

**HUMAN RIGHTS COMPLIANT CRIMINAL  
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**Expert Comments on  
the Draft Law “On Amendments to the Criminal Code of Ukraine  
Concerning Criminal Liability for Torture”**

These expert comments have been prepared under the auspices of the Council of Europe Project “Human Rights Compliant Criminal Justice System in Ukraine” on the basis of expertise by Mr. Jeremy McBride

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*The opinions expressed in these expert comments are the responsibility of the author and do not necessarily reflect the official policy of the Council of Europe*

## A. Introduction

1. These expert comments concern the Draft Law of Ukraine “On Amendments to the Criminal Code of Ukraine Concerning Criminal Liability for Torture” (“the Draft Law”).
2. The Draft Law is currently under consideration by the Committee for Law Enforcement Activities of the Verkhovna Rada of Ukraine.
3. The goal of the amendments being proposed in the Draft Law is, according to its Explanatory Note, to “bring provisions of the Criminal Code of Ukraine in line with provisions of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment” (“the UN Convention”).
4. In this connection, the Draft Law was referred to in the *Updated Action Plan on measures to be taken for implementation of the European Court's judgements in Kaverzin/Afanasyev/Belousov groups of cases (application nos. [23893/03](#), [38722/02](#) and [4494/07](#))* that was submitted to the Committee of Ministers of the Council of Europe by Ukraine on 5 January 2021.<sup>1</sup>
5. Subsequently the Committee of Ministers urged the authorities to step up their efforts to resolve all the outstanding issues, in particular the adoption of the necessary amendments to the legal framework on torture and ill-treatment.<sup>2</sup>
6. The proposed amendments in the Draft Law relate to the provisions in the Criminal Code of Ukraine dealing with the application of the statute of limitations and the offences of torture and forced disappearance.
7. The expert comments review the compliance of the Draft Law with European standards, particularly the European Convention on Human Rights (“the European Convention”) and those elaborated by the European Committee for the Prevention of Torture and Inhuman and Degrading Treatment or Punishment (“the CPT”).
8. The expert comments first make an assessment of the compatibility of the respective provisions of the Draft Law with European standards and then provides an overall conclusion.
9. The expert comments have been developed by Mr Jeremy McBride<sup>3</sup> under the auspices of the Council of Europe’s Project “Human Rights Compliant Criminal Justice System in Ukraine”. It has been based on an English translation of the Draft Law provided by the Council of Europe’s Secretariat.

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<sup>1</sup> [https://hudoc.exec.coe.int/eng#%7B%22EXECIdentifier%22:%5B%22DH-DD\(2021\)31E%22%5D%7D](https://hudoc.exec.coe.int/eng#%7B%22EXECIdentifier%22:%5B%22DH-DD(2021)31E%22%5D%7D)

<sup>2</sup> 1398th meeting, 9-11 March 2021 (DH); [https://hudoc.exec.coe.int/eng#%7B%22EXECIdentifier%22:%5B%22CM/Del/Dec\(2021\)1398/H46-35E%22%5D%7D](https://hudoc.exec.coe.int/eng#%7B%22EXECIdentifier%22:%5B%22CM/Del/Dec(2021)1398/H46-35E%22%5D%7D).

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## B. The proposed amendments

10. The principal changes proposed in the Draft Law concern the applicability of the statute of limitations pursuant to Articles 49.5 and 80.6 and the offence of torture in Article 127, with the proposed amendment to the offence of forced disappearance in Article 1461 being consequential on that to the offence of torture.
11. These proposed amendments are considered in turn.

