



BRIEFING PAPER

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Overseas Operations (Service Personnel and Veterans) Bill 2019-21

By Claire Mills
Joanna Dawson

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Summary

The Government presented the [Overseas Operations \(Service Personnel and Veterans\) Bill](#) (Bill 117) on 18 March 2020. Second Reading has been scheduled for 23 September 2020.

The main purpose of the Bill is to provide greater legal protections to Armed Forces personnel and veterans serving on military operations overseas.

Framework of law governing armed conflicts

There is a myriad of law that oversees the conduct of military personnel on operations overseas. Personnel must act in accordance with UK law, both Service and civilian, international humanitarian law (also known as the Laws of Armed Conflict) and international human rights law.

As such Armed Forces personnel are not immune from prosecution for offences committed whilst serving on operations overseas.

Over the last two decades there has been an increasing tension between the body of international humanitarian law that has traditionally governed armed conflicts, and human rights law. The latter has been increasingly applied in armed conflict situations as a result of a number of key rulings which extended the territorial application of the European Convention on Human Rights (ECHR). The ECHR has direct effect in the UK as a result of the *Human Rights Act 1998*.

The Government has stated on many occasions its assumption that international humanitarian law takes precedence where the two bodies of law overlap; a position which is now being challenged.

Investigation of alleged offences by British Service personnel in Iraq and Afghanistan

Al-Sweady Inquiry

The Al-Sweady Inquiry was launched by the Labour Government in 2009 following a judicial review brought by the uncle of Hamid Al-Sweady, claiming that his nephew had been unlawfully killed while in the custody of British troops. Other linked claims related to detention and mistreatment by British troops.

The Report of the inquiry was published in December 2014. It concluded that certain aspects of the way in which the detainees were treated amounted to actual or possible ill-treatment. However, the vast majority of the allegations were found to be wholly without merit or justification, and were the result of deliberate and calculated lies, or inappropriate and reckless speculation.

A solicitor who was involved in bringing a large proportion of the claims, Phil Shiner of Public Interest Lawyers, was subsequently struck off in 2017 for professional misconduct.

Iraq Historic Allegations Team (IHAT)

Numerous legal claims also arose in relation to actions of British service personnel in Iraq between 2003-2009 more broadly.

In 2010 the Government announced the establishment of the Iraq Historic Allegations Team (IHAT) to sift through and investigate allegations and refer them for prosecution, where appropriate. A subsequent decision by the European Court of Human Rights (ECtHR) in 2011 (*Al Skeini*) determined that the UK had a duty under the Convention to

investigate allegations of death and ill treatment, and IHAT therefore was intended to fulfil this function.

Around 3,400 allegations of unlawful killings and ill treatment were received by IHAT. In approximately 70% of cases it was determined that there was not a case to answer or it was considered not proportionate to conduct a full investigation.

The decision in 2017 to strike off Phil Shiner allowed IHAT to dismiss many of the false allegations he submitted. The Government took the subsequent decision to close IHAT by the summer of 2017.

Service Police Legacy Investigations (SPLI)

Although IHAT was closed down, the legal obligation on the Government to investigate allegations of wrongdoing remained.

In July 2017 the remaining Iraq legacy investigations were therefore taken over by the Service Police.

The Service Police Legacy Investigations (SPLI) branch inherited 1,260 allegations of criminal conduct from IHAT. By 31 March 2020 a further 27 allegations had been received or identified. As of 30 June 2020, the SPLI had closed, or was in the process of closing, 1,213 allegations, either on the grounds of proportionality or because of a lack of evidence.

Iraq Fatalities Investigations (IFI)

In 2013 the High Court determined that a publicly accountable investigation into the circumstances of certain deaths, with participation from the families of the deceased, was required by Article 2 of the ECHR. The High Court indicated that the requirement could be met by holding inquisitorial inquiries modelled on coronial inquests.

Iraq Fatalities Investigations was subsequently established. The IFI does not determine civil or criminal liability. Cases are referred to it after it has been decided that there is no realistic prospect of a conviction. The investigations serve a purpose similar to a coronial inquest by providing the families of the deceased and the wider public with as much information as possible about the circumstances of the death.

The IFI has concluded seven cases to date. It has one ongoing case: [an investigation into the death of Saeed Radhi Shabram Wawi Al-Bazooni](#) in May 2003.

Operation Northmoor

In 2014 an independent Royal Military Police led investigation (Operation Northmoor) was launched into allegations relating to UK detention operations in Afghanistan between 2005 and 2013.

In total 675 allegations were received by the RMP from 159 individuals. By July 2017 investigations into more than 90% of those allegations had been discontinued because there "was no evidence of criminal or disciplinary offence".

In July 2019 remaining investigations conducted under Operation Northmoor were brought to an end. No case investigated as part of Operation Northmoor was referred for prosecution by the independent Service Prosecuting Authority.

Government commitment to address 'lawfare'

In response to the legal rulings extending the application of the ECHR, the outcome of the Al Sweady inquiry and the closing down of IHAT, successive Conservative Governments have indicated their intention to address the increasing influence of 'lawfare'.

Proposals under consideration have included replacing the Human Rights Act and derogating from the ECHR in future conflicts. In July 2019 the Government published a consultation paper which set out a number of proposals including a statutory presumption against prosecution for alleged offences committed on overseas operations more than 10 years ago and a time limit on civil litigation claims for personal injury/death. The consultation paper did not examine derogation from the ECHR which the Government had already committed to.

Upon re-election in December 2019, Boris Johnson's Conservative party promised to introduce legislation "to tackle vexatious legal claims that undermine our Armed Forces" within 100 days.

Informed by the submissions to the earlier consultation paper, and the 2016 commitment to the presumption to derogate from the ECHR, the Government subsequently published legislation on 18 March 2020.

Main provisions of the Overseas Operations Bill

The main purpose of the Bill is to provide greater legal protections to Armed Forces personnel and veterans serving on military operations overseas. It would not provide blanket immunity from prosecution for offences committed during overseas operations but seeks to raise the threshold for the prosecution of alleged offences.

There are three main facets to the Bill:

1. It would create what has been termed a "triple lock", to give personnel and veterans greater certainty that the pressures placed upon them during overseas operations would be taken into account when prosecution decisions for alleged historical offences are made. That lock would consist of:
 - a presumption against prosecution for alleged offences committed more than five years ago;
 - a requirement for prosecutors to give weight to certain matters when reaching decisions in such cases;
 - a requirement to obtain the consent of the Attorney General, or the Advocate General in Northern Ireland, before any prosecution can proceed.
2. It would introduce time limits on bringing civil claims in connection with overseas operations.
3. It would place a duty on the Government to consider derogating from the European Convention on Human Rights in relation to significant overseas military operations.

The Bill would not apply to operations in the United Kingdom, including events that occurred in Northern Ireland during The Troubles. The Government has made clear its intention to introduce separate legislation to address legacy issues in Northern Ireland.

The provisions on presumption against prosecution and the limitations on bringing civil claims could not be applied retrospectively to legal proceedings that are already underway.

The Government has stated its belief that the Bill's provisions are consistent with the UK's obligations under domestic and international law and that "The measures in the Bill are a proportionate solution to the problem, and strike an appropriate balance between victims' rights and access to justice on the one hand, and fairness to those who defend this country on the other".

Reactions

Support for the Bill has been mixed. Longstanding campaigners for greater legal protection for veterans have largely welcomed its proposals. Others, however, have expressed concern that it will place Armed Forces personnel seemingly above the law and contravene the UK's international legal obligations. Specifically, the applicability of the Bill to war crimes and crimes against humanity has provoked widespread concern that the legislation, as it stands, could leave Armed Forces personnel open to prosecution by the International Criminal Court.

There has been concern that the introduction of a 6-year time limit for bringing civil claims, which would apply to service personnel and veterans, will breach the Armed Forces Covenant.

The exclusion of operations relating to Northern Ireland from the Bill's provisions has also drawn criticism from many quarters.

1. Background

1.1 The legal framework for armed conflict

There is a myriad of law that oversees the conduct of military personnel on operations overseas. Primarily personnel must act in accordance with UK law, both Service and civilian, customary international humanitarian law and international human rights law.

Application of UK law to Service personnel overseas

Service personnel are subject to both the civilian law of England and Wales and to Service law, and they have a duty to uphold both.

A system of Service law, through which military discipline is preserved, is regarded as essential for maintaining the operational effectiveness of the Armed Forces. It provides an avenue to enforce standards that are distinctive to the Armed Forces,¹ and ensures that Service personnel are subject to a single disciplinary system wherever they are serving in the world.

The statutory basis for this service justice system is the [Armed Forces Act 2006](#). That legislation established a single harmonised system of Service law which had previously been set out in the individual Service Discipline Acts.² It also brought the military disciplinary system into line, as far as practicable, with the civilian criminal justice system in England and Wales.

