Twelfth: Palestinian Children Protection Law no. (4) of 2016:

Articles 19, 21, 22 are consistent with article 12 of the convention.

Articles 5/1, 7, 8 are consistent with article 16 of the convention.

Thirteenth: Crimes preventing Act no. (7) of 1954:

Article 3/C and 8 are inconsistent with article 16 of the convention.

Fourteenth: Crimes preventing Act no.(48) of 1933:

Article 3/3 and 8 are inconsistent with article 16 of the convention.

Fifteenth: Law concerning Electronic Crimes no. (17) of 2017:

Article 25 is consistent with article 2 of the convention.

Most of the articles of this law contradicts and inconsistent with article 16 of the convention.

Fifteenth: Law on the civil responsibility of wrongful acts no. (36) of 1944:

This law constitutes a legal base for a form of redress for the victims of torture, however, it doesn't fulfill Palestine's obligations under article 14 of UNCAT, nor does it fulfill the essential steps for a fair redress process for the victim of torture as listed in the General comment no.3 on the implementation of article 14 of UNCAT².

The general comment presents the scope of the right to redress, in which it should include restitution, compensation, rehabilitation, satisfaction, the right to truth and lastly guarantees of non-repetition. While the 1944 law only allows the victims to ask for compensation on behalf of physical body damages that occurred as a direct result of torture; which clearly shows that it is inconsistent with the obligation set under article 14 of UNCAT.

² UN Committee Against Torture (CAT), General comment no. 3, 2012 : *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment : implementation of article 14 by States parties*, 13 December 2012.

What are the advantages of the Palestinian laws?

- The applicable punishments do not include any cruel, inhuman or degrading punishment.
- The investigating and questioning methods do not include any cruel, inhuman or degrading method.
- The applicable rules take into consideration the issue of burden of proof, therefore, the conduct of the crime of torture can be proven freely and in any method of proofing.
- The applicable rules take into consideration the age, physical abilities, medical status and gender whether in investigations or in prisons.
- The applicable rules allows the prisoners to fill a complaint at any time.

What articles does the Palestinian laws lack?

- Articles on the definition of torture.
- Articles that directly prevent and punish on the crime of torture.
- Articles on the legal value of the ratified international treaties on behalf of the domestic courts.
- Articles on the redress process for the victims of torture.
- Articles on the time limit of each questioning/investigation session.
- Articles on the universal jurisdiction over the crime of torture.
- Articles on the civil responsibility of the perpetrators on the crimes of torture.

What we recommend?

- To eliminate all the above mentioned articles which are inconsistent and violates the obligations undertaken by the State of Palestine under the UNCAT.
- To adopt adjustments on all the above mentioned articles which are incompatible with the UNCAT articles.
- To adopt new articles on the above mentioned issues not covered by the existing laws.
- To prepare the common core document (CCD) of the State of Palestine.
- To unify the applicable legislations in both Gaza strip and the West Bank.
- To call for the Palestinian Legislative Council (PLC) to practice its legislative authorities back again, so that it can harmonize all the applicable rules with the articles of the ratified international human rights treaties.