### *i. The applicability of the statute of limitations*

12. Although the Explanatory Note states that the goal of the Draft Law is to bring the Criminal Code of Ukraine into line with the UN Convention, the latter instrument does not actually contain any provision dealing with the applicability of limitation periods.
13. Nonetheless, the unacceptability of the applicability of limitation periods might be an implication of the statement by the Committee against Torture in its General Comment on Article 2 of the UN Convention that it:

considers that amnesties or other impediments which preclude or indicate unwillingness to provide prompt and fair prosecution and punishment of perpetrators of torture or ill-treatment violate the principle of non-derogability.<sup>4</sup>

14. In any event, the European Court of Human Rights (“the European Court”), in application of Article 3 of the European Convention, has repeatedly held that

where a State agent has been charged with crimes involving torture or ill-treatment, it is of the utmost importance for the purposes of an “effective remedy” that criminal proceedings and sentencing are not time-barred.<sup>5</sup>

15. Moreover, the CPT also considers that limitation periods are inappropriate for offences relating to torture and other forms of ill-treatment.<sup>6</sup>
16. It would, therefore, be entirely appropriate for the Draft Law to make limitation periods inapplicable for the commission of torture by State agents, namely, the offence envisaged in Article 127.3.

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<sup>4</sup> General Comment No. 2 Implementation of Article 2 by States Parties, CAT/C/GC/2, 24 January 2008, para. 5.

<sup>5</sup> *Abdulsamet Yaman v. Turkey*, no. 32446/96, 2 November 2004, at para. 50, reiterated, e.g., in *Okkali v. Turkey*, no. 52067/99, 17 October 2006, at para. 76, *Savin v. Ukraine*, no. 34725/08, 16 February 2012, at para. 67 and *Mocanu and Others v. Romania* [GC], no. 10865/09, 17 September 2014, at para. 326.

<sup>6</sup> See, e.g., the observation in its *Report to the Greek Government on the visit to Greece carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 28 March to 9 April 2019* (CPT/Inf (2020) 15) that: “The CPT regrets that the revised Criminal Code, adopted on 6 June 2019, has not fully addressed these deficiencies. The amended torture provision still contains the element of “systematic” (συστηματικού) (paragraph 2 a)) and the term “methodical” or “planned (μεθοδική/μεθοδευμένη) (paragraph 5), providing for a narrow definition of torture. Therefore, it is still not in line with international standards. Moreover, the limitation period for acts of torture and other forms of ill-treatment remains in place”; para. 91.

17. However, the proposed amendments to Articles 49.5 and 80.6 would not entirely fulfil the requirement established by the European Court for limitation periods to be inapplicable for acts contrary to Article 3 of the European Convention.
18. This is because, as is clear from the quotation above, that this should be the case not only where torture is committed by state agents but also where the latter are responsible for inflicting other forms of ill-treatment prohibited by Article 3 of the European Convention.<sup>7</sup>
19. Moreover, although the European Court has so far only specifically stated that a limitation period should not be applicable in respect of acts contrary to Article 3 of the European Convention where these were committed by State agents, this does not mean that the same approach is not required where the acts concerned are committed by persons other than State agents.
20. In this connection, it should be noted that, referring to the analogous concepts of amnesties and pardons, the European Court has stated that the unacceptability of such measures limiting criminal responsibility also  

applies to acts between private individuals in so far as the treatment reaches the threshold under Article 3 of the Convention.<sup>8</sup>
21. In so doing, the European Court specifically cited its case law on the unacceptability of limitation periods.
22. *In order for the Criminal Code of Ukraine to be brought into line with the requirements of Article 3 of the European Convention regarding the inapplicability of limitation periods, there would thus be a need for the proposed amendments to Articles 49.5 and 80.6 to be broadened to cover the one offence involving torture other than those in the proposed Article 127<sup>9</sup> and other offences involving the infliction of physical pain and/or mental suffering which could amount to the proscribed forms of ill-treatment.<sup>10</sup>*

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<sup>7</sup> Judge Wojtycek in *Mocanu and Others v. Romania* [GC], no. 10865/09, 17 September 2014 was the sole member of the European Court to suggest that penal policy might justify limitation “at least for acts of lesser seriousness. However, as is clear from the preceding footnote, this is not the view of the CPT.

<sup>8</sup> *Pulfer v. Albania*, no. 31959/13, 20 November 2018, at para. 83.

<sup>9</sup> Namely, that in Article 121.2; “Intentional grievous bodily harm caused by a method characterized by significant torture”.

