Response to the Joint Committee of Human Rights call for evidence on the Overseas Operations (Service Personnel and Veterans) Bill

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On the 27th July 2020, the Joint Committee of Human Rights launched an inquiry into the controversial Overseas Operation (Service Personnel and Veterans) Bill. The bill was introduced in the House of Commons in March 2020 and is due its second reading imminently. In short, the bill aims to limit prosecution and civil proceedings against military personnel, as well as to enable the UK government to derogate from the ECHR during combat operations. Bethany Shiner (Middlesex University) and Dr Tanzil Chowdhury (QMUL) have reproduced the evidence that they submitted to the inquiry. The evidence is structured as a response to the questions set by the JCHR.

We resist the Bill on the grounds that:

1. It is contrary to the UK's human rights commitments and to its obligations under the Rome Statute.
2. It contains unnecessary provisions pertaining to limitations. The law already provides robust limitations to bringing late claims or claims without merit.
3. The effect of the Bill will be to entrench near-impunity of both the MoD and military personnel.

The statutory presumption against prosecution

Is the introduction of a presumption against prosecution of service personnel and veterans justified?

No. Presumptions against prosecution are typically introduced into legislation to encourage victims to come forward about greater criminal activity which they have unwillingly participated in and thus not fear recrimination. For example, in instances where those who commit crimes are victims of trafficking, such a law will instruct a prosecutor not to prosecute.[1] There is no comparable situation where military personnel are under such victimisation that a presumption would be needed to encourage them to come forward about the nature of said-victimisation. The presumption, therefore, has no merit.

If there is to be a presumption against prosecution after a certain time, is five years from the time period of the date of the alleged conduct a reasonable period of time?

[1] s.45 *Modern Slavery Act* 2005; the same is also the case with the Human Trafficking and Exploitation (Scotland) Act 2015. See also 'Lord Advocate's Instructions for Prosecutors when considering Prosecution of Victims of Human Trafficking and Exploitation' https://www.copfs.gov.uk/images/Documents/Victims_and_Witnesses/HumanTrafficking/Lord%20Advocates%20Instructions%20for%20Prosecutors%20when%20considering%20Prosecution%20of%20Victims%20of%20Human%20Trafficking%20and%20Exploitation.pdf

No. Foreign victims of killings or abuse by state actors on the victims' own territory are likely to be delayed in bringing their claims before the English courts. Members of the armed forces are often immune from the legal processes of foreign territories and victims often do not know that they can or how to bring such claims before the courts of the invading or occupying country. It may be "practically impossible" to bring a claim against the Ministry of Defence in the English courts.[2] Victims therefore face numerous and significant barriers to justice.[3] As such, any limits to accountability in the context of military operations overseas is unreasonable and contrary to the interests of justice.

Furthermore, the presumption is unnecessary. Built into the law are standards which prosecutors must already consider before proceeding with a prosecution. Currently, the Service Prosecuting Authority is able to refuse to proceed with a prosecution if it views that a prosecution would not be in the public interest or if it deems that there is a low success of prosecution, even when an investigating authority has recommended that an individual be charged. Although, there are some time limits within criminal law,[4] we do not think this can be justified for some of the most egregious crimes. It would be inconceivable to introduce a presumption against prosecution for serious domestically committed crimes like GBH, murder or torture so we do not see why it should be different for military personnel serving abroad which would create a special category of persons immune from criminal prosecution.

If there is to be a presumption against prosecution, should the presumption apply to all offences, including serious offences such as murder and torture? Should it apply where the alleged conduct may amount to a war crime or crime against humanity?

In addition to the above, such a presumption for war crimes and crimes against humanity could be contrary to Article 29 of the Rome Statute. Torture has been illegal in the UK for over 300 years. The Bill ends such proscription and would decriminalise torture in some circumstances. Further, murder can, under no circumstances, escape the threat of prosecution. Indeed, there are already numerous ways in which killing someone in battle and during an occupation attracts no legal consequence.

How would the right to an effective remedy for victims be impacted by the proposed change in law?

Although a presumption against prosecution is different from a statute of limitations, it is only partially less strict because the combined effect of the "new factors" that a prosecutor must consider make it very difficult for a prosecution to proceed. Furthermore, the "longstops" mean victims' rights to justice and effective reparation are severely limited. For example, torture is a gross violation of International Human Rights Law, a serious violation of International Humanitarian Law and a crime. As such, attempts to time-bar victims of torture from bringing civil and human rights claims and placing temporal barriers to prosecuting perpetrators is not consistent with international law.[5]

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[2] *Alseran & Others v Ministry of Defence* [2017] EWHC 3289 (QB) paras 769 - 786
[3] *Al-Saadoon & Others v Secretary of State for Defence* [2016] EWHC 773 (Admin) para 166
[4] Sexual Offences Act 1956, para 10(a), Schedule 2
[5] Principles 24 of the Joinet Principles, 1968 UN Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity and General Assembly, 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'; Resolution 60/147, para. 7 (2005).

Does the presumption against prosecution raise any issues in respect of the UK's procedural obligations under Articles 2 (right to life) and 3 (prohibition on torture, inhuman and degrading treatment or punishment) ECHR?

Yes. Strasbourg jurisprudence confirms that there is a positive duty to have effective criminal law provisions to deter the commission of conduct or treatment which would be contrary to Articles 2 and 3 ECHR.[6] If there are credible allegations then an investigation must be initiated reasonably promptly and be capable of identifying culpable individuals and securing accountability, including through the criminal justice process with criminal proceedings being a potential remedy.[7] The State's article 2 ECHR positive obligation also requires an "effective independent judicial system to be set up so as to secure legal means capable of establishing the facts, holding accountable those at fault and providing appropriate redress to the victim."[8] Furthermore, the awarding of compensation is not enough to satisfy the positive obligations.[9]

What would be the implications of this change in law be on the UK's compliance with its international obligations? Does the presumption against prosecution raise any issues in respect of the UK's obligations under the Rome Statute to prosecute international crimes?

