

MONGOLIA

COMMENTS AND
RECOMMENDATIONS ON
THE DRAFT CRIMINAL CODE
OF MONGOLIA

AMNESTY
INTERNATIONAL



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4 Mongolia
Comments and recommendations on the draft criminal code

MONGOLIA: COMMENTS AND RECOMMENDATIONS ON THE DRAFT CRIMINAL CODE OF MONGOLIA

“Amnesty International calls on parliamentarians to abolish the death penalty and safeguard against impunity for crimes under international law.”

In this paper Amnesty International reviews the “draft of the Assorted Criminal Code of Mongolia” (draft Code) and provides comments and recommendations for amendments.¹

Despite some positive elements, Amnesty International is dismayed that the draft Code retains the death penalty for some crimes and concerned that it fails to implement Mongolia’s obligations to ensure that its national courts can investigate and prosecute human rights violations that amount to crimes under international law: genocide, crimes against humanity, war crimes, torture, extrajudicial executions and enforced disappearances.

The organization is also disappointed that Mongolia, a strong supporter of the establishment of the International Criminal Court and one of the first 60 states parties to the Rome Statute of the International Criminal Court (Rome Statute), has not yet implemented its obligations under that treaty to cooperate with the International Criminal Court seven years after ratifying it. The organization urges Mongolia to implement its cooperation obligations as a matter of the utmost priority so that it cannot become a safe haven for fugitives from international justice being

¹ As an English version of the draft had not been issued at the time of writing, Amnesty International has relied on unofficial translations and advice of national legal experts. Unofficial translations of key sections of the draft Code are included in footnotes for reference purposes.

sought by the International Criminal Court. To ensure that Mongolia can implement its cooperation obligations effectively, it should also ratify the Agreement on the Privileges and Immunities of the International Criminal Court (APIC).

In this paper, Amnesty International identifies flaws in the draft Code and makes recommendations for parliamentarians to make amendments before the Code is enacted.

I. POSITIVE ASPECTS OF THE DRAFT

There are positive aspects of the draft Code that Amnesty International wishes to recognize. Firstly, the draft Code excludes the death penalty for crimes of terrorism, genocide, rape, banditry and sabotage, which are subject to the penalty under the current criminal code. Secondly, the draft Code includes a chapter on *security of mankind and peace* which includes the crime of genocide. Thirdly, the draft Code excludes some common national obstacles to justice for human rights violations. In particular, a provision guaranteeing the *principle of equality before the law and court* excludes immunities as a protection from all criminal conduct.² The draft Code also prohibits the application of statutes of limitations for certain crimes in the chapter on *security of mankind and peace*, including genocide.³

II. FAILURE TO ABOLISH THE DEATH PENALTY

Despite the exclusion of the death penalty for some offences currently subject to the penalty, Amnesty International is dismayed that the draft Code does not prohibit the death penalty for all offences. Under the draft Code, courts that convict persons of two crimes (1) premeditated murder and (2) assassination of a state or public figure can still sentence a person to death by shooting. This contradicts the important inclusion in section 7 of the draft Code setting out the principle of humanity which prohibits cruel, inhuman and degrading punishments.⁴

Amnesty International opposes the death penalty in all cases without exception regardless of the nature of the crime, the characteristics of the offender, or the

² Section 5 (1) states: "A culprit whose guilt has been established by court shall be subject to criminal liability irrespective of his or her ethnic origin, language, race, age, sex, social origin and status, property, official position, occupation, religion, opinion, belief and education."

³ Section 71 (5) states: "Limitation shall not apply to the cases of committing crimes against the security of mankind and peace specified in the articles as 326, 329, 330, 331."