<sup>10</sup> Notably, Articles 120 (incitement to suicide), 121 (intentional grievous bodily harm [i.e., the offences covered by it other than the one mentioned in the preceding footnote]), 122 (intentional moderate bodily harm), 124 (intentional grievous bodily harm in the event of excessive self-defense measures), 125 (intentional minor bodily harm), 126 (battery and torment), 129 (threat to kill), 142 (illegal human subject research) and 373 (compelling to testify). They could also include Articles 194 (wilful destruction or endamage of property) and 195 (threat to destroy property). In addition, the illegal deprivation of liberty or kidnapping, contrary to Article 146, could be relevant where this formed part of a possible strategy to put pressure on someone other than the person deprived of liberty or kidnapped.

## *ii. The offence of torture*

23. There are three matters that need to be considered in respect of the proposed amendment to Article 127, namely: the definition of the offence; the penalty ranges applicable; and the definition of state agents.

### *a. Definition*

24. The proposed change to the definition would replace a formulation<sup>11</sup> that does not follow that found in Article 1.1 of the UN Convention by one that does use much, but not all, of its wording<sup>12</sup>.

25. The definition in the UN Convention is one that is also reflected in the approach of the European Court to determining what amounts to torture:

425. The Court has considered treatment to be “inhuman” because, *inter alia*, it was premeditated, was applied for hours at a stretch and caused either actual bodily injury or intense physical or mental suffering. It has deemed treatment to be “degrading” because it was such as to arouse in the victims feelings of fear, anguish and inferiority capable of humiliating and debasing them (see, for example, *Kudla v. Poland* [GC], no. [30210/96](#), § 92, ECHR 2000-XI).

426. In order to determine whether a particular form of ill-treatment should be qualified as torture, the Court must have regard to the distinction embodied in Article 3 between this notion and that of inhuman or degrading treatment. As it has previously found, it was the intention that the Convention should, by means of this distinction, attach a special stigma to deliberate inhuman treatment causing very serious and cruel suffering; the same distinction is drawn in Article 1 of the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ...<sup>13</sup>

26. In addition, this definition is one that the CPT considers appropriate.<sup>14</sup>

27. However, the new formulation leaves out certain elements from the definition in the UN Convention.

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<sup>11</sup> Thus Article 127.1 currently provides “Torture, that is a willful causing of severe physical pain or physical or mental suffering by way of battery, martyrizing or other violent actions for the purpose of inducing the victim or any other person to commit involuntary actions, including receiving from him/her or any other person information or confession, or for the purpose of punishing him/her or any other person for the actions committed by him/her or any other person or for committing of which he/she or any other person is suspected of, as well as for the purpose of intimidation and discrimination of him/her of other persons, ...”.

<sup>12</sup> This provides “1. For the purposes of this Convention, the term “torture” means 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. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanction”.

<sup>13</sup> *Ilaşcu and Others v. Moldova and Russia* [GC], no. 48787/99, 8 July 2004.

<sup>14</sup> E.g., in referring to the fact that it had “commented in the past that the definition of the torture provision in the Criminal Code was not in line with international standards”, it stated that “in particular, the definition in the Greek Criminal Code differs from the definition provided in Article 1 of the United Nations Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment”; *Report to the Greek Government on the visit to Greece carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 28 March to 9 April 2019* (CPT/Inf (2020) 15), para. 91.

28. The first omission relates to one of the motives for the act, “coercing him ... or for any reason based on discrimination of any kind”.
29. A second omission concerns the official involvement in the acts concerned, “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”.
30. In addition, the proposed offence does not mention an exclusion from the definition in the UN Convention, namely, “pain or suffering arising only from, inherent in or incidental to lawful sanction”.
31. The last point is not problematic as it only clarifies the purposive aspect of the proscribed conduct.
32. The other omissions are, however, more significant.
33. The first omission would mean both that coercion as a purpose is not covered by the offence and that the purpose of discrimination is not as elaborate as that in the UN Convention (“discriminating him/her or a third person” as opposed to “for any reason based on discrimination of any kind”).
34. As a result, the purposive element of the definition would be weakened.
35. Moreover, this is being done without any obvious justification since the declared aim of the Draft Law is to implement the UN Convention and the text of part one of Article 1 is actually set out in full in the Explanatory Note.
36. Furthermore, the importance of a strong statement regarding a discriminatory motive – which may not be directed to a specific person – in the formulation of the offence is evident from the following statement of the European Court