It would be incompatible with the Rome Statute to introduce any law which prevents or limits the investigation and prosecution of any individual alleged to have committed a war crime or a crime against humanity. The Rome Statute cannot be derogated from. The International Criminal Court have warned, in the context of its ongoing preliminary examination of allegations related to the conduct of British military personnel in Iraq, that if proposals for a presumption against prosecution were introduced, it "would need to consider its potential impact on the ability of the UK authorities to investigate and/or prosecute crimes allegedly committed by members of the British armed forces in Iraq, against the standards of inactivity and genuineness set out in article 17 of the Statute."[10]

The limitation period for bringing civil claims and human rights claims

Is the proposed limitation period of six years (without exception) in cases of personal injury and death a reasonable period of time? Is the new hard time limit of six years for bringing human rights claims in relation to overseas military operations reasonable, even where it would otherwise have been equitable in all the circumstances to allow such a claim to be brought?

No. As stated above, there are already several barriers to foreign nationals bringing claims against the government in the English courts. Additionally, if the claimant is the cause for delay without acceptable explanation then it is already settled that the court should refuse to extend the time for making a claim, in tort and human rights law. The case law on limitations across tort and human rights proceedings are varied and generally illustrate a common reticence toward litigation on distant events in the past.[11] However, the tort claim for personal injury

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[6] *Mustafa Tunç and Fecire Tunç v. Turkey* [GC] 24014/05, 14 April 2015, para 171
[7] *Calvelli and Ciglio v. Italy* [GC] 32967/96, 17 January 2002 para 51; *Anna Todorova v. Bulgaria* 23302/03, 24/08/2011, para 73
[8] *Ciechonzska v Poland* 19766/04, 14 June 2011, para 66
[9] *McKerr v. the United Kingdom* 28883/95 para 121; *Bazorkina v. Russia* 69481/01, 11/12/2006, para 117; *Al-Skeini and Others v. the United Kingdom* [GC] 55721/07, 7 July 2011, para 165
[10] https://www.icc-cpi.int/itemsDocuments/191205-rep-otp-PE.pdf
[11] See *Kimathi & Others v The Foreign and Commonwealth Office* [2018] EWHC 2066 and *Alseran & Others v Ministry of Defence* [2017] EWHC 3289 (QB)

arising from the killing, torture and ill-treatment of the Mau Mau in Kenya was dismissed due to the passage of time.[12]

Establishing a rigid time limit of 6 years, given the complexity of bringing claims, will have the likely effect of entrenching a level of impunity for the military, senior commanders, and ministers. The discretion of the court to decide when it is equitable to allow a claim to proceed must not be removed for the purpose of protecting the government from public scrutiny and legal accountability. We do not think there is any justification or need for a limitation period as there are already numerous limits built in to the ECHR, domestic jurisprudence as well as the Limitation Act 1980 and s7(5)(b) Human Rights Act 1998.

What will the impact be of requiring a judge to consider the mental health of witnesses before allowing a case to proceed?

The impact of requiring individuals to revisit traumatic events when being interviewed or as witnesses should not be overlooked, particularly when those individuals have PTSD and psychological trauma. However, this must be balanced against the interests of justice which demand that allegations are scrutinised. As Justice Leggatt in Al-Saadoon said:

> "Of course, if there is sufficient reason to believe that a serious criminal offence may have been committed and that interviewing the witness may lead to the perpetrator(s) being prosecuted and convicted, the distress which this may cause to the witness is a cost which has to be incurred. But it is not a step which should be taken lightly or without strong cause."[13]

As far as we are aware, in no other circumstances does such a requirement exist in criminal law and the Code for Crown Prosecutors does not contain such a consideration. The potential harm to vulnerable witnesses (not the accused) should be countered by specialist witness support measures as are already in place in the criminal justice system.[14] It would be unconscionable not to prosecute, where the evidence meets the high threshold for proceeding, on the grounds of concerns for witness mental health. However, the vulnerability of military and other witnesses should be assessed in advance with support put in place for those who need it.

The duty to consider derogating from the ECHR

Does the introduction of a duty to consider derogating from the Convention in relation to overseas operations have any meaningful legal effect?

It is not clear whether an extraterritorial derogation can be made to the Convention and no state has ever attempted to derogate in such circumstances. While derogation from certain rights under the ECHR is permitted, a state may not derogate from the Article 2– unless deaths result from lawful acts of war – or from the Article 3.[15]

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[12] *Kimathi & Others v The Foreign and Commonwealth Office* [2018] EWHC 2066 paras 201-202. See https://internationalandtravellawblog.com/2018/08/16/first-judgment-on-the-merits-in-the-kenya-emergency-group-litigation-tc34/

[13] *Al-Saadoon & Others v Secretary of State for Defence* [2016] EWHC 773 (Admin) para 202

[14] Youth Justice and Criminal Evidence Act 1999, sections 16-33

[15] Article 15(1) European Convention on Human Rights 1950

A derogation will not stop litigation. Instead, where an individual brings a claim for the breach of a Convention right the court will still consider whether a right has been breached before evaluating whether the existence of that right had been displaced by a valid derogation.[16] Litigation and investigations would continue to be brought despite a valid derogation being put in place, for example, to prevent the UK's investigation by the ICC for war crimes.

[16] See for instance A. and Others v. the United Kingdom (2009) 49 EHRR 29, 161; Lawless v Ireland (1979-80) 1 EHRR 15, 15.