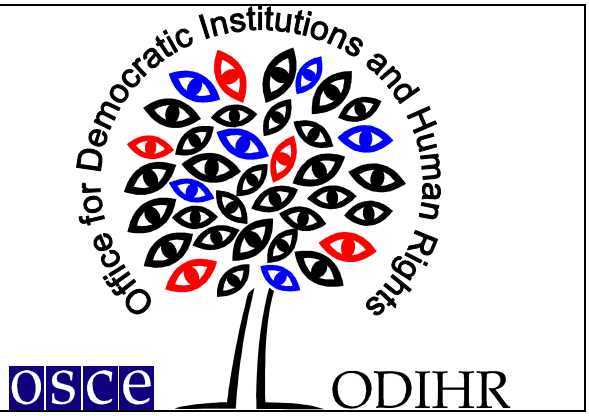
Warsaw, 10 June 2014 Opinion-Nr.: GEN-UZB/250/2014 [AlC] www.legislationline.org	

OPINION

ON ARTICLE 235 OF THE CRIMINAL CODE

OF THE REPUBLIC OF UZBEKISTAN

based on an English translation of Article 235 of the Criminal Code provided by the National Human Rights Centre of the Republic of Uzbekistan

OSCE Office for Democratic Institutions and Human Rights
Ulica Miodowa 10 PL-00-251 Warsaw ph. +48 22 520 06 00 fax. +48 22 520 0605

TABLE OF CONTENTS

Annex: Article 235 of the Criminal Code of the Republic of Uzbekistan

I. INTRODUCTION

1. *On 22 April 2014, the Director of the National Human Rights Centre of the Republic of Uzbekistan sent an official letter to the Director of the OSCE Office for Democratic Institutions and Human Rights (hereinafter "OSCE/ODIHR") requesting a review of Article 235 of the Criminal Code of the Republic of Uzbekistan.*
2. *On 5 May 2014, the OSCE/ODIHR Director responded to this request, confirming the Office's readiness to prepare a legal opinion on the compliance of this article with OSCE commitments and international human rights standards, in particular the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.*
3. *This Opinion is provided in response to the above-mentioned request, by virtue of OSCE/ODIHR's mandate to assist OSCE participating States in the implementation of key OSCE commitments in the human dimension.*

II. SCOPE OF REVIEW

4. The scope of this Opinion covers only Article 235 of the Criminal Code, as submitted for review. The Opinion does not constitute a full and comprehensive review of the entire legal and institutional framework governing the prohibition of torture and other cruel, inhuman or degrading treatment or punishment.
5. The Opinion raises key issues and provides indications of areas of concern. In the interests of concision, the Opinion focuses more on problematic areas rather than on the positive aspects of the provision. The ensuing recommendations are based on relevant international human rights standards and OSCE commitments, as well as good practices from other OSCE participating States.
6. This Opinion is based on an English translation of Article 235 of the Criminal Code provided by the National Human Rights Centre of the Republic of Uzbekistan, which is attached to this document as an Annex. Errors from translation may result.
7. In view of the above, the OSCE/ODIHR would like to make mention that this Opinion is without prejudice to any written or oral recommendations or comments on the legal and institutional framework governing the prohibition of torture and other cruel, inhuman or degrading treatment or punishment, that the OSCE/ODIHR may make in the future.

III. EXECUTIVE SUMMARY

8. At the outset, OSCE/ODIHR welcomes the National Human Rights Centre's willingness to seek international expertise to review Article 235 of the Criminal Code, and hopes that this Opinion will prove helpful in ongoing attempts to align relevant legislation relating to the prohibition of torture and other cruel, inhuman or degrading treatment or punishment, with international human rights standards and OSCE commitments.
9. At the same time, the wording of Article 235 of the Criminal Code could benefit from certain revisions and additions, to ensure its full compliance with Articles 1 and 2 of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or

Punishment. In particular, the definition of torture should be broadened, to include discrimination among the listed purposes for inflicting torture and to ensure that this definition applies also to other persons acting in an official capacity. Additionally, Article 235 of the Criminal Code should expressly exclude the application of general provisions of the Criminal Code pertaining to defences, amnesties and pardons, as well as statutes of limitations to cases of torture and other cruel, inhuman or degrading treatment or punishment and should provide for penalties that are commensurate with the gravity of the offence.

10. The OSCE/ODIHR thus recommends as follows:

1. Key Recommendations

A. to explicitly include discrimination among the listed purposes for inflicting torture; [par 25]

B. to extend the definition of torture to acts or omissions committed by "other persons acting in an official capacity", so that it will apply to a wide range of professionals such as to doctors, health professionals and social workers, defence/security services, border management and immigration officials; [pars 28-29]

C. to broaden the applicability of Article 235 to public officials and other persons acting in an official capacity who instigate, consent to or acquiesce in torture perpetrated by non-State officials or private actors and by personnel under their command; [pars 30-32]

D. to expressly exclude the application of general provisions of the Criminal Code pertaining to defences, amnesties and pardons, as well as statutes of limitations, to the criminal offense of torture and other cruel, inhuman or degrading treatment or punishment; [pars 33-36]

