

Overseas Operations (Service Personnel and Veterans) Bill Briefing

Introduction

The Overseas Operations Bill creates limits on accountability for violations of international humanitarian law (IHL)¹ and human rights committed by UK armed forces overseas. The Overseas Operations Bill:

- Creates a statutory presumption against prosecution of current or former service personnel for alleged offences committed more than five years ago while deployed abroad;
- Requires courts to take into account the 'operational context' when extending normal time limits for civil claims for personal injury and/or death in connection with military operations overseas;
- Imposes an absolute limit or 'longstop' of six years on bringing claims for personal injury and/or death in connection with military operations overseas, applicable to both tort claims and claims under the Human Rights Act; and
- Requires the Government to consider derogating from the European Convention on Human Rights in relation to future overseas operations.

The UK Government has previously stated that the law of armed conflict- not human rights law- is the appropriate and applicable law to military operations. However, in an attempt to limit the application of *human rights* law to military operations overseas through this Bill, the proposed legislation also contravenes IHL or the law of armed conflict, and fails to take into account the status of certain crimes under international law, the prohibitions of which constitute *jus cogens* norms. As a result, **the Bill violates the UK's legal obligations under both human rights law and the law of armed conflict/IHL.**

Given the much-needed focus in the media and among NGOs on the compliance of the Bill with human rights law, this briefing will instead focus principally on the Bill's failure to comply with the UK's legal obligations under IHL.

Part 1- Restriction on prosecutions for certain offences

Clause 6: "Relevant offence"

The UK has a duty under binding international legal instruments to ensure that serious crimes under international law are investigated and prosecuted, and several of these instruments also prohibit any statute of limitations. Although the Bill does contain several 'excluded offences' to which the provisions of the Bill do not apply, these all relate to sexual offences.² Whilst this is a welcome commitment to ensuring no restrictions are placed on the prosecution of sexual offences that constitute international and domestic crimes, it creates a legally incoherent distinction between sexual offences and other equally serious international crimes, such as torture or genocide, which are not excluded.

In particular, the Bill may result in UK law falling foul of the following bodies of law which prohibit a statute of limitations or require effective investigation and prosecution into rights violations:

¹ International humanitarian law, also referred to as the law of armed conflict, governs the conduct of hostilities and the protection of civilians and those no longer participating in hostilities.

² HM Government, [Overseas Operations \(Service Personnel and Veterans\) Bill](#), Schedule 1, Part 2, paras 16-31

- The Rome Statute of the International Criminal Court- prohibits a statute of limitations for any crimes under the jurisdiction of the court.³
- Customary International Law- prohibits any statute of limitations for war crimes in both international and non-international armed conflicts.⁴
- The Geneva Conventions- establish a duty to investigate deaths of civilian internees and prisoners of war,⁵ as well as the right of families to know the fate of their relatives.⁶ The ICRC has confirmed that the obligation to investigate extends to non-international armed conflicts.⁷
- The UN Convention against Torture- requires investigation and prosecution of allegations of torture.⁸ The UN Committee against Torture (CAT) has also affirmed a prohibition on statutes of limitations for torture,⁹ and has further stated that *'impediments that preclude or indicate unwillingness to provide prompt and fair prosecution and punishment of perpetrators of torture or ill-treatment violate the principle of non-derogability'*.¹⁰ Last year, the Committee expressed concerns over the proposed UK legislation.¹¹
- The ECHR- requires effective investigations capable of leading to prosecutions for alleged violations of Article 2 and 3 of the Convention.

The proposed statute of limitations has been referred to as a 'qualified statute of limitations'.¹² However, even a 'qualified' statute of limitations fails to recognise the *jus cogens* nature of certain crimes under international law. It has long been accepted that the prohibition of war crimes, crimes against humanity, genocide, and torture are peremptory norms of international law.¹³ The *erga omnes* obligations which flow from these norms mean that no restriction can be placed on the investigation and prosecution of these crimes.

