Ministry of JUSTICE

The Government Response to the Joint Committee on Human Rights Report

Closing the Impunity Gap: UK law on genocide (and related crimes) and redress for torture victims

October 2009

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by the Lord Chancellor and Secretary of State for Justice
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Introduction

We are grateful to the Joint Committee on Human Rights (JCHR) for their detailed consideration of these issues. Their analysis has provided a valuable contribution to the debate on both these important issues. We are pleased the JCHR has welcomed the Government's decision to strengthen the law on genocide, war crimes and crimes against humanity. Their work has assisted the Governments thinking about the ways in which the law might be strengthened.

The Government is committed to the fight against heinous crimes such as war crimes, genocide and crimes against humanity. We are working with other countries and international organisations to ensure that those who are alleged to have committed such crimes can be brought to justice in the best and most effective way. We have also looked at whether our domestic law at present is strong enough.

Currently, under the International Criminal Court Act 2001 we can prosecute UK nationals and residents for alleged offences of genocide, war crimes and crimes against humanity committed anywhere in the world from 2001. This includes those who became resident in the UK after the alleged offence took place.

Following discussions with key stakeholders, we announced on 7th July 2009 that we would extend the law to cover genocide, war crimes and crimes against humanity from 1991, as far is permissible under the legal principles applicable to retrospection. That is a pivotal date in the development of international criminal law in this area as it is the date from which the International Criminal Tribunal for Yugoslavia was given jurisdiction by the United Nations Security Council**.** This is an exceptional step, made possible by the fact that these types of crime were recognised in international law before our own law came into force.

The extension to the law will remain limited to UK nationals and residents. Our aim is to ensure that the UK is not a safe haven for those who are alleged to have committed such crimes. Our strong preference is for those alleged to have committed these crimes to be brought to justice in the place the crimes took place so that justice can be clearly visible to the community that has suffered. Where this is not possible we must be able to use our own law against those who live here.

The Committee's recommendations were wide-ranging, covering policy and business areas across both the Ministry of Justice and the Home Office, and having potential ramifications for other parts of Government. What follows, therefore, is a whole Government response to each of the Committee's recommendations.

The Government response to the Committee's recommendations

Recommendation 1

1. What the Government has termed 'flexibility' in terms of who counts as a resident of the UK, would be more accurately regarded as a combination of legal loopholes and uncertainty. In our view, the residence requirement in the ICC Act 2001 creates practical impunity gaps in UK law. (Paragraph 41)

Government response

We do not believe that the 'resident' test in the 2001 Act is a difficult one for the courts to apply or that it creates loopholes. Neither do we believe that limiting liability to UK nationals and residents opens up an impunity gap.

However, we do recognise the concerns that have been expressed that the position may not be entirely clear in respect of certain categories of people.

As regards practicalities, if individuals arrive here and are known to be suspected of an offence of such a serious nature, they may well be turned back at the port of entry. However, we agree that it would be unacceptable if, for example, a person who has been refused asylum but cannot be removed from the UK for human rights reasons would be able to argue in court that they are not 'resident'. We are therefore proposing that we should provide more certainty over what Parliament intends by the term 'resident' in this context and believe our amendments to the Coroners and Justice Bill should achieve this.

Recommendation 2

2. We welcome the Government's recognition that the existing law should be reviewed. Revisiting the definition of 'resident' at least has the potential to address the uncertainty in the current law. We recommend that 'residence' be replaced with a broadly defined 'presence' test so as to send the strongest possible message to international criminals that they are not welcome in the UK, whether to live here, shop, study, or visit. We recommend that the Government consider adopting the presence requirement in the US Genocide Accountability Act of 2007. (Paragraph 51)

Government response

We do not think it would be right to move to criminal liabilities based on 'presence'. This would be extremely unusual in English law. We need to ensure as far as we can that the UK does not provide a safe haven for people who are alleged to have committed heinous crimes of this kind. However,

somebody who is genuinely transitory is not seeking a safe haven here, and has little or no connection to the UK. It is important that our courts concentrate first and foremost on those with a connection here, and that we are not seen to be global prosecutors on behalf of other countries. A suspect who is here temporarily should be dealt with in the country where they are resident, and we should continue to encourage countries to deal with their own nationals and residents within their own jurisdictions.

We recognise that there are concerns over certainty in respect of the term 'resident'. The term carries its normal English meaning and it is for the courts to determine in any particular case whether a person was "resident". Ultimately, it is about whether a person lives here. As noted above, we intend to provide more certainty about what Parliament intends by the term 'resident'.