Lastly, the Court considers that the authorities’ duty to investigate the existence of a possible link between racist attitudes and an act of violence is an aspect of their procedural obligations arising under Article 3 of the Convention, but it may also be seen as implicit in their responsibilities under Article 14 of the Convention to secure the fundamental value enshrined in Article 3 without discrimination. Owing to the interplay of the two provisions, issues such as those in the present case may fall to be examined under one of the two provisions only, with no separate issue arising under the other, or may require examination under both Articles. This is a question to be decided in each case on its facts and depending on the nature of the allegations made (see *Bekos and Koutropoulos*, cited above, § 70).<sup>15</sup>

37. By not following the purposive aspects of the definition in the UN Convention in its entirety, the proposed amendment would not only fail to fulfil the goal set out in the Explanatory Note but it would also run the risk of leading to a characterization of conduct that does not fully accord with the approach adopted by the European Court.
38. Moreover, it does this without any compensatory benefit being obtained.

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<sup>15</sup> *Antayev and Others v. Russia*, no. 37966/07, 3 July 2014, at para. 122.

39. *There is thus a need to remedy the omission relating to coercion and discrimination from the formulation of the offence proposed in Article 127.1.*
40. The second omission would have the effect of confirming the extension of the existing offence of torture to private individuals even though there is no official involvement in its infliction.
41. This extension is not something that is required by the UN Convention.
42. It is also not an issue that has been addressed in the application of Article 3 of the European Convention, although the European Court
- has repeatedly found Article 3 is applicable in cases involving deliberate ill-treatment, such as rape, sexual abuse or violence, including family violence or injuries sustained in a fight, which involves behaviour capable of inducing feelings of humiliation and degradation in the victim.<sup>16</sup>
43. However, such an extension does not seem inconsistent with Article 3 insofar as it would lead to the reprehensible conduct described in the offence being punished in an appropriate manner.
44. Nonetheless, apart from the infliction of severe mental suffering, it is not evident that the extension of the offence of torture to private individuals adds to existing offences such as intentional grievous bodily harm under Article 121.1, which has a greater penalty attached to it.<sup>17</sup>
45. A further aspect of the second omission is addressed in the context of the discussion below of the proposed specific offence of torture involving State agents, i.e., that in Article 127.3.

#### *b. Penalties*

46. The proposed offences would provide three different penalty ranges depending upon whether the torture is committed (a) without any aggravating features, (b) repeatedly or by prior agreement by a group of people or (c) by the state agent.
47. Thus, the ranges are respectively, three to six years, five to ten years and seven to twelve years with deprivation of the right to hold certain positions or engage in certain activities for a term of up to three years.
48. The European Court considers that the determination of the appropriate penalty for treatment contrary to Article 3 is primarily a matter within the exclusive jurisdiction of the national criminal courts.
49. Nonetheless, it has also emphasized that

under Article 19 of the Convention and in accordance with the principle that the Convention is intended to guarantee rights that are not theoretical or illusory, but practical and effective, the Court has to ensure that a State's obligation to protect the rights of those under its jurisdiction is adequately

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<sup>16</sup> *Nicolae Virgiliu Tănase v. Romania* [GC], no. 41720/13, 25 June 2010, at para.119. It confirmed the appropriateness of this approach at para. 121.

<sup>17</sup> Up to eight years' imprisonment.

discharged (see *Nikolova and Velichkova*, cited above, § 61, with further references). It follows that while the Court acknowledges the role of the national courts in the choice of appropriate sanctions for ill-treatment by State agents, it must retain its supervisory function and intervene in cases of manifest disproportion between the gravity of the act and the punishment imposed. Otherwise, the State's duty to carry out an effective investigation would lose much of its meaning (see *Nikolova and Velichkova*, cited above, § 62; compare also *Ali and Ayşe Duran*, cited above, § 66).<sup>18</sup>

50. Similarly, Article 4.2 of the UN Convention provides that

Each State Party shall make these offences punishable by appropriate penalties which take into account their grave nature.

51. In principle, the ranges being proposed in the Draft Law do not seem likely to be regarded as out of proportion to the gravity of the acts covered in the proposed offences.

