

MINISTRY OF JUSTICE

Consultation on Reform of the Human Rights Act 1998

Submission by

CEASEFIRE CENTRE FOR CIVILIAN RIGHTS

AND

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This is a submission by Dr Stuart Wallace on behalf of **CEASEFIRE Centre for Civilian Rights**. CEASEFIRE is an international initiative to develop civilian-led monitoring of violations of international humanitarian law or human rights; to secure accountability and reparation for those violations; and to develop the practice of civilian rights. CEASEFIRE is registered in the UK as a charity, no. 1160083.

This submission was organised by CEASEFIRE's UK military accountability programme, funded by the Joseph Rowntree Charitable Trust, whose latest report, 'Reparations for civilian harm from military operations: towards a UK policy', examines compensation claims for civilians harmed by UK military operations in Iraq and Afghanistan. Many of these claims are made under the Human Rights Act 1998.

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Introduction

This paper is drafted in response to the Ministry of Justice’s consultation to reform the Human Rights Act 1998 and responds specifically to Q.22

“Given the above, we would welcome your views on the most appropriate approach for addressing the issue of extraterritorial jurisdiction, including the tension between the law of armed conflict and the Convention in relation to extraterritorial armed conflict.”

It explores the viability of the IHRAR Panel’s proposed solution to this question, along with alternatives including derogation, domestic law reform, simultaneous application of international human rights law (IHRL) and international humanitarian law (IHL) and improvements that can be made to military actions in theatre.

IHRAR Panel’s Proposed Solution – Additional Protocol

The IHRAR panel has recommended

“a careful, clarificatory, reform of the Convention [...] to develop a new Protocol to the Convention, setting out a clear, logically coherent, well thought out approach to its territorial and temporal scope, together with the Convention’s relationship with IHL”.¹

This would be a slow and difficult process. Even when there is widespread recognition of the need for reform within the Convention system and diplomatic will to achieve it, the process of reforming the Convention has usually involved multiple inter-governmental conferences (Interlaken, Izmir, Brighton, Oslo, Brussels, Copenhagen) over many years.²

¹ Peter Gross, *Independent Human Rights Act Review 2021* (Cm 586, 2021) 390 (hereinafter IHRAR Report).

² See <https://www.echr.coe.int/Pages/home.aspx?p=basictexts/reform>.

It would be challenging to get all contracting States to agree to the content of a new protocol on the extra-territorial application of the Convention. Leaving aside the technical difficulty of the subject matter, this is simply not an issue for many contracting States who do not engage in extra-territorial military operations.³ Such a protocol may also be perceived as an attempt to weaken accountability for abuses by the military forces of powerful States.⁴ Given that the most prominent likely supporter of such a protocol, other than the UK, would be the Russian Federation, its promotion in the current circumstances would be politically untenable.

Even when amending protocols to the Convention are agreed and finalised, as with recent protocols 15 and 16, it takes a long time for them to enter into force because they must be ratified by all parties. Protocol 15 was opened for signature on 24 June 2013, but did not enter into force until 1 August 2021.⁵ Thus, even assuming such a protocol was negotiable, its entry into force would be deferred significantly.

Alternative Approaches

Amend Domestic Law

Unilateral action to amend the HRA so that it is not applicable to military operations overseas would be futile. If the UK remains party to the ECHR, it cannot rely on provisions of its domestic law to justify failure to perform its obligations under a treaty.⁶ Victims would simply lose access to the domestic legal system and take cases to Strasbourg instead, which is acknowledged by the IHRAR Panel.⁷

Derogation

Derogation from the ECHR is a possible alternative, but it is not a panacea. Several non-derogable rights would continue to apply to the armed forces during overseas military operations, including the prohibition on torture, inhuman and degrading treatment.⁸ Derogation could strike a balance between IHRL and IHL, which is more acceptable to the military. It would be possible, for example, for the UK to issue limited, proportionate derogations to the right to life and the right to liberty and security.

³ There are, for example, several neutral countries in the Council of Europe, including Ireland, Austria and Switzerland.

⁴ This observation was made by the Northern Ireland Human Rights Commission - IHRAR Report 374.

⁵ <https://www.coe.int/en/web/conventions/full-list?module=signatures-by-treaty&treaty-num=213>.

⁶ Article 27, Vienna Convention on the Law of Treaties 1969.

⁷ IHRAR Report 384.

⁸ See Article 15, European Convention on Human Rights 1950.