⁴ Section 7 states: "Punishment and measures of coercion to be imposed to a person who committed a crime may not have the purpose of inhumane, cruel treatment or degrading his/her honor and dignity."

method used by the state to kill the prisoner. The punishment is the ultimate denial of human rights. It is a cruel, inhuman and degrading punishment that violates the right to life recognized in the Universal Declaration of Human Rights. To date more than two-thirds of countries in the world have abolished the death penalty in law or practice.⁵

On 18 December 2007, the United Nations General Assembly adopted resolution 62/149 calling for a worldwide moratorium on executions. The resolution was adopted by an overwhelming majority of 104 UN member states in favour, 54 countries against and 29 abstentions. On 18 December 2008, the United Nations General Assembly adopted a second resolution calling for a moratorium on the use of the death penalty. 106 countries voted in favour of the draft resolution, 46 voted against and 34 abstained. The increased support for this resolution is yet further evidence of the worldwide trend towards the abolition of the death penalty.

Recommendation 1: Amnesty International calls on parliamentarians to amend the draft Code to abolish the death penalty in Mongolia for all crimes.

III. FAILURE TO INCLUDE SAFEGUARDS AGAINST IMPUNITY FOR HUMAN RIGHTS VIOLATIONS

In recent years, Mongolia has made important commitment to end impunity for human rights violations which amount to crimes under international law:

- On 24 January 2002, Mongolia ratified the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.
- On 11 April 2002, Mongolia ratified the Rome Statute, which provides that national courts have the primary obligation to investigate and prosecute crimes of genocide, crimes against humanity and war crimes.
- On 6 February 2007, Mongolia signed the International Convention for the Protection of All Persons from Enforced Disappearance

Mongolia is also a state party to the 1948 Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention), the 1949 Geneva Conventions and its two Additional Protocols of 1977.

Having ratified these treaties, Mongolia has an obligation to include crimes of genocide, crimes against humanity, war crimes, torture and enforced disappearances - defined in accordance with the strictest requirements of

⁵ For more information see: <http://www.amnesty.org/en/death-penalty/abolitionist-and-retentionist-countries>

international law - as crimes under national law and to ensure that they can be effectively investigated and prosecuted by national courts. In addition, although there is no specific convention on extrajudicial executions, Mongolia should include this crime in national law in accordance with the United Nations Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions.⁶

(I) OMISSION OF CRIMES UNDER INTERNATIONAL LAW FROM THE DRAFT CODE

Amnesty International is disappointed that, despite Mongolia's strong commitments by ratifying key treaties aimed at ending impunity, the draft Code only includes the crime of genocide and not other crimes under international law.

The definition of genocide in the draft Code is also not consistent with the definition in the Genocide Convention and the Rome Statute. In particular: the prohibited act of "[c]ausing serious bodily or mental harm to members of the group" is not adequately reflected in section 330 of the draft Code, which could be interpreted as only applying to acts causing bodily and not mental harm.⁷ Furthermore, the ancillary crime of "direct and public incitement to commit genocide" is not included in the draft Code.

⁶ Principle 1 provides:

"Governments shall prohibit by law all extra-legal, arbitrary and summary executions and shall ensure that any such executions are recognized as offences under their criminal laws, and are punishable by appropriate penalties which take into account the seriousness of such offences. Exceptional circumstances including a state of war or threat of war, internal political instability or any other public emergency may not be invoked as a justification of such executions. Such executions shall not be carried out under any circumstances including, but not limited to, situations of internal armed conflict, excessive or illegal use of force by a public official or other person acting in an official capacity or by a person acting at the instigation, or with the consent or acquiescence of such person, and situations in which deaths occur in custody. This prohibition shall prevail over decrees issued by governmental authority."

Recommended by Economic and Social Council Res. 1989/65, 24 May 1989, and welcomed in General Assembly Res. 44/159, 15 December 1989.

⁷ Section 330 (1) of the draft Code states:

"Any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: killing of members of the group; causing grave injuries to the health to members of the group [emphasis added]; imposing measures intended to prevent births within the group; forcibly transferring or deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part shall be punishable by imprisonment for a term of 12 to 20 years or the life imprisonment."