E. to remove the reference to "correctional work" in Article 235 and replace it, and other penalties mentioned therein with penalties that are commensurate with the gravity of the offence; [pars 38-39]

2. Additional Recommendations

F. to expressly include not only acts but also omissions (meaning failure to act) in the definition of torture; [par 21]

G. to remove the word "unlawful" from Article 235 and expressly clarify that the prohibition contained therein does not apply to pain or suffering arising only from, inherent in or incidental to lawful sanctions; [par 20]

H. to delete references to "a suspect, accused, witness, victim or any other party at a criminal proceeding, or a convicted person serving a sentence" and specify instead that Article 235 shall apply to any individual; [par 26] and

I. to adapt the wording of Article 235 so that it refers more generally to third persons, without specifying who these third persons shall be, and not only "close relatives". [par 27]

IV. ANALYSIS AND RECOMMENDATIONS

1. International Standards relating to the Prohibition of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

11. Article 1 of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (hereinafter "the UNCAT")[1] defines "torture" as "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining 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."

12. Article 16 of the UNCAT also requires States to prevent "other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture […], when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity". While the UNCAT does not provide a definition of such acts, the UN Special Rapporteur on Torture has highlighted that the decisive criteria for distinguishing torture from cruel, inhuman and degrading treatment are the purpose of the conduct and the powerlessness of the victim, rather than the intensity of the pain or suffering inflicted.[2]

13. Article 7 of the International Covenant on Civil and Political Rights (hereinafter "the ICCPR") states that "[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment".[3] While the ICCPR does not contain a definition of these terms, the UN Human Rights Committee (hereinafter "the HRC") has indicated that the assessment of whether a particular treatment constitutes a violation of Article 7 of the ICCPR "depends on all circumstances of the case, such as the duration and manner of the treatment, its physical or mental effects as well as the sex, age and state of health of the victim."[4] Elements such as the victim's age and state of health may therefore aggravate the effect of certain treatment so as to bring it within the scope of the prohibition of Article 7 of the ICCPR.[5] In contrast to the UNCAT, the ICCPR does not require a certain level of involvement or acquiescence by a public official for an act to be qualified as torture or ill-treatment and the State has a duty to protect whether the reprehensible acts are inflicted by people acting in their official capacity, outside their official capacity or in a private capacity.[6]

14. OSCE participating States have committed themselves to prohibit torture and other cruel, inhuman or degrading treatment or punishment and to take effective legislative,

---

1 UN Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by General Assembly resolution A/RES/39/46 on 10 December 1984. The Republic of Uzbekistan acceded to this Convention on 28 September 1995.

2 See par 39 of the Report of the UN Special Rapporteur on the Question of Torture, UN Doc. E/CN.4/2006/6, 23 December 2005, available at http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G05/168/09/PDF/G0516809.pdf?OpenElement.

3 UN International Covenant on Civil and Political Rights, adopted by General Assembly resolution 2200A (XXI) on 16 December 1966. The Republic of Uzbekistan acceded to this Covenant on 28 September 1995.

4 See par 9.2 *Vuolanne v. Finland*, HRC Communication No. 265/1987, UN Doc. Supp. No. 40 (A/44/40), 7 April 1989, available at http://www1.umn.edu/humanrts/undocs/session44/265-1987.htm.

5 *Ibid.*

6 See par 2 of the General Comment No. 20 of the Human Rights Committee on Article 7 of the ICCPR (1992) available at http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G08/422/35/PDF/G0842235.pdf?OpenElement (page 200).

administrative, judicial and other measures to prevent and punish such practices.[7] Additionally, they made it clear that "no exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture".[8]

2. The Definition of Torture under the UNCAT

15. As recommended by the UN Committee against Torture (hereinafter "the UNCAT Committee"), all States party to the UNCAT should adopt a definition of torture that reflects all of the elements contained in Article 1 of the UNCAT.[9] Such definition should also be in accordance with Article 4 of the UNCAT which requires that attempt, complicity and participation in torture constitute criminal offences in the domestic legislation.[10] It is welcome that Article 26 of the Constitution of Uzbekistan states that "[n]o one may be subject to torture, violence or any other cruel or humiliating treatment" and that the Supreme Court of Uzbekistan has taken a strong stand to require the use of the definition of torture contained in Article 1 of the UNCAT.[11] However, the UNCAT Committee has noted that for judges, investigators and law enforcement personnel, the Criminal Code continues to be the most relevant law in this respect, thus demonstrating the need to adapt the definition contained in the Criminal Code to ensure that in practice, there is clear adherence to a definition that is in line with the UNCAT.

16. In principle, States parties may choose the measures through which they fulfil their obligations stemming from the UNCAT; however, such measures need to be effective and consistent with the object and purpose of the UNCAT.[12] While States parties do not need to adopt exactly the same definition as the one provided in this instrument, serious discrepancies between the UNCAT's definition and that incorporated into domestic law may create actual or potential loopholes for impunity.[13]

17. This is all the more important from an international law perspective. The legitimacy of international treaties stems from their homogeneous application, which requires to a certain extent that States parties adopt similar, even if not the same definition. This also has a potential impact on the ability of State authorities to prosecute alleged perpetrators of acts of torture committed in other countries.

