Liberty's evidence to the Joint Committee on Human Rights on UK legislation relating to genocide, torture and related offences

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About Liberty

Liberty (The National Council for Civil Liberties) is one of the UK's leading civil liberties and human rights organisations. Liberty works to promote human rights and protect civil liberties through a combination of test case litigation, lobbying, campaigning and research.

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Liberty provides policy responses to Government consultations on all issues which have implications for human rights and civil liberties. We also submit evidence to Select Committees, Inquiries and other policy fora, and undertake independent, funded research.

Liberty's policy papers are available at http://www.liberty-human-rights.org.uk/publications/1-policy-papers/index.shtml

Contact

Isabella Sankey
Director of Policy
Direct Line 020 7378 5254
Email: bellas@liberty-human-rights.org.uk

Anita Coles
Policy Officer
Direct Line: 020 7378 3659
Email: anitac@liberty-human-rights.org.uk

Introduction

1. Liberty welcomes the opportunity to respond to the Joint Committee on Human Rights (JCHR) inquiry on UK legislation relating to genocide, torture and war crimes committed abroad and in relation to the Torture (Damages) Bill. There is something of a gap in UK law in relation to some of these crimes as a number of these offences cannot be prosecuted in the UK, despite the fact that under international law the UK has jurisdiction to prosecute. In particular, given the recent allegations and admissions of UK involvement in extraordinary rendition and torture it is timely that there be a review of the UK's laws in relation to torture. The Torture (Damages) Bill is an important proposal that seeks to provide a means by which persons tortured abroad can have access to a civil remedy – a long overdue measure and one which we hope the JCHR will support.

International Legal Framework

2. Customary international law gives States the power to assert criminal law jurisdiction over certain conduct, generally on the basis that the crime occurred on its territory; the crime was committed by or against one of the State's nationals; or the act threatened the State's interests. These are some of the grounds on which the UK has legislated to make it an offence to commit genocide, war crimes or crimes against humanity on UK territory or, outside of the UK, by a UK national.[1] The UK also has treaty obligations to criminalise certain conduct under its domestic law. So, for example, the Torture Convention requires the UK to legislate to make torture an offence and to either prosecute or extradite an alleged offender found in the UK.[2] On this basis the UK has legislated to implement the Genocide Convention[3] and the Geneva Conventions,[4] and to criminalise torture carried out by a public official.[5]

3. One other, and more controversial, basis for jurisdiction is 'universal jurisdiction' which gives a State the power to criminalise certain conduct committed abroad. It is generally accepted that this power extends to the crime of piracy,

[1] See the *International Criminal Court Act 2001*, section 51.
[2] See article 4 and 5(2) of the *Convention Against Torture and Inhuman or Degrading Treatment or Punishment*, 1984.
[3] See the *Genocide Act 1969*, making the act of genocide a criminal offence. This Act was later repealed and replaced by the *International Criminal Court Act 2001*.
[4] See the *Geneva Conventions Act 1957*.
[5] See section 134 of the *Criminal Justice Act 1988*.

slavery, war crimes, crimes against humanity, torture and genocide.[6] It is on this basis that the UK enacted the limited scope of the *War Crimes Act 1991* to enable murder charges to be brought against a person for war crimes committed in German occupied territory during World War II, irrespective of the person's nationality at the time the offences were committed (although they were required to be a UK citizen before they could be prosecuted).[7]

International Criminal Court Act 2001

4. The recent criminalisation of genocide, war crimes and crimes against humanity under the *International Criminal Court Act 2001* (ICCA), makes use of universal jurisdiction to a limited extent as it criminalises conduct committed abroad, despite the fact that at that time there was no link to the UK. However, it only enables that jurisdiction to be enforced once the person is resident in the UK.[8] One of the main drawbacks of this Act is the failure to define who a UK 'resident' is. Does it have the same meaning as that found in immigration legislation, which requires a degree of permanency in the UK? Or should a different definition apply in the criminal context? It does seem clear that it could not apply in order to prosecute a person who was holidaying in the UK. The other problem with the ICCA is that it has no retrospective application, applying only from the date the Act came into force (September 2001). This is despite the fact that all of these offences have been criminal offences under international law from at least World War II. It is a fundamental principle of international criminal law and human rights law that no one can be found guilty of an offence if, at the time it was alleged to have been committed, it was not a criminal offence.[9] This is an extremely important principle which allows for legal certainty and protects people from unfair laws that criminalise conduct retrospectively. However, it was established by the Military Tribunals in

[6] See *Tadic*, IT-94-1, Appeals Chambers, International Court for the Former Yugoslavia, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, at [62], and *Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v Belgium)*, ICJ Rep 2002, per Judge Koroma at [9], Judges Higgins, Kooijmans and Buergenthal at [59]-[65] and Judge Van den Wyngaert at [59]. See also Roger O'Keefe, 'Universal Jurisdiction: Clarifying the Basic Concept' (2004) 2 *Journal of International Criminal Justice* 735.