The Right to Life

The right to life is among the list of non-derogable rights, but there is an exception to this for 'lawful acts of war'. Thus, a deprivation of life which is a consequence of a lawful act of war may be the subject of a derogation,⁹ if the UK derogated from Article 2 it would not face responsibility for such an act. There are significant caveats. The right to life would still apply for uses of force in violation of the laws of war and any measures taken by the UK must be strictly required by the exigencies of the situation. An assessment of the necessity, proportionality and duration of measures adopted would be needed.¹⁰ This may lead to a less permissive normative environment governing the use of force than IHL.¹¹ The ECtHR would likely still demand that the State adopt strict rules of engagement and ensure compliance with IHL. The derogations must also be consistent with the UK's other international law obligations. If the UK derogated from Article 2 for lawful acts of war, the Court would consider whether the State's actions in killing or inflicting life-threatening injuries, were consistent with IHL and international criminal law.¹² This would effectively force the ECtHR to balance IHL and IHRL norms.

The Right to Liberty and Security

States routinely engage in security detention during military operations overseas and the UK has been held liable for breaching the right to liberty and security in the context of military operations overseas.¹³ When the UK claimed UNSCRs or IHL justified security detention in breach of the right to liberty and security, such arguments failed.¹⁴ If the UK derogated from Article 5 to permit security detention during a military operation, its right to engage in security detention would be respected, in the context of an international armed conflict, or in a non-international armed conflict if it was permitted under other legal provisions. Ukraine, for example, has derogated from Article 5 in respect of its ongoing conflict with Russia.¹⁵ In an extraterritorial NIAC, however, the authority to intern is not clear under IHL. The requirement that any derogation be strictly required by the exigencies of the situation, could require the UK to prove that the situation in theatre required the detention of people, for example, without any judicial oversight. The requirement that derogations are consistent

⁹ Elizabeth Wicks, *The Right to Life and Conflicting Interests* (Oxford University Press 2010) 82; Stuart Wallace, *The Application of the European Convention on Human Rights to Military Operations* (Cambridge University Press 2019) 194.

¹⁰ Mohamed El Zeidy, 'The ECHR and States of Emergency: Article 15 – A Domestic Power of Derogation from Human Rights Obligations' (2003) 4 San Diego International Law Journal 277, 286.

¹¹ Wicks (n.9) 82

¹² William Abresch, 'A Human Rights Law of Internal Armed Conflict: The European Court of Human Rights in Chechnya' (2005) 16 EJIL 741, 746; Michael O'Boyle and Jean Paul Costa, 'The ECtHR and IHL' in Christos Rozakis (ed), *The European Convention on Human Rights, a Living Instrument* (Bruylant Press 2011) 117–18.

¹³ See, for example, *Al-Jedda v UK* (2011) 53 EHRR 23.

¹⁴ Wallace (n.9) 160.

¹⁵ <https://www.coe.int/en/web/conventions/full-list?module=declarations-by-treaty&numSte=005&codeNature=0>

with the State's other obligations in international law would limit the scope of any derogation. The requirements of the ICCPR and IHL combine to ensure that it could not be utilised to take hostages, abductions, unacknowledged detention and in the words of the UN Human Rights Committee "cannot justify a deprivation of liberty that is unreasonable or unnecessary under the circumstances".¹⁶

Addressing the Causes of IHRL cases

As the preceding illustrates, altering the law itself or how it applies is difficult. The better approach to resolving perceived issues with extra-territorial jurisdiction and the tension between IHL and IHRL is to address the underlying problems giving rise to claims under the ECHR/HRA.

Poor Enforcement of IHL

The IHRAR Report refers to IHL as the more appropriate body of law to apply during military operations.¹⁷ While IHL is specifically adapted to apply to military operations, it is an area of law characterised by weak enforcement with many violations of IHL going unpunished.¹⁸ When violations are addressed, the focus is on criminalising perpetrators rather than compensating victims.¹⁹ There are also few forums where individuals can raise complaints concerning IHL violations, a key factor behind individuals seeking redress through the ECHR/HRA in the first place.²⁰ The Convention system offers clear benefits to victims of violations of IHL. Violations of IHL and IHRL are often substantively similar and the ECHR/HRA offers integrated domestic and supra-national forums to seek redress. It offers clear procedures, a developed jurisprudence and a means of securing some compensation for victims.²¹ If the UK offered better enforcement of IHL, forums for redress and compensation to victims of unlawful acts, it would obviate the need for victims to utilise the ECHR/HRA system. In this context Ceasefire has proposed the establishment

¹⁶ Human Rights Committee, General comment No 35 (2014) CCPR/C/GC/35.

¹⁷ IHRAR Report 389.

¹⁸ M. Cherif Bassiouni, 'Searching for Peace and Achieving Justice: The Need for Accountability' (1996) 59 *Law & Contemporary Problems* 9, 17-18.

