

Afghanistan: Shadow Report on Draft Anti-Torture Legislation
Committee Against Torture's 60th Session (18 Apr 2017 - 12 May 2017)

Prepared by the Detention Working Group and Open Society Afghanistan¹

April 2017

Relevant to List of Issues Prior to Reporting (LOIPR): Paragraphs 1, 2 (Arts. 1 & 4), 8, 19 (Art. 2), 29, 30 (Art. 10), 31 (Art. 11), 36, 39 (Arts. 12 & 13) and 42 (Art. 14)

A. OVERVIEW

1. Despite high-level government commitments to addressing the routine use of torture and other ill-treatment in Afghanistan,² accountability of perpetrators and redress for victims remains non-existent.³ To address this, the government and civil society have been engaged in a long-running dialogue to draft legislation to strengthen the legal prohibition of torture, to promote criminal prosecutions, to ensure oversight of institutions and to enable redress for victims.
2. Following a number of joint workshops and meetings between government and civil society, and in particular a six day workshop in October 2016, agreement was reached on several sensitive aspects of the draft that have would positively address many of these issues (**Annex III**). However, without warning, on 1 March

¹ Open Society Afghanistan focuses on access to justice, human rights, independent media, and civil society engagement in peace and reconciliation. It also provides technical assistance to civil society working on rule of law and human rights issues. The Detention Working Group (DWG), established in 2009, is a coalition of Afghan human rights and legal aid organizations, which focuses its advocacy efforts on aligning the conflict-related detention law, policy, and practice with Afghanistan's constitution and international obligations. DWG is comprised of the following organizations: Afghanistan Independent Bar Association (AIBA), Open Society Afghanistan (OSA), Afghanistan Independent Human Rights Commission (AIHRC), the International Legal Foundation – Afghanistan (ILF-A), Afghanistan Forensic Sciences Organization (AFSO), Afghanistan Human Rights Organization (AHRO), Feminine Solidarity for Justice Organization (FSJO), Afghanistan Independent Defenders (AID), Da Qanoon Ghushonky (DQG), and Women & PEACE Studies Organization. United Nations Assistance Mission in Afghanistan (UNAMA), ICRC, and the Asia Foundation are observer members to DWG.

² See Proposed National Plan on Elimination of Torture, Issued on 12 February 2015. See also Decree [No. 129] of the President of the Islamic Republic of Afghanistan to implement the Afghan fact-finding delegation's suggestions on the presence of torture and ill-treatment in detention centres (28/11/1391 – 16 February 2013). Text of both available at: https://unama.unmissions.org/sites/default/files/unama_detention_report_2015_revised.pdf (Annex IV and Annex VI).

³ United Nations Assistance Mission in Afghanistan ("UNAMA"), Office of the United Nations High Commissioner for Human Rights ("OHCHR") (2015), 'Update on the Treatment of Conflict-Related Detainees in Afghan Custody: Accountability and Implementation of Presidential Decree 129', February 2015, pp. 20-21, https://unama.unmissions.org/sites/default/files/unama_detention_report_2015_revised.pdf.

2017, the Cabinet prepared and passed⁴ a Government Bill on Torture (**Annex II**) that in many respects does not reflect the progress made and that raises a number of concerns about compliance with the Convention. Specifically, it failed to properly address redress mechanisms, though the government claims that such a mechanism will be added as an annex.

3. This short report highlights key concerns with the government Bill, particularly in light of the dialogue already established with civil society, and suggests important areas for amendment. These concerns include:
 - the definition of torture;
 - failure to criminalize or punish torture, and limiting prohibition to torture committed during “judicial proceedings”;
 - removal of specific language on hymen testing;
 - weakened provisions on investigation and prosecution;
 - removal of detailed provisions on redress;
 - removal of provision outlawing immunity or amnesty for torture;
 - removal of victims’ rights in proceedings; and
 - a lack of independence of the Secretariat of the Commission monitoring implementation.
4. We welcome the government’s commitment to strengthening the legal environment to address torture and other ill-treatment. We urge the government to enact laws that specifically prohibit hymen testing. It should also incorporate provisions on redress that is currently being discussed between the civil society and government. The redress provisions shall include an avenue for the victim to seek redress directly from the government, ensure victims of torture have access to redress, create a specific budget line or fund to which government can charge redress expenditures to. We see the Committee’s dialogue with the State Party as a crucial opportunity to improve the legislation to achieve this.

B. LEGISLATIVE BACKGROUND

⁴ In Afghanistan, the Executive, the Judicial, and the Legislative can originate the law making process by proposing a bill. Government Bill refers to bills originated outside the Legislative branch. A government Bill becomes law after passing the stages of drafting, scrutiny by the Ministry of Justice and other relevant Ministries, affirmation or approval by the Council of Ministers. If the draft of the government bill does not require the approval of the National Assembly, such as regulations, procedural rules, etc, then it is endorsed by the President and directly published in the Official Gazette. Other government bills including laws, legislative decrees, national budget and ratification of international treaties, require approval of National Assembly. If the National Assembly chooses not to act on the decree or reject it becomes law of the land, and is published in the official gazette. For more on Afghanistan legislative processes, see: Legislative Process Manual, Prepared by USAID Afghanistan Parliamentary Assistance Program, published in 2011: http://www.cid.suny.edu/publications1/arab/Legislative_Process_Manual.pdf

5. Torture is prohibited under Article 29 of the Constitution and is criminalized under Article 275 of the Penal Code. Article 276 of the Penal Code also criminalizes infliction of punishment by a public official beyond that ordered by a Court (see **Annex I** for the relevant provisions). However, torture is not defined in either document, and Article 275 only covers torture committed for the purpose of obtaining a confession.
6. Presidential Decree 129⁵ orders Government agencies and ministries to take specific measures to address torture, ill-treatment and arbitrary detention and to ensure availability of medical treatment and legal defence or legal aid services for detainees. However, there is currently no specific legislation implementing this decree or specifying mechanisms for investigation, prosecution, training, monitoring of places of detention and provision of redress. The Proposed National Plan for Elimination of Torture provided that torture should be defined “in accordance with the Convention against Torture and in the spirit of the Constitution of Afghanistan”. It also sought to ensure that the use of torture is “prohibited at all stages of criminal procedure”, and that victims of torture be provided with “due remedy”.