International Criminal Court (ICC) Prosecution- failure to fulfil the UK's international legal obligations may result in the Bill leaving UK military personnel open to prosecution by the ICC. In addition to prohibiting any statute of limitations for crimes that fall under the jurisdiction of the ICC,¹⁴ the Rome Statute states that the ICC can prosecute cases where the State concerned is 'unwilling' or 'unable' to carry out an investigation or prosecution itself.¹⁵

³ UN General Assembly, Rome Statute of the International Criminal Court, (1998), Article 29

⁴ ICRC, Customary IHL Database, "[Rule 160](#)"

⁵ Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention), (August 1949) Article 121; Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention) (August 1949), Article 131

⁶ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, (1977), (AP I) Article 32.

⁷ ICRC, [Guidelines for investigating deaths in custody](#), (2013) p.12

⁸ UN General Assembly, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT), (1984), Article 12 and Article 7

⁹ UN Committee Against Torture (CAT), 'General comment no. 3: implementation of article 14 by States parties', (2012) para 40;

¹⁰ CAT, 'General Comment No. 2: Implementation of Article 2 by States Parties', (2008), para 5.

¹¹ Owen Bowcott, [UN condemns MoD plans to grant veterans amnesty](#), The Guardian, (May 2019)

¹² House of Commons Defence Committee, [Drawing a line: Protecting veterans by a Statute of Limitations](#), Seventeenth Report of Session 2017–19, p.4

¹³ See, for example, [the Report of the International Law Commission](#) to the UN General Assembly on Peremptory norms of general international law, (2019), A/74/10, Chapter V p.141

¹⁴ UN General Assembly, Rome Statute of the International Criminal Court (1998) Article 29

¹⁵ Ibid. Article 17 1(a)

UK reputation and influence- the Bill damages the UK's international standing as a State committed to upholding international humanitarian law and human rights. Furthermore, it creates a risk that other States who have committed serious violations of international law may introduce similar 'qualified' statutes of limitations legislation, which may technically still allow prosecutions after a set time period, but mean that in practice perpetrators will go unpunished. The UK would render itself unable to condemn such legislation or practice in other States when it has itself introduced a statute of limitations.

Practical effect- the aim of the legislation is purportedly to prevent a continuous cycle of investigations and threats of prosecution for service personnel.¹⁶ However, prosecutions for crimes committed by UK personnel in overseas operations have been extremely low. In 2019, the CAT noted that *'while the Iraq Historic Allegations Team has received around 3,400 allegations of unlawful killings, torture and ill-treatment committed by the United Kingdom armed forces in Iraq between 2003 and 2009, no prosecutions for war crimes or torture have resulted from the Team's investigations.'*¹⁷ In June 2020, the Director of the Service Prosecuting Authority, which took over former IHAT investigations, confirmed that all but one case had been dropped.¹⁸ In order to clarify the practical effects of the Bill, the Ministry of Defence (MoD) should publish figures on how many UK military personnel have been convicted for international crimes committed in overseas operations, as well as figures for ongoing investigations and prosecutions.

Part 2- Overseas operations: limitation periods and human rights

Limitation: Clauses 8-11

The 'longstops' introduced by the Bill for civil litigation and claims under the Human Rights Act violate the UK's obligations under international law to ensure victims of violations of IHL and human rights have access to a remedy and reparation. For victims of violations which constitute *jus cogens* norms, no restriction can be placed on the right to remedy and redress.

IHL places binding legal obligations on States to provide remedy and redress to the victims of IHL violations, and these obligations are further complemented by human rights law. Whilst the right to remedy for violations of IHL is sometimes enforced through human rights treaties and mechanisms, these treaties merely reflect pre-existing obligations on States under IHL to provide remedy and reparation for violations of IHL:

- Additional Protocol I to the Geneva Conventions- states that a Party that violates any provision of the Conventions or the Protocol will be liable to pay compensation and will be responsible for the act of its armed forces.¹⁹
- Customary international law- states that 'full reparation' is required for IHL violations in both international and non-international armed conflict.²⁰
- The UN General Assembly's 'Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious

¹⁶ MoD, [Legal Protections for Armed Forces Personnel and Veterans serving in operations outside the United Kingdom](#), (July 2019)

¹⁷ CAT, Concluding observations on the sixth periodic report of the United Kingdom of Great Britain and Northern Ireland, (2019), CAT/C/GBR/CO/6, p.7 para 32

¹⁸ The Independent, [British soldiers unlikely to face Iraq war prosecutions as more than 1,000 allegations dismissed](#), (June 2020)

¹⁹ AP I, Article 91

²⁰ International Committee of the Red Cross (ICRC), Customary IHL Database, "Rule 150": A State responsible for violations of international humanitarian law is required to make full reparation for the loss or injury caused.