Recommendation 3

3. We can see no evidence that Parliament substantively debated retrospective criminalisation of genocide, crimes against humanity and war crimes in internal armed conflicts in the 2001 debate, as the Government has asserted. (Paragraph 65)

Government response

We accept that the initial memorandum to the Justice Committee in which this issue was discussed and on which the Minister based her response to the Committee did not properly distinguish between the different contexts. The Minister wrote to the JCHR shortly after the evidence session to acknowledge and apologise for this.

Recommendation 4

4. We welcome the Government's announcement to apply retrospection to the crimes of genocide, crimes against humanity and war crimes in internal armed conflicts. In agreeing to make the ICC Act 2001 retrospective, the Government has accepted that the international community does not need to have mandated that states establish extra-territorial jurisdiction for the UK to implement it. However, we fail to understand the justification for using 1991 as the date from when extra-territorial jurisdiction should apply to genocide and war crimes; it is a date only relevant to crimes against humanity. In principle, the aim should be to establish jurisdiction as far back as is legally possible for each offence. It is not necessary that the dates for each offence be the same – it is justifiable for the dates to be different on the grounds that some offences date back further than others in international law. We recommend that the Government use the dates when the relevant crimes were internationally recognised, and establish retrospection accordingly. We recommend the law be amended to provide extra-territorial jurisdiction over genocide from 1948 and war crimes in internal armed conflicts from 1949. We recognise that there may be complexity in defining the relevant dates for types of war crimes but this should not be

overstated. We do not consider this to be an exercise beyond the capacity of the UK Government, or beyond the understanding of the public. (Paragraph 67)

Government response

As the Committee itself appreciates, what we are aiming to do is not a case of making a simple or straightforward change to the law. It is essential to ensure that the change does not extend the law so as to catch any conduct that was not clearly criminal under international law at the relevant time. While international law existed in respect of all these areas earlier, the offences in the 2001 Act may be wider than those recognised prior to when the Rome Statute establishing the International Criminal Court was agreed.

We agree that it could be legally possible to extend the law further back than 1991 in respect of at least some of the offences covered by the 2001 Act, provided that any extension did not go beyond the point at which any particular conduct was clearly recognised as criminal under international law. We have looked at previous proposals that the three categories of offences could be made retrospective to different dates. This has the attraction that we would obtain the maximum possible coverage for the offences.

However, there is also a significant benefit in keeping the law clear and consistent, and therefore having one date for all of the categories of offences. 1st January 1991 is an important point in the development of international criminal law in this area. It is that date from which the International Criminal Tribunal for the former Yugoslavia had jurisdiction to try offences under the Tribunal's Statute adopted by the United Nations Security Council. We are confident that all the three categories of crime were recognised in some form in international law at that time.

We must also recognise that the further back in time you go the less chance there is of successfully investigating and prosecuting a case, particularly when the events took place in a foreign country which was in the grip of armed conflict. From 1991 there is a reasonable prospect that we can conduct successful cases. It would allow us to cover the areas that most concern us – the conflicts in Rwanda and the former Yugoslavia in the 1990s. We have therefore concluded that it is the best option.

The Government's decision to cover the categories of crime from 1991 was widely welcomed across the House when the issue was debated at Lords Committee of the Coroners and Justice Bill on 7 July.

Recommendation 5

5. The Tamils Against Genocide said in their memorandum: "Whilst [there could be] little by way of prosecution owing to evidential difficulties, this is a lesser problem than an absence of prosecution owing to the legal incapacity to instigate it." We agree. (Paragraph 73)

Recommendation 6

6. We take the Government's point that prosecutions for international crimes are likely to be expensive, complex and time-consuming. However, as the Government have now acknowledged, this is a secondary concern - it is far worse to be incapable of prosecution where the evidence would otherwise support it. Practical difficulties and potential costs cannot stand as a reason for the UK not having jurisdiction to prosecute the rare cases that do satisfy the evidentiary requirements. (Paragraph 75)

Government response

As recommendations 5 and 6 deal with linked issues the response below covers both. We agree that practical difficulties on their own should not stand as a reason for not taking jurisdiction to prosecute, particularly where serious crimes are involved, such as genocide, war crimes and crimes against humanity. Equally, we need to be realistic about what can be achieved, and we do not want to pass laws which are not effective, or to raise expectations about what the law can achieve when those expectations are unlikely to be met.

We remain of the view that such cases are best dealt with in the country where the crimes took place for both practical reasons, because the evidence and witnesses are located there, and for reasons of principle, because that would bring justice closer to the victims. Systems may have been damaged by armed conflict over a number of years. Ensuring that suspects are tried in the country where the crimes took place can help to build capacity and confidence, and trial in other countries may damage that capacity and confidence.

On practical issues, obtaining evidence from overseas through mutual legal assistance requires the consent of the relevant foreign government. It is likely to be difficult to secure evidence from a country where there has been armed conflict, and witnesses may be difficult to find and/or unwilling to give evidence in any event.