18. Finally, the definition of any criminal offense must respect the principle of legality (*nullum crimen, nulla poena sine lege)* which stipulates that an act can be punished only if, at the time of its commission, the act was the object of a valid, sufficiently precise,

---

7 See par 23 of the OSCE Vienna Document (1989). See also the Istanbul Charter of 1999 where OSCE participating States committed themselves to the eradication of torture and other cruel, inhumane or degrading treatment or punishment in the OSCE area and to "promote legislation to provide procedural and substantive safeguards and remedies to combat these practices."

8 See par 16 of the OSCE Copenhagen Document (1990). See also the 1990 Charter of Paris, the 1991 Moscow Document, the 1994 Budapest Document, the 1999 Istanbul Document and the 2005 Ljubljana Document.

9 For the case of Uzbekistan, see par 10 of the 2013 Concluding Observations of the UNCAT Committee on the 4th periodic report of Uzbekistan, CAT/C/UZB/CO/4, 10 December 2013, available at http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CAT%2fC%2fUZB%2fCO%2f4&Lang=en.

10 *Op. cit.* footnote 6, par 8 (General Comment No. 20 of the Human Rights Committee).

11 *Op. cit.* footnote 9, par 10 (2013 Concluding Observations of the UNCAT Committee on Uzbekistan).

12 See par 6 of the General Comment No. 2 of the UNCAT Committee on Implementation of Article 2 of the UNCAT, UN Doc. CAT/C/GC/2/CRP.1/Rev.4 (23 November 2007), available at http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CAT%2fC%2fGC%2f2&Lang=en.

13 *Ibid*. par 9 (General Comment No. 2 of the UNCAT Committee).

written criminal law to which a sufficiently certain sanction was attached.[14] Clear legislative provisions will also avoid divergence in interpretation by judges, investigators and law enforcement personnel.

19. According to international standards, there are four elements that need to be taken into account for qualifying an act as torture, namely (i) the nature of the act, (ii) the intention of the perpetrator, (iii) the purpose of the act and (iv) the involvement of public officials or other persons acting in an official capacity. It is from the perspective of these four constitutive elements of the criminal offense that the subsequent review and analysis of Article 235 of the Criminal Code is conducted. It must be highlighted that an analysis of the definition of torture cannot ignore the underlying principle that acts of torture attack the inherent dignity of the human person. It is for this very reason that such acts cannot be addressed via general criminal law provisions (such as assault or abuse of power),[15] and that a special legal regime shall apply to the criminal offense of torture and other cruel, inhuman or degrading treatment or punishment (see pars 30-33 *infra* regarding the absolute and non-derogable character of the prohibition).

2.1. Nature of the Act

20. Article 235 of the Criminal Code covers acts amounting to "unlawful mental or physical pressure […] by means of threatening, striking, beating, tormenting, causing of suffering or other unlawful acts". It is assumed that the word "unlawful" has been introduced to distinguish it from the "pain or suffering arising only from, inherent in or incidental to lawful sanctions" referred to in Article 1 (1) of the UNCAT which is excluded from the scope of the prohibition. Such wording is somewhat unclear and may be interpreted as leaving open the possibility of "legal" forms of coercion. If the purpose of the drafter was to reflect the exclusion stated in Article 1 of the UNCAT, it would be advisable to remove the word "unlawful" and expressly clarify that the scope of Article 235 does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.[16] It should be pointed out in that respect that the lawfulness of any sanction shall be determined by reference to both national and international law and standards.[17]

21. It is important to bear in mind that the term "act" which is mentioned in Article 1 of the UNCAT should not be given a narrow interpretation and that the provision has been construed as including physical and mental pains and sufferings as a result of omission (meaning failure to act).[18] From the wording of Article 235 of the Criminal Code, it is not clear whether omission could fall within the scope of the offense and this will thus

---

[14] For examples of key issues in drafting anti-torture legislation, see the Report of the Expert Meeting organized by APT on Key Issues in Drafting Anti-Torture Legislation: Experience, Advice and Good Practices (2013) available at http://www.apt.ch/content/files_res/report-expert-meeting-on-anti-torture-legislation-en.pdf (hereinafter "2013 APT Report on Key Issues in Drafting Anti-Torture Legislation").

[15] See page 3 of the Remarks by Matt Pollard on "Torture as a Specific Criminal Offense in Domestic Laws" (2009) http://www.wcl.american.edu/hrbrief/16/4pollard.pdf. See also *op. cit.* footnote 12, par 11 (General Comment No. 2 of the UNCAT Committee). See also par 7 of the Concluding Observations of the UNCAT Committee on Poland, CAT/C/POL/CO/5-6, 23 December 2013, available at http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CAT%2fC%2fPOL%2fCO%2f5-6&Lang=en.

[16] See for instance the definition of "torture" stated in the Act Containing Rules Concerning Serious Violations of International Humanitarian Law of 19 June 2003 (International Crimes Act) of the Netherlands which is compliant with Article 1 of the UNCAT, available at http://www.apt.ch/content/countries/netherlands.pdf (pages 4-7).

[17] In that respect, international standards include the UN Standard Minimum Rules for the Treatment of Prisoners, available at http://www.ohchr.org/EN/ProfessionalInterest/Pages/TreatmentOfPrisoners.aspx.