[7] The reference to nationality was not necessary as a matter of international law. The power to enact this legislation must be based on universal jurisdiction as subsequent acquisition of nationality cannot confer jurisdiction under the nationality principle - if it did this would fall foul of the rule against non-retroactivity, see Roger O'Keefe, 'Universal Jurisdiction: Clarifying the Basic Concept' (2004) 2 *Journal of International Criminal Justice* 735.

[8] See section 68 of the ICCA.

[9] See article 7(1) of the *European Convention of Human Rights* and article 15(1) of the *International Covenant on Civil and Political Rights.*

Nuremberg and Tokyo that certain crimes, have long been criminalised by international law. In subsequent international treaties and decisions it has been established that prosecution for a crime under customary international law does not require the country prosecuting the person to have criminalised such conduct at the time when it was allegedly committed. Therefore, the principle of non-retroactivity under human rights law does not preclude the trial and punishment of a person for an act which, at the time it was committed, was criminal under international law, such as war crimes, genocide, and crimes against humanity.[10] The decision not to make the ICCA crimes retroactive means that a person accused of an offence committed before 2001 can only be prosecuted in the UK if it was a crime under other legislation at that time. So for example, while the *Geneva Conventions Act 1957* criminalises certain grave breaches of the Geneva Conventions and Additional Protocol I to the Conventions, it does not criminalise conduct under Additional Protocol II, which applies to internal armed conflicts. Thus there is a gap in the law in relation to those accused of crimes that took place during an internal armed conflict before 2001. This means, for example, that four Rwandans accused of war crimes and torture during the Rwandan genocide are waiting to be extradited to Rwanda rather than prosecuted in the UK. In addition, it may be that the *Genocide Convention Act 1969* does not apply to those with state immunity, given that it did not incorporate article IV of the *Genocide Convention 1948* which precludes the application of state immunity.[11] Liberty believes that this gap in the law needs to be remedied. As is recognised under the ECHR, certain grave offences do not need the protection of non-retroactivity, as they are by their very nature so obviously criminal.

Section 134 of the Criminal Justice Act 1988: Torture

5. Liberty also has concerns about the current wording of section 134 of the *Criminal Justice Act 1988*, which criminalises torture by public officials. While torture by public officials is made criminal in the first instance, the provision includes a defence if the accused can prove that he or she had 'lawful authority, justification or excuse' for their conduct. This is defined to mean authority under the law of the UK or, in certain circumstances, the law of the country in which the pain or suffering was inflicted. A UK law that authorised torture could never be lawful so it is very unlikely

[10] See article 7(2) of the *European Convention of Human Rights* and article 15(2) of the *International Covenant on Civil and Political Rights*.
[11] See Lord Bingham's decision *in Pinochet v Evans (Metropolitan Stipendiary Magistrate); Ex parte Pinochet* [1998] EWHC Admin 1013 (28th October, 1998). Note the question about the application of the Genocide Convention was not pressed on appeal to the House of Lords.

that this could ever be used as a defence for torture, although there may be room for some doubt in relation to the laws of another country. This provision should be redrafted to align it more closely with the provision in the Torture Convention which provides that the prohibition does not apply to pain or suffering arising only from, inherent in or incidental to lawful sanctions.[12]

Investigation and prosecution of offences

6. As already stated, the current legal framework has a number of gaps in it which could result in perpetrators of some of the most heinous offences not being brought to justice in the UK. Non UK citizens or residents, however defined, are not covered by the ICCA and even in relation to citizens/residents, if the crimes were committed before 2001 the offenders may not be able to be prosecuted. The only alternative in such situations is to extradite suspects to an appropriate country to face trial, but this depends on another country seeking their extradition and showing that fair trial standards can be met.[13] In very rare cases such a person may be surrendered to the International Criminal Court (ICC). However, the ICC suffers from the same problem that it has no retroactivity and there are a number of other procedural and legal hurdles that mean this option will not generally be available. In the absence of applicable alternatives persons who are suspected of committing heinous offences may well be able to continue to holiday or reside in the UK. The government should look to amend the law to close the gaps and not wait until a situation arises where it is unable to prosecute or extradite suspected war criminals or torturers.

7. While it is important to close this gap in the law, the current issue of most concern in this area is the adequacy of UK law in respect of domestic prosecutions for crimes of torture. The UK government has, after initially and consistently denying it, admitted UK territory has been used for flights illegally transporting detainees to

[12] Article 1(1) of the Torture Convention.
[13] Following the enactment of the *Extradition Act 2003*, current extradition arrangements for extradition from the UK leave much to be desired. Liberty believes that the decision about the country in which a person should be tried should be informed by human rights considerations to recognise the serious impact which extradition has on those concerned and their families. We believe that before a person is extradited to any country (including another EU country) a basic case should be demonstrated by the requesting country and considered in UK courts; a person should not be extradited where it would not be in the interests of justice to do so, and where extradition would constitute a disproportionate interference with the individual's human rights. The following factors would indicate whether extradition would be disproportionate or contrary to the interests of justice: (i) where the individual lives; (ii) where the offence was committed; (iii) where the victims are; and (iv) where the evidence is located.