C. THE BILL: KEY CONCERNS

7. The Bill prepared and passed by the Cabinet on 1 March 2017 (“**the Bill**”) is attached as **Annex II**. The Bill contains number of concerning provisions and significant departures from language discussed with civil society as shown in the draft legislation attached as **Annex III (“Draft Law”)**. These key differences also raise serious concerns that the Bill passed by the Cabinet does not fully comply with the Convention and requires amendment.

(i) *Definition of torture*

8. The definition of torture included in in **Article 3 of the Bill** does not meet the requirements of the Convention, in that:
 - It does not specifically cover torture committed by a public official (instead covering acts committed by the command of or with the consent or in the silence of a public official or person acting in an official capacity);
 - It does not clearly cover all of the prohibited purposes, referring to obtaining information or a confession from the defendant or suspect (rather than any person) and collapsing the discriminatory purpose with the purposes of punishment.
9. **Article 3(1) of the Draft Law** provides more appropriate wording and should be inserted into **the Bill** in the place of current **Article 3**.

⁵ Decree [No. 129] of the President of the Islamic Republic of Afghanistan to implement the Afghan fact-finding delegation’s suggestions on the presence of torture and ill-treatment in detention centres (28/11/1391 – 16 February 2013).

(ii) Torture not explicitly criminalized and prohibition limited to judicial proceedings

10. The Bill does not explicitly criminalize torture. Rather, **Article 6 of the Bill** “prohibits” torture in the following circumstances:

Police, officials of the National Directorate of Security and Ministry of Defense, the prosecutors from the Attorney General’s office, the judge, public officials or any other person acting in an official capacity, under no circumstance, during the judicial processes shall torture the suspect, defendant, the convict, or any other person.

11. This is contrary to the Convention, not least because it is limited to acts committed “during the judicial processes”, leaving many types of torture out of scope.⁶ Given the limitations with the existing criminalization of torture under the Penal Code, which is not defined and applies only to acts committed to obtain a confession (see above and Annex I), the Bill must be amended to explicitly criminalize and appropriately punish all forms of torture committed in any context.

12. The Draft Law appropriately criminalizes torture. The language agreed in **Articles 4 and Article 5 of the Draft Law** criminalizes torture and specifies appropriate punishments, in accordance with the Convention, and should therefore be reinserted into the Bill.

(iii) Removal of specific language on hymen testing

13. In Afghanistan, “running away” from home (*faraar az khana*) and committing or attempting to commit sex outside marriage (*zena*) are considered “moral crimes”, punishable by five to 15 years in prison.⁷ According to Human Rights Watch, half of all women in Afghanistan prisons and almost all juvenile girls in juvenile detention facilities are imprisoned on “moral crimes” charges.⁸

14. Afghanistan’s Legal Medicine Directorate routinely subjects women and girls accused of “moral crimes” to invasive hymen examinations.⁹ These examinations are purportedly undertaken to establish whether a woman has had sexual intercourse, thereby determining the nature of the charge in criminal prosecution and contribute to conviction and long sentences against the woman and girls found guilty of “moral crimes.”¹⁰

⁶ Committee Against Torture, General Comment No. 2: Implementation of Article 2 by States Parties, CAT/C/GC/2, para. 15.

⁷ Article 427(1) of Afghanistan’s Penal Code.

⁸ “I Had To Run Away”, The Imprisonment of Women and Girls for “Moral Crimes” in Afghanistan, Human Rights Watch, March 2012. Available at: <https://www.hrw.org/report/2012/03/28/i-had-run-away/imprisonment-women-and-girls-moral-crimes-afghanistan>

⁹ Such examinations are also performed when families accuse the bride of not being a ‘virgin’ if she didn’t bleed on the wedding night and have reportedly also occurred when single women are admitted to women’s shelters.

¹⁰ See Human Rights Watch, “I Had to Run Away”

15. Vaginal examinations to determine whether a woman's hymen is intact are a form of cruel and inhumane treatment routinely carried out by state agents in the context of criminal procedures in Afghanistan, despite being recently outlawed under Afghan law.¹¹ There is no scientific basis for these tests.¹²
16. The **Draft Law Article 22** includes explicit recognition of this practice as cruel and inhuman treatment. It was a major achievement of the dialogue between government and civil society and recognition of the importance of this issue.
17. This wording has been removed from **the Bill**, and should be reinserted, or the issue of hymen testing otherwise specifically addressed.