[18] *Op. cit.* footnote 12, par 15 (General Comment No. 2 of the UNCAT Committee).

very much depend on how it is interpreted by the respective criminal courts. Additionally, it is doubtful whether the wording of Article 235 of the Criminal Code would cover the particular situation where public authorities/law enforcement officers fail to intervene where they know or should have reasonably known that acts amounting to torture will be carried out by private individuals. To avoid any discrepancy in its interpretation and actual application, it is advisable to expand Article 235 of the Criminal Code to expressly include omissions.

22. In any case, the wording of Article 235 of the Criminal Code should be broad enough to encompass various grave violations of a person's integrity which have been qualified as torture by the UNCAT Committee.[19]

23. Article 1 of the UNCAT further states that the physical pain or suffering caused would need to be "severe". Article 235 of the Criminal Code does not use such qualification and focuses on the coercive act committed by the perpetrator, rather than on the pain or suffering caused to the victim. Therefore, the drafters and stakeholders should review, and ideally revise Article 235 of the Criminal Code to ensure that the domestic courts assess the effect of the mental or physical pressure on the victim, taking into account all the circumstances, such as the duration and manner of the treatment, its physical or mental effects as well as the sex, age and state of health of the victim, since the same act may have a different impact depending on the specific situation and vulnerability of the victim.[20]

2.2. Intention of the Perpetrator and Purpose of the Act

24. Article 1 of the UNCAT states that torture needs to be "intentionally inflicted" and thus requires a form of intent on the part of the perpetrator. The UNCAT Committee clarified that the element of intent and purpose does not involve a subjective inquiry into the motivations of the perpetrators but rather must result from objective determinations under the circumstances,[21] i.e., whether the consequences of the conduct were reasonably foreseeable by the perpetrator.[22] Consequently, due consideration should be given to the purposive element. While the list of purposes contained in Article 1 of UNCAT[23] is not intended to be exhaustive but rather indicative, the purposes

---

[19] See the section on "Typology of acts that may amount to torture and/or cruel, inhuman and degrading treatment" in the Report of the UN Voluntary Fund for Victims of Torture on the Interpretation of Torture in the Light of the Practice and Jurisprudence of International Bodies (2011), pages 9-27, available at http://www.ohchr.org/Documents/Issues/Torture/UNVFVT/Interpretation_torture_2011_EN.pdf. These include but are not limited to violence against women and girls, as well as the failure to prevent and protect victims from gender-based violence, such as domestic violence, rape, female genital mutilation and trafficking; the use of solitary confinement (see e.g. pages 42-43 of the Guide to Jurisprudence on Torture in International Law jointly published in 2008 by the Association for the Prevention of Torture (APT) and the Center for Justice and International Law (CEJIL), available at http://www.apt.ch/content/files_res/jurisprudenceguide.pdf); the administration in detention and psychiatric institutions of certain medical treatment of an intrusive and irreversible nature, when they lack a therapeutic purpose or aim at correcting or alleviating a disability, if enforced or administered without the free and informed consent of the person concerned (see par 47 of the Report of the UN Special Rapporteur on Torture, A/63/175, 28 July 2008, available at http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N08/440/75/PDF/N0844075.pdf?OpenElement).

[20] See par 9.2 *Vuolanne v Finland*, HRC Communication No. 265/1987, 7 April 1989.

[21] *Op. cit.* footnote 12, par 9 (General Comment No. 2 of the UNCAT Committee).

[22] See Hathaway, Oona; Nowlan, Aileen; and Spiegel, Julia, "Tortured Reasoning: The Intent to Torture under International and Domestic Law" (2012). *Faculty Scholarship Series.* Paper 4723. http://digitalcommons.law.yale.edu/fss_papers/4723.

[23] i.e., "for such purposes as obtaining 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" (Article 1 of the UNCAT).

mentioned in respective domestic laws should be of a similar nature as the ones listed therein.[24]

25. Article 235 of the Criminal Code only punishes acts of torture and other cruel, inhuman or degrading treatment or punishment when the purpose of such acts is to (i) obtain information or confession relating to the commission of a crime, (ii) punish for a committed act, or (iii) coerce to commit any act. It is noted in this context that Article 1 of the UNCAT further protects specifically against acts carried out for "any reason based on discrimination of any kind." Article 235 par 2 of the Criminal Code refers to discrimination on the grounds of nationality, race, religion or social status but only as an aggravating circumstance and not as a constitutive element of the criminal offense. Moreover, other grounds for discrimination should be contemplated, including, among others, colour, ethnicity, age, religious belief or affiliation (and not only religion), political or other opinion, gender, sexual orientation, transgender identity, mental or other disability, health status, economic or indigenous status, the reason for which the person is detained, including persons accused of political offences or terrorist acts, asylum-seekers, refugees or others under international protection, or any other status or adverse distinction.[25] Article 235 of the Criminal Code does not envision the fourth purposive element of discrimination, and consequently has a more restrictive scope than Article 1 of UNCAT. To enhance compliance with this international instrument, it is recommended to explicitly include in Article 235 discrimination among the listed purposes for inflicting torture.

