

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

REFERENCE:
OL GBR 6/2020

15 June 2020

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 34/19.

In this connection, I would like to bring to the attention of your Excellency's Government information I have received concerning the proposed **Overseas Operations (Service Personnel and Veterans) Bill 117 2019-21**, introducing statutes of limitations to the prosecution of offences perpetrated by members of the British armed forces while deployed on overseas operations, including peacekeeping operations and operations dealing with terrorism, civil unrest or serious public disorder, as well as to bring legal claims for personal injuries or deaths.

According to the information received:

On 18 March 2020, the Overseas Operations (Service Personnel and Veterans) Bill was introduced in the House of Commons and given its first reading. A second reading which would include a debate is expected but has not yet been announced.

The explanatory note prepared by the Ministry of Defence states that the proposed legislation aims to provide greater certainty for service personnel and veterans in relation to "vexatious claims", notably by establishing a statutory presumption against prosecution.

Accordingly, once five years have elapsed from the date of an incident, it is to be exceptional for a service person or veteran to be prosecuted for an offence committed during an overseas operation. This presumption applies to any crime, including war crimes and crimes against humanity, the only exception being sexual offences.

The bill also amends section 33 of the Limitation Act (1980) to limit the court's discretion to extend the normal time limit of three years for tort claims to be brought in relation to personal injuries or death occurring in the context of overseas military operations, to specify additional factors to which a court must have regard in exercising that discretion, and to establish an absolute time limit of six years for any such claim to be brought, regardless of any potentially applicable foreign limitation periods.

Further, Section 11 of the bill limits the court's discretion to extend the ordinary limitation period for claims brought in relation to violations of the Human Rights Act (1998) occurring during overseas military operations, and establishes an absolute time limit of six years for any such claim to be brought.

The bill also compels all future governments to consider derogating from the European Convention on Human Rights for the purpose of a specific military operation, notably for the purpose of maintaining operational effectiveness "by, for example, enabling detention where appropriate for imperative reasons of security".

While I do not wish to prejudge the accuracy of this information, serious concern is expressed over the envisaged introduction of a statutory presumption against prosecution, and of very short time limits (statute of limitations) of, respectively, five years for the prosecution of war crimes and crimes against humanity, including torture and other cruel, inhuman or degrading treatment or punishment, and six years for legal claims to be brought by victims seeking redress for death, personal injury and other human rights violations occurring in the context of overseas military operations conducted by the UK. I am deeply concerned that the envisaged legislation will encourage or impose near systematic impunity for torture and other cruel, inhuman or degrading treatment or punishment perpetrated by UK personnel, in clear contradiction to treaty obligations to prevent and prosecute any such abuse, most notably under the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (1984), as well as under the Geneva Conventions (1949) and the ICC Statute (1998), all of which have been ratified by the United Kingdom in December 1988, September 1957 and November 1998 respectively.

It must be emphasized that the prohibition of torture and other ill-treatment is of absolute and non-derogable nature and that, therefore, Governments cannot lawfully grant impunity for such crimes. The prohibition of torture being of peremptory nature, any national legislation undermining it must be regarded as legally void from the outset. Moreover, failure on the part of public authorities to prosecute crimes against humanity and war crimes may incur not only international State responsibility under international humanitarian and human rights law, but also individual criminal liability for the involved officials under the customary doctrine of command and superior responsibility codified in Art. 28 ICC Statute.

In this context, I would like to recall the judgment of the International Tribunal for the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia (ICTY) in *Prosecutor v Anto Furundzija* (1998), stating that "*(t)he value of freedom from torture is so great that it becomes imperative to preclude any national legislation act authorising or condoning torture or at any rate capable of bringing about this effect*" (para 150). *Consequently [...] torture may not be covered by a statute of limitations, and must not be excluded from extradition under any political offence exemption.*" (para 157).