(iii) Weakened provisions on investigation and prosecution

18. The LOIPR highlights impunity for crimes including torture as a significant issue in Afghanistan.¹³ This remains the case – the most recent United Nations Assistance Mission in Afghanistan (“UNAMA”) report on torture and ill-treatment of conflict related detainees recognized that some progress had been made in addressing torture and ill-treatment, but that:

...the Government's efforts ... have not embraced accountability Similar to previous findings, UNAMA observed a persistent lack of accountability for perpetrators of torture with flawed investigations of allegations of torture by prosecutors and very few prosecutions, loss of jobs or disciplinary sanctions for those responsible for torture. NDS and Ministry of Interior internal accountability and oversight mechanisms including their human rights and inspections' departments remained deeply inadequate lacking independence, authority, transparency and capacity.¹⁴

19. Any law on torture must therefore include strong provisions promoting effective investigations and prosecution.
20. **The Draft Law** addressed this in a number of ways. Investigations are dealt with by **Article 13**, which establishes a Committee made up of qualified experts, including experts in forensic medicine and mental health, under the High Coordination and Monitoring Board (the “Board”) for investigating cases of torture. It also specifies standards it must adhere to including following the Istanbul Protocol. In addition, **Article 18**, provides that all torture investigations must be in accordance with protocols attached to the Convention, and **Articles 20 and 21**, provide further detailed guidance on standards based on the Istanbul

¹¹ See further Zahra Nader and Mujib Mashal (2017), ‘Despite Ban, Invasive Virginity Tests Remain Prevalent in Afghanistan’, *New York Times*, 6 January 2017, https://www.nytimes.com/2017/01/06/world/asia/despite-ban-invasive-virginity-tests-remain-prevalent-in-afghanistan.html?_r=1.

¹² See, eg. Stefan Schmitt, MS, Dallas Mazoori, JD (2015), Virginity Tests: No Factual, Scientific or Medical Basis’, Physicians for Human Rights, <http://physiciansforhumanrights.org/library/other/virginity-and-hymen-testing-no-factual-scientific-or-medical-basis.html>.

¹³ See Committee Against Torture, ‘List of issues prior to the submission of the second periodic report of Afghanistan’ (CAT/C/AFG/2) (“LOIPR”), para. 39.

¹⁴ UNAMA Report (2015), above n.3, pp. 20-21.

Protocol for all torture investigations. On prosecution, **Article 8** provides the victim with the right of appeal if the Attorney General's office does not deal with a complaint, **Articles 12(1)(3), 12(1)(10) and 14(3)** provide that the Board and its investigation Committee must pass information on torture to the prosecutor's office and/or justice institutions, and **Article 15** requires that all institutions to which complaints can be made under the legislation refer perpetrators to authorities for prosecution.

21. **The Bill** has been drafted to remove this critical language. **Article 13** establishes a Torture Investigation Committee under the Commission (similar to the Board in the Draft Law). However, unlike the Draft Law, it includes a representative of the Ministry of Interior Affairs and National Directorate of Security. Inclusion of these members, who run prison facilities, undermines independence of the Committee. The Bill does include reference to the Torture Investigation Committee following the Istanbul Protocol in **Article 14(4)**, but does not include similar provisions for all torture investigations outside the ones conducted by the Commission. On prosecutions, **Article 8(2)** of the Bill does put an obligation on the Ministries of Interior and Defense, and National Directorate of Security to refer suspected perpetrators to prosecution, which is a welcome addition. However, as discussed in the UNAMA report, the record of these bodies on accountability is very weak.¹⁵ In the present Bill, the Committee can only report cases to the Attorney General, however it does not provide specific power to follow up or take action if the Attorney-General does not act on a complaint. It is also not clear whether the Commission can issue public reports rather than only reporting back to the Commission.
22. The provisions of **the Bill** on investigation and prosecution should be amended to at least (i) remove the representative from the Ministry of Interior and National Directorate of Security, (ii) provide minimum standards for all torture investigations, (iii) provide that all bodies to which complaints of torture are made under Article 4 are, subject to consent of the victim, obliged to refer cases to investigation and prosecution and (iv) provide a specific right of appeal if the Attorney General's office does not act on a complaint of torture.

(iv) Removal of detailed provisions on redress

23. Alongside lack of criminal accountability, victims of torture in Afghanistan are rarely provided with other forms of redress. Although legal provisions exist through which victims could theoretically claim compensation through the courts (including constitutional claims, adhesion to criminal proceedings, and civil claims), significant practical and legal barriers mean that this is rarely, if ever, done.
24. **The Draft Law** includes detailed provisions on redress, set out in **Articles 23 to 30**, covering issues such as the primary responsibility of the state to provide redress, comprehensive forms of redress, mechanisms for ordering redress in

¹⁵ UNAMA Report (2015), above n.3, pp. 20-21.

criminal and civil cases, a prohibition on dismissing civil claims because the perpetrator was not identified or prosecuted or criminal proceedings were discontinued, burden and standard of proof, and enforcement. This was a significant achievement and outcome from dialogue between the government and civil society.

25. **The Bill** replaces these detailed provisions with a single provision in **Article 18**, limiting redress to merely compensation for wrongful action, linked to criminal prosecution of a perpetrator, who if convicted shall provide compensation to victim. Critically, it fails to establish the State as having primary responsibility to provide redress to victims of torture. As such it fails to comply with UNCAT.

26. **The Bill** should be amended to reinsert detailed provisions providing effective mechanisms to achieve comprehensive redress from the State, such as those set out in the Draft Law.

(v) Removal of provision outlawing amnesty

27. Amnesty laws have been further barrier to accountability in Afghanistan.¹⁶ This was addressed in the **Draft Law** by **Article 6**, which provides that “Perpetrators of torture shall not receive amnesty, probation or mitigated sentence”. This provision is not included in the Bill.

28. In line with the Committee’s jurisprudence,¹⁷ a provision specifically outlawing immunity from prosecution and amnesty for crimes of torture should be included in the Bill.

(vi) Removal of victims’ rights in proceedings

29. **Article 10 of the Draft Law** guaranteed victims a number of rights during proceedings, including fair treatment, respect for human dignity and upholding personal respect, participating in the trial, access to information on prosecution procedures and outcomes, and access to legal aid. These are the types of rights that the Committee has stressed as particularly important for victims to achieve redress in torture cases.¹⁸

30. **In the Bill**, this language has also been removed and should be reinserted.

(vii) Change of Secretariat of the Commission

¹⁶ For example, the adoption in 2009 of the National Reconciliation, General Amnesty and National Stability Law, which provides immunity from criminal prosecution to those involved in serious human rights violations committed before the formation of the Interim Administration in Afghanistan in December 2001.