26. Finally, Article 235 of the Criminal Code addresses acts inflicted on a particular kind of individual i.e., "*a suspect, accused, witness, victim or any other party at a criminal proceeding, or a convicted person serving a sentence*". This seems to imply that only the persons having a procedural status in the course of criminal proceedings or serving a sentence, and their close relatives, are protected by the provision. This is unduly restrictive since Article 1 of the UNCAT aims at protecting all individuals, irrespective of their procedural status as well as at covering situations outside of criminal proceedings. The prohibition of torture and ill-treatment actually applies in all contexts of custody or control, for example, in hospitals, schools, or institutions that engage in the care of children, the aged, the mentally ill or disabled, in military service, and in other institutions as well as in situations where the failure of the State to intervene encourages and enhances the danger of privately inflicted harm.[26] It is thus recommended to remove the reference to "a suspect, accused, witness, victim or any other party at a criminal proceeding, or a convicted person serving a sentence", and to specify instead that Article 235 shall apply to any individual. Moreover, the scope of this provision should be broadened to encompass other situations of custody or control, not just those related to criminal proceedings and detention.

27. It is worth mentioning that Article 235 of the Criminal Code also targets acts committed against "close relatives" whereas Article 1 of the UNCAT refers to acts that are aimed at obtaining information from, punishing, intimidating or coercing a third person[27]

---

[24] See par 35 of the Report of the UN Special Rapporteur on the Question of Torture, A/HRC/13/39/Add.5, 5 February 2010, available at http://www2.ohchr.org/english/bodies/hrcouncil/docs/13session/A.HRC.13.39.Add.5_en.pdf.

[25] *Op. cit.* footnote 12, par 21 (General Comment No. 2 of the UNCAT Committee).

[26] *Op. cit.* footnote 12, par 15 (General Comment No. 2 of the UNCAT Committee).

[27] See e.g. par 8 of the Concluding Observations of the UNCAT Committee on Senegal, CAT/C/SEN/CO/3, 23 December 2013, available at http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CAT%2fC%2fSEN%2fCO%2f3&Lang=en.

without specifying that this would need to be a close relative. In order to avoid a too restrictive application of Article 235, it is recommended to adapt its wording to Article 1 of the UNCAT, so that it also refers more generally to third persons, without specifying who these third persons shall be.

2.3. Involvement of Public Officials or Other Persons Acting in an Official Capacity

a) Direct Perpetrators

28. Article 235 of the Criminal Code refers to the conduct of "an inquiry officer, an investigator, a prosecutor or any other employee of law-enforcement agency [and] penitentiary facility". This personal scope is more limited than that of Article 1 of the UNCAT, which does not only cover acts of law enforcement officials, but extends to any person acting in an official capacity.[28]

29. In fact, the UNCAT imposes obligations on States parties as regards acts and omissions of their officials and others, including agents, private contractors, and other persons acting in official capacity or acting on behalf of the State, in conjunction with the State, under its direction or control, or otherwise under colour of law, in all context of custody or control (see par 25 *supra* which provides examples of such contexts).[29] The UN Special Rapporteur on Torture has highlighted that the prohibition against torture relates not only to public officials, such as law enforcement agents in the strictest sense, but may apply also to doctors, health professionals and social workers, including those working in private hospitals, other institutions and detention centres.[30] For instance, this would include e.g. members of the defence/security services, border management and immigration officials[31] as well as medical professionals that may play a role, direct or indirect, in torture.[32] Non-state officials and private actors may additionally be subject to such prohibition if they act in an official capacity.[33] It is recommended to supplement Article 235 of the Criminal Code accordingly.

b) Indirect Perpetrator

30. The UNCAT Committee further recommended in its 2013 Concluding Observations on Uzbekistan to extend Article 235 of the Criminal Code to ensure that "officials who *consent* to or *acquiesce* in torture perpetrated by third parties, are classified under the law as perpetrators of torture rather than, as is presently the case, as persons who aid and abet torture".[34] This recommendation is of particular significance since the threshold of the UNCAT relating to "acquiescence" (i.e. the lowest form of

---

[28] See *op. cit.* footnote 9, par 10 (2013 Concluding Observations of the UNCAT Committee on Uzbekistan).

[29] *Op. cit.* footnote 12, par 15 (General Comment No. 2 of the UNCAT Committee).

[30] See par 51 of the Report of the UN Special Rapporteur on Torture, A/63/175, 28 July 2008, available at http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N08/440/75/PDF/N0844075.pdf?OpenElement. See also pars 15 and 17 of the General Comment No. 2 of the UNCAT Committee.

[31] See e.g. par 10 of the Concluding Observations of the UNCAT Committee on Japan, CAT/C/JPN/CO/1, 3 August 2007, available at http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CAT%2fC%2fJPN%2fCO%2f1&Lang=en.

[32] See par (n) of the General Recommendations of the Special Rapporteur on Torture (2003) E/CN.4/2003/68, available at http://www2.ohchr.org/english/issues/docs/recommendations.doc.

[33] *Op. cit.* footnote 12, par 18 (General Comment No. 2 of the UNCAT Committee).

