

Mandate of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment

REFERENCE:
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23 November 2016

Excellency,

I have the honour to address you in my capacity as Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, pursuant to Human Rights Council resolution 25/13.

In this connection, I would like to bring to the attention of your Excellency's Government information I have received concerning **the recent case law of the U.S. Supreme Court, which may be seriously undermining the absolute and unconditional nature of the prohibition of torture and cruel, inhumane or degrading treatment.**

According to the information received:

In a series of cases dealing with the permissibility of the death penalty through lethal injection (most notably *Glossip v Gross*, 2015), the U.S. Supreme Court held that any death row inmate challenging the method planned for his execution under the constitutional prohibition of cruel punishment must prove the availability of an alternative method of execution involving a substantially lower risk of severe pain. If the convict fails to do so, for example because no other method is permitted by the law of the relevant State, the Court does not seem to be prepared to consider whether the planned method - in and of itself - falls foul of the prohibition of torture and cruel punishment.

Contrary to the absolute nature of the prohibition, the U.S. Supreme Court seems to apply a relative standard based on the availability of less cruel alternatives. This interpretation begins to be confirmed by various State Courts and represents a severe blow to universal efforts of eradicating all forms of torture and inhuman treatment.

A case in point is that of Mr. Thomas Arthur, 74, who was convicted for murder in Alabama in 1982 and scheduled to die by lethal injection on 4 November 2016 (See case UA USA 13/2016). In his appeals before State Courts, Mr. Arthur reportedly offered medical evidence that Alabama's three-drug lethal injection protocol may have "torturous effects" due to the use of a sedative pharmacologically incapable of holding a convict unconscious in the presence of the excruciating pain likely to be induced by the other drugs injected during his execution. The judges never considered the potential cruelty of the planned method of execution, however, because they determined that the alternative

methods proposed by Mr. Arthur (essentially by firing squad or the use of a different drug), were not permitted or not available in the State of Alabama.

Only hours before his scheduled lethal injection, Mr. Arthur's execution was stayed by the U.S. Supreme Court - for the seventh time in his 34 years on death row. The stay will remain in place until the Supreme Court decides whether or not to consider the case.

Serious concern are expressed that, as a matter of principle and thus irrespective of the ultimate justification of any individual case, the recent jurisprudence by the U.S. Supreme Court and the interpretation thereof by State courts seem to seriously undermine the absoluteness of the prohibition of torture and cruel, inhumane and degrading treatment.

In view of the importance and urgency of the matter, which seems to be currently under consideration by the U.S. Supreme Court, I urge your Excellency's Government to call upon the Court to unequivocally clarify its case law so as to reaffirm the absolute and unconditional nature of the prohibition of torture and other cruel, inhuman or degrading treatment or punishment.

In this context, we wish to remind your Excellency's Government of the of **absolute and non-derogable prohibition of torture and other cruel, inhuman or degrading treatment or punishment**, which is recognized as an international norm of *jus cogens*, and has been codified, inter alia, in the **Convention against Torture** and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), which the United States ratified in 1994, as well as in article 7 of the International Covenant on Civil and Political Rights (ICCPR) which the United States ratified in 1992.

The duty to ensure that penal sanctions do not violate this prohibition is absolute and cannot be conditioned on the ability or willingness of the convict to propose alternative methods for his own execution. Forcing convicts to do so as a procedural precondition for escaping potential torture or cruelty not only contradicts the fundamental concept of State responsibility, but amounts to treatment that can only be regarded as inhumane and degrading.

Finally, I would like to recall that, according to paragraph 4 of General Comment 31 of the Human Rights Committee, the obligations contained in the Covenant are binding on every State as a whole and that all branches of government (executive, legislative and judicial), and other public or governmental authorities, at whatever level - national, regional or local - are in a position to engage the responsibility of the State Party.

As it is my responsibility, under the mandate provided to me by the Human Rights Council, to seek to clarify all cases brought to my attention, I would therefore be grateful for your observations on the following matters:

1. Please provide any additional information and/or comment(s) you may have on the above-mentioned allegations.

The full texts of the human rights instruments and standards recalled above are available on www.ohchr.org or can be provided upon request.

Your Excellency's Government's response will be made available in a report to be presented to the Human Rights Council for its consideration.

Please accept, Excellency, the assurances of my highest consideration.

Nils Melzer
Special Rapporteur on torture and other cruel, inhuman or degrading treatment or
punishment