Criminal conduct offences

Within Service law is the offence of criminal conduct (Section 42 of the *Armed Forces Act 2006*), which is referred to frequently in Part 1 of this Bill. Section 42 covers any offence, committed by Service personnel anywhere in the world, that would be punishable under the law of England and Wales, i.e. civilian law.

A Commanding Officer has the power to deal with most offences, including Section 42 offences, summarily. There are exceptions, however, which are set out in Schedule 2 of the *Armed Forces Act 2006* and relate to the most serious of offences including murder, manslaughter and crimes against humanity. Such cases must be referred to the Service Police for investigation and cannot be dismissed by a Commanding Officer.

On overseas operations criminal or Service disciplinary jurisdiction lies with the UK authorities. UK courts cannot generally try offences that are committed outside the UK. Any charges relating to Schedule 2 offences would therefore be heard within the military justice system by Court Martial. Decisions to prosecute would be taken by the Service

Military personnel are subject, at all times, to both Service law and civilian law wherever they are serving in the world.

As such Armed Forces personnel are not immune from prosecution for offences committed whilst serving.

¹ Service law provides for a number of offences that are unique to military life and do not exist elsewhere within the civilian justice system, such as Absence without Leave or desertion.

² The *Army Act 1955*, the *Air Force Act 1955* and the *Naval Discipline Act 1957*. An explanation of the differences in the Acts is available in Library Briefing, [RP05/75, Background to the forthcoming Armed Forces Bill](#), November 2005

Prosecuting Authority and the Director of Service Prosecutions, who are independent of the Ministry of Defence.

Box 1: Further reading

- House of Commons Library, [CBP08953, Service Police Review](#)
- House of Commons Library, [SN06823, The military justice system: an introduction](#)
- Ministry of Defence, [Overview of Service Justice System and the Act](#), 2011
- Ministry of Defence, [Service Justice Review](#), February 2020

International Humanitarian Law

International Humanitarian Law, or what is more commonly referred to as the Law of Armed Conflict (LOAC), is a set of rules that defines the accepted conduct of parties in an armed conflict. It does not determine the circumstances in which a state may resort to using force, or whether an armed conflict is legal. These are governed by the international law on the use of force, also known as *jus ad bellum*.³

IHL is based on a [series of treaties](#), including the Geneva Conventions and their Additional Protocols, and [customary international law](#) which has emerged from general state practice. It is intended to be a universal and neutral body of law that strikes a balance between legitimate military action and the humanitarian objective of reducing human suffering, particularly among civilians. It protects individuals who are not, or are no longer, participating in hostilities and restricts the means and methods of warfare. The conduct of armed conflict is therefore based upon the principles of humanity, military necessity, distinction, proportionality and precaution.

There is no specific court or enforcement mechanism for IHL: prosecution is a matter for states and, more recently, international criminal tribunals.

Over the last two decades there has been an increasing tension between the body of international humanitarian law that has traditionally governed armed conflicts, and human rights law which has been increasingly applied in armed conflict situations (see [Application of the European Convention on Human Rights \(ECHR\)](#) below). In written evidence to the Defence Committee in November 2013, Michael Meyer, Head of International Law at the British Red Cross explained the difference between IHL and human rights law:

IHL and international human rights law, while generally complementary, are two distinct bodies of law.

While both bodies of law share some common goals—namely, to protect the lives, health and dignity of human beings—they do so from different perspectives. Importantly, IHL was specifically developed to regulate a unique set of circumstances: the conduct

³ A useful explanation of *jus ad bellum* is available in the International Committee of the Red Cross publication: [International humanitarian law: answers to your questions](#)

of parties to an armed conflict. In regulating such behaviour, IHL seeks to establish a *balance* between the war-fighting objectives of the adversaries and the requirements of humanity. In contrast, human rights law seeks to protect persons from abusive power by governments, the latter to be curbed through the assertion of individual rights. Consequently, whereas IHL aims to protect, so far as possible, certain categories of persons affected by armed conflict, and to limit (but not to eliminate) the methods and means of warring parties, human rights law sets out inherent entitlements belonging to all individuals.⁴

The Government has stated on many occasions its assumption that international humanitarian law takes precedence where the two bodies of law overlap; a position which is now being challenged. Giving evidence to the same defence committee inquiry in 2013, the MOD argued:

During the last decade the increasing importance of international human rights law, arguably to the detriment of IHL, and the expansive interpretations being given to provisions of the ECHR by both our domestic courts and by Strasbourg has not, in the Government's view, been conducive to clarity.⁵

The relationship between IHL and human rights law, and how they differ, is examined in greater detail in House of Commons Library briefing, CBP7429, [International Humanitarian Law: a primer](#), January 2016.

Application of the European Convention on Human Rights (ECHR)

International human rights law now forms part of the law regulating the Armed Forces as a result of a number of key rulings extending the territorial application of the ECHR. The ECHR has direct effect in the UK as a result of the *Human Rights Act 1998* and therefore enables individuals to bring civil claims before the UK courts for a breach of Convention rights.

Case law developments

The territorial scope of application of the ECHR is governed by Article 1, under which state parties 'shall secure to everyone within their jurisdiction' the rights and freedoms defined in the Convention.

*Al-Skeini*⁶ was one of several cases arising out of the occupation of Iraq. It concerned a number of individuals who were allegedly killed by British troops on patrol in UK occupied Basra. The European Court of Human Rights (ECtHR) determined that there may be instances when the Convention should apply outside the territories of the Convention's member states. This may occur when agents of a member state are exercising authority and control over individuals within a given territory upon which that member state is exercising some public powers. The Convention was therefore found to be applicable to actions taken by British troops in Basra where the UK assumed the exercise of some

Article 2 of the ECHR protects the right to life. It requires states to take appropriate steps to safeguard the lives of those within their jurisdiction, including carrying out an effective investigation into alleged unlawful killings.

⁴ Defence Committee, UK Armed Forces personnel and the legal framework for future operations, HC931, Session 2013-14, Ev.56

⁵ Ibid, Ev.1

⁶ [Al-Skeini & Others v UK \(App. No. 55721/07\), 2011](#)

public powers normally exercised by a sovereign government. The court went on to find that there had been a failure to conduct an independent and effective investigation into the deaths of the relatives of five of the six applicants, in violation of Article 2 (right to life). In the related case of *Al-Jedda*, the court found a violation of Article 5 (right to liberty and security) in relation to the detention of the applicant by British forces in Iraq.

*Smith*⁷ concerned a claim brought by widows of British soldiers killed in Iraq on the basis of alleged shortcomings on the provision of vehicles and equipment. The UK Supreme Court concluded, in light of *Al-Skeini*, that deaths outside British military bases could be within the jurisdiction of the Convention as a result of the control and authority exercised by the UK over its soldiers.

In *Hassan*⁸ the ECtHR held that in situations of armed conflict, the provisions of the ECHR should be interpreted against the background of the provisions of international humanitarian law. Specifically, the grounds of permitted deprivation of liberty under article 5 should be accommodated, as far as possible, with the taking of prisoners of war and the detention of civilians who posed a risk to security under the Third and Fourth Geneva Conventions. Deprivation of liberty had to comply with international humanitarian law in order to be lawful, and also had to be in keeping with the fundamental purpose of article 5(1), which is to protect the individual from arbitrariness. The court concluded that there had been no breach of article in this case, because the capture and detention of the claimant's brother in Iraq had fulfilled these requirements.

In *Al Saadoon*⁹: the appellants sought orders requiring the secretary of state to investigate allegations of unlawful killings of Iraqi civilians by British soldiers. The Court of Appeal held that the 'public powers' basis for extra-territorial jurisdiction of the Convention established in *Al-Skeini* could also apply during a post-occupation period. It would apply in situations where state agents exercised a degree of power and control over a person which went beyond the use of potentially lethal force, and included an element of control prior to the use of force. The court then considered various test cases to determine whether Iraqi civilians who had been killed were under the control of British armed forces and therefore came within the article 1 of the Convention.¹⁰

In *Mohammed*¹¹ the Supreme Court considered whether the detention of enemy combatants for long periods in Iraq and Afghanistan breached Article 5. It held that British forces had legal power to detain individuals for periods longer than 96 hours. Authority to detain was implicitly conferred by the UN Security Council Resolutions where it was required for imperative reasons of security.

⁷ *R (Smith) v Ministry of Defence* [2013] UKSC 41

⁸ *Hassan v United Kingdom* (29750/09) [2014] 9 WLUK 388

⁹ *R (Al-Saadoon) V SoS for Defence* [2016] EWCA Civ 811

¹⁰ Paras 75-105

¹¹ [2017] UKSC 2

Article 5(1) should be read so as to accommodate as permissible grounds detention pursuant to that power in the context of non-international armed conflict. This followed the reasoning of the ECtHR in *Hassan*, that article 5(1) should be treated as non-exhaustive so as to accommodate the existence of a power of detention in international law.