[34] *Op. cit.* footnote 9, par 10 (2013 Concluding Observations of the UNCAT Committee on Uzbekistan). See also pars 46-49 of the Conclusions and Recommendations of the UNCAT Committee in the 3rd periodic report submitted by the Republic of Uzbekistan, CAT/C/UZB/CO/3, available at http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CAT%2fC%2fUZB%2fCO%2f3&Lang=en.

participation) is likely to be much lower than what is set out in Article 28 of the Criminal Code (on complicity) which requires a certain degree of active involvement either in the form of directing the preparation or commission, actively inciting or assisting (e.g. with advice, directions, or by providing the means or concealment) a criminal act. Acquiescence may actually result from the mere failure of state officials to exercise due diligence to prevent, investigate, prosecute and punish non-State officials or private actors, whom they know or have reasonable grounds to believe will commit acts of torture or ill-treatment.[35] In that case, the UNCAT Committee considers that the state officials should be considered as authors, complicit or otherwise responsible under the UNCAT for instigating, consenting to or acquiescing in such impermissible acts committed by non-State officials or private actors.[36]

31. Article 235 of the Criminal Code should be supplemented to ensure that in case impermissible acts are committed by non-State officials or private actors, the state officials will be held liable for torture or and other cruel, inhuman or degrading treatment or punishment. Such situation cannot adequately be addressed through Article 28 of the Criminal Code (on complicity). In the case of complicity, Article 30 of the Criminal Code states that the "instigator" or the "head for crime" shall be subject to liability under the same article of the Criminal Code as the "committers" (direct perpetrators). In cases of torture, however, the direct perpetrators of such acts cannot be held liable under Article 235 of the Criminal Code if they are non-State officials or private actors not acting in an official capacity, as this provision only addresses acts committed by public officials.

32. The UNCAT Committee has interpreted "complicity or participation" as provided in Article 4 par 1 of the UNCAT to include acts such as incitement, instigation, superior order or instructions, consent, acquiescence and concealment. The UNCAT Committee has clarified that superior officials will be guilty of complicity (or acquiescence) if they know or should have known that torture was being practiced by personnel under their command i.e., if they tacitly consented to torture.[37] Consequently, as appropriate, Article 235 of the Criminal Code shall ensure that persons in the chain of command (i.e. those exercising authority, such as those who supervise the perpetrator or are in charge of the place where the acts was perpetrated), who instigate, consent or acquiesce to acts involving torture, are criminally liable for torture in the same manner as the direct perpetrator(s).[38]

---

[35] *Op. cit.* footnote 12, par 18 (General Comment No. 2 of the UNCAT Committee). See also *Dzemaji v. Yugoslavia*, UNCAT Committee CAT/C/29/D/161/2000 (2002) available at http://www1.umn.edu/humanrts/cat/decisions/161-2000.html.

[36] *Op. cit.* footnote 12, par 18 (General Comment No. 2 of the UNCAT Committee).

[37] See e.g. par 5(b) of the Conclusions and Recommendations of the UNCAT Committee on Azerbaijan, CAT/C/CR/30/1, 14 May 2003, available at http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CAT%2fC%2fCR%2f30%2f1&Lang=en.

[38] *Op. cit.* footnote 12, pars 10 and 26 (General Comment No. 2 of the UNCAT Committee). See also par 202 of the Addendum to the Report of the UN Special Rapporteur on Follow-up to the Recommendations, E/CN.4/2005/62/Add.2, 21 February 2005, available at http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G05/111/52/PDF/G0511152.pdf?OpenElement and par (d) of the General Recommendations of the Special Rapporteur on Torture (2003) E/CN.4/2003/68, available at http://www2.ohchr.org/english/issues/docs/recommendations.doc.

3. Punishment Commensurate with the Gravity of the Crime

3.1 Exclusion of Defences, Amnesties, Pardons, Statutes of Limitations and Immunities in Cases of Torture or Inhuman or Degrading Treatment

33. The prohibition of torture and of ill-treatment is recognized as absolute and non-derogable.[39] No exceptional circumstances whatsoever may be invoked by a State to justify acts of torture, even in a state of war, internal political instability or any other public emergency and even under threat of terrorist acts or violent crimes.[40] Furthermore, amnesties have been recognized as incompatible with the duty of States parties to investigate acts of torture, to guarantee freedom from such acts within their jurisdiction and to ensure that they do not occur in the future.[41] The non-derogability of the prohibition of torture also implies that an order of a superior or public authority can never be invoked as a defence and that subordinates should be held to account individually.[42] The UNCAT also considers that no statute of limitations should apply to the crime of torture[43] and that no defence should be available.[44] It is also acknowledged that mitigating circumstances should not apply in the case of torture.[45]

34. The UNCAT Committee noted that in Uzbekistan, amnesties continue to be awarded to individuals who have been convicted of violating Article 235 of the Criminal Code, and recommended that the practice of granting amnesties to persons convicted of torture or ill-treatment be abolished.[46] On several occasions, the UNCAT Committee has highlighted the importance to provide prompt and fair prosecution *and punishment* of perpetrators of torture or ill-treatment.[47] Since amnesties reduce or abolish the punishment of perpetrators, they negate the key principle of having a punishment commensurate with the gravity of the crime of torture. For this reason, it is reiterated that there should be no amnesty for cases of torture.