52. However, as has already been noted the penalty range for the offence under Article 127.1 would be less harsh than that for the offence under Article 121.1.

53. Moreover, the offence under Article 121.2 – intentional grievous bodily harm caused by a method characterized by significant torture, or by a group of persons – is punishable by imprisonment for a term of seven to ten years, which is greater than the range being proposed for the offences in Article 127.1 and 127.2.

54. *It would, therefore, be desirable to ensure that there is some internal consistency between the approach to the proposed penalties for the offences under Article 127.1 and 127.2 and those for other offences in the Criminal Code that could be invoked for essentially the same conduct.*

*c. State agents*

55. There are two issues of concern regarding the offence proposed in Article 127.3, namely, (a) the general way in which it applies to State agents and (b) its applicability to what is termed a “foreign state agent”.

56. At first glance, the omission previously noted of the phrase concerning official involvement from the definition of the offence in Article 127.1 might appear to have been rectified by Note 1 to the offence in Article 127.3, thereby bringing it into line with the definition in the UN Convention.

57. However, this is not the case as there is an important difference between the formulation in the UN Convention and that in Note 1.

58. Thus, while the conduct proscribed under the UN Convention relates to that

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.

a State agent is defined as

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<sup>18</sup> *Gäfgen v. Germany* [GC], no. 22978/05, 1 June 2010, at para. 123.



a public official, a person or a group of persons acting at the instigation of or with the consent or acquiescence of the state.

59. The fact that the consent or acquiescence is that of the State is potentially more restrictive than where this is that of a public official or other person acting in an official capacity. This is because it will be open to argument that there is a need for some act or conduct by the State going beyond the conferment of functions on the public official or other persons. Such an act or conduct could be, for example, the awareness of a superior of that official or person previously inflicting the ill-treatment and failing to take any action to sanction her or him for that ill-treatment.<sup>19</sup>
60. As the European Court has made clear a State will not only be responsible under the European Convention for violations of human rights caused by acts of its agents carried out in the performance of their duties but may also be held responsible even where its agents are acting *ultra vires* or contrary to instructions.<sup>20</sup>
61. As a result, it has considered that treatment inflicted by a ticket inspector on a tram, albeit in violation of domestic criminal law and unauthorised, was committed in that person's capacity as capacity of ticket inspector rather than as a private individual. This meant that the conduct of the ticket inspector
- was not so far removed from the perpetrator's status that it could not engage the State's substantive international responsibility.<sup>21</sup>
62. This ruling did not depend upon any failure by the ticket inspector's superiors such as to suggest that his conduct was consented to or acquiesced in by the State. It can thus be contrasted with the attribution of responsibility for ill-treatment inflicted by security guards who had been licensed by the State but police officers appeared to have remained passive in the face of most of the actions of the security guards aimed at counteracting a protest.<sup>22</sup>
63. While the proposed offence in Article 127.3 might capture the conduct of the security guards, it would not capture that of the inspector because there was no consent or acquiescence by the State.

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<sup>19</sup> The UN Committee against Torture takes this approach in attributing to the State responsibility for the conduct of persons other than officials: ““18. The Committee has made clear that where State authorities or others acting in an official capacity or under colour of law, know or have reasonable grounds to believe that acts of torture or ill-treatment are being committed by non-State officials or private actors and they fail to exercise due diligence to prevent, investigate, prosecute and punish such non-State officials or private actors consistently with the Convention, the State bears responsibility and its officials should be considered as authors, complicit or otherwise responsible under the Convention for consenting to or acquiescing in such impermissible acts. Since the failure of the State to exercise due diligence to intervene to stop, sanction and provide remedies to victims of torture facilitates and enables non-State actors to commit acts impermissible under the Convention with impunity, the State's indifference or inaction provides a form of encouragement and/or de facto permission”; General Comment No. 2 Implementation of article 2 by State parties, (CAT/C/GC/2, 24 January 2008), para. 18.

<sup>20</sup> *Basenko v. Ukraine*, no. 24213/08, 26 November 2015, at para. 78.

<sup>21</sup> *Ibid*, at para. 89.

<sup>22</sup> *Chernega and Others v. Ukraine*, no. 74768/10, 18 June 2019.