Amnesty International is particularly concerned that torture is not expressly defined as a crime in the draft Code in accordance with the definition in the Convention against Torture. In the organization's 2008 Annual Report, Amnesty International reports that "torture and other ill-treatment appeared to be prevalent in police stations, prisons and detention centres."⁸ Furthermore, the report identified "a lack of awareness among prosecutors, lawyers and the judiciary of international standards relating to the prohibition of torture." Section 112 of the draft Code defines the crime of "degrading treatment." Although the section recognizes torture as a potential element of the crime, torture itself is not defined in the draft Code as a specific crime. A commentary to section 112 defines torture for the purposes of that section as "coerc[ing] the person to obtain the testimony or any acts against their aspiration and causing bodily or moral harm according to the purpose of punishment or other purpose." This definition is significantly narrower than the definition in the Convention against Torture. For example, it appears to exclude acts of severe pain or suffering committed "for any reason based on discrimination of any kind." It also fails to define the responsibility of public officials. The Convention's definition expressly allocates criminal responsibility for pain or suffering "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."

Recommendation 2: Amnesty International calls on parliamentarians to amend the draft Code, ensuring that national courts can investigate and prosecute all crimes under international law.

In particular:

Genocide: Section 330(1) should be amended to prohibit expressly "[c]ausing serious bodily or mental harm to members of the group" and to include direct and public incitement to commit genocide as a crime in the Code.

Crimes against humanity: Should be included as crimes in the draft Code. The definition should be consistent with the definition of crimes against humanity in Article 7 of the Rome Statute.

War Crimes: The draft Code should include all war crimes. The definition of the crimes should be consistent with the definition of war crimes in Article 8 of the Rome Statute and other conventional and customary international law. The Rome Statute does not criminalize all war crimes in the Geneva Conventions and its Protocols, or other conventional or customary international law, which should also be incorporated into Mongolian criminal law. In particular, unjustified delays in repatriating or freeing prisoners of war or interned civilians once active hostilities have ceased has been defined as a "grave breach" and, thus, a war crime under the provisions of Article 85 (4) (b) of Protocol I. Similarly, the prohibition of an attack

⁸ <http://www.amnesty.org/en/region/mongolia/report-2008>

on demilitarized zones, is not expressly defined as a crime in the Rome Statute, but such conduct is prohibited in Article 85 (3) (d) of Protocol I.

Torture: Should be included as a specific crime in the draft Code. The definition should be consistent with Article 1 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.⁹

Enforced Disappearance: Should be included as a crime in the draft Code. The definition should be consistent with Article 2 of the International Convention for the Protection of All Persons from Enforced Disappearance (Disappearances Convention), but it should apply also, as in the Rome Statute, to individuals not associated with the state in anyway.¹⁰

Extrajudicial executions: Should be included as a crime in the draft Code. The definition should be consistent with the Principle 1 of the United Nations Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions.¹¹

(II) THE LIMITED SCOPE OF UNIVERSAL JURISDICTION OVER CRIMES UNDER INTERNATIONAL LAW.

Section 12 of the draft Code largely re-enacts provisions in the 1961 Criminal Code, which provides Mongolian courts with powers to exercise universal jurisdiction

⁹ Paragraph 1 of Article 1 of the Convention against Torture states:

““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.”

¹⁰ Article 2 of the Disappearances Convention states:

““enforced disappearance” is considered to be the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law.”

¹¹ See footnote 6.

Recommended by Economic and Social Council Res. 1989/65, 24 May 1989, and welcomed in General Assembly Res. 44/159, 15 December 1989.

over crimes committed outside Mongolia, but, as in that Criminal Code, only in two limited situations and subject to inappropriate restrictions.¹²

First, Section 12 (1) provides for universal jurisdiction over stateless persons permanently residing in Mongolia.¹³

Second, Section 12 (3) of the draft Code provides that Mongolian courts can exercise jurisdiction over crimes committed by foreigners only if “an international agreement to which Mongolia is a party provides so.”¹⁴ Although some treaties

¹² These provisions are supplemented by two constitutional provisions, which may reinforce the legislation or be independent sources of universal jurisdiction. Firstly, Article 10 (3) of the 1992 Constitution provides: ‘

“The international treaties to which Mongolia is a Party, become effective as domestic legislation upon the entry into force of the laws on their ratification or accession.”