35. Under the Criminal Code of Uzbekistan, certain defences or attenuating circumstances, as well as statutes of limitations are generally applicable to all offences, including Article 235 of the Criminal Code. For instance, Article 40 of the Criminal Code provides for exculpatory circumstances including "execution of an order or another

---

39 *Op. cit.* footnote 12, pars 1 and 3 (General Comment No. 2 of the UNCAT Committee). See also *op. cit.* footnote 6, par 3 (General Comment No. 20 of the Human Rights Committee).

40 *Op. cit.* footnote 12, par 5 (General Comment No. 2 of the UNCAT Committee).

41 *Op. cit.* footnote 12, par 5 (General Comment No. 2 of the UNCAT Committee) and par 38 of the General Comment No. 3 (2012) on the implementation of Article 14 of the UNCAT (CAT/C/GC/3) available at http://www2.ohchr.org/english/bodies/cat/docs/GC/CAT-C-GC-3_en.pdf. See also *op. cit.* footnote 6, par 15 (General Comment No. 20 of the Human Rights Committee).

42 Article 2 of UNCAT and par 26 of the General Comment No. 2 of the UNCAT Committee.

43 See e.g. par 8 of the Concluding Observations of the UNCAT Committee on Japan, CAT/C/JPN/CO/2, 28 June 2013, available at http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CAT%2fC%2fJPN%2fCO%2f2&Lang=en.

44 See e.g. par 10 of the Concluding Observations of the UNCAT Committee on the United Kingdom, CAT/C/GBR/CO/5, 24 June 2013, available at http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CAT%2fC%2fGBR%2fCO%2f5&Lang=en, where it states for instance that the defence of "lawful authority, justification or excuse" to a charge of official intentional infliction of severe pain or suffering is contrary to the principle of absolute prohibition of torture. See also par 14 of the Concluding Observations of the UNCAT Committee on Israel, CAT/C/ISR/CO/4, 23 June 2009, available at http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CAT%2fC%2fISR%2fCO%2f4&Lang=en regarding the removal of the 'necessity defense' exception which arises in cases of 'ticking bombs,' i.e., interrogation of terrorist suspects or persons otherwise holding information about potential terrorist attacks.

45 *Op. cit.* footnote 14, page 37 (2013 APT Report on Key Issues in Drafting Anti-Torture Legislation).

46 *Op. cit.* footnote 9, par 10 (2013 Concluding Observations of the UNCAT Committee on Uzbekistan).

47 *Op. cit.* footnote 12, par 5 (General Comment No. 2 of the UNCAT Committee).

duty" which seems to be applicable to all offences, including torture and ill-treatment. The same applies to Article 64 of the Criminal Code on statutes of limitations.

36. To combat torture, a number of states have decided to include a specific clause in the related article or section on torture in their criminal codes expressly precluding the application of general criminal law provisions relating to defences (including defence of superior order or necessity), amnesties and pardons, as well as statutes of limitations.[48] It is recommended to similarly amend Article 235 of the Criminal Code to expressly exclude the application of the general provisions of the Criminal Code pertaining to defences, amnesties and pardons, as well as statutes of limitations, in cases of torture.[49]

3.2. Appropriate Sanctions

37. Article 235 of the Criminal Code provides for a sentence of "correctional work for a period up to three years or imprisonment for a period up to three years" which may be increased to higher penalties of five or eight years when certain aggravating factors are present.

38. Article 4 par 2 of the UNCAT states that offences of torture shall be punishable by appropriate penalties which take into account the grave nature of these crimes. A system of sentencing is not simply a method of imposing penalties upon an offender to prevent harmful conduct, but also reflects a set of values shared by a country, as expressed in the Criminal Code, of what constitutes intolerable behavior. Although international standards do not prescribe specific levels of sanctions, the UNCAT Committee noted the need to establish "appropriate sanctions" given the special gravity of the crime of torture.[50] In one case in particular, the UNCAT Committee considered that the respective State had been in breach of Article 4 of the UNCAT for imposing a light penalty (i.e. reducing the sentence from four years of imprisonment to one year) and had also violated Article 2 of the UNCAT for having pardoned the perpetrator[51], which, according to the Committee, had the effect of allowing torture to go unpunished and encouraging its repetition. Recently, the UNCAT Committee has considered that the deprivation of liberty for a term of six to nine years was likewise not commensurate with the gravity of the criminal offence of torture.[52] A light sentence such as a few months of suspension from work has also been generally recognized as contravening Article 4 of the UNCAT.[53] It is likely that correctional work as provided by Article 235 of the Criminal Code would similarly be considered not to be commensurate with the

---

[48] *Op. cit.* footnote 14, pages 42-47 (2013 APT Report on Key Issues in Drafting Anti-Torture Legislation), with state examples.

[49] Including for instance Article 55 on Mitigating Circumstances, Article 57 on Mitigation of Penalty, Article 37 on Necessary Defense, Article 38 on Extreme Necessity, Article 40 on Execution of Order or Another Duty, Article 64 on Discharge from Criminal Liability due to Expired Term of Liability, Article 66[1] on Discharge from Criminal Liability due to Conciliation, Article 68 on Discharge from Criminal Liability due to Act of Amnesty, Article 72 on Conditional Conviction and Article 76 on Discharge from Penalty due to Act of Amnesty or Pardon.