¹⁷ See, eg. Committee Against Torture, General Comment No. 3: Implementation of Article 14 by States Parties, CAT/C/GC/3, paras. 38-42.

¹⁸ *Ibid.*, paras 29-38.

31. The Draft Law reflected agreement that the Secretariat of the Board established to monitor implementation of the Act would be within the Afghanistan Independent Human Rights Commission (**Article 11(2)**). In the Bill adopted by the Cabinet, the Commission's secretariat is situated within the Ministry of Justice (**Article 11(2)**). Given the body's role of scrutinizing the actions of government authorities and the history of impunity for torture within the country this gives rise to a significant risk of interference in the operation of the Commission. To better ensure functional independence of the Commission, the Secretariat should be moved to the Independent Human Rights Commission.

(viii) Removal of other important provisions

32. The current Bill has also removed provisions that outlawed cruel and ill-treatment (Art.9(2)), removed definition of victim (Art. 3(3)), and eliminated the provision on non-refoulement (Art. 31).] These provisions are necessary to ensure compliance with Afghanistan's compliance with UNCAT.

ANNEX I

Relevant existing legislation

CONSTITUTION OF AFGHANISTAN

Article 29

Persecution of human beings shall be forbidden. No one shall be allowed to or order torture, even for discovering the truth from another individual who is under investigation, arrest, detention or has been convicted to be punished. Punishment contrary to human dignity shall be prohibited.

AFGHAN PENAL CODE (published In official gazette No. 347 1977)¹⁹

Article 275:

- (1) If the official of public services tortures the accused for the purpose of obtaining a confession, or issues an order to this effect, he shall be sentenced to long imprisonment.
- (2) If the accused dies as a result of torture, the person committing it shall be sentenced to the punishment of intentional murder as anticipated in this Law.

Article 276:

If the official of public services punishes the convict more than what he has been sentenced to, or issues an order to this effect, or applies to him a punishment to which he has not been sentenced, in addition to medium imprisonment, he shall be sentenced to debarment from profession or separation from duty too.

¹⁹ Official translation available at:
[http://www.iec.org.af/public_html/About%20JEMB/Legal%20Framework/Legislation%20of%20Reference/Penal%20Code/Penal%20Code%20\(English\).pdf](http://www.iec.org.af/public_html/About%20JEMB/Legal%20Framework/Legislation%20of%20Reference/Penal%20Code/Penal%20Code%20(English).pdf)

ANNEX II

Bill prepared and passed by Afghan Cabinet, 1 March 2017²⁰

Report on bill of Law on Prohibition of Torture

Pursuant the decision No (9) January 23 2016 of Justice and Judiciary Committee in regard to due legal processes of the Law against Torture, the preliminary draft Law against Torture with the aim of complying with the provisions of Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, published in legal gazette No. (710) 1990, prepared for further review and scrutiny , in according to the provisions of Article 38 of the Regulations for the preparation and processing of legislative documents published in official gazette No. (1081) 2013 subsequent to study and scrutiny made by the representatives of various organization, namely with the participation of representatives of national organization and international experts during numerous sessions is agreed upon for further legal procedures.

Purpose of due processes of legal bill:

The purpose of enacting the Law against Torture is to prevent torture, protect human dignity, safeguard rights of suspects, defendants, convicts, and other individuals involved in judicial processes. It is also to support and protect witnesses and victims of torture, promote torture free practices during judicial processes, prosecution and punishment of perpetrators of acts of torture, and finally to provide compensation to the victims of torture.

List of Representatives:

The draft of Law against Torture was studied and discussed in numerous sessions by the representatives of the following entities:

1. Ministry of Foreign Affairs
2. Ministry of Defense
3. Ministry of Finance
4. Ministry of Interior
5. Ministry of Economics
6. Office of Attorney General
7. The National Directorate of Security
8. Office of National Security Council
9. Independent Human Rights Commission of Afghanistan
10. Afghanistan Independent Bar Association
11. A number of expert from international organizations with the experience in implementation Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

²⁰ Translation provided by Open Society Foundations, the original Dari version of the can be provided upon request.

Evaluation of legislative documents:

Article 275 of Penal Code (published on official gazette No. 347 1977) in regard to acts of torture and its punishments declares the following:

Article two hundred seventy five:

1. When public official whether order or perform the act of torture against the suspect with the intention of obtaining information or a confession shall be sentenced to long- term imprisonment
2. If the suspect dies as result of torture, the perpetrator of the act of torture will be convicted of murder. Likewise, in Penal Code a specific chapter- Article 450- 452- provides details on the nature of punishment for those who committed torture

The draft of Law against Torture in 3 chapters and 18 Articles is prepared and presented; his honorable to (might be referring to the president) as may deem it will decide.

The report respectfully presented as above.

**Torture Prohibition Law
Chapter One**

Foundation

Article 1:

This law is enacted in pursuant of provisions of article seventh, twenty seventh, and twenty ninth of the Afghan constitution.