¹⁹ Jean-Marie Henckaerts, 'Concurrent Application of International Humanitarian Law and Human Rights Law: A Victim Perspective' in Noelle Quenivet and Roberta Arnold (eds), *International Humanitarian Law and Human Rights Law: Towards a New Merger in International Law* (Brill 2008), 249.

²⁰ Noelle Quenivet, 'The Right to Life in International Humanitarian Law and Human Rights Law' in Roberta Arnold and Noelle Quenivet (eds), *International Humanitarian Law and Human Rights Law: Towards a New Merger in International Law* (Brill 2008), 9; Theodor Meron, 'The Humanization of Humanitarian Law' (2000) 94 *AJIL* 239, 247.

²¹ Wallace (n.9) 2-3.

of a Civilian Harm Compensation Scheme, as one element of a UK policy on reparations for civilian harm in military operations.²²

Investigations during Military Operations

Many cases coming before the ECtHR concerning military operations do not relate to substantive violations of human rights, but procedural violations – failures to properly investigate.²³ Thus, if the UK improved its system of investigation during military operations, it would reduce complaints at their source.

Track record

The UK's track record on investigations during military operations is poor. In Northern Ireland, in several cases where it was alleged that British soldiers had unlawfully used force, the Court called into question the independence of the investigators of these cases, the promptness and effectiveness of the investigations and public scrutiny of the investigative process.²⁴

Similar problems arose in the UK's investigations into military actions in Iraq. In *Al-Skeini v UK*,²⁵ for example, the lack of operational independence of investigators,²⁶ shortcomings in the gathering of evidence (e.g. failure to identify Iraqi witnesses and persuade them to come forward)²⁷ and the focus exclusively on criminal liability were criticised.²⁸ Another investigation, into the death of Nadheem Abdullah who was killed by British soldiers in Iraq, was deemed to be inadequate and suffering serious omissions.²⁹ It is also clear that the UK's capacity to investigate the activities of its military personnel during military operations in Iraq was extremely limited.³⁰

²² Ceasefire Centre for Civilian Rights, *Reparations for Civilian Harm from Military Operations: Towards a UK Policy*, December 2021, p63.

²³ See for example *Jaloud v Netherlands* (2015) 60 EHRR 29; *Al-Skeini and Others v UK* (2011) 53 EHRR; *Bankovic and Others v Belgium and Others* (2007) 44 EHRR SE5; *Hanan v Germany* (App No 4871/16) 16 February 2021.

²⁴ *Hugh Jordan v UK* (App No 24746/94) 4 May 2001; *McKerr v UK* (App No 28883/95) 4 May 2001; *Kelly v UK* (App No 30054/96) 4 May 2001; *Shanaghan v UK* (App No 37715/97) 4 May 2001; *Finucane v UK* (App No 29178/95) 1 July 2003.

²⁵ *Al-Skeini and Others v UK* (2011) 53 EHRR.

²⁶ *Ibid.* at [171].

²⁷ *Ibid.* at [170].

²⁸ *Ibid.* at [174].

²⁹ Carla Ferstman, Thomas Obel Hansen and Noora Arajärvi, 'The UK Military in Iraq: Efforts and Prospect for Accountability for International Crimes Allegations? A Discussion Paper' available at <https://www1.essex.ac.uk/hrc/documents/THE_UK_MILITARY_IN_IRAQ_1Oct2018.pdf> accessed 18 February 2022.

³⁰ Wallace (n.9) 114-115.

Practical Issues

The IHRAR Panel report cites sources at the military roundtable who observed that

“It can be difficult to carry out Article 2 compliant investigations in an armed conflict. The practical realities of war are often overlooked, and Article 2 does not seem to have been developed with a military application in mind”.³¹

It is clear that practical problems can arise,³² however this statement does not reflect the full situation.

The ECtHR has recognised the difficulties States face in these contexts observing that ‘Article 2 must be applied realistically, to take account of specific problems faced by investigators’.³³ It stated in *Al-Skeini* that the Convention obligations could be divided and tailored to specific situations.³⁴ This approach of realistic application was evident in *Hanan v Germany*, where the ECtHR acknowledged the practical limits Germany faced in carrying out an effective investigation during military operations in Afghanistan.³⁵ The ECtHR ruled that the investigation, carried out in extremely difficult circumstances, was effective. The ECtHR is willing to adapt the procedural obligation and the *Hanan* case shows it is possible to discharge the procedural obligation during active military operations.

There are several measures that the UK can take to improve procedures and learn lessons from both Northern Ireland and Iraq. These include improving procedures for collecting and handling evidence, introducing measures to separate the chains of command of investigators from those under investigation, establishing agreements to cooperate with local authorities and admitting credible evidence from third parties including civilian sources on the ground.