1.2 Investigation of alleged offences by British Service personnel in Iraq

Al-Sweady Inquiry

The Al-Sweady Inquiry was launched by the Labour Government in 2009 to investigate allegations that Iraqi civilians were killed and tortured by British soldiers after a fierce battle in 2004, known as the Battle of Danny Boy. The inquiry followed a judicial review brought by the uncle of Hamid Al-Sweady in 2009, claiming that his nephew had been unlawfully killed while in the custody of British troops. Other linked claims related to detention and mistreatment by British troops.

The Report of the inquiry was published in December 2014. It concluded that certain aspects of the way in which the detainees were treated amounted to actual or possible ill-treatment. However, the vast majority of the allegations were found to be wholly without merit or justification, and were the result of deliberate and calculated lies, or inappropriate and reckless speculation.¹²

A solicitor who was involved in bringing a large proportion of the claims, Phil Shiner of Public Interest Lawyers, was subsequently struck off in 2017 for professional misconduct. The allegations against him included dishonesty and acting without integrity and concerned the circumstances in which he had identified and approached potential clients.¹³

Iraq Historic Allegations Team (IHAT)

Numerous legal claims also arose in relation to actions of British service personnel in Iraq between 2003-2009 more broadly.

In 2010 the then Labour government announced the establishment of the Iraq Historic Allegations Team (IHAT) to sift through and investigate allegations and refer them for prosecution, where appropriate. A subsequent decision by the ECtHR in 2011 (*Al Skeini*, discussed above) determined that the UK had a duty under the Convention to investigate allegations of death and ill treatment, and IHAT was intended to fulfil this function.

According to the Government it also enabled the UK to fulfil its obligations under the [Rome Statute](#)¹⁴ to ensure that credible allegations are properly investigated and the facts established, without which the

¹² [The Report of the Al-Sweady inquiry](#), 17 December 2014, Ministry of Defence

¹³ [News release: Professor Phil Shiner and the Solicitors Disciplinary Tribunal, 2 February 2017](#)

¹⁴ An international agreement that established the International Criminal Court

Armed Forces would have been vulnerable to referral to the International Criminal Court.¹⁵

Around 3,400 allegations of unlawful killings and ill treatment were received by IHAT. In approximately 70% of cases it was determined that there was not a case to answer or it was considered not proportionate to conduct a full investigation.¹⁶

In 2016 the MOD attempted to address rising criticism of IHAT:

The IHAT has no control over the allegations it receives but considers all those submitted in order to identify those that are credible, and which ones it is legally obliged to investigate. This Government has consistently voiced concerns about the volume of sometimes spurious claims made against our service people and believes the legal firms involved have questions to answer over their role in the current situation.¹⁷

The decision to strike off Phil Shiner in February 2017 for misconduct (see above), subsequently allowed IHAT to dismiss many of the false allegations he submitted. The Government took the subsequent decision to close IHAT by the summer of 2017. Then Chief of the General Staff, General Sir Nick Carter supported this decision:

The Army's Leadership Code requires the highest values and standards. It is right therefore that on the occasions that there are credible allegations of unacceptable behaviour they should be investigated.

However, a significant number of claims made against our soldiers have not been credible. The recent exposure of unscrupulous law firms and vexatious claims has clearly shown this to be the case; it is right therefore that the Defence Secretary has decided to close IHAT and hand over the remaining investigations to the Service Police, a process the Army supports.¹⁸

Service Police Legacy Investigations (SPLI)

Although IHAT was closed down, the legal obligation on the Government to investigate allegations of wrongdoing remained.

In July 2017 the remaining Iraq legacy investigations were therefore taken over by the Service Police.¹⁹ [Service Police Legacy Investigations \(SPLI\)](#) is an independent unit led by a senior Royal Navy Police Officer.

SPLI inherited 1,260 allegations of criminal conduct from IHAT. By 31 March 2020 a further 27 allegations had been received or identified. As of 30 June 2020, the SPLI had closed, or was in the process of closing, 1,213 allegations, either on the grounds of proportionality or because of a lack of evidence. Eight further cases and two directed lines of enquiry, accounting for 74 allegations, remain active.²⁰

¹⁵ [IHAT: What it is and what it does](#), MOD News Team, gov.uk, 2016

¹⁶ Ministry of Defence, [Iraq Historic Allegations Team](#)

¹⁷ [IHAT: What it is and what it does](#), MOD News Team, gov.uk, 2016

¹⁸ [Ministry of Defence Press Release](#), 5 April 2017

¹⁹ For a discussion of the Service Police see Library Briefing CBP08953, [Service Police Review](#)

²⁰ [SPLI Quarterly Update 1 April 2020 to 30 June 2020](#)

Iraq Fatalities Investigations (IFI)

Iraq Fatalities Investigations (IFI) was established after a High Court decision in 2013 determined that a publicly accountable investigation into the circumstances of certain deaths, with participation from the families of the deceased, was required by Article 2 of the ECHR.²¹ The High Court indicated that the requirement could be met by holding inquisitorial inquiries modelled on coronial inquests.

It is chaired by a retired judge, currently Baroness Hallett, and, [according to the Government](#) is structured so as to satisfy the state's investigatory obligations without the duration and expense of a statutory public inquiry.

The IFI does not determine civil or criminal liability. Cases are referred to it after it has been decided that there is no realistic prospect of a conviction. The Attorney General and the International Criminal Court are asked to give assurances in each case that witnesses will not be prosecuted on the basis of any self-incriminating evidence they give. The investigations serve a purpose similar to a coronial inquest by providing the families of the deceased and the wider public with as much information as possible about the circumstances of the death.²²

The IFI has concluded seven cases to date. It has one ongoing case: [an investigation into the death of Saeed Radhi Shabram Wawi Al-Bazooni](#) in May 2003.

1.3 Operation Northmoor- investigation of alleged offences in Afghanistan

In 2014 an independent Royal Military Police led investigation (Operation Northmoor) was launched into allegations relating to UK detention operations in Afghanistan between 2005 and 2013.

In total 675 allegations were received by the RMP from 159 individuals. By July 2017 investigations into more than 90% of those allegations had been discontinued because there "was no evidence of criminal or disciplinary offence".²³

In July 2019 remaining investigations conducted under Operation Northmoor were brought to an end by the independent Provost Marshal (Army), following consultation with the Director of Service Prosecutions.²⁴

No case investigated as part of Operation Northmoor was referred for prosecution by the independent Service Prosecuting Authority.

The MOD has been criticised for failing to properly investigate alleged offences. In November 2019 an investigation by [Panorama](#) and *The Sunday Times* also alleged that the MOD had covered up evidence

²¹ [R\(Ali Zaki Mousa and others\) v Secretary of State for Defence](#) [2013] EWHC 1412 (Admin)

²² [HC Deb 27 March 2014 C29-30WS](#)

²³ [HC Deb 10 July 2017, c21](#)

²⁴ PQ62292, Afghanistan: war crimes, 26 June 2020

relating to war crimes committed by British SAS personnel in Afghanistan.

In a debate in the House in January 2020, the Minister for Veterans, Johnny Mercer, addressed those allegations:

On the basis of five specific incidents—two from Iraq and three from Afghanistan—*The Sunday Times* and the BBC make four broad allegations: first, that we operated death squads in Afghanistan; secondly, that there has been a systematic attempt by the MOD not to investigate allegations; thirdly, that the MOD has applied pressure to terminate investigations prematurely; and fourthly, that the MOD has sought throughout to ensure that war crimes in Iraq go unpunished. The BBC wrote to the Ministry of Defence prior to broadcast setting out these and other allegations that were not repeated in its “Panorama” programme. The MOD promptly forwarded these letters to the service police and the Service Prosecuting Authority. The service police have reviewed the letters and the programme, and have confirmed that *The Sunday Times* and the BBC have not produced any new allegations or any new evidence in relation to those five incidents that had not already been considered [...]

let me deal with the allegation that our armed forces operated so-called death squads in Afghanistan. This is simply not true. Our armed forces did conduct many daring operations to capture Taliban insurgents. However, these were not “kill or capture” operations; rather, they were carefully planned “capture” operations with the object of capturing known Taliban insurgents and their associates. While every effort is taken to minimise the risk to any civilians who are present during such operations, it is simply an unfortunate fact that the risk of civilian casualties in war cannot be eliminated altogether.

Irrespective of the unit involved in any operation, civilian deaths were reported to, and have been independently investigated by, the Royal Military Police. All three of the incidents cited by *The Sunday Times* and the BBC have been investigated. The RMP referred one case—the shooting of Fazel Mohammed and three Afghan minors, to which the hon. Gentleman referred—to the Service Prosecuting Authority, which, having obtained independent legal advice outside the Ministry of Defence from senior external counsel, decided that the evidence did not establish a realistic prospect of conviction. In the other two cases, the RMP concluded that there was insufficient evidence of wrongdoing and did not refer any soldiers for any offence.