Objectives

Article 2:

The objectives of this law are as followings:

1. Respect for human dignity and protection of the rights of suspects, defendants, and convicts during prosecution
2. Prevention of torture of suspects, defendants, convicts, and other individuals during crime detection, investigation, and enforcement of the sentences
3. Support and protection of victims of torture and witnesses
4. Prosecution of perpetrators of the act of torture
5. Provision of compensation and redress to the victim of act of torture

Terminology

Article 3:

(1) Bellow expressions and phrases indicate the following interpretation in this law:

1. Torture: is an act by which pain or sever physical or psychological suffering is inflicted on a suspect, defendant, convict, or any other person by the command of or with the consent or in the silence of a public office or any other person acting in an official capacity for purpose such as:

- Obtaining information or a confession from the suspect or the defendant about her or him or any other person
 - The person provides information about the suspect, the defendant, or the convict
 - Discrimination of any kind or punishing [the person] for an act committed.
 - Coercing [a person or any other person] to do, or to refrain from doing, any act.
2. Detention Centers: detention facilities, prisons and Juvenile Rehabilitation Centers.
 3. Threat to torture is also considered torture.
 4. Adopting and enforcement of precautionary measures, as well as execution of legal punishment shall not be considered the act of torture

Filing complaint about Torture:

Article 4:

If whenever a person is tortured during the course of prosecution, the victim the act of torture, his/ her defense lawyer or relatives can file a complaint to the Attorney General's office, court, the Independent Human Rights Commission of Afghanistan, Higher Commission on Torture Prohibition, or any other relevant organizations.

Right to Compensation:

Article 5:

Victim of torture is entitled to receive compensation for the pain and suffering inflicted upon him/ her by torture.

**Chapter Two
Torture Prevention**

Torture Prohibition:

Article 6:

Police, officials of the National Directorate of Security and Ministry of Defense, the prosecutors from the Attorney General's office, the judge, public officials or any other person acting in an official capacity, under no circumstance, during the judicial processes shall torture the suspect, defendant, the convict, or any other person.

Lack of Justification for Torture:

Article 7:

State of war, threat to war, internal political instability or any other circumstances or an order from superior or a public official shall not serve as a justification for torture.

Adopting Measure to Prevent Torture:

Article 8:

(1) During interrogation, investigation, trial, and enforcement of the sentence Attorney General's office, ministries of Interior and Defense, National Directorate of

Security are obliged to take necessary measures to prevent torture of suspects, defendants, and prisoners in places of detention.

(2) Authorities and personals mentioned in the preceding paragraph of this Article are obliged to ensure no torture used and if so they should refer and surrender the perpetrators to the entities in charged prosecution

Protection of Complainants, Witnesses, and Investigators:

Article 9:

Authorities responsible for detection, investigation, prosecution, and the enforcement of punishment shall take necessary measures to protect complainants, witnesses, and members of the committees documenting torture, and personnel of institutions with authority to oversight torture prohibition.

Inclusion and embodiment avoidance of torture in terms of reference:

Article 10:

With the aim of prevention from using of torture, cruel and inhuman treatment, authorities responsible for crime detection, investigation, prosecution, and enforcement of punishment are obliged to include avoidance of torture in the terms of reference of their employees and other regulations.

Committee Establishment:

Article 11:

(1) With the aim of preventing torture a commission with the composition of following members shall be established:

1. The Chairperson Commissioner of Afghanistan Independent Human Rights Commission as chairperson
2. Deputy of Ministry of Justice as Deputy of the Commission
3. Member of the Independent Commission for Oversight of Implementation of Constitution as member
4. Deputy minister of ministry of women affairs as member
5. Deputy of Attorney General Office as member
6. Director of Human Rights and International Affairs of Women of Ministry of Foreign Affairs as member
7. General director of prisons and detention centers as member
8. General Director of Juvenile Rehabilitation Centers as member
9. General director of the Department of Fight against Crime of ministry of interior affairs as member
10. General director of department of Legal Affairs of ministry of defense as member
11. General director of Human Rights of General Directorate of Security as member
12. General director of Forensic Medicine as member
13. General director of Afghanistan Bar Association as member
14. General director of Afghanistan Lawyer Association as member

15. Civil Society Representative dealing with the relevant affairs subject to the selection by chairperson of Commission on Torture Prohibition as member
- (2) The Secretariat of the Commission on Torture Prohibition is under the jurisdiction of the Afghanistan Independent Human Rights Commission.
- (3) In this law, the Commission on Torture Prohibition is called the Commission.

Responsibilities and Authorities of the Commission:

Article 12:

- (1) The Commission has the following responsibilities and authorities:
 1. Visit from places of detention without prior notification.
 2. Establish committees to investigate cases of torture
 3. Ensure reporting of the torture cases to the authorities for prosecution.
 4. Oversee torture prohibition at places of detention
 5. Follow up investigation of torture cases with legal and judicial authorities
 6. Design and develop torture prohibition awareness programs for officials of detention centers, investigation, prosecution, and enforcement of sentences entities, as well as at the ministries of defense and interior and National Directorate of Security
 7. Documenting the torture cases including the identification of the perpetrator and victim whether the cases under prosecution or the court has decided on or any disciplinary action is taken on.
 8. Report about the violation of the provisions of this laws to the office of the President and Afghan National Assembly
 9. Adopt and enactment of programs and guidelines to better implement the provisions embodied in this law.
- (2) Affairs of the Commission is regulated by the rules of procedures approved by the Commission.

Appointment of the Torture investigation and assessment Committees:

Article 13:

- (1) To investigate the cases of torture, the Commission establishes torture investigation committees with the following composition:
 1. Expert in forensic medicine as chairperson
 2. Mental health expert as member
 3. Representative of ministry of interior affairs as member
 4. Representative of Ministry of Women Affairs as member
 5. Representative of Attorney General's office as member
 6. Representative of National Directorate of Security as member
 7. Representative of Independent Human Rights Commission of Afghanistan as member
 8. Representative of Afghanistan Independent Bar Association as member

9. Representative of Afghanistan Lawyer Association as member
10. A representative from the Civil Society that is dealing with the affairs of prohibition of torture subject to the selection by the Commission as member

(2) In this law, the Committee Investigation of Torture and Assessment will be called the Committee

(3) The affairs of the Committee shall be regulated by the rules of procedures approved and adopted by the Committee

Responsibilities and Authorities of the Committee:

Article 14:

1. Visit places of detention without prior notification
2. Interview with suspects, defendants, and convicts
3. Identify torture cases, assess nature of the torture, and report torture cases to the relevant offices of prosecutors
4. Compliance with the established practices based on Istanbul Protocol during investigation of torture cases
5. Determine the pain or physical or mental suffering and severity of the pain and suffering inflicted upon the victim
6. Determine compensation for any physical or mental suffering the victim experienced including the treatment and rehabilitation cost.
7. Present report to the Commission

Methods to document Torture:

Article 15:

When investigating incidents of torture, the Committee on torture shall comply with practices enshrined in Istanbul Protocol and additional protocols of Convention Against Torture.