The Government therefore believes the reasonable and sensible approach would be to extend retrospective reach in this area, effective from one common start date, whether in respect of genocide, war crimes or crimes against humanity. The Government believes that a start date of 1 January 1991 would realistically enable criminal proceedings still to be brought in appropriate cases – including those arising from the conflicts of the 1990s in Rwanda and in the former Yugoslavia.

As regards costs, any allegations of genocide, war crimes or other international crimes are assessed and dealt with on a case by case basis. This is an operational matter for the police and the Crown Prosecution Service. The resources available for investigation, and how they are best prioritised, are also matters for the Chief Constable of the relevant police force, and for the Crown Prosecution Service.

Finally we would like to draw to the Committee's attention that the Government's proposed changes in the law should not be seen in isolation, but in the context of the UK's wider efforts to ensure that justice is done.

For example, the UK is working with the Government of Rwanda and international partners to strengthen the Rwandan judiciary so that future extradition requests from Rwanda are more likely to succeed. Amongst other things, we are supporting capacity-building efforts in Rwanda, including through funding a project to help Rwandan criminal investigators and prosecutors enhance their ability to investigate and prosecute the most serious crimes speedily and fairly. With partners, we continue to have a constructive dialogue with the Government of Rwanda on a wide range of issues, including governance, human rights and the rule of law. We also discuss governance and human rights through the EU-Rwanda dialogue under Article 8 of the Cotonou Agreement. The latest constructive round of discussions covered difficult issues, such as Rwanda's review of their law on "genocide ideology" and the media.

Recommendation 7

7. We recommend that the Government re-establish a specialist war crimes unit and that they give it resources commensurate with the seriousness of the crimes they need to investigate and the importance of leading the world in bringing international criminals to justice. (Paragraph 76)

Government response

We fully recognise the importance of the recommendation and the need to have in place an effective structure which has the capacity to prioritise and take forward investigations and prosecutions. Whether, operationally such cases are best dealt with through the establishment of a dedicated unit or through other arrangements is primarily a matter for the police and the CPS. The Home Office is, however, working with the police and the CPS to help ensure that effective arrangements are in place. We will keep the Committee informed of any proposed changes to the existing working arrangements.

Recommendation 8

8. The Torture (Damages) Bill will not automatically deliver reparations to victims. The scope of this Bill is narrow - to remedy the UK's domestic legislation; it does not purport to be the panacea of all obstructions to justice for torture victims. It is the necessary first step. (Paragraph 93)

Government response

The Government has considerable sympathy with the motivation behind the Torture (Damages) Bill, and with the situation of people who have been victims of torture. However, the Bill raises difficult legal issues, and would

require a reconsideration of various principles of international law, as well as the UK's diplomatic and legal relations with other states.

These include the consensus on the degree to which the international community, or other state parties and actors, can interfere with the sovereignty of states, and the general principle that one State is not subject to the jurisdiction of another, except in certain recognised circumstances.

The exercise of extra-territorial jurisdiction, even where States and State officials are not involved, is a difficult and highly controversial area. The Government believes there is little doubt that a unilateral assumption of universal civil jurisdiction, as required by this Bill, would place the United Kingdom in breach of its obligations under international treaties and international law, and would not provide victims of torture with significant practical benefits.

Recommendation 9

9. Creating the exception to state immunity for the tort of torture would give the courts the opportunity to develop international law in this regard. We think that the pre-eminence of UNCAT, and in particular article 14, provides a strong basis for positive future developments. The Government's interpretation of the current international legal position is not a sufficient reason to retain unjust, outdated domestic law and prevent any opportunity for the UK to lead the development of international law in this regard. (Paragraph 94)

Government response

The United Nations Convention Against Torture (UNCAT) requires States party to establish jurisdiction in their criminal law over the offence of torture, wherever in the world that torture is alleged to have occurred. In the United Kingdom, this obligation is fulfilled by Section 134 of the Criminal Justice Act 1988. The Act provides that if a person who is alleged to have committed torture is present in UK territory, they should either be extradited to face trial overseas, or tried in our domestic courts.

In 2005 the UK Government prosecuted Faryadi Zardad, an Afghan warlord who had committed torture in Afghanistan. As a result, Zardad is now serving 20 years imprisonment. This was an innovation in international law; the first time that a State had prosecuted a foreign national for torture perpetrated on victims outside normal territorial jurisdiction.

However, although universal criminal jurisdiction over torture is mandated by UNCAT, universal civil jurisdiction is not.

Generally, States have not recognised any obligation to exercise universal civil jurisdiction over civil claims arising from alleged torture. Accordingly, when the UNCAT was negotiated, the option of creating an international civil cause of action was not pursued. The Convention provides that, where torture is

alleged to have occurred in a given State, that State should provide a means of civil redress in its own law.