It is simply not credible to suggest, given the scale of resources expended by the MOD on investigating alleged criminal behaviour in Iraq and Afghanistan, that this demonstrates that there could have been a systematic cover-up. Over £40 million has been spent to date on the Iraq criminal investigations, while £10 million has been spent on Operation Northmoor, which is the RMP’s investigation into 675 allegations from Afghanistan. At their height, the Iraq Historical Allegations Team and Operation Northmoor each involved over 100 investigators who have collated and reviewed vast numbers of documents and interviewed large numbers of alleged victims, families, witnesses, service personnel and veterans.

Throughout, the MOD has wanted investigations and prosecution decisions to be conducted efficiently and effectively. But the reality is that the nature of warfare has changed. So-called

lawfare has become a tool for extending conflicts by other means or attempting to actually rewrite history itself [...]

The Iraq investigations have been subject to unprecedented court oversight, with extensive, transparent reporting obligations to a designated judge of the High Court. Operation Northmoor has been subject to independent assurance by an experienced senior criminal barrister and a retired chief constable. The allegation that IHAT and Op Northmoor investigations were closed down for political reasons in 2017 is, I am afraid, simply wrong and self-defeating. IHAT's case load was transferred to Service Police Legacy Investigations, which stood up on 1 July 2017 and is still conducting a small number of investigations. Investigations under Operation Northmoor continued with independent external assurance into 2019.²⁵

Allegations of a war crimes cover up in Afghanistan have once again resurfaced as a result of documents revealed in a case that is currently before the High Court.²⁶

²⁵ [HC Deb 7 January 2020](#), c359-363

²⁶ "Rogue SAS Afghanistan execution squad exposed by email trail", *The Sunday Times*, 2 August 2020. See also "[Defence Secretary to review Afghanistan emails](#)", *BBC News*, 3 August 2020

2. Government response to the rise of “lawfare”

In response to the legal rulings on the application of the ECHR, the outcome of the AI Sweady inquiry and the closing down of IHAT, successive Conservative Governments have indicated their intention to address the increasing influence of ‘lawfare’.

In October 2014 the Conservatives published a policy paper [Protecting Human Rights in the UK: The Conservatives’ proposals for changing Britain’s Human Rights Law](#) which set out key objectives for a new bill of rights to replace the *Human Rights Act 1998* (HRA), including:

Limit the reach of human rights cases to the UK, so that British Armed forces overseas are not subject to persistent human rights claims that undermine their ability to do their job and keep us safe.²⁷

In March 2015 Policy Exchange published a report - [Clearing the Fog of Law](#) – calling for Britain to derogate from the ECHR during periods of future conflicts and for the Geneva Conventions to be the standard that guides the UK military in combat situations. It argued that the “judicialisation of war” had markedly increased since the introduction of the HRA in 1998. It also characterised the application of the ECHR to forces deployed in combat abroad, and the importation of civilian laws of negligence into combat situations, as “judicial imperialism”. It made a number of recommendations, including derogating from the ECHR during future armed conflict and reinstating combat immunity to prevent claims of negligence being brought against the Government.

The 2015 Conservative manifesto committed to repealing the HRA, replacing it with a British Bill of Rights, and breaking the formal link between British courts and the ECtHR. It also pledged to “ensure our Armed Forces overseas are not subject to persistent human rights claims that undermine their ability to do their job”.²⁸

In October 2016 the then-Defence Secretary Michael Fallon said in a statement to Parliament that in the future the Government intended to derogate from the Convention before any significant future military operations, “where appropriate in the precise circumstances of the operation in question”. He acknowledged that any derogation would need to be justified and could only be made from certain articles of the Convention.²⁹

In a subsequent letter responding to questions from the Chair of the Joint Committee on Human Rights he indicated that the Government did not intend to introduce legislation to give effect to this policy.³⁰

²⁷ Page 7

²⁸ [Conservative Party Manifesto 2015](#)

²⁹ [HCWS168, 10 October 2016](#)

³⁰ [Letter from Secretary of State for Defence to Chair of the Joint Committee on Human Rights](#), 22 November 2016

Then Chief of the Defence Staff, Air Chief Marshal Sir Stuart Peach, welcomed the Government's decision:

Extending the jurisdiction of the European Convention on Human Rights to the battlefield risks seriously undermining the operational effectiveness of UK Armed Forces, so this important announcement is very welcome.

Our Armed Forces will continue to be held to the very highest standards. UK personnel will always be subject to the Law of Armed Conflict – which includes the Geneva Conventions – and to UK Service law – which includes the criminal law of England and Wales.³¹

The 2017 Conservative manifesto said that the Government would ensure that in the future the Armed Forces would be subject to the Law of Armed Conflict rather than the ECtHR. Plans to replace the HRA were put on hold until the process of leaving the EU was concluded.³²

2.1 Consultation on legal protections

In May 2019 that the Secretary of State for Defence announced that the Government would hold a consultation on proposals for legislation:

The Government is strongly opposed to our Service personnel and veterans being subject to repeated investigations in connection with historical operations many years after the events in question and do not want to repeat the type of situation that has evolved under the Iraq Historical Allegations Team (IHAT) [...]

To address the basic unfairness of repeated investigations many years after the event, I intend to undertake a short public consultation on measures which I believe should be taken forward in legislation [...]

IHAT was established with the best of intentions but was hijacked by unscrupulous lawyers who argued for an expansion of our investigative obligations [...] Of the many thousands of allegations put to IHAT, only a small proportion merited full investigation and only a handful might lead to a prosecution.³³

The [consultation paper](#) was launched on 22 July 2019 and set out three main proposals:

- A statutory presumption against prosecution for alleged offences committed on overseas operations more than 10 years ago.
- Creation of a new partial defence to murder.
- A time limit on civil litigation claims for personal injury/death.

The consultation paper did not examine derogation from the ECHR. In the foreword to the consultation the Secretary of State reiterated the Government's commitment to derogate from future significant operations, as set out in October 2016:

We intend to derogate from the European Convention on Human Rights before we embark on significant future military operations, where this is appropriate in the precise circumstances of the

³¹ [Ministry of Defence press release](#), 4 October 2016

³² [Conservative Party Manifesto 2017](#)

³³ HCWS1575, Legal protections and support for Armed Forces personnel and veterans, 21 May 2019

operation in question. Any derogation would need to be justified and could only be made from certain Articles of the Convention. In the event of such a derogation, our Armed Forces will continue to operate to the highest standards and be subject to the rule of law.³⁴

The paper also reiterated the Government's commitment to [delivering better compensation](#) for those injured, or the families of those killed on combat operations:

Specifically, to make sure that Armed Forces personnel and their families no longer have to endure the stress of pursuing lengthy claims in court, the Government has committed to establishing a no-fault scheme that will pay the same level of compensation as a court would award. Following an extensive consultation exercise, we will bring forward legislation when Parliamentary time allows.³⁵

That separate legislation is expected to "clarify the scope of the common law principle of Combat Immunity".³⁶

MOD response

On 17 September 2020, and shortly before Second Reading of the Bill, the MOD published its [consultation analysis and response](#). The consultation received 4,223 responses. 90 percent of respondents identified themselves either as serving personnel, a veteran or a family member of both.

There was overwhelming support among respondents that greater protection should be afforded to serving personnel and veterans from the threat of prosecution for alleged historical offences.

With respect to the three main proposals in the consultation paper:

1. There was strong support for reducing the timeframe for statutory presumption against prosecution of more than 10 years ago "given the impact that historical allegations can have on a Service person's/veteran's mental health and wellbeing". The MOD duly acknowledged that a timeframe of five years was more appropriate.³⁷
2. With regard to the proposed new partial defence to murder, the MOD recognised that "this is a very complex area of law" and stated that it was "working through all the possible options to determine the most appropriate and effective way of addressing this particular proposal".³⁸
3. On the introduction of a timeframe for bringing civil claims the MOD's consultation response states

By introducing absolute limitation periods, we can be more confident that the MOD will not be calling upon Service personnel

³⁴ Ministry of Defence, [Legal Protections for Armed Forces personnel and veterans serving in operations outside the United Kingdom](#), July 2019

³⁵ Ministry of Defence, [Legal Protections for Armed Forces personnel and veterans serving in operations outside the United Kingdom](#), July 2019

³⁶ Ministry of Defence, [Better combat compensation consultation portal](#)

³⁷ Ministry of Defence, Public consultation on legal protections for Armed Forces personnel and veterans serving in operations outside of the United Kingdom: Analysis and response, p.12

³⁸ *ibid*, p.18

and veterans indefinitely to give evidence about incidents during historical overseas operations. These measures will not prevent genuine claims from being brought, but they will require such claims to be brought in a timely manner. It will also bring the time limit for death and personal injury claims into line with other tort claims, for example assault and false imprisonment.³⁹

The MOD also confirmed in its consultation response that, contrary to the suggestion in the original consultation paper (see above), legislation relating to Better Compensation, and the principle of combat immunity “is not being taken forward in legislation at this time”. It goes on to state that “claims in relation to Armed Forces personnel injured or killed can still be brought either through the Armed Forces Compensation Scheme or (except where they are barred under the principle of combat immunity) through the courts”.⁴⁰ The AFCS has a seven-year time limit for bringing claims.