Providing Effective Measures

Article 16:

In order to assess the situation of the person under interrogation or at detention facilities, authorities in places of detention are obliged to provide the chairman and members of the Commission, as well as the Torture Investigation and Assessment Committee, and the representatives of the International Committee against Torture all of the necessary facilities as followings:

1. Facilitate access to enter detention facilities
2. Access to information about the number of people kept in detention facility
3. Access to information about the treatment of the detainees and detention conditions and location in which they keep the detainees
4. Permission to visit detention and related facilities
5. Permission to meet with the detainees kept in the detention facilities
6. Upon request, access to records of suspects, defendants, and convicts.

Chapter three Punishment

Punishment of Torture

Article 17:

- (1) Any person committed torture shall be punished to medium imprisonment not less than three years.
- (2) In case where the victim of torture is a women or child, the perpetrator shall be punished to the maximum punishment specified for torture.
- (3) In case where the victim is died as a result of torture, the perpetrator shall be punished to intentional murder punishment and when as a result of torture, battery is caused to victim, the perpetrator shall in addition to the punishment specified for torture, be punished to assault and battery punishment as well.

Compensation

Article 18:

- (1) In all circumstances stated in this chapter, the perpetrator shall, in addition to the punishment specified to torture, be sentenced to provide compensation to victim.
- (2) In case where the perpetrator has no financial capability or his/her assets could not be proved, the organization where the perpetrator works for shall pay the compensation stated in paragraph 1 of this article.

Chapter four Final provisions

Regulations Proposal:

Article 19:

For better implementation of the provisions of this law, the Commission can adopt and enact regulations.

Preference of the provisions of this Law

Article 20:

In case that the provisions of this law is in conflict with the law on detention centers and prisons or any other legislative documents, the provisions of this law shall apply.

Effective Date:

Article 21:

This law shall be enforced from the date of endorsement and with the enforcement of this law, article 275 of the penal code published in the official gazette number 374 dated 1355 shall be annulled.

ANNEX III

Draft law agreed following joint meetings between Government and Civil Society

Draft Anti-Torture Legislation

Chapter one

General Provisions

Foundation

Article One:

This law shall be enacted in light of provisions of articles seven and twenty-nine of the constitution of Afghanistan.

Objectives:

Article Two:

Objectives of this law are as follows:

1. Protecting human dignity and upholding rights of suspects, the accused and convicts in phases of prosecution;
2. Preventing torture of any person, including suspects, the accused and convicts in crime detection phase, investigation, trial and sentencing.
3. Promoting standards that prevent torture in institutions for crime detection, investigation, trial and sentencing;
4. Prosecuting those who committed torture;
5. Protecting victims and witnesses of torture;
6. Providing redress for victims; and
7. Complying with the provisions of the Convention Against Torture.

Terminology

Article Three:

In this legislation, the following terms have the following meanings:

1. Torture: Intentionally inflicting severe physical or mental pain or suffering on a person by a public official or anyone representing a public office or at the order, instigation or consent of a public official or anyone representing a public office for the following objectives:
 - Obtaining confession or information from the person or third person;
 - Punishing the person for the action that that person or another person committed or is suspected of committing;
 - Intimidating or coercing that person or another person; or
 - Any other reason based on any type of discrimination.

This definition does not include pain and suffering caused by precautionary and protective measures, and punishments prescribed in the Criminal Procedures Law and the Penal Code.

2. Places of Deprivation of Liberty: Jails, detention facilities, prisons, correctional facilities for children and facilities where persons under security and precautionary measures are kept.
3. Victim: Victim is anyone upon whom, through torture, harm, including physical and mental harm, or financial loss is inflicted, or whose fundamental

rights are significantly violated irrespective of whether or not perpetrator is prosecuted.

Article Four:

Torture is a crime. Perpetrator is punished under the law.

Punishment

Article Five:

1. Anyone who commits torture shall be sentenced to medium imprisonment of not less than three years.
2. If perpetrator of torture as described in section 1 of this article causes physical harm to victim, they shall be sentenced to maximum medium imprisonment.
3. If perpetrator of torture as described in section 1 of this article cause permanent physical or mental damage to victim, they shall be sentenced to long imprisonment.
4. If perpetrator of torture as described in section 1 of this article cause victim's death, they shall be sentenced to life imprisonment.
5. If victim of torture as described in section 1 of this article is a disabled person, child or woman, perpetrator shall be sentenced to long imprisonment of not less than seven years.
6. If torture entails rape, perpetrator shall receive punishment for torture and rape.
7. Threat to torture is a crime. Perpetrator shall be sentenced to medium imprisonment of up to three years.
8. Attempt to torture shall be considered torture.
9. Complicit in torture shall receive the sentence that torture perpetrator receives.
10. Perpetrator of torture shall be fired from their job.

Amnesty and Mitigation

Article Six:

Perpetrators of torture shall not receive amnesty, probation or mitigated sentence.

No Justification for Torture

Article Seven:

State of war, threat to war, internal political instability or any other circumstances or an order from superior or a public official shall not serve as a justification for torture.