Secondly, Art. 10 (1) states: “Mongolia adheres to the universally recognized norms and principles of international law . . .” indicating that it may be possible for Mongolia to exercise of universal jurisdiction based on customary international law or general principles of law.

¹³ Section 12 (1) of the draft Code states:

“If a citizen of Mongolia or a stateless person permanently residing in Mongolia has committed a crime specified in this Code abroad and he or she has not been sentenced for it, he or she shall be subject to criminal liability under this Code.”

Thus, it is more restrictive than paragraph b of Article 3 (Limits of the Effects of the Present Code) of the 1961 Criminal Code, which provides:

“ . . . stateless persons in the Mongolian People's Republic who have committed crimes beyond the limits of the People's Republic shall, in the event they are detained on the territory of the MPR, be subject to criminal responsibility and punishment according to the present Code.”

Criminal Code of the Mongolian People's Republic of 1961, as amended through 1975, and reprinted in William E. Butler, *The Mongolian Legal System: Contemporary Legislation and Documentation* (The Hague/Boston/London: Martinus Nijhoff Publishers 1982), Art. 3 (b). That provision does not require that the stateless person be permanently resident in Mongolia for a Mongolian court to exercise jurisdiction.

¹⁴ Section 12 (3) of the draft Code provides:

“Foreign nationals and stateless persons who have committed crimes beyond the territory of Mongolia shall be subject to criminal liability under this Code if only an international agreement to which Mongolia is a party provides so. If a foreign national or a stateless person who does not permanently reside in Mongolia has committed a crime against the interests of

covering crimes under international law - such as the Convention against Torture which expressly provides that states parties have an obligation to extradite persons suspected of certain crimes listed in the treaty or to submit the cases to the competent authorities for the purpose of prosecution - not all crimes under international law are incorporated in specific treaties with such “extradite or prosecute” provisions. For example, crimes against humanity are included in the Rome Statute and genocide in the 1948 Genocide Convention, but neither treaty has an “extradite or prosecute” clause. Limiting Mongolia’s exercise of such jurisdiction to international agreements, does not take into account the strong body of customary international law that permits, and in some cases requires, every state to enact and implement legislation providing for universal jurisdiction over all crimes under international law.¹⁵ Mongolia should strengthen its current legislation to ensure that it cannot become a safe haven for persons accused of these horrific crimes.

Recommendation 3: Amnesty International calls on parliamentarians to amend the draft Code to expand the scope of Section 12 to authorize Mongolian courts to exercise universal jurisdiction over any person suspected of genocide, crimes against humanity, war crimes, torture, extrajudicial executions and enforced disappearances, regardless of rank and regardless when or where the crimes were committed. The provisions should be without inappropriate obstacles, such as a requirement that the suspect had to have been present in Mongolia at some point before an investigation can be opened or an extradition request issued.

(III) THE INABILITY OF MONGOLIAN COURTS TO EXERCISE JURISDICTION OVER CRIMES UNDER INTERNATIONAL LAW REGARDLESS OF WHEN THEY WERE COMMITTED

Amnesty International is concerned that sections 9 and 10 of the draft Code would prohibit investigations and prosecutions of genocide, crimes against humanity, war crimes, torture, extrajudicial executions and enforced disappearances which occurred before the enactment of the Code.¹⁶ Although the principle of legality

Mongolia beyond its territory for which he or she has not been sentenced, he or she may be subjected to criminal liability under this Code in the events specified in an international agreement to which Mongolia is a party.”

