

Implementation of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in China:

A Parallel Report by Research Center for Human Rights and Humanitarian Law, Peking University Law School

*Submitted to the Committee against Torture in advance of its review of the fifth periodic report of
the People's Republic of China*

1. Introduction

Research Center for Human Rights and Humanitarian Law, Peking University Law School (hereinafter, “the Center”) has prepared this parallel report for the Committee against Torture (CAT) to assist its consideration of China’s fifth periodic report under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (hereinafter, “the Convention”) during its 56th Session in 2015. Based on the recent research interests of and the information available for the Center, this parallel report will concentrate on Articles 1 and 4 of the Convention, and its scope will be limited to mainland China, excluding Hong Kong and Macau Special Administrative Regions.

2. China’s Legal Framework in Relation to the Prohibition of Torture

China has repeatedly expressed its views that “[t]he act of torture defined by the Convention, which also constitutes a crime under the stipulations of the Criminal Law of the People’s Republic of China, is strictly prohibited in accordance with the relevant laws of the People’s Republic of China.”¹ It has also outlined its legal framework in relation to the prohibition of torture, which also contains laws and many regulations. In

¹ CAT/C/7/Add.5, para. 38.

regard to this legal framework, the Center is of the view that the information provided by the State Party is generally accurate and contains most of the applicable laws. Nevertheless, it deems necessary to provide some additional information as follows, in order to supplement the State Party's report and to assist the Committee in forming a more comprehensive understanding of the legal framework of the State Party.

First of all, it is worth noticing that, as stated the Core Document² submitted by the State Party, in addition to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, China is also a State Party to the four Geneva Conventions, which contain provisions expressly prohibiting torture, for example in Article 3 common to the four Geneva Conventions, Article 12 of the First and Second Conventions, Articles 17 and 87 of the Third Convention, Article 32 of the Fourth Convention.

In the meantime, at domestic level, acts of torture are offences under China's Criminal Law. However, since there is not a separate offence of torture under Chinese law³, all such criminal allegations must be brought up in line with relevant provisions under the Criminal Law, namely Articles 247 and 248, outlawing the use of torture to extort a confession from a criminal suspect or defendant, or the use of violence to extort testimony from a witness, and beating or mistreating prisoners by corporal punishment, respectively.⁴

Apart from the Criminal Law, there are many regulations specifying application of these articles, some of which have been introduced by the State Party in its reports.⁵ Besides, Provisions of the Supreme People's Procuratorate on the Criteria for Opening Cases of Malfeasance and Infringement Crimes (最高人民法院关于渎职侵权犯罪案件立案标准的规定, 高检发释字[2006]2号), issued in 2006, stipulates that:

3. Cases of extorting confessions by torture (Article 247)

The crime of extorting a confession by torture means the act whereby judicial functionaries extort a confession out of a criminal suspect or defendant by corporal punishment or disguised corporal punishment.

² HRI/CORE/CHN/2010.

³ CAT/C/CHN/CO/4/Add.2, p.19.

⁴ See CAT/C/CHN/4, paras. 61 and 62.

⁵ See *ibid*, paras. 65-66; CAT/C/CHN/5, para. 37.

Under any of the following circumstances, a case shall be filed for investigation and prosecution:

(1) Extorting a confession by assaulting, tying up, illegally using tools or any other abominable means;

(2) Making a criminal suspect or defendant suffer from the cold, hunger or sunburn, parching for a long time to extort a confession, which seriously damages the health of the criminal suspect or defendant;

(3) Extorting a confession by torture and causing a minor injury, serious injury or death to a criminal suspect or defendant;

(4) Extorting a confession by torture with serious circumstances, causing a criminal suspect or defendant to commit suicide, get severely wounded from self-mutilation, be dead or become insane;

(5) Extorting a confession by torture and resulting in the misjudgment of a case;

(6) Torturing three persons or more to extort confessions;

(7) Conniving at others' extorting confessions by torture, giving hint to, instigating or forcing others to extort confessions by torture under any of the above-mentioned circumstances; or

(8) Any other circumstance under which criminal liability shall be assumed for extorting confessions by torture.