Torture Complaint

Article Eight:

1. Victim, victim's attorney or relatives can file complaints with any of the following institutions: the Independent Human Rights Commission, Secretariat of High Board for Coordinating and Supervising Implementation of the Anti-Torture Legislation, Committee for Determining Torture or Attorney's Office.

2. If victim's complaint is not addressed by one of the units of the attorney general's office, victim may send the complaint to a higher authority within the attorney's office.
3. If victim seeks redress, he/she can file with relevant court.
4. Institutions described under sections 1, 2 and 3 of this article shall act under the law.

Chapter Two Preventing Torture

Measures to Prevent Torture

Article Nine:

1. Institutions for detection, investigation, enforcement and liberty deprivation shall take necessary measures to ensure preventing torture of suspects, convicts and inmates, and monitor and supervise that torture is not used in their institution.
2. Cruel, inhumane and degrading treatment is prohibited. Relevant institutions shall take measures to prevent such treatment.

Rights of Torture Victims

Article Ten:

- (1) Torture victims shall enjoy the following rights in prosecution phases:
 1. Fair treatment, respecting human dignity and upholding personal respect;
 2. Providing immunity;
 3. Participating in trial and justifying special questions to the accused of murder and assault;
 4. Demanding and receiving original property or its monetary equivalent and compensation under the law;
 5. Access to information on prosecution procedures and results in various phases of trial;
 6. Objection to deeds of judicial clerk, expert, prosecutor and judge under the law;
 7. Access to defense attorney and necessary legal, financial, medical, psychological and social assistance;
- (2) Police, prosecutors and court shall under their own jurisdictions take measures to ensure torture victims access to rights under section 1 of this article.

High Coordination and Monitoring Board for the Implementation of Anti-Torture Legislation

Article Eleven:

- 1) To prevent torture and monitor implementation of the anti-torture legislation, Coordination and Monitoring Board for the Implementation of Anti-Torture Legislation shall be made up of the following:
 1. Minister of Justice as the Chairman.
 2. Attorney-General's Office Investigation advisor as Member.
 3. Deputy Defense Minister as Member.

4. Deputy of national security at the Ministry of Interior as Member.
 5. Deputy of National Security Directorate as Member.
 6. Chairman of the Independent Human Rights Commission as Member.
 7. Chairman of the Independent Bar Association as Member.
 8. Chairman of the Lawyers Union as Member.
 9. Deputy Public Health Minister as Member.
 10. Chairman of Public Prisons as Member.
 11. Three Members of the Civil Society as Members.
- 2) Independent Human Rights Commission shall serve as the secretariat of the Coordination and Monitoring Board for the Implementation of Anti-Torture Legislation.
 - 3) Coordination and Monitoring High Board for the Implementation of Anti-Torture Legislation shall be referred to as “the board” in this legislation.

Duties and Authorities of the Board

Article Twelve:

- (1) The board shall have the following responsibilities and authorities:
 1. Institutions for detecting crimes, security, enforcement and liberty deprivation shall report on incidents of torture at their institutions to the secretariat on a quarterly basis.
 2. Through the secretariat, the board will compile and review the reports. If necessary, the board will share its comments with relevant institutions.
 3. If the board members receive information on incidents of torture, they shall pass it to the prosecutor’s office.
 4. The board shall be able to request any type of necessary information on torture cases from relevant institutions.
 5. The board shall enact programs and guidelines for better implementation of this law.
 6. The board shall develop and approve practical programs to raise awareness among personnel of institutions for detection, investigation, enforcement and deprivation of liberty on prohibition against torture.
 7. The board may send its reports, comments, suggestions and activities to the President’s Office and the Parliament on annual basis.
 8. The board shall be able to establish a technical committee from relevant institutions;
 9. The board shall maintain a relationship with the United Nations Committee Against Torture.
 10. The board shall refer violators of the Anti-Torture Legislation to justice institutions.
 11. The Independent Human Rights Commission shall serve as the secretariat of the board.
- (2) The board’s conduct shall be based on the regulations that the board will approve.

Establishing Committee for Determining Torture

Article Thirteen:

- 1) To investigate cases of torture, the commission shall establish committees that document incidents of torture. The committee will have the following structure:
 1. Expert in forensic medicine with at least five years of experience.
 2. Mental health expert with at least five years of experience.
 3. Representative of the Independent Human Rights Commission.
 4. Representative of the Independent Bar Association.
 5. Representative from the prosecutor's office.
 6. Representative from police.
 7. Representative from the civil society.
- 2) The commission shall establish committees for identifying torture in regions and provinces.
- 3) The Independent Human Rights Commission of Afghanistan shall provide necessary facilities to the committees for their work.

Responsibilities and Authorities of the Committee

Article Fourteen:

The committee shall have the following responsibilities and authorities:

1. Visitation privilege without notice from places of detention and access to individual dossier of the person included in the medical report and other cases.
2. Ability to interview suspects, the accused and convicts confidentially.
3. Identifying cases of torture and torture claims, determining type of torture and informing the prosecutor's office of incidents of torture.
4. Complying with standards of the Istanbul Protocol in investigating cases of torture.
5. Documenting mental or physical pain or suffering inflicted upon victim, and its severity.
6. Determining loss caused by severe mental or physical harm as a result of torture, including medical treatment expenses.
7. Providing reports to the commission.
8. Other responsibilities given by the board.

Reporting Torture and Torture Perpetrators

Article Fifteen:

Authorities from the institutions described in Article Eight of this legislation shall ensure that torture does not happen and if it does, they shall refer perpetrators to authorities for prosecution.

Protecting Complainant, Witnesses and Investigators

Article Sixteen:

Institutions for detection, investigation, trial and enforcement shall take necessary measures to protect complainant, witnesses, members of committees documenting torture and personnel of institutions with monitoring torture prohibition authority.