¹⁵ See: Amnesty International, Universal Jurisdiction: The duty of states to enact and implement legislation (AI Index: IOR 53/002-018/2001).

¹⁶ Section 9 (1) of the draft Code states:

“Criminality of and criminal liability for a socially dangerous acts (omissions) shall be determined according to the Criminal Code in force at the time of committing them.”

In addition, Section 10 of the draft Code also provides:

usually requires that persons cannot be prosecuted for crimes before they are criminalized, these crimes have been considered crimes under international law under general principles of law recognized by the international community for decades. Article 15(2) of the International Covenant on Civil and Political Rights (ICCPR) makes clear that nothing in the article prohibiting retroactive punishment “shall prejudice the trial and punishment of any person for any act or omission which, at the time it was committed, was criminal according to the general principles of law recognized by the community of nations.”

Recommendation 4: Amnesty International calls on parliamentarians to amend the draft Code to ensure that Mongolian courts have criminal jurisdiction over genocide, crimes against humanity, war crimes, torture, extrajudicial executions and enforced disappearances no matter when they were committed.

(IV) THE FAILURE TO PROVIDE FOR COMMAND AND SUPERIOR RESPONSIBILITY FOR CRIMES UNDER INTERNATIONAL LAW

The draft Code contains no provisions on the responsibility of military commanders and persons effectively acting as military commanders and civilian superiors, who in many cases are instrumental in the commission of crimes under international law.¹⁷ Amnesty International is concerned that this omission in the draft Code could result in impunity in some situations as the provisions on culpability in section 4 (1) do not appear to attach responsibility to commanders and superiors that knew or should have known that crimes by their subordinates are being committed and fail to take effective measures to prevent or punish them.¹⁸ The need for a specific

“(1) A law decriminalizing an act (omission) or mitigating the penalty for it, improving the legal status of the person who commits the crime shall apply retroactively to an accused, defendant or the person who has served the penalty but whose conviction has not been expunged.

“(2) A law criminalizing an act (omission) or toughening the penalty for it, worsening the legal status of the person who committed crime shall not apply retroactively to an accused, defendant or the person who has served the penalty but whose conviction has not been expunged.”

¹⁷ For the scope of command and superior responsibility, see Amnesty International, The international criminal court: Making the right choices – Part I (AI Index: IOR 40/001/1997), as well as the organization’s amicus curiae brief submitted in Prosecutor v. Jean-Pierre Bemba Gombo in the International Criminal Court, Amicus curiae observations on superior responsibility submitted pursuant to Rule 103 of the Rules of Procedure and Evidence, ICC-01/05-01/08, 20 April 2009, available at: <http://www.icc-cpi.int/iccdocs/doc/doc669669.pdf>

¹⁸ Article 4 (1) of the draft Code states: “Criminal liability shall be subjected on the persons whose acts (omissions) that represent danger to the society have been established by court.”

standard for commanders and superiors is reflected in numerous international instruments¹⁹ and most states parties to the Rome Statute have enacted such provisions in their implementation laws. It is also a requirement for Mongolia to implement these provisions into national law under Protocol I to the Geneva Conventions.

Recommendation 5: Amnesty International calls on parliamentarians to amend the draft Code by adding specific provisions on command and superior responsibility. The provisions should contain the following elements:

- ***equal application of the provision to military commanders and civilian superiors;***
- ***the commander or superior knew or should have known that the subordinate was committing or was about to commit a crime;***
- ***the commander or superior failed to take all feasible measures (stronger than all reasonable measures) within the power of the commander or superior; and***
- ***the commander or superior failed to prevent or punish the subordinate.***

(V) THE ABSENCE OF A PROHIBITION OF THE DEFENCE OF SUPERIOR ORDERS FOR CRIMES UNDER INTERNATIONAL LAW.