2.2 The commitment to legislate within 100 days

As part of its [2019 election manifesto](#), Boris Johnson’s Conservative party promised to introduce legislation “to tackle vexatious legal claims that undermine our Armed Forces” within 100 days of being re-elected.⁴¹

That commitment was subsequently set out in the [Queen’s Speech](#) in December 2019.

Informed by the submissions to the earlier consultation paper, and the 2016 commitment to the presumption to derogate from the ECHR, the Government set out its intention to introduce legislation by 22 March 2020.

Box 2: Further reading

- Policy Exchange, [Resisting the Judicialisation of War](#), November 2019
- Policy Exchange, [Protecting those who serve](#), June 2019
- Defence Committee, [Drawing a line: protecting veterans by a Statute of Limitations](#), HC 1224, Session 2017-19, and [Government response](#), HC 325, Session 2019-21
- House of Lords Library, [Armed Forces: legal challenges and derogation from the European Convention on Human Rights](#), November 2016
- Defence Committee, [UK Armed Forces personnel and the legal framework for future operations](#), HC 931, Session 2013-14

³⁹ Ministry of Defence, Public consultation on legal protections for Armed Forces personnel and veterans serving in operations outside of the United Kingdom: Analysis and response, p.21

⁴⁰ Ministry of Defence, Public consultation on legal protections for Armed Forces personnel and veterans serving in operations outside of the United Kingdom: Analysis and response, p.4

⁴¹ Conservative Party, [“The first 100 days of a Conservative majority Government”](#), 4 December 2019

3. Overseas Operations Bill

The Government presented the [Overseas Operations \(Service Personnel and Veterans\) Bill](#) (Bill 117) on 18 March 2020, thereby meeting its 100 days self-imposed deadline. Second Reading has been scheduled for 23 September 2020.

The main purpose of the Bill is to provide greater legal protections to Armed Forces personnel and veterans serving on military operations overseas.

Upon presenting the Bill to the House the Government commented:

We owe our service personnel and veterans justice and fairness. When serving personnel and veterans are subject to repeated investigations, with no new evidence, in connection with historical operations many years after the original events, it has the potential to do great damage to morale, and to undermine not only operational effectiveness, but also our ability to recruit future service personnel.⁴²

However, the Government has made clear that the Bill does not place Service personnel above the law and that they will continue to be “held to the highest standards of personal behaviour and conduct” and that “credible allegations of serious criminality” will continue to be investigated.⁴³

There are three main facets to the Bill:

1. It would create what has been termed a “triple lock”, to give personnel and veterans greater certainty that the pressures placed upon them during overseas operations would be taken into account when prosecution decisions for alleged historical offences are made. That lock would consist of:
 - a presumption against prosecution for alleged offences committed more than five years ago;
 - a requirement for prosecutors to give weight to certain matters when reaching decisions in such cases;
 - a requirement to obtain the consent of the Attorney General, or the Advocate General in Northern Ireland, before any prosecution can proceed.
2. It would introduce time limits on bringing civil claims in connection with overseas operations.
3. It would place a duty on all future governments to consider derogating from the European Convention on Human Rights in relation to significant overseas military operations.

The Bill would not apply to operations in the United Kingdom, including events that occurred in Northern Ireland during The Troubles. The Government has made clear its intention to introduce separate

⁴² Ministry of Defence, [Overseas Operations \(Service Personnel and Veterans\) Bill: Guidance](#)

⁴³ Ministry of Defence, [Overseas Operations \(Service Personnel and Veterans\) Bill: Guidance](#)

legislation to address legacy issues in Northern Ireland, which also puts in place appropriate protections for all Service personnel and veterans.⁴⁴

Nor does the Bill make any provision for the creation of a new partial defence to murder, a proposal originally outlined in the Government's 2019 consultation paper.

3.1 Presumption against prosecution

Part 1 of the Bill provides for the triple lock described above. The intention is to raise the bar for prosecutions in relation to alleged historical offences and require "prosecutors to have proper regard to the uniquely challenging context".⁴⁵ The legislation does not provide blanket immunity from prosecution for offences committed during overseas operations.

Application and time limits

This legislation does not prevent the investigation of alleged criminal offences in relation to overseas operations, nor does it prevent prosecutions. What the Bill does is introduce a statutory presumption against the prosecution of Service personnel and veterans⁴⁶ for alleged relevant offences which occurred more than five years previously,⁴⁷ within the context of an overseas operation (**clause 1**).⁴⁸

The Bill halves the timeframe initially envisaged for the prosecution of offences. The Government's [consultation](#) originally proposed a 10-year deadline. This change means that operations in Iraq and Afghanistan, which ended in 2009 and 2014 respectively, will fall outside of the time limit unless the circumstances for prosecuting any new alleged offences are deemed exceptional (see [Prosecutorial considerations](#)).

The Government has been keen to stress that the presumption against prosecution does not constitute a Statute of Limitations covering all military operations, or an amnesty in any way. In its recent response to the Defence Select Committee report on [Protecting Veterans](#), the Government argued:

We consider that a statute of limitations covering all military operations would be very challenging. This is not least because, in relation to offences alleged to have been committed during military operations overseas, there is a substantial risk that the

The Bill would not prevent the investigation or prosecution of alleged offences in relation to overseas operations.

It only seeks to raise the threshold for the prosecution of alleged offences which took place on overseas operations more than five years previously.

⁴⁴ This is discussed in greater detail in Library briefing CBP08352, [Investigation of Former Armed Forces personnel who served in Northern Ireland](#)

⁴⁵ Ministry of Defence, Overseas Operations (Service Personnel and Veterans) Bill: Explanatory Notes

⁴⁶ Who were a member of the Regular or Reserve forces, or a member of a British Overseas Territory force to whom Service law applies, at the time of the alleged incident. It does not apply to contractors or civilians subject to Service law.

⁴⁷ The five-year time limit refers to the date of the alleged incident, or the last date on which the alleged incident occurred, if it occurred over a period of time. This is irrespective of whether a victim died as a result of any injuries sustained during that incident, at a later date (**clause 7**).

⁴⁸ An overseas operation is defined as any outside of the UK, including peacekeeping missions and any operation addressing terrorism, civil unrest or serious public disorder in which UK forces come under attack, or face the threat of attack or violent resistance.

absence of a domestic system of prosecution would lead to the International Criminal Court asserting its jurisdiction.⁴⁹

What is a relevant offence?

A relevant offence is a criminal offence against an individual who is not a member of the Armed Forces, a Crown servant or a defence contractor at the time of the incident. There are some exceptions however, as set out in **Schedule 1** of the Bill. The offences excluded from the scope of this Bill and could therefore be prosecuted without reference to a presumption against prosecution, relate to sexual offences and certain crimes against humanity of a sexual nature.⁵⁰

The Bill would also give the Secretary of State the power to make regulations in order to amend Schedule 1 and add or delete excluded offences at any date in the future (**clause 6**). The Government has stated that:

It may be that in the future certain offences not currently included in Schedule 1 become the focus of wider public concern; and it would, consequently, be inappropriate for individuals accused of committing them to continue to benefit from a protective provision like the presumption [against prosecution]. The offences currently listed in Schedule 1, for example, reflect the Government's clear concern and stated position against the use of sexual violence and sexual exploitation in the context of conflict, and other overseas operations.

The Government suggests that such offences could include financial offences, or offences relating to the wellbeing of children and animals, or any other offences that may develop in the future under common law.⁵¹

War crimes and crimes against humanity

The list of excluded offences does not, however, extend to war crimes and crimes against humanity more generally.⁵² This has led to criticism from a number of human rights groups that the Bill places military personnel above the law. Clare Collier, Advocacy Director at Liberty argues:

A war crime does not stop being a war crime after five years [...] Trauma from torture and sexual violence doesn't have a time limit and Liberty strongly rejects any attempt to put a deadline on justice. It sets a dangerous precedent.⁵³

⁴⁹ Defence Committee, [Second Special Report of Session 2019-21](#), HC 325, para.18. Under the principle of complementarity, the UK retains the right to investigate and where necessary prosecute UK citizens, those resident in the UK and those subject to UK Service law, for any crime defined by the Rome Statute. The ICC cannot investigate or try a case unless a State is unable or unwilling to launch an investigation itself.