Training on Prohibition and Prevention of Torture

Article Seventeen:

- (1) The Ministry of Interior, Ministry of Defense and National Directorate of Security shall include prevention of torture and cruel, inhumane and degrading treatments in their trainings.
- (2) Institutions for detection, investigation, trial and enforcement shall include preventing torture and cruel, inhumane and degrading treatments in regulations pertaining to job descriptions of their personnel.

Method to Address Torture

Article Eighteen:

When investigating incidents of torture, the committee for investigating torture, particularly forensic medicine and mental health experts, shall comply with the protocols attached to the Convention Against Torture.

Providing Effective Measures

Article Nineteen:

To check on people under custody, detention or imprisonment, authorities at facilities for deprivation of liberty shall provide the following necessary authorizations to the chairman and members of the commission, the committee for investigating torture and representatives of the international committee against torture:

1. Permission to enter detention facilities.
2. Access to information on the number of people kept in the detention facility
3. Access to information on conditions of detention and treatment during detention of those deprived of their liberty.
4. Permission to visit detention centers and relevant institutions.
5. Permission to meet with detainees and those deprived from their liberty
6. Access to record of suspects, the accused and convicts upon request.

Chapter Three

Investigation and Scientific and Medical Examinations of Torture

Standards for Medical and Scientific Investigation of Torture

Article Twenty:

Investigation and scientific and medical examinations shall be done in compliance with the following standards:

- Examination shall only take place after informed consent of torture victim is secured
- Examination shall be done independently, objectively, effectively and in a timely manner.
- Examination shall take place in the presence of attorney of torture victim.
- Examination shall be done confidentially by medical experts.
- Doctors at detention facilities shall immediately report incidents of torture to relevant authorities.
- Security personnel and other government officials shall not be present during investigations and medical examinations.

Investigations, and Scientific and Medical Examinations Standards

Article Twenty-One:

Investigations and scientific and medical examinations standards shall comply with the Istanbul Protocol, which are the following:

- Allegations of torture and ill-treatment
- Documenting background
- Complete physical examination
- Complete mental examination
- Laboratory examinations
- Digital pictures
- Use of anatomy maps
- Providing scientific and standard reports

Hymen Examination

Article Twenty-Two:

1. To respect women's rights to human dignity and health, prevent cruel, virginity test to prove adultery and rape is prohibited, and perpetrator of this act shall be punished under this law. This test for the purpose of medical treatment and with woman's informed consent shall be an exception to this rule.
2. For the purpose of this article, virginity test is a compulsory test of hymen, and for size, morphology, anatomy and existence and non-existence of hymen to determine if a woman has experienced vaginal intercourse.

Chapter Four

Redress for Torture Victims

Access to Redress

Article Twenty-Three:

- (1) Torture victim shall be entitled to full redress, including restitution, compensation, rehabilitation and guarantees of non-repetition, by the state.
- (2) For the purpose of this law, redress shall include the following:
 1. Restitution of victim and their relatives, including returning their confiscated properties, restoring their pension rights and reinstating their jobs unless the court banned them from being reinstated under the law.
 2. Rehabilitation, including providing medical, psychological, legal and social services directly or indirectly.
 3. Guarantees of non-repetition, including amending laws and policies, reforming institutions and holding training programs to promote awareness on a culture free of torture.
 4. Compensation, including for mental and physical harms, lost opportunities, including job, education and other benefits, financial loss and income loss, including potential income loss and expenses for necessary legal, financial, medical, psychological and social assistance.

Institution for Filing for Redress

Article Twenty-Four:

Victim shall be able to file for redress at the court where torture happens, at the court where perpetrator works or city primary court in Kabul.

Handling Redress Filings in Ongoing Criminal Cases

Article Twenty-five:

- (1) Victim shall be able to file for redress under Section Three, Chapter Four of the Criminal Procedures Law.
- (2) Should perpetrator get convicted, authorized court shall order provision of redress from the State's budget.
- (3) Court shall be able to order restoration of the redress provided by the state from perpetrator.
- (4) Should several people commit torture, all perpetrators are equally accountable to pay back the redress that the State provides for victims unless court has specified each perpetrator's share.

Handling Redress Filings in Civil Cases

Article Twenty-Six:

- (1) Victim shall be able to file for redress for torture in civil court under the Civil Procedures Law or under Section Three, Chapter Four of the Criminal Procedures Law.
- (2) Authorized court shall order provision of redress from the State's budget.
- (3) Court shall not be able to dismiss a filing for redress when perpetrator is not identified or prosecuted or when investigation is pending or when related criminal case is dismissed.
- (4) Civil court shall be able to order restoration of redress from perpetrator under paragraphs 3 and 4 of Article Twenty-Six of this law.

Torture Victim Death

Article Twenty-Seven:

Should victim pass away during or before or after criminal trial, his/her relatives shall be able to file for redress or proceed with redress filing at authorized court.

Burden of Proof

Article Twenty-Eight:

- (1) Court shall evaluate evidence for and against in a balanced manner. Should court conclude that evidence for is stronger than evidence against, they shall order redress.
- (2) Should signs of torture be visible in a person's body in a deprivation of liberty facility, that shall be considered torture unless proved otherwise.

Prioritizing Redress

Article Twenty-Nine:

Court shall prioritize redress filing for torture.

Enforcement

Article Thirty

Relevant institutions shall provide victim with redress within 30 days after a final court verdict. Should victim not receive redress within the time-limit, the relevant institutions shall have to pay interest under the law.

Chapter Five

Concluding Provisions

No Extradition:

Article Thirty-One:

Request for extraditing to a country where there is a potential for the individual to be tortured shall not be approved.

Suggestion for Regulations

Article Thirty-Two:

The commission may suggest regulations for better implementation of this legislation.

Enforcement Date

Article Thirty-Three:

This law shall come into force once published in the official gazette.