[50] *Op. cit.* footnote 12, par 11 (General Comment No. 2 of the UNCAT Committee). See also page 19 of the Guide to Jurisprudence on Torture in International Law jointly published in 2008 by the Association for the Prevention of Torture (APT) and the Center for Justice and International Law (CEJIL), available at http://www.apt.ch/content/files_res/jurisprudenceguide.pdf.

[51] See par 6.7 *Urra Guridi v. Spain*, UNCAT Communication No. 212/2002, U.N. Doc. CAT/C/34/D/212/2002, 17 May 2005, available at http://www1.umn.edu/humanrts/cat/decisions/212-2002.html.

[52] See e.g. par 7 of the Concluding Observations of the UNCAT Committee on Andorra, CAT/C/AND/CO/1, 20 December 2013, available at http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CAT%2fC%2fAND%2fCO%2f1&Lang=en.

[53] *Op. cit.* footnote 14, page 40 (2013 APT Report on Key Issues in Drafting Anti-Torture Legislation).

gravity of the offence. Reference to "correctional work" should consequently be deleted from this provision.

39. To assess whether certain penalties are appropriate given the special gravity of the crime of torture, it may prove useful to conduct a comparative review of other provisions of the Criminal Code. It seems that similar punishments (ranging from correctional work to eight years of imprisonment in case of aggravating circumstances) are provided for in cases of criminal offenses of medium gravity, e.g. intentional infliction of medium bodily injury. Given that torture and cruel and degrading treatment are significantly more serious, both in terms of purpose, and in terms of effect, it is unlikely that up to three years' of imprisonment, or up to eight years in aggravated cases, would be considered as constituting an "appropriate sanction".[54] The drafters are encouraged to review Article 235, and to provide a penalty that is commensurate with, and demonstrates the gravity and significance of the offence of torture. Thought may be given to providing minimum sentences as it is done in the Criminal Code for other grave criminal offences such as terrorism, as well as in torture provisions from certain other countries.[55] This will help ensure that potential perpetrators, victims and the public are aware of the special gravity of the crime of torture and that the punishment is in proportion to the crime.[56]

[END OF TEXT]

[54] See e.g. par 8 of the Concluding observations of the UNCAT Committee on Burkina Faso, CAT/C/BFA/CO/1, 2 January 2014, available at http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CAT%2fC%2fBFA%2fCO%2f1&Lang=en where the acts of torture were carrying the penalties prescribed, among other things, for malicious wounding, assault and battery or causing bodily harm or injury, which was considered as not taking into account the grave nature of acts of torture. See also par 8 of the Concluding observations of the UNCAT Committee on Estonia, CAT/C/EST/CO/5, 17 June 2013, available at http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CAT%2fC%2fEST%2fCO%2f5&Lang=en where the Committee compared the penalties for torture and those for trafficking in human beings.

[55] As regards sentencing in cases of torture and other cruel, inhuman or degrading treatment or punishment, see e.g. pages 40-43 of 2013 APT Report on Key Issues in Drafting Anti-Torture Legislation. See also *op. cit.* footnote 50, page 19 (2008 APT-CEJIL Joint Guide to Jurisprudence on Torture in International Law). Additionally, see the Comparative Research for the Northern Ireland Assembly on Sentencing Guidelines Mechanisms by Fiona O'Connell (2011) available at http://www.niassembly.gov.uk/Documents/RaISe/Publications/2011/Justice/6611.pdf. For an overview of anti-torture legislation, see http://www.apt.ch/en/compilation-of-torture-laws/ (to be read together with relevant UNCAT Concluding Observations).

[56] See in the context of international criminal law *Ashley Joy Stein*, Reforming the Sentencing Regime for the Most Serious Crimes of Concern: The International Criminal Court through the Lens of the Lubanga Trial, Brooklyn Journal of International Law, Vol. 39 (2014), page 558, available at http://www.brooklaw.edu/~/media/PDF/LawJournals/BJI_PDF/bji_vol39i.ashx.

ANNEX

Article 235. Use of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

Use of torture and other cruel, inhuman or degrading treatment or punishment, that is unlawful mental or physical pressure on a suspect, accused, witness, victim or any other party at a criminal proceeding, or a convicted person serving a sentence, their close relatives by means of threatening, striking, beating, tormenting, causing of suffering or other unlawful acts committed by an inquiry officer, an investigator, a prosecutor or any other employee of law-enforcement agency, penitentiary facility with the aim to obtain from them any information, confession in committing a crime, their unauthorized punishment for the committed act or their coercion to commit any act, is punished by correctional work for a period up to three years or imprisonment for a period up to three years.

The same acts committed:

a) *with use of violence dangerous for life and health or threat to use such violence;*
b) *on any ground based on nationality, race, religious or social discrimination;*
c) *by a group of people;*
d) *iteratively;*
e) *towards a juvenile or a women, who is known to be pregnant for the guilty person*

shall be punished by imprisonment from three to five years.

Stipulated in parts one and two of the present Article acts that has resulted in grave bodily injures or other grave consequences shall be punished by imprisonment from five to eight years with deprivation of certain right."