⁵⁰ Those specific crimes are set out in Schedule 8 of the International Criminal Court Act 2001, Articles 7.1 (g) and 8.2 (b) (xxii) and 8.2 (e) (vi).

⁵¹ Ministry of Defence, Overseas Operations (Service Personnel and Veterans) Bill: Memorandum from the Ministry of Defence to the Delegated Powers and Regulatory Reform Committee

⁵² A useful explanation of the difference between war crimes and crimes against humanity is provided by the [UN Office on Genocide Prevention and the Responsibility to Protect](#)

⁵³ [Liberty press release](#), 18 March 2020

It also raises the prospect of the ICC asserting its jurisdiction. [Article 29](#) of the Rome Statute of the International Criminal Court prevents crimes that fall within the jurisdiction of the ICC from being subject to statutes of limitation domestically.

As outlined above, the Government has argued that the presumption against prosecution provision in this Bill does not amount to a statute of limitation. However, many critics contend that the effect of a presumption against prosecution is essentially the same as a statute of limitations.⁵⁴ They argue that any failure by the UK to investigate and potentially prosecute war crimes, regardless of the timeframe for the offence, could therefore invite the jurisdiction of the ICC.

In June 2020, the Judge Advocate General for the Armed Forces, Judge Blackett, was reported in *The Times* to have sent a letter to the Secretary of State outlining his concerns over the Bill. He is reported to have suggested that the legislation was “ill conceived” and increased the chances of both serving and former personnel facing war crimes charges at The Hague.⁵⁵ Those reservations have also been echoed by a number of military and political figures, who are reported in *The Times* to have urged the Prime Minister to reconsider the “ill conceived” legislation. They argue that creating a presumption against prosecution for war crimes and torture after five years would be “a damaging signal for Britain to send to the world” and would be “a stain on the country’s reputation” if “Britain is perceived as reluctant to act in accordance with long-established international law”.⁵⁶

Since 2014 the ICC has already been conducting a [preliminary examination of alleged war crimes](#) committed by British military personnel in Iraq between 2003 and 2008.⁵⁷

However, in its consultation response, published on 17 September 2020, the MOD suggested that in cases involving war crimes, crimes against humanity or torture:

The statutory presumption allows for a prosecutor to determine that the circumstances of a case are “exceptional” and therefore the presumption is rebutted and a prosecution can be taken forward; this could include cases where there is evidence that a serious offence has been committed.⁵⁸

⁵⁴ See for example, the submissions to the MOD consultation on legal protections from [Freedom from Torture](#) and [Dr Thomas Obel Hansen, Ulster University, Transitional Justice Institute and Dr Carla Ferstman, University of Essex School of Law](#).

⁵⁵ “Law to protect soldiers could leave them facing war crimes tribunal”, *The Times*, 4 June 2020

⁵⁶ “Law to protect soldiers would harm reputation of UK soldiers”, *The Times*, 18 September 2020

⁵⁷ During a preliminary examination the ICC Office of the Prosecutor must determine whether there is sufficient evidence of crimes of sufficient gravity falling within the ICC’s jurisdiction, whether there are genuine national proceedings, and whether opening an investigation would serve the interests of justice and of the victims. If the requirements are not met for initiating an investigation, or if the situation or crimes are not under the ICC’s jurisdiction, the ICC’s Prosecution cannot investigate ([ICC, How the Court works](#))

⁵⁸ Ministry of Defence, Public consultation on legal protections for Armed Forces personnel and veterans serving in operations outside of the United Kingdom: Analysis and response, p.13

In an article for *The Daily Telegraph*, Defence Minister Johnny Mercer confirmed the UK's commitment to upholding international humanitarian law:

We remain committed to our obligations under international humanitarian and human rights law, including the UN Convention Against Torture. Nothing in the Bill alters this.

Contrary to some stories, the Bill still allows for allegations of wrongdoing more than five years old - including war crimes and torture - to be investigated and, where appropriate, prosecuted. A decision on whether to prosecute for such crimes will continue to be for the independent prosecutor to make.

The UK will never put the Armed Forces above the law. On the contrary, we hold our people to the highest standards. Whenever the Armed Forces embark on operations outside the UK, our people and their chain of command are bound to abide by the criminal law of England and Wales, as well as international humanitarian law as set out in the Geneva Conventions. The overwhelming majority meet those expectations and serve with great distinction. As for the tiny minority who fall short, they should expect the full force of the law. The uniform is no hiding place. Again this Bill won't change that.⁵⁹

Box 3: Some international comparisons

All of the countries below refer to statutes of limitation with respect to the investigation and prosecution of offences. None of them refer to this provision in the same way that the Overseas Operations Bill does, i.e. a statutory presumption against prosecution. In all cases the law is also applied equally and does not confer a special status on military personnel.

France – Crimes punishable by 15 years or more in prison must be prosecuted within 20 years of the crime being committed. Offences punishable by 2 months- 10 years in prison must be prosecuted within six years, and offences punishable by other measures, prosecuted within a year. There are a number of specific crimes, including terrorism offences and war crimes that have a statute of limitation of 30 years. The statute of limitation does not, however, apply to crimes against humanity and genocide.⁶⁰

The United States - [Section 843, Article 43 of the Uniform Code of Military Justice \(UCMJ\)](#) sets out the statute of limitations applicable to offences. For court martial offences, the statute of limitations is generally set at five years. There are, however, exceptions related to absence without leave or missing in time of war, murder, rape or sexual assault, rape or sexual assault of a child, maiming of a child, kidnapping of a child, or with any other offense punishable by death. All of those offences may be tried and punished at any time without limitation. Under the [Section 2441](#) of the US Code, there is no statute of limitation for war crimes. The US has also not ratified the Rome Statute of the International Criminal Court and therefore the ICC does not have jurisdiction over US military personnel.

Canada – Under [Article 69 of the Code of Service Discipline](#), as set out in the *National Defence Act 1985*, there is no statute of limitation that prevents the prosecution of criminal charges at any time after the offence occurs.

⁵⁹ "We must not let our veterans down", *The Daily Telegraph*, 20 September 2020

⁶⁰ Articles 7 and 8 of the French Code of Criminal Procedure. See also "[Statute of limitation reform in criminal matters](#)", Strategic Lawyering, 29 June 2017

In [written evidence](#) submitted to the Defence Select Committee inquiry: *Drawing a line: Protecting veterans by a Statute of Limitations* in April 2019, the MOD also outlined the work it had done on international comparisons, particularly within the context of ECHR State Parties.

Prosecutorial considerations

For a prosecution to be brought the circumstances must be exceptional (**clause 2**), with the prosecutor giving particular weight to a number of issues before reaching a decision (**clause 3**). Giving weight to these matters is considered by the Government to potentially reduce the culpability of the accused individual and “move the balance of decision making by the prosecutor in favour of not prosecuting”.⁶¹ The issues to consider are set out in the Bill as follows:

- The adverse effect that the prevailing conditions of an overseas operation are likely to have had on the ability of an individual to make sound judgements or exercise self-control, and the impact on their mental health at the time of the alleged incident.

An individual’s unique experiences and level of responsibility are considered to form part of those conditions, regardless of an individual’s length of service, rank or personal resilience.

- In cases where there has already been an investigation by an investigating authority,⁶² which is no longer active and did not result in charges being brought; if no compelling new evidence has emerged, the public interest in achieving a final outcome without undue delay must be considered.

Although not stated in the legislation, the implication is that in cases where there is compelling new evidence, a prosecutor could determine that it would be appropriate to proceed to a prosecution.

Consent to prosecute

After taking into consideration these statutory obligations, if a prosecutor determines that a case should proceed to trial then they must obtain the consent of the Attorney General, or the Advocate General for Northern Ireland, before proceeding (**clause 5**).

3.2 Limitation periods

Civil claims

The Bill would amend the relevant limitation periods for initiating civil claims in England and Wales, Scotland and Northern Ireland

⁶¹ Ministry of Defence, *Overseas Operations (Service Personnel and Veterans) Bill: Explanatory Notes*, Bill 117EN, Session 2019-21

⁶² A Service police force, a UK police force or an overseas police force.

respectively, where they are brought for personal injury or deaths relating to overseas operations.

Currently, under the *Limitation Act 1980*, any action (in England and Wales) for damages for personal injury or death resulting from negligence, nuisance or breach of duty must be brought within three years. However, section 33 provides the court with a discretion to disapply this time limit if it would be “equitable to allow an action to proceed”. The Bill would amend section 33 to remove the court’s discretion to allow an action to proceed more than six years after the cause of action arose, if it relates to an ‘overseas armed forces action’ (**clause 8** and **Schedule 2**).