64. Such an outcome would be inconsistent with the scope of the definition in the UN Convention and with the approach by the European Court to the attribution of responsibility to the State when applying Article 3 of the European Convention.
65. Thus, Note 1 would not fulfil the requirements of either Article 3 of the European Convention or the UN Convention.
66. *This deficiency could be remedied by replacing commission by a “state agent” in Article 127.3 with the formulation in Article 1.1 of the UN Convention, i.e., “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”.*
67. Note 2 defines a “foreign state agent” in very extensive terms, namely,
- as persons acting as public servants of the foreign state or serving in the armed forces, police, state security bodies, intelligence bodies, or persons holding positions in the specified or any other state bodies or local governments of the foreign state set up under its legislation or acting on the order of such persons, as well as representatives of irregular illegal armed groups, armed gangs and mercenary groups set up, subordinated, managed and financed by the Russian Federation, as well as representatives of the occupation administration of the Russian Federation which includes its state authorities and structures, functionally responsible for the governance of temporarily occupied territories of Ukraine, and representatives of self-proclaimed bodies controlled by the Russian Federation which usurped the performance of government functions with temporarily occupied territories of Ukraine.
68. It is unlikely that the singling out of the Russian Federation would be regarded as amounting to discrimination contrary to Article 1 of Protocol No. 12 as the current situation could be expected to be viewed as an objective and rational justification for any affected by the difference of treatment between those who are and who are not covered by the offence.
69. Indeed, in determining the scope of the offence’s applicability in the way proposed, Ukraine could be seen as fulfilling its positive obligation to take measures that it is in its power to take and are in accordance with international law to secure to the rights guaranteed by the European Convention in respect of territory that is temporarily subject to a local authority sustained by rebel forces or by another State.<sup>23</sup>
70. On the other hand, it is possible that the various terms used might be regarded by the European Court as insufficiently precise to comply with the requirement of Article 7 of the European Convention that offences be clearly defined by law, even taking into account its view that
- in any system of law, however clearly drafted a legal provision, including a criminal law provision, may be, there is an inevitable element of judicial interpretation.<sup>24</sup>
71. In particular, this might be the view taken of

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<sup>23</sup> See, e.g., *Ilașcu and Others v. Moldova and Russia* [GC], no. 48787/99, 8 July 2004, at paras. 332-335.

<sup>24</sup> *Ashlarba v. Georgia*, no. 45554/08, 15 July 2014.

representatives of irregular illegal armed groups, armed gangs and mercenary groups set up, subordinated, managed and financed by the Russian Federation.

72. However, it may be more likely that it will simply be difficult to secure convictions because of the multitude of factors that will need to be established in cases where torture is alleged to have been committed.

73. Moreover, it is doubtful whether such a convoluted provision is really necessary.

74. Certainly, the view of the United Kingdom's Supreme Court, taking into account the views of the UN Committee against Torture, is that the words "other person acting in an official capacity" in the phrase "public official or other person acting in an official capacity" can be interpreted to include members of armed groups which exercise governmental control over civilian population in a territory over which they control.<sup>25</sup>

75. In taking this view, particular significance was attached to the purpose of the UN Convention

in seeking to establish a regime for the international regulation of "official" torture as opposed to private acts of individuals.<sup>26</sup>

76. More specifically, it was stated that a "person acting in an official capacity"

includes a person who acts or purports to act, otherwise than in a private and individual capacity, for or on behalf of an organisation or body which exercises, in the territory controlled by that organisation or body and in which the relevant conduct occurs, functions normally exercised by governments over their civilian populations. Furthermore, it covers any such person whether acting in peace time or in a situation of armed conflict.<sup>27</sup>

77. Such an interpretation thus makes it clear that members of non-State armed groups can be prosecuted for acts amounting to torture by reference to the formulation found in the UN Convention.

78. In making this ruling, the Supreme Court was applying Section 134 of the Criminal Justice Act 1988, which was enacted to give effect to the offence required by the UN Convention.