Violations of International Humanitarian Law’ (the Basic Principles)- further confirm the right to full reparation.²¹ The Basic Principles also state that ‘domestic statutes of limitations...including those time limitations applicable to civil claims and other procedures, should not be unduly restrictive.’²²

The longstops introduced by the Bill are unduly restrictive, and unnecessary given the courts in England and Wales have clearly demonstrated that existing powers to exclude or allow time limits are appropriate. Under the Limitation Act 1980, which sets a limitation period of six years for claims, English courts have the discretion under section 33 to exclude this limitation where the interests of justice so require. The High Court’s differing rulings in two cases concerning colonial era human rights violations in Kenya- the *Mutua and others* case²³ in which the court excluded the limitation period, and the *Kimathi and others* case²⁴ in which the court refused to exclude the limitation period, clearly demonstrate that current provisions are appropriate. Under the current Bill’s provisions, the *Mutua* case, which resulted in compensation being paid for torture and war crimes, would be barred.

The UK should take note of the recent judgment by the UN Committee against Torture in a case concerning wartime sexual assault, which took account of legislation and jurisprudence in Bosnia-Herzegovina that introduced a statute of limitations of five years for civil claims.²⁵ The Committee found that the Convention Against Torture had been violated, stating that ‘*on account of the continuous nature of the acts of torture, statutes of limitations should not be applicable as these deprive victims of the redress, compensation, and rehabilitation due to them*’.²⁶

In addition to violating the right to redress under the Convention Against Torture,²⁷ the longstop provisions will also violate the International Covenant on Civil and Political Rights, which provides for access to a court,²⁸ as well as the standards set by the European Court of Human Rights (ECtHR) on the right to a remedy,²⁹ and the right to a fair and public hearing.³⁰

In order for restriction of access to a court to be lawful under the ECHR, it must pursue a legitimate aim and there must be a reasonable relationship of proportionality between the means employed and the aim sought to be achieved.³¹ Whilst statutes of limitations for civil claims may pursue legitimate aims, these aims are inevitably disproportionate if they prejudice the rights of victims of violations of non-derogable rights. When examining statutes of limitations, the Court has stated that it must ascertain ‘*whether the nature of the time-limit in question and/or the manner in which it was applied*

²¹ Principle 18 provides for ‘full and effective reparation’, which includes restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition. UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, Adopted and proclaimed by General Assembly resolution 60/147 (2005)

²² The Basic Principles, Principle 7

²³ *Mutua and others v. The Foreign and Commonwealth Office* [2012] EWHC 2678 (QB)

²⁴ *Kimathi and others v The Foreign and Commonwealth Office* [2018] EWHC 1169 (QB)

²⁵ [Mrs. A v. Bosnia and Herzegovina](#), Communication No. 854/2017, Views of 22 August 2019, UN Doc. CAT/C/67/D/854/2017

²⁶ Ibid. para 7.5

²⁷ UNCAT, Article 14

²⁸ International Covenant on Civil and Political Rights, (1966), Article 14. Also, the UN Human Rights Committee have found that statutes of limitation are not acceptable where claimants are excluded from the outset- *Preiss v. Czech Republic* UN Human Rights Committee Gen Comm. 93, para 9, U.N. Doc. CCPR/C/93/D/1497 (2006).

²⁹ Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, (1950), Article 13

³⁰ Ibid. Article 6

³¹ *Steel and Morris v. United Kingdom*, Application no. 68416/01, ECtHR, para. 62 (2005)

is compatible with the Convention.³² Limiting claims concerning violations of Article 2 and Article 3 cannot be compatible with the Convention due to their non-derogable nature.

The Bill fails to take account of the status of war crimes, crimes against humanity, torture and genocide under international law, the right to remedy for which cannot be restricted. Without the development of an alternative mechanism through which victims can seek redress, the UK will be in violation of its legal obligations.