The Bill would also require the court to consider a number of additional factors when deciding whether to allow an overseas armed forces action to proceed beyond the three-year time limit. Currently section 33(3) lists the factors that the court should consider and subsection (b) requires that the court have regard to the extent to which any relevant evidence is likely to be less cogent than if the claim had been brought within three years. When considering this issue in the context of an overseas armed forces action, the Bill would require the court to ‘have particular regard to’ the impact of the operational context on the ability of members of the armed forces to remember events or actions and to keep records of them. It must also have particular regard to the likely impact of the action on the mental health of any actual or potential witness who is a member of the armed forces (**Schedule 2, part 1**).

The Bill would also amend the *Foreign Limitation Periods Act 1984*. Section 1 of the 1984 Act currently provides that where legal proceedings in a court in England and Wales require the court to take into account the law of another jurisdiction, the limitation law in that jurisdiction should be applied.

The Bill would provide that for claims relating to “an overseas armed forces tort action”, in this scenario the defendant would have a complete defence after six years, regardless of the limitation period applicable in the other jurisdiction (**Schedule 2, part 2**).

Amendments to the *Prescription and Limitation (Scotland) Act 1973* and the *Limitation (Northern Ireland) Order 1989* provided for by **clauses 9 and 10** and **Schedules 3 and 4** would have the equivalent effect in those jurisdictions.

Human rights claims

Currently, section 7 of the HRA permits a claim to be brought against a public authority which has acted incompatibly with the Convention by someone who is a victim of that act. The default position is that a claim must be brought within a year of the act taking place. However, the court has an unlimited discretion to extend this period if it considers it to be equitable, in the circumstances. A successful claim can result in the award of damages.

The Bill would amend the HRA to reduce the court’s discretion to extend the limitation period for human rights claims (**clause 11**).

The Limitation Act 1980 provides the ordinary time limits for bringing different classes of legal action, including actions in connection with wrongs causing personal injuries or death. These ordinary time limits are subject to extension in some circumstances.

It would insert a new section 7A into the HRA which would place a limit of six years from when the act complained of took place, or one year from the 'date of knowledge'.

It would also require the court to consider the same factors as specified in relation to civil claims when considering whether to extend the limitation period beyond a year. This would include the impact of proceedings on the mental health of any armed forces witnesses.

This provision would apply to proceedings against the Ministry of Defence or Secretary of State for Defence in connection with any overseas operation, including peacekeeping or counter-terrorism operations, where members of the Armed Forces come under attack or face the threat of attack or armed resistance.

It would apply to claims brought after the provision came into effect, regardless of when the act in question took place.

3.3 Derogation from the ECHR

The Bill would also insert a new section 14A into the HRA which would impose a duty on the Secretary of State to consider, on an ongoing basis, derogating from the ECHR under Article 15 in any overseas operations that are considered to be significant (**clause 12**).

If the Secretary of State decided to derogate from the Convention, the specific derogation would be added to Schedule 3 of the HRA by Order, in accordance with section 14.

The Order would need to be approved by Parliament within 40 days, otherwise it would cease to have effect in accordance with section 16. It would expire after five years if not withdrawn at an earlier date.

Conditions for derogating under Article 15

Article 15 of the ECHR allows a Government to derogate from certain Convention obligations during times of 'war or other public emergency threatening the life of the nation'.

The threshold for determining whether such an emergency exists is quite high: it must be "an exceptional situation of crisis or emergency that affects the whole population and constitutes a threat to the organised life of the community of which the state is composed".⁶³ However, member states have a wide margin of appreciation in determining whether they are facing such an emergency, and the claimed existence of a state of emergency has not yet been rejected by the ECtHR.⁶⁴

Since the HRA came into force, the UK has derogated once before, in relation to the indefinite detention of foreign terrorist suspects after

⁶³ [Lawless v Ireland \(no. 3\)](#), App no.332/57 (1961), para 28

⁶⁴ The European Commission (predecessor to the Court) found that the conditions were not met in The Greek case ([Denmark, Norway, Sweden and the Netherlands v Greece](#) (1969)). For further information and examples of past derogations see: [Factsheet - Derogation in time of emergency, European Court of Human Rights](#), April 2020

9/11.⁶⁵ The House of Lords found that the Government was entitled in principle to conclude that the terrorist threat posed by Al-Qaeda was a public emergency such as to justify the UK's derogation from Article 5 under the *Terrorism, Crime and Security Act 2001*.⁶⁶ The ECtHR also accepted that there had been a public emergency threatening the life of the nation, emphasising in its judgment the weight that should be attached to the views of Parliament and the executive on this question, as well as to those of the national courts.⁶⁷

When *Al-Jedda* was considered by the House of Lords, Lord Bingham suggested that it was hard to think of a situation in which the dual requirements of (i) a war or public emergency threatening the life of the nation, and (ii) that derogation be strictly required by the exigencies of the situation, could ever be met when a state had chosen to conduct an overseas peace-keeping operation, from which it could withdraw. However, following ECtHR decisions in *Al-Skeini* and *Al-Jedda* (see above at section 1.2), the High Court revisited this issue and concluded that the conventional understanding of Article 15 needed to be revisited in light of the dramatically expanded jurisdictional reach of the Convention following these decisions. This could be done by construing the phrase 'war or other public emergency threatening the life of the nation' as including, in the context of an international peacekeeping operation, a war or other emergency threatening the life of the nation on whose territory the relevant acts take place.⁶⁸

Derogation is permitted only to the extent required by the exigencies of the situation, meaning that there must be a link between the facts of the emergency and the measures chosen to deal with it. Again, the ECtHR allows member states a wide margin of appreciation in relation to this condition, in recognition of their responsibility for the life of the nation, and ability to determine whether that was threatened by an emergency, and if so what measures might be required to avert it.⁶⁹

Any derogation must also be consistent with the state's other obligations under international law.

Certain rights are 'non-derogable':

- Article 2 – the right to life, other than deaths resulting from lawful acts of war;
- Article 3 – prohibition on torture and inhuman and degrading treatment or punishment;
- Article 4(1) – prohibition on slavery and servitude;

⁶⁵ The UK notified the Council of Europe of derogations on a number of prior occasions in relation to the Troubles.

⁶⁶ [A & others v SSHD \[2004\] UKHL 56](#) although the legislation was found to be incompatible with the Convention because it applied only to foreign nationals and was therefore discriminatory and disproportionate. The relevant designation order was therefore quashed.

⁶⁷ [A and others v UK](#) (2009), App. No. 3455/05, para 180

⁶⁸ [Mohammed v Ministry of Defence](#) [2014] EWHC 1369 (QB), paras 156-157

⁶⁹ [Ireland v UK](#) (1978), App. No. 5310/71, para 207

- Article 7 – prohibition on retrospective application of the criminal law.

This means that whilst it is possible to exclude specified articles from being a 'Convention right' for the purposes identified in the derogation, it is not possible to avoid the obligations imposed by the non-derogable rights without being in breach of the Convention.

Derogating states must inform the Secretary General of the Council of Europe of any derogations and of the reasons for them.

3.4 When will the Bill enter into force?

Part 3 of the Bill would come into force on Royal Assent. The main provisions of the Bill set out in Parts 1 and 2 would come into force by regulations presented by the Secretary of State for Defence or the Lord Chancellor, at an appropriate time (**clause 15**).

None of the provisions set out in clauses 1 to 11 would apply to proceedings that started before the date on which these sections of the Bill enter into force. The provisions on presumption against prosecution and the limitations on bringing civil claims could not, therefore, be applied retrospectively to legal proceedings that are already underway.

4. Human rights issues raised by the Bill

The Government has stated its belief that the Bill's provisions are consistent with the UK's obligations under domestic and international law:

The measures in the Bill are a proportionate solution to the problem, and strike an appropriate balance between victims' rights and access to justice on the one hand, and fairness to those who defend this country on the other.

The Bill does not undermine the UK's commitment to human rights. We will continue to abide by our obligations in domestic and international law, including those under the European Convention on Human Rights, and fully intend to maintain our leading role in the promotion and protection of human rights, democracy, and the rule of law.⁷⁰

A [memorandum](#) published by the Government alongside the Bill provides an assessment of the specific human rights issues that it raises. These include:

Article 2 – Right to life

Article 3 – Prohibition of torture

Article 6 – Right to a fair trial

Article 13 – Right to an effective remedy

Article 14 – Prohibition of discrimination

Article 2 – Right to life

The provisions in the Bill relating to the presumption against prosecution are not considered by the Government to contravene Article 2 of the ECHR. Investigations of alleged offences can still take place and will still be capable of leading to a prosecution. Prosecutors will also remain independent and free to exercise their discretion when making decisions to prosecute. As outlined above, the provisions in Part 1 only seek to raise the threshold of prosecution for those offences more than five years old.