I also wish to draw the attention of your Excellency's Government to the updated Set of Principles for the protection and promotion of human rights through action to combat impunity (E/CN.4/2005/102/Add.7). According to principle 1 *"impunity arises from a failure by States to meet their obligations to investigate violations; to take appropriate measures in respect of the perpetrators, particularly in the area of justice, by ensuring that those suspected of criminal responsibility are prosecuted, tried and duly punished; to provide victims with effective remedies and to ensure that they receive reparation for the injuries suffered; to ensure the inalienable right to know the truth about violations; and to take other necessary steps to prevent a recurrence of violations."* Furthermore, principle 19 places a duty on the state with regards to the administration of justice to ensure that those responsible for serious crimes under international law are prosecuted, tried and duly punished.

The envisaged Overseas Operations Bill is particularly alarming in light of the 2018 report of the Intelligence and Security Committee of the UK Parliament on "Detainee mistreatment and rendition 2001-2010", which corroborated evidence of British Defense personnel involvement in torture and ill-treatment in the context of the US detention and rendition programme, as well as their intentional negligence in investigating complaints on torture and ill-treatment during overseas deployments. Concerns regarding the UK Government's refusal to conduct a judicial inquiry on the aforementioned have been formally communicated in my letter dated 19 August 2019 under reference AL GBR 4/2019, which regretfully has remained without any response on the part of your Excellency's Government. The adoption of the envisaged Overseas Operations Bill would consolidate the impression of a deliberate policy of impunity for the involvement of British officials in torture and ill-treatment, thus further eroding the credibility of the UK's traditional commitment to fundamental norms of international humanitarian law and human rights law.

Beyond the aspect of impunity, I am also concerned that the proposed legislation will deprive victims of torture and ill-treatment of their internationally protected right to redress. The duty of States to bring perpetrators of torture and ill-treatment to justice is an integral part of the victims' right to reparations. Given the absence of a national reparations programme for wartime victims, lawsuits often are the only procedure available to victims in order to obtain redress. The envisaged introduction of statutes of limitation for legal proceedings relating to torture and ill-treatment grossly underestimates the practical risks and difficulties experienced by many victims and survivors in initiating such proceedings and fails to show due consideration for the gravity of the harm and suffering inflicted by torture and ill-treatment. Any such limitation clearly violates the right of victims to remedy provided for in article 8 of the Universal Declaration of Human Rights; article 2 paragraph 3 of the International Covenant on Civil and Political Rights (ICCPR); articles 1, 14 and 16 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; article 39 of the Convention on the Rights of the Child; article 3 of the Hague Convention respecting the Laws and Customs of War on Land of 18 October 1907 (Convention IV); article 91 of the Protocol Additional to the Geneva Conventions of 12 August 1949 relating to the Protection of Victims of International Armed Conflicts (Protocol I) of 8

June 1977; as well as articles 68 and 75 of the Rome Statute of the International Criminal Court to which your Excellency's Government is a party.

Last but not least, if adopted, the proposed bill would be setting an alarming precedent internationally, encouraging many other States to dangerously backslide on their commitment to international law, justice and human dignity, and undermine the ongoing international effort towards eradicating torture and ill-treatment worldwide. For these reasons, I respectfully urge your Excellency's Government to renounce the consideration of this legislation and reaffirm its respect, commitment and compliance with its basic obligations under international humanitarian law, human rights law and international criminal law, all of which are at the very heart and foundation of the international *ordre public*.

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 information presented in this letter.
2. Please explain how the provisions of the bill are in accordance with the United Kingdom's obligations under international law, particularly with regard to the absolute and non-derogable prohibition of torture and other cruel, inhuman or degrading treatment or punishment, the right of victims and their families to redress, and the international legal duty of States and individual officials to prevent and prosecute torture and ill-treatment, including under the universally recognized criminal law doctrine of command and superior responsibility.
3. Please explain whether any analysis and/or consultation have been undertaken with victims and their families to assess the impact of the proposed legislation. I would welcome any document presenting the outcome of such analysis or consultation.

This communication, as a comment on pending or recently adopted legislation, regulations or policies, and any response received from your Excellency's Government will be made public via the communications reporting website within 48 hours. It will also subsequently be made available in the usual report to be presented to the Human Rights Council.

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

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