locations where they faced torture and inhuman and degrading treatment.[14] It has also now admitted to having handed over detainees within the UK's jurisdiction to US officials who were then unlawfully rendered to Afghanistan where torture routinely takes place.[15] The government has also sought to suppress information regarding involvement of UK and US authorities in extraordinary rendition and torture.[16] This led to the High Court rule that an earlier redacted judgment containing details regarding the action of UK and US officials could not be made public despite "*the requirements of open justice, the rule of law and democratic accountability demonstrate the very considerable public interest in making the [information] public*". Most worryingly, evidence has recently come to light that implicates UK officials in providing intelligence to the US that has been used in interrogating detainees alongside torture. The High Court in 2008[17] found that the UK Security Services facilitated interviews by or on behalf of the United States when Mr Binyam Mohamed was being detained by the United States incommunicado and without access to a lawyer, and continued to do so in the knowledge of what had been reported to them in relation to the conditions of his detention and treatment. The court found that "*the relationship of the United Kingdom Government to the United States authorities in connection with BM was far beyond that of a bystander or witness to* the *alleged wrongdoing*".[18] In October last year the government stated it had referred this matter to the Attorney-General to investigate whether it should be referred to the police for a criminal investigation. After a five month delay in which the Attorney-General considered this matter this has finally been referred to the police for investigation. Given there was already an allegation of a criminal offence (of torture) these allegations should have been, in the first instance, investigated by the police.

8. It is clear that there are many questions that need to be answered in relation to the UK's involvement in extraordinary rendition and possible complicity or

[14] See the statement by Foreign Minister David Miliband in the House of Commons on 21 February 2008 about the use of airfields on Diego Garcia.
[15] See the admission by Defence Secretary John Hutton in the House of Commons on 26 February 2009.
[16] See *R (on application of Binyam Mohamed) v Secretary of State for Foreign and Commonwealth Affairs* [2009] EWHC 152 (Admin),4 February 2009 at [54]..
[17] In *R (on application of Binyam Mohamed) v Secretary of State for Foreign and Commonwealth Affairs* [2008] EWHC 2048.
[18] Ibid at [88]. See also the cases of Mr Bisher Al-Rawi and Jamil El-Banna in which it is alleged that UK authorities actually provided information to US and Gambian authorities that directly led to their arrest and later extraordinary rendition to Afghanistan where they were tortured, and then to Guantanamo Bay: see Amnesty International report, *State of Denial: Europe's Role in Rendition and Secret Detention*, June 2008, pages 71-73, available at: http://www.amnesty.org/en/library/info/EUR01/003/2008/en

encouragement in torture. This can only be done by a full independent and public inquiry that can properly examine these issues in the public interest and as part of the UK's obligations under the Convention Against Torture. It is likely that there will need to be criminal investigations into official involvement, using section 134 of the *Criminal Justice Act 1984*. This makes it an offence to intentionally inflict severe pain or suffering on another in the performance or purported performance of his or her official duties, including whether it was caused by an act or an omission. It seems clear that the mere presence of intelligence personnel at an interview with a person who is being held incommunicado and in conditions where torture is likely, implicitly condones the torture, and the interrogation of such a person, or indeed the mere failure to try to prevent it, may well constitute an offence under section 134. However, a potential obstacle to justice in these circumstances is contained in section 7 of the *Intelligence Services Act 1994* (ISA) which provides that if a person who would otherwise be criminally or civilly liable for an act done outside the British Islands, can obtain immunity if the act was authorised by the Secretary of State. There is no limitation on what the Secretary of State can authorise, although his or her duties under the *Human Rights Act 1998* should mean that any authorisation given that is contrary to the HRA would be unlawful. Despite the application of the HRA the ISA should be amended to make it clear on the face of it that it cannot be used to excuse any acts of torture, or indeed questioning or provision of questions in circumstances where a UK official knew, or ought to have known, that the detainee faced a real risk of torture or other unlawful treatment.

Torture (Damages) Bill

9. The Torture (Damages) Bill seeks to remedy the current gap in the law whereby victims of torture which was committed abroad are often unable to seek any compensation for their trauma. This was epitomised in the case of *Jones v Saudi Arabia*,[19] where the House of Lords held that civil actions could not proceed against officials of the government of Saudi Arabia for torture because of the principle of state immunity. Despite torture being a crime under international law, state immunity (and potentially personal head-of-state immunity) precludes any chance of compensation in many instances. This Bill seeks to amend the *State Immunity Act 1978* to provide that a state will not be immune from proceedings issued against state officials in respect of torture. It also extends the limitation period for a claim in

[19] [2006] UKHL 26; [2007] 1 AC 270.

respect of torture to six years, in recognition of the fact that it may take some time for a traumatised victim of torture to be able to gather the strength and resources to seek compensation for their suffering. Liberty wholly supports this Bill as it is an important step forward in recognising the rights and needs of torture victims and the essential nature of the prohibition against torture. State immunity should not attach to violations as grave as torture. The rationale for state immunity is based on state sovereignty, but given the absolute prohibition against torture, nationally and internationally, immunity should no longer be accepted. We hope that the JCHR will also lend its support to this Bill and help put pressure on parliamentarians to enact this Bill as law.

Anita Coles