Disproportionate effect on civilians- The proposed legislation greatly underestimates the difficulties faced by civilians in conflict or post-conflict environments in seeking redress in UK courts. There are numerous reasons why victims of rights violations would not bring a claim within six years, not least because civilians in Iraq and Afghanistan have lived in an almost constant state of armed conflict and insurgency for the majority of the past two decades. There are currently 1.4 million displaced people inside Iraq, with 6 million displaced at the height of the conflict with ISIS.³³ Recent conflicts across the Middle East and West Asia have been characterised by war crimes, large-scale displacement of civilian populations, and destruction of infrastructure and property, leaving many civilians facing a daily struggle to survive. Further obstacles include language barriers, lack of awareness of the UK's legal systems, access to communications technology to find or communicate with a lawyer, and the potential costs involved.

The Bill effectively discriminates against victims overseas, who will be left with no recourse to remedy or redress after six years. Claims in tort or under the Human Rights Act are currently the only avenue open to civilians to claim compensation, whereas veterans affected by the Bill will rightly continue to have access to non-judicial remedies. An MoD spokesperson stated in August 2019 that although the longstop will also apply to veterans, 'our plans for a new compensation scheme will mean that personnel will receive compensation at the level a court would order anyway.'³⁴ Veterans will therefore still have access to a remedy in the form of compensation via dedicated schemes, whereas civilians will be left with no recourse to justice or remedy. In order to fulfil its legal obligations, the UK should create a dedicated reparations scheme for civilians who have been harmed in overseas operations.

UK policy on reparations for civilian harm- In order to ensure the Bill does not leave the UK in breach of its legal obligations, the UK should introduce a policy on reparations for civilians who have been subject to violations of IHL in UK military operations overseas. The Basic Principles provide that States should 'endeavour to develop procedures to allow groups of victims to present claims for reparation and to receive reparation.'³⁵ Historically, the UK and many of its partner countries in overseas conflicts have provided some compensation for civilian harm that has resulted from military operations overseas, in recognition of the fact that compensation can serve as a form of redress and provide benefits to both States and victims.³⁶ There is a growing international practice in this area, and the US Department of Defense is currently building on existing policy to develop a comprehensive reparations policy addressing civilian casualties resulting from US military operations.³⁷

³² *Vrbica v. Croatia*, Application no. 32540/05, ECtHR, para. 66 (2010)

³³ United Nations Office for the Coordination of Humanitarian Affairs, [About OCHA Iraq](#)

³⁴ Ministry of Defence, [Defence in the media: Armed forces recruitment and compensation claims](#), (2019)

³⁵ The Basic Principles, Principle 13

³⁶ See, for example, CIVIC, [Addressing Civilian Harm in Afghanistan: Policies & Practices of International Forces](#), (2010)

³⁷ US Department of Defense Memorandum, [Development of a DoD Instruction on Minimizing and Responding to Civilian Harm in Military Operations](#), (January 2020)

The UK now has an opportunity to help establish global good practice by creating a policy on reparations for civilians affected by military operations overseas in line with existing international standards on reparations. This would not only address the legal implications that arise because of the introduction of the longstop, but may also reduce the need for civilians to pursue civil litigation in future to access justice where there is a clear reparations policy in place.

Ceasefire would welcome the opportunity to work further with the UK Government on the creation of a reparations policy based on international standards and best practice.

Recommendations

1. In order to comply with the UK's legal obligations, the Bill must be amended so that serious crimes under international law including war crimes, crimes against humanity, genocide, and torture, are be exempt from the presumption against prosecution as 'excluded offences'.
2. The MoD should publish figures on how many UK military personnel have been convicted for international crimes committed in overseas operations, as well as figures for ongoing investigations and prosecutions.
3. The right to reparation for victims of serious crimes under international law cannot be restricted. In order to comply with its obligations under international law to provide remedy ad redress, the UK Government should develop a policy on reparations for civilians who have suffered harm as a result of UK military operations overseas. The policy should be holistic in its approach to reparation and be developed in cooperation with civil society organisations.