Amnesty International is concerned that section 42 of the draft Code could be used as a complete defence for persons claiming that they committed genocide, crimes against humanity, war crimes, torture, extrajudicial executions and enforced disappearances because they were ordered by a superior to do so.²⁰ It should not be possible for persons accused of such grave crimes under international law to argue that they did not know such an order was illegal. Customary international law, as

¹⁹ See, for example: Article 86 (2) of Protocol I of 1977 to the Geneva Conventions, Article 6 of the 1996 Draft Code of Crimes against the Peace and Security of Mankind, Article 7(3) of the 1993 Statute of the International Criminal Tribunal for the former Yugoslavia, Article 6(3) of the 1994 Statute of the International Criminal Tribunal for Rwanda and Article 6(3) of the Statute of the Special Court for Sierra Leone.

²⁰ Section 42 of the draft Code states:

“(1) Causing harm to the rights and interests protected by this Code in the course of fulfilling mandatory orders or decrees shall not constitute a crime. The person giving an illegal order or decree shall be subject to criminal liability for the harm caused.

(2) A person causing harm to others’ rights and interests protected by this Code by fulfilling a knowingly illegal order or decree shall be subject to criminal liability. A person who fails to fulfill a knowingly illegal order or decree shall not be subject to criminal liability.”

reflected in Article 8 of the Nuremberg Charter, precludes a defence of superior orders:

‘[t]he fact that the Defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment, if the Tribunal determines that justice so requires.’

The Statutes of the International Criminal Tribunals for the Former Yugoslavia and Rwanda and the Special Court for Sierra Leone contain the same rule.

Recommendation 6: Amnesty International calls on parliamentarians to amend the draft Code to provide that superior orders can never be a defence for genocide, crimes against humanity, war crimes, torture, extrajudicial executions and enforced disappearances.

(VI) THE FAILURE TO PROHIBIT STATUTES OF LIMITATIONS FOR CRIMES UNDER INTERNATIONAL LAW

Amnesty International welcomes that section 71(5) of the draft Code, prohibits statutes of limitations for the crime of genocide, as well as other crimes included in the chapter on *security of mankind and peace*, including genocide.²¹ This is consistent with international law, as reflected in Article 29 of the Rome Statute, which provides that “[t]he crimes within the jurisdiction of the court shall not be subject to any statute of limitations.” It is also consistent with the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, which Mongolia has ratified.

Recommendation 7: In addition to including crimes against humanity, war crimes, torture, extrajudicial killings and enforced disappearances in the draft Code, section 71(5) should also be amended to exclude statutes of limitations for these crimes under international law.

²¹ See footnote 3.

CONCLUSIONS

Amnesty International's analysis of the draft Code has identified a number of flaws which must be addressed by parliament through amendments before the draft Code is enacted. Parliamentarians wishing to discuss these recommendations in more detail should contact Amnesty International Mongolia:

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SUMMARY OF AMNESTY INTERNATIONAL'S RECOMMENDATIONS

Amnesty International calls on parliamentarians to amend the draft Code:

1. to abolish the death penalty in Mongolia for all crimes.
2. to ensure that national courts can investigate and prosecute all crimes under international law, in particular : genocide, crimes against humanity, war crimes, torture, extrajudicial executions and enforced disappearances.
3. to expand the scope of section 12 to authorize Mongolian courts to exercise universal jurisdiction over any person suspected of genocide, crimes against humanity, war crimes, torture, extrajudicial executions and enforced disappearances,
4. to ensure that Mongolian courts have criminal jurisdiction over genocide, crimes against humanity, war crimes, torture, extrajudicial executions and enforced disappearances no matter when they were committed.
5. to add specific provisions on command and superior responsibility.
6. to provide that superior orders can never be a defence for genocide, crimes against humanity, war crimes, torture, extrajudicial executions and enforced disappearances.
7. to exclude statutes of limitations for genocide, crimes against humanity, war crimes, torture, extrajudicial executions and enforced disappearances.

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