Post-conflict Investigations

Leaving aside the practical issues, even outside operational constraints, post-conflict investigations have encountered issues. The Iraq Historical Allegations Team (IHAT), which was established in 2010 to determine whether allegations against the military were properly investigated in Iraq and to determine what further action, if any, should be taken, encountered many problems. It was subject to several judicial review challenges over its compliance with the procedural obligations of Articles 2 and 3.³⁶

³¹ IHRAR Report 537.

³² Wallace (n.9) Chapter 4.

³³ *Al-Skeini and Others v UK* (2011) 53 EHRR 18 at [168].

³⁴ *Al-Skeini and Others v UK* (2011) 53 EHRR at [137].

³⁵ *Hanan v Germany* (App No 4871/16) 16 February 2021 at [145].

³⁶ See, for example, *R. (Ali Zaki Mousa) v Secretary of State for Defence (HC No.2)* [2010] EWHC 3304 (Admin) 126; *R. (Ali Zaki Mousa) v Secretary of State for Defence* [2011] EWCA Civ 1334 114

Even though thousands of allegations were made against British soldiers in both Iraq and Afghanistan, including allegations of unlawful killings and ill-treatment, very few charges were brought against military personnel.³⁷

When the International Criminal Court (ICC) Office of the Prosecutor reviewed the investigations carried out by the UK, it observed that

“the initial response of the British Army in theatre at the time of the alleged offences was inadequate and vitiated by a lack of a genuine effort to carry out relevant investigations independently or impartially”.³⁸

This in turn had a knock-on effect on subsequent investigations where the lack of initial evidence (physical and witness) restricted the possibility of establishing the truth and, where appropriate, securing convictions. There is a pattern here: inadequate initial investigations in theatre and few forums in which to raise complaints against service personnel, which drives victims and next-of-kin to raise complaints under the ECHR/HRA. The solution is not to remove or avoid the obligation to investigate, it is to improve investigations, this obligation to investigate cannot be avoided.

Other International Obligations

The obligation to investigate effectively is not an additional obligation arising under IHRL. The Geneva Conventions (and Additional Protocol I),³⁹ the Rome Statute of the ICC,⁴⁰ the ECHR and the Convention against Torture (CAT),⁴¹ all impose obligations on the UK to investigate various activities during military operations. These are widely incorporated into domestic law too.⁴² The UK also has obligations under customary international law. Rule 158 of the Study on Customary International Humanitarian Law by the International Committee of the Red Cross (ICRC) reflects a customary obligation to investigate:

“States must investigate war crimes allegedly committed by their nationals or armed forces, or on their territory, and, if appropriate, prosecute the suspects.

³⁷ https://www.ceasefire.org/wp-content/uploads/2020/12/FOI2020_06821-Response-V2.pdf accessed 18 February 2022.

³⁸ <https://www.icc-cpi.int/itemsDocuments/201209-otp-final-report-iraq-uk-eng.pdf> accessed 18 February 2022.

³⁹ Article 50, Geneva Convention (I) 1949; Article 51, Geneva Convention (II) 1949; Article 130, Geneva Convention (III) 1949; Article 147, Geneva Convention (IV) 1949; Articles 11 and 85, Protocol Additional to the Geneva Conventions (I) 1977.

⁴⁰ Rome Statute of the International Criminal Court 1998.

⁴¹ Article 8, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984.

⁴² Geneva Conventions Act 1957; International Criminal Court Act 2001 and s.134 of the Criminal Justice Act 1988.

They must also investigate other war crimes over which they have jurisdiction and, if appropriate, prosecute the suspects”.⁴³

This is applicable to both international and non-international armed conflicts and the UK accepts the rule.⁴⁴ There are also extensive obligations under IHL to investigate possible violations which do not amount to war crimes.⁴⁵ The ECtHR has also held that the obligation to investigate subsists even where other substantive obligations, such as the right to life, are inapplicable.⁴⁶ It also considers that “there is no substantive normative conflict in respect of the requirements of an effective investigation between the rules of international humanitarian law [...] and those under the Convention”.⁴⁷ In sum, the UK’s obligations under IHL, domestic law and IHRL demand that it must try, as far as possible, to provide genuine and effective investigations into allegations of abuse by service personnel during military operations.