The requirement to seek the consent of the Attorney General also does not prevent investigations from leading to prosecution, with the Attorney General acting independently of Government.⁷¹ There is precedent for such provision, including in the [International Criminal Court Act 2001](#).⁷²

Article 3 – prohibition of torture

The Government considers that an investigative duty, broadly similar to that which arises under Article 2, also arises under Article 3 in relation to the prohibition of torture. However, the measures in Part 1 of the Bill

⁷⁰ [Statement by Ben Wallace MP](#), 18 March 2020

⁷¹ Framework agreement between the Law Officers and the Director of Public Prosecutions, para 50

⁷² Section 53.

are not considered to breach Article 3 for the same reasons as those outlined above.

However, the decision not to include war crimes and crimes against humanity, including torture, in the Schedule 1 list of excluded offences has drawn considerable criticism and concerns that it could invite the jurisdiction of the ICC.

Article 6 – right to a fair trial

Part 2 of the Bill engages Article 6, which protects the right to a fair trial, by preventing a person from vindicating their civil rights (by claiming compensation for personal injury or human rights violations). However, the Government does not consider this to amount to a breach of Article 6, because the ECtHR has found limitation periods to be legitimate restrictions on the right of access to a court, even where they are absolute.⁷³

The ECHR memorandum also points to the fact that limitation periods already exist with respect to both human rights claims and civil claims, and the Bill would not alter these 'primary limitation periods'.⁷⁴ Whilst this is true, the Bill would remove the court's limited discretion to allow a claim to proceed where it would be equitable to do so in light of all the circumstances. This implies that some cases will not be able to proceed as a result of the changes made by the Bill, even when this would be inequitable.

The memorandum further argues that the requirement for the court to have particular regard to certain factors when deciding whether to extend the primary limitation period does not interfere with the court's discretion, and therefore does not breach Article 6. The memorandum points to the fact that section 33 of the *Limitation Act 1980* already requires the court to have regard to certain factors when exercising its discretion in support of this position. It states that the MOD's view is that none of the new factors set unduly high thresholds for claimants to overcome. It argues that the new factors are tailored to the unique circumstances of such cases, which are heavily reliant on the memories of service personnel.⁷⁵ It does not address the equity of requiring the court have regard to the mental health of service personnel, but not of other witnesses, such as victims.

The memorandum also acknowledges that Part 2 of the Bill engages Article 14 together with Article 6, because it applies to claims connected to overseas operations and therefore is likely to disproportionately affect foreign nationals. However, it states that the Government does not consider it to give rise to "disproportionately prejudicial effects" and that there is an objective and reasonable justification for any difference in treatment because of "the unique position of the armed forces involved in overseas operations".⁷⁶

⁷³ The ECHR memorandum cites *Stubbings v UK* (1996) 23 EHRR 213

⁷⁴ [ECHR memorandum](#), para 33

⁷⁵ *Ibid*, paras 35-37

⁷⁶ *Ibid*, paras 48-49

Article 13 – right to an effective remedy

The memorandum acknowledges that clause 11 engages Article 13, which provides for the right to an effective remedy for human rights breaches, because it would prevent applicants bringing claims under the HRA after six years. It states that the Government's view is that an absolute limitation period does not entirely prevent a claimant from bringing a claim because it only 'bites' after a reasonable period of time. Therefore, individuals would still have an effective domestic remedy, and there would be no breach of Article 13.⁷⁷ However, the purpose of clause 11, as stated by the Government, is to prevent individuals whose human rights have been breached from bringing claims after six years, even where the court considers it equitable to allow the claim to proceed. Therefore, it would deny victims of human rights breaches an effective domestic remedy in some circumstances.⁷⁸ Ultimately a litigant could bring a case to the ECtHR if they were unable to bring a case in the UK.

Article 14 – Prohibition of discrimination

The Government considers the provisions in Part 1 to have an impact on Article 14 of the ECHR, as the effect is to treat Service personnel, who allegedly commit offences in overseas operations, preferentially when compared to personnel prosecuted for the same offences within a different context.⁷⁹ However, as set out in the MOD's [ECHR Memorandum on the Bill](#), the Government considers such preferential treatment to be justified. It states:

The difference in treatment is justified because when Service personnel deploy on overseas operations, they do so in very different circumstances [...] On overseas operations, Service personnel act in the heat of the moment under unique pressures and they face a high degree of hostility and threat of violence. These uniquely challenging circumstances justify the introduction of legal protections against the risk of historic and repeated prosecutions in relation to actions taken during overseas operations.⁸⁰

The impact on Article 14 also has relevance for those offences that may be heard summarily by a Commanding Officer who, for the purposes of this Bill, is not considered to be a relevant prosecutor. In such cases, the legal protections set out in this legislation would not apply.

Under the *Armed Forces Act 2006* there is a distinction, based on rank, as to who can be charged by a Commanding Officer. More senior ranks can only be charged by the Service Prosecuting Authority at a Court Martial, and therefore would benefit from the legal protections set out in this Bill.

As outline above, a Commanding Officer also cannot summarily deal with some of the more serious criminal conduct offences, including

⁷⁷ Ibid, paras 38-39

⁷⁸ It is worth noting that this would apply equally to service personnel or their families who wanted to bring human rights claims against the MOD.

⁷⁹ For example, when deployed on operations within the UK such as military aid to the civil authorities.

⁸⁰ Para 15

murder and manslaughter, regardless of the rank of the accused.⁸¹ Those offences would fall under the jurisdiction of a Court Martial and therefore the legal protections set out in this Bill would apply.

As a result, this Bill potentially discriminates between Service personnel based on their seniority and rank, and indirectly their age as more junior Service personnel tend to be younger.

However, the *Armed Forces Act 2006* also introduced a universal right to elect trial by Court Martial, regardless of rank and alleged offence. An accused being tried by a Commanding Officer could opt for a Court Martial and therefore bring themselves under the legal protections set out in Part 1 of this Bill. An individual is not legally obliged to opt for a Court Martial. In its assessment, therefore, the Government suggests that the ability to make this choice means that this legislation does not breach article 14 of the ECHR.

The Government also consider that Part 2 of the Bill could engage Article 14 by treating the MOD differently to other defendants, such as charities, NGOs, or private contractors working in the context of overseas operations. This may amount to a discriminatory advantage.

However, the Government believes that other defendants would not have qualifying status for the purposes of Article 14 in this context,⁸² and in any event it considers that there is an objective and reasonable justification for any difference in treatment, given the unique circumstances the armed forces are in in such situations. In particular, the Government points to the fact that NGOs and private contractors are not in an equivalent position to the armed forces because they are not deployed in an exercise of State authority and are not subject to the specific rules of engagement and legal parameters that govern such situations.⁸³

Derogation

The memorandum acknowledges that clause 12 “does not require derogation nor does it make a decision to derogate more or less likely; derogation is still entirely dependent on the particular circumstances under consideration at the time”. On the basis of this analysis it is not evident what the practical impact of clause 12 will be.

⁸¹ These exceptions are set out in Schedule 2 of the *Armed Forces Act 2006*.

⁸² Article 14 prohibits discrimination “on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status

⁸³ Paras 46-47

5. Reaction

Support for the Bill has been mixed. Longstanding campaigners for greater legal protection for veterans have largely welcomed its proposals. Others, however, have expressed concern that it will place Armed Forces personnel above the law and contravene the UK's international legal obligations. There has also been concern that the Bill's provisions in relation to civil claims breaches the Armed Forces Covenant. The exclusion of operations relating to Northern Ireland has drawn criticism from many quarters.

Parliamentary

Defence Select Committee

In its July 2019 report [*Drawing a line: protecting veterans by a statute of limitations*](#), the Defence Committee stated:

At the heart of this inquiry and our Report is a determination to ensure that justice prevails for veterans and Service personnel. This does not mean that those who serve our country are above the law: far from it. We are unequivocal in our belief that wrongdoing must be investigated and punished. However, we also believe that there is something fundamentally wrong when veterans and Service personnel who have been investigated, and exonerated, become subject to what can often seem an unending cycle of investigation and re-investigation. That is neither a just nor a sustainable state of affairs and it risks undermining morale within the Armed Forces and trust in the rule of law.⁸⁴

The Committee therefore concluded that “the legal framework underpinning military operations is unclear [and] that service personnel should be protected by a qualified Statute of Limitations from repeated investigation and prosecution...”.⁸⁵ It also endorsed future derogations from parts of the ECHR and the adoption of a presumption against prosecution for historical offences.

This view that legal clarity is required was shared by the previous Defence Committee in its March 2013 report, [UK Armed Forces and the legal framework for future operations](#).

However, both Committees sought to make clear that at no point have they “endorsed amnesties or blanket immunity from prosecution”