79. In holding that this provision could be invoked in respect of alleged torture involving an armed group, the National Patriotic Front of Liberia, it was significant that Section 134 applied to an official or other person "whatever his nationality" and the conduct occurred "in the United Kingdom or elsewhere".<sup>28</sup>

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<sup>25</sup> See *R. v. Reeves Taylor (Appellant)*, [2019] UKSC 51; 13 November 2019; <https://www.supremecourt.uk/cases/docs/uksc-2019-0028-judgment.pdf>, at para. 76. The Supreme Court distinguished these kinds of groups from armed groups whose activities are 'purely military'.

<sup>26</sup> *Ibid.*

<sup>27</sup> *Ibid.*

<sup>28</sup> Thus Section 134(1) provides that: "A public official or person acting in an official capacity, whatever his nationality, commits the offence of torture if in the United Kingdom or elsewhere he intentionally inflicts severe pain or suffering on another in the performance or purported performance of his official duties. (2) A person not falling within subsection (1) above commits the offence of torture, whatever his nationality, if - (a) in the United Kingdom or elsewhere he intentionally inflicts severe pain or suffering on another at the instigation or with the

80. This formulation – which extends the offence to foreign officials as much as non-State actors – also meets the obligation under Article 5 of the UN Convention to exercise criminal responsibility in some instances where the torture occurred other than in the State itself.<sup>29</sup>
81. *Adopting a formulation such as that seen in the United Kingdom offence would not only simplify the proposed offence in Article 127.3, insofar as it is concerned with the commission of torture by non-State actors or foreign officials, but it would also ensure that Ukraine fulfilled its obligation under Article 5.*

### ***iii. The offence of forced disappearance***

82. The only change proposed for this offence would be the deletion of the two Notes currently attached to Article 146<sup>1</sup> as a consequence of them becoming Notes 1 and 2 to the offence in Article 127.3 and thus ceasing to be required.
83. It would not be appropriate to leave this deletion in place if the proposal as to the reformulation of Article 127.3 is adopted as the reference in part 1 of Article 146<sup>1</sup> would then have no explanation for the phrase “by a state agent, including a foreign state”.
84. Nonetheless, retaining this phrase does not seem appropriate as it is subject to same shortcomings discussed in relation to the offence under Article 127.3.
85. *However, the substitution of the phrase “by a state agent, including a foreign state” with “by a public official or person acting in an official capacity, whatever his nationality or State” would be sufficient to achieve the coverage intended by the offence in Article 146<sup>1</sup> without the shortcomings of the existing formulation.*

## **C. CONCLUSION**

86. The adoption of the Draft Law would bring some improvement to the current arrangements regarding criminal liability for torture. In particular, it would preclude the application of limitation periods to the torture offences in Article 127 and would more

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consent or acquiescence - (i) of a public official; or (ii) of a person acting in an official capacity; and (b) the official or other person is performing or purporting to perform his official duties when he instigates the commission of the offence or consents to or acquiesces in it”.

<sup>29</sup> “1. Each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences referred to in article 4 in the following cases: (a) When the offences are committed in any territory under its jurisdiction or on board a ship or aircraft registered in that State; (b) When the alleged offender is a national of that State; (c) When the victim is a national of that State if that State considers it appropriate. 2. Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over such offences in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite him pursuant to article 8 to any of the States mentioned in paragraph I of this article. 3. This Convention does not exclude any criminal jurisdiction exercised in accordance with internal law.

closely align the understanding of torture with the definition in Article 1.1 of the UN Convention.

87. However, there are a number of shortcomings in the proposed amendments as regards compliance with European standards.
88. In the first place, the preclusion of the applicability of limitation periods is not extended to the other forms of ill-treatment proscribed by Article 3 of the European Convention.
89. Secondly, there is a need to remedy the omission relating to coercion and discrimination from the formulation of the offence proposed in Article 127.1.
90. Thirdly, there is a need to ensure that there is some internal consistency between the approach to the proposed penalties for the offences under Article 127.1 and 127.2 and those for other offences in the Criminal Code that could be invoked for essentially the same conduct.
91. Fourthly, the definition of state agent is insufficient to capture all treatment 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”.
92. Finally, the definition of foreign state agent is unnecessarily complex and potentially imprecise and could be simplified without any adverse impact on the objective being pursued.