Furthermore, in 2004, after a period of prolonged negotiation, the United Nations adopted the Convention on Jurisdictional Immunities of States and Their Property. That Convention makes no exception in respect of personal injury or death that is alleged to have occurred outside the territory of a State. The United Kingdom signed the Convention in 2005 and although it is not yet in force, Lord Bingham of Cornhill, the former Lord Chief Justice of England and Wales, has described it as "the most authoritative statement available on the current international understanding of the limits of state immunity in civil cases".

The Government does not believe that a unilateral assumption of jurisdiction by the UK Government without international agreement, as is required by this Bill, would be an effective means by which to continue the UK's campaign against torture. Far from upholding an international condemnation of torture, the Government fears that, on the contrary, the inevitable practical difficulties would risk bringing international efforts to punish torture into disrepute.

Recommendation 10

10. Practical questions of foreign relations, enforcement and litigation procedure are important, but they are secondary to the issue we are examining, which is: should there be a civil remedy available in the UK to victims of torture at the hands of foreign states? We are of the strong opinion that there should. Such an action would be in line with our positive responsibilities towards torture victims under international law. It would also go a long way towards the rehabilitation of torture victims, for whom access to an action for damages would itself be an acknowledgement of their suffering. (Paragraph 101)

Government response

The Government does not believe that practical questions can simply be brushed aside. It considers it important to establish how the proposed Bill would operate, how difficulties in the litigation process could be dealt with, and how any court judgment could be enforced.

These questions were recognised, implicitly and explicitly, even by some of the Bill's supporters in its second reading in 2008 in the House of Lords. Lord Sheikh pointed out that: "It must be of concern . . . that a court judgment passed in this country will not necessarily lead to a resolution for those victims of torture, particularly among rogue states that are likely to be most disposed towards the use of torture. Achieving adequate redress will require rather more than well intentioned legislation. . ."[1]

[1] Lords Hansard 16 May 2008 : Column 1209/ 1210

Lord Judd recognised that "there will always be the question of whether the judgments of a court will be enforced"[2], and that the "implementation of the findings would remain a challenge".[3]

The Government believes that in practice the likelihood of enforcing a judgment imposing damages against a foreign State would be very low indeed. Any attempt to seize the property or assets of a State would be particularly controversial, and liable to lead to retaliatory action against United Kingdom interests. The result would be protracted and frustrating legal proceedings in which the perpetrator would remain unpunished, and the victims would have their suffering prolonged.

Recommendation 11

11. The UK should lead the international community in condemning torture and expanding international law to ensure victims have access to the reparations they are entitled to. This Bill would send a strong message: there are consequences for states that torture. We recommend the Government adopt the Torture (Damages) Bill and then consider what else needs to be done to promote its enforcement. (Paragraph 102)

The Government believes that the UK has good cause to maintain that it is and has been for many years among the leaders in campaigning against torture.

The United Kingdom regards its commitments under international law with the utmost seriousness, and expects all countries to comply with their international legal obligations. We encourage other countries to adopt and adhere to international standards, particularly the United Nations Convention Against Torture and the European Convention for the Prevention of Torture.

Over the last 10 years the Government has taken action to strengthen UN and other international torture prevention mechanisms. We have funded projects around the world to help tackle torture and we have used our diplomatic network to press for progress.

The Foreign and Commonwealth Office (FCO) spend more than £2m per year on criminal justice projects as part of its Strategic Programme Fund. In 2008/9 over half of this budget was spent on prison reform and torture prevention projects.

In November last year the UK launched its fourth lobbying campaign to encourage states to deepen their commitment to international agreements, and to sign UNCAT and its Optional Protocol.

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2 Lords Hansard 16 May 2008 : Column 1213

3 Lords Hansard 16 May 2008 : Column 1214

We have also taken the lead internationally to put in place practical measures to combat torture. The United Kingdom ratified the Optional Protocol to the United Nations Convention Against Torture in 2003: the third country in the world and the first in the European Union to do so. On 31 March this year, Michael Wills MP, the Minister of State for Justice, announced the establishment of the United Kingdom's National Preventive Mechanism (NPM), as required by the Optional Protocol.

We also support the work of the Association for the Prevention of Torture (APT), the leading international NGO working for the ratification and implementation of the UN Convention and its Optional Protocol. With the help of UK funding, the APT has delivered workshops in a number of countries. These bring together governments, national commissions and civil society for open discussion on the most appropriate and effective arrangements for a National Preventive Mechanism in each country.

The Government continues to condemn torture as a barbarous and abhorrent crime and continues to work for its worldwide eradication. However, it remains of the opinion that the Torture Damages Bill would not be of practical assistance in achieving that goal and would not live up to its promise of providing victims of torture with redress and rehabilitation.

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