4. Cases of resorting to violence to obtain testimonies (Article 247)

The crime of resorting to violence to obtain testimonies means the act whereby judicial functionaries resort to violence to obtain testimonies from witnesses.

Under any of the following circumstances, a case shall be filed for investigation and prosecution:

(1) Extorting testimonies from witnesses by assaulting, tying up, illegally using tools or any other abominable means;

(2) Causing the minor injury, serious injury or death of a witness as a result of resorting to violence to obtain a testimony;

(3) Resorting to violence to obtain testimonies with serious circumstances, and causing a witness to commit suicide, get severely wounded from self-mutilation, be dead or become insane;

(4) Resorting to violence to obtain testimonies and resulting in the misjudgment of a case;

(5) Using violence against three persons or more to obtain testimonies;

(6) Conniving at others' resorting to violence to obtain testimonies, giving hint to, instigating or forcing others to resort to violence to obtain testimonies under any of the above-mentioned circumstances; or

(7) Any other circumstance under which criminal liability shall be assumed for resorting to violence to obtain testimonies.

5. Cases of abusing detainees (Article 248)

The crime of abusing detainees means the act whereby the functionaries of prisons, detention facilities, jails, criminal detention houses, reform centers and other incarcerating facilities assault detainees or physically abuse them, with any serious circumstance.

Under any of the following circumstances, a case shall be filed for investigation and prosecution:

(1) Abusing detainees by assaulting, tying up, illegally using tools or any other abominable means;

(2) Abusing detainees by making them suffer from the cold, hunger or sunburn, parching for a long time, which seriously damages the health of detainees;

(3) Causing the minor injury, serious injury or death of a detainee as a result of abuse;

(4) Abusing detainees with serious circumstances, and causing a detainee to commit suicide, get severely wounded from self-mutilation, be dead or become insane;

(5) Assaulting or physically abusing three persons or more;

(6) Instigating a detainee to assault or physically abuse any other detainee under any of the above-mentioned circumstances; or

(7) Any other serious circumstance.

Rules of Criminal Procedure of the People's Procuratorate (for Trial Implementation) (人民检察院刑事诉讼规则(试行), 高检发释字[2012]2号) stipulates that "extorting a confession by torture is the use of corporal punishment or disguised corporal punishment, by which severe pain or suffering, whether physical or mental, is inflicted on a suspect."

The Supreme People's Procuratorate interpreted Article 248 of the Criminal Law in an Official Reply⁶ dated 15 February 2015, to the People's Procuratorate of Hebei Province, that:

In accordance with the relevant legal provisions, an isolated compulsory drug rehabilitation center is a supervisory authority restricting the personal freedom of drug addicts who satisfy certain conditions for the purpose of isolated compulsory drug rehabilitation. Its employees performing the supervisory duties constitute the supervisory staff set out in Article 248 of the Criminal Law.

Where any supervisory staff member of an isolated compulsory drug rehabilitation center batters, physically punishes or abuses a person in drug rehabilitation, or instigates a person in drug rehabilitation to batter, physically punish or abuse another person in drug rehabilitation, and the circumstances are serious, the provisions of Article 248 of the Criminal Law shall apply, and he or she shall be subject to criminal liability for the crime of abusing a person in custody. Where any person in drug rehabilitation is injured, disabled or dead as a result thereof, a severer punishment shall be imposed for the crime of intentional injury or the crime of intentional homicide in accordance with Article 234 or Article 232 of the Criminal Law.

3. Information and Observations Regarding the List of Issues

After surveying the legal framework of the State Party in relation to the prohibition of torture, information will be provided to assist the Committee in considering the issues listed while the observations of the Center will also be presented in this part.

a) Conformities and Unconformities with the Convention

⁶ Official Reply of the Supreme People's Procuratorate on Issues concerning Whether an Employee of an Isolated Compulsory Drug Rehabilitation Center Constitutes the Subject of the Crime of Abusing a Person in Custody (最高人民法院于强制隔离戒毒所工作人员能否成为虐待被监管人罪主体问题的批复, 高检发释字[2015]2号)