Resolving Tensions between IHL and IHRL

The global trend on the application of IHRL during military operations has been to continue to apply it and try to reconcile any clashes between IHL and IHRL that may arise. This should be the UK’s preferred approach, consistent with its obligations under international law. The ICJ, for example, has stated that:

“As regards the relationship between international humanitarian law and human rights law, there are thus three possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law”.⁴⁸

The UN Human Rights Committee clearly endorses simultaneous application of IHL and IHRL:

“While, in respect of certain Covenant rights, more specific rules of international humanitarian law may be specially relevant for the purposes of the interpretation of Covenant rights, both spheres of law are complementary, not mutually exclusive”.⁴⁹

⁴³ https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule158#targetText=Rule%20158,%20appropriate%20%20prosecute%20the%20suspects.> accessed 18 February 2022.

⁴⁴ https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2_rul_rule158 accessed 18 February 2022.

⁴⁵ See generally Mark Lattimer, ‘The Duty in International Law to Investigate Civilian Deaths in Armed Conflict’, in Mark Lattimer and Philippe Sands, *The Grey Zone: Civilian Protection Between Human Rights and the Laws of War*, Oxford, Hart, 2018, pp 52-65.

⁴⁶ *Georgia v Russia (II)* (App no 38263/08) 21 January 2021 at [329] – [332].

⁴⁷ *Hanan v Germany* (App No 4871/16) 16 February 2021 at [199].

⁴⁸ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion [2004] ICJ Rep 136, [106].

⁴⁹ UN Human Rights Committee, General Comment No 31 CCPR/C/21/Rev.1/Add.13 at [11].

The Inter-American human rights bodies have also endorsed this approach of interpreting IHRL consistently with IHL,⁵⁰ with the Inter-American Commission observing there was substantial overlap and ‘the potential application of one does not necessarily exclude or displace the other’.⁵¹ The Inter-American Court has stated it “considers it useful and appropriate to interpret the scope of the treaty-based norms and obligations in a way that complements the norms of international humanitarian law”.⁵²

The ECtHR has illustrated what can be achieved in *Hassan v United Kingdom*.⁵³ There the ECtHR applied **both** IHL and the ECHR simultaneously, expressly stating that

“even in situations of international armed conflict, the safeguards under the Convention continue to apply, albeit interpreted against the background of the provisions of international humanitarian law”.⁵⁴

In this context safeguards applicable in the context of the right to liberty and security were adapted and applied to norms of IHL. This made allowances for the challenging circumstances presented by an extraterritorial military operation while maintaining the protective thrust of the right to liberty and security to avoid arbitrary detention.⁵⁵

The most appropriate approach to resolving tensions between IHL and IHRL is to try to apply both simultaneously with each body complementing the other. This approach has worked in the Convention system and other jurisdictions already and would be consistent with the UK’s other international legal obligations.

Conclusion

In conclusion, attempts to remove overseas military operations from the application of human rights law, whether by means of an international protocol, domestic legislation, or derogation, face formidable obstacles and are unlikely to achieve the result that the UK government intends.

Rather than trying to alter the application of the law to military operations, the UK would be better served taking an alternative approach. It should seek to address the underlying problems which drive applicants to the ECHR/HRA system. It should do this by improving enforcement of IHL in theatre

⁵⁰ Juan Pablo Perez Leon Acevedo, ‘The Role of the Inter-American Court of Human Rights in Sealing with Armed Conflicts and Post-Conflict Reconstruction: Jurisprudential Analysis and Some Comparative Considerations’ (2009) 7 *International Journal of Civil Society Law* 7, 9; Alonso Gurmendi Dunkelberg, ‘There and Back Again: The Inter-American Human Rights System’s Approach to International Humanitarian Law’ (2017-2018) 56 *The Military Law and the Law of War Review* 305.

⁵¹ IACoMHR, *Coard and Others v United States*, Report No 109/99, 29 September 1999 at [39].

⁵² IACtHR, *Santo Domingo Massacre v Colombia*, Series No 259, 30 November 2012 at [187]. See, also, IACoMHR, *Arturo Ribón Avilán v Colombia*, Report No 26/97, 30 September 1997; IACoMHR, *Juan Carlos Abella v Argentina*, Report No 55/97, 18 November 1997; IACoMHR, *Hugo Bustios Saavreda v Peru*, Report No 38/97, 16 October 1997.

⁵³ *Hassan v UK* (App No 29750/09) ECtHR, 16 September 2014.

⁵⁴ *ibid* at [104].

⁵⁵ Wallace (n.9) 162.

and offering alternative forums through which victims can address complaints, confident that they will be dealt with independently and effectively. It should improve investigation methods where problems arise in theatre, including by securing independent investigations. Finally, seeking complementary application of both IHL and IHRL during military operations should be the preferred approach to each body of law as it is consistent with the UK's other legal obligations and international legal practice.