The State Party insists that “according to Chinese law, torture is a criminal offence, and those inflicting torture or instigating or conspiring in torture are all severely punished in accordance with the law”⁷ and that “all aspects of torture as defined in the Convention are covered in the relevant Chinese laws.”⁸ In principle, the Center agrees with the State Party that acts of torture are criminally punishable under Chinese law. As asserted by the State Party, Articles 238, 247, and 248 may all be used for the punishment of torture.⁹ Moreover, the Center observes that Articles 232 and 234 could also be used to punish acts of torture that cause consequences of deaths or injuries. Since the wording of Article 4 of the Convention implies that its requirement that torture shall be a criminal offence under domestic law does not mean that there must be a specific, separate offence corresponding to torture under Article 1 of the Convention¹⁰, the Center is of the view that the legal framework of the State Party is in principle compatible with the requirements of the Convention. However, the fact that there is not an explicit definition of torture in China’s Criminal Law may raise practical concerns that in some cases the acts of torture might escape sanctions due to the complexity of the legal framework. The Center believes that the prohibition of torture under Chinese law would be strengthened if the State Party incorporates in its domestic law a definition of torture that fully complies with the definition contained in the Convention, as suggested by the Committee.¹¹

Nevertheless, there remains several defects in China’s legal framework against torture. The Committee expressed its concern that the provisions relating to torture refer only to physical abuse and do not include the infliction of severe mental pain or suffering.¹² This situation is partly alleviated after the promulgation of Rules of Criminal Procedure of the People’s Procuratorate (for Trial Implementation) in 2012, which stipulates that “extorting a confession by torture is the use of corporal punishment or disguised corporal punishment, by which severe pain or suffering, whether physical or mental, is inflicted on a suspect.” Therefore, Article 247 may now

⁷ See CAT/C/CHN/4, para. 60.

⁸ CAT/C/CHN/CO/4/Add.2, p.19.

⁹ *Ibid.*

¹⁰ Herman Burgers and Hans Danelius, *The United Nations Convention against Torture: A Handbook on the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, Martinus Nijhoff Publishers (Dordrecht, 1988).

¹¹ CAT/C/CHN/CO/4, para. 32.

¹² *Ibid.*, para. 33.

apply to the infliction of severe mental pain or suffering as well. Nonetheless, due to the vagueness of this provision, its actual effects are yet to be seen. In fact, the Center searched major databases¹³ containing court judgments in China and regrettably found not even a single case where such acts were indicted or convicted. Moreover, for acts inflicting severe mental pain or suffering but not punishable under Article 247, it remains difficult to bring such perpetrators to trial.

The State Party has stated that “China’s Criminal Law is applicable to all criminal acts of torture, irrespective of the identity, intent or purpose of the perpetrators”¹⁴, as a reply to the Committee’s concern that “the prohibited practice of torture to the actions of judicial officers and officers of an institution of confinement and do not cover acts by ‘other persons acting in an official capacity’, including those acts that result from instigation, consent or acquiescence of a public official.”¹⁵ While “the provisions of article 247 of the Criminal Law concerning the crime of extorting confessions by means of torture and violence apply to judicial officers who obtain evidence by acts of torture. The provisions of article 248 of the Criminal Law concerning the crime of ill-treatment of detainees apply to supervisors who commit acts of torture against detainees,”¹⁶ the “supervisors” as defined in Article 248 also includes those acting in an official capacity, although “judicial officers” as in Article 247 do not include non-officers acting in an official capacity. Nevertheless, none of Articles 238, 232, or 244 contain requirements of the identity of the perpetrators, they may still be punishable under these provisions. Therefore, the Center is of the view that China’s Criminal Law is in general in conformity with the Convention. Nevertheless, since the thresholds of these articles are higher than Article 247, some perpetrators may be able to escape criminal punishments if their acts of torture are not “severe” enough. It is thus suggested that the State Party should incorporate in the Criminal Law a definition of torture that fully complies with the definition contained in the Convention and include persons acting in an official capacity therein.

Similar situations also apply to acts of torture perpetrated for purposes other than to extract confessions. Apart from Article 248 which applies to supervisors who commit

¹³ Namely Judicial Opinions of China (中国裁判文书网, available at: <http://www.court.gov.cn/zgcpwsw/>) and pkulaw.cn (北大法宝).

¹⁴ CAT/C/CHN/CO/4/Add.2, p.19.

¹⁵ CAT/C/CHN/CO/4, para. 33.

¹⁶ CAT/C/CHN/CO/4/Add.2, p.19.

acts of torture against detainees, Articles 238, 232, and 244 may also be applicable to acts of torture irrespective of the purposes of the perpetrators, however the threshold of these three articles are higher than Articles 247 and 248.

b) Draft Ninth Amendment to the Criminal Law

China started its process of amending the Criminal Law in 2014. In the second draft published on 6 July 2015 for a nationwide call for opinions, an article was added as Article 37 *bis*, Section 1 of which reads as follows:

Where a crime was committed taking advantage of occupational convenience, or where it was committed in violation of specific obligations required by a certain profession, the People's Court may, in accordance with the circumstances of the crime and the need to prevent recidivism, prohibit the criminal from taking up the profession after he or she completes serving the sentence or gets parole, for a period between three and five years, counting from the date thereof.

Therefore, public officials who committed crimes under Articles 247 and 248 are qualified under this draft article and as a result they may be subject to the prohibitions that they may not take up their profession for a certain period of time.

c) The Status of the Convention in the Domestic Level

While some other conventions have been applying by national courts in China, the Center regrettably found nothing that indicates the Convention have been invoked by parties in court proceedings or applied by national courts. Nevertheless, the Convention does have some effects, not only during legislative process but also the implementation of relevant provisions of domestic law as well.

For example, as the State Party submitted in its report, Chinese government often regards the Convention as a guidance that should be followed. As early as in 1989, only one year after China's ratification of the Convention, the Ministry of Public Security has promulgated a notice to the provincial departments in relation to the compliance with international conventions for public security authorities, stating that:

... The third meeting of the Seventh National People's Congress has ratified the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Some of the provisions of the Convention are directly relevant with the work of public security authorities...

First, leaders at all levels of public security authorities should improve and strengthen awareness of the work in this regard, and comply strictly with the relevant provisions of international conventions, and organize the police officers, in particular, the investigation, pre-trial detention facilities officers, to thoroughly study and strictly implement the provisions of international law and relevant international conventions.

Second, during the process of arresting, detaining suspects and dealing with cases of obstruction of social security, in case of resisting arrest, detention, public security administrative punishment and taking away for inspection, except necessary enforcement measures and self-defense, any beating, corporal punishment, abuse or other degrading treatment shall strictly be prohibited. During the investigation process and pre-trial process, should attach importance to investigation and research, the use of torture to extort a confession is strictly prohibited.

Third, leaders of public security authorities shall require their subordinate officers strictly, that they should act strictly according to law, and should not torture those in custody or detention, nor infringe upon their other personal rights with any excuses...

Fourth, public security authorities should improve the conditions of detention centers, establish and improve various systems, and improve life and health management. It is prohibited to beat and abuse prisoners in custody...¹⁷

Moreover, the Convention may sometimes play a significant role during legislative process. During the drafting of the 2012 amendment of the Criminal Procedure Law, some suggested that “*ordinary people and some of the people handling cases, generally understand torture as beating, however, in practice, illegal ways of obtaining evidence from suspects and the accused also include disguised use of violence to extort testimony and mental torture... which seriously violate human rights as well. Therefore, evidence that shall be excluded should also include ‘by means of corporal punishment or abuse’, or adopting the wording ‘statement which is established to have been made as a result of torture’ of the UN Convention against Torture ratified by China, because according to the definition of the Convention, torture includes ‘any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person’...*”¹⁸

¹⁷ Notice of Strict Compliance with the Provisions of International Conventions in Relation to Public Security Work (公安部关于严格履行国际公约中与公安工作有关的规定的通知, [89]公法字 33 号).

¹⁸ Huang Taiyun, Explanation of the Amendment of the Criminal Procedure Law, People’s Procuratorial Semimonthly, 2012, Issue 8 (黄太云, 刑事诉讼法修改释义, 人民检察 2012 年第 8 期). The author is a former deputy director of Criminal Law Department, Legislative Affairs

Although this suggestion was not adopted in the end for reason that many experts considers that the definition of the Convention had already been included in the then draft, it shows how the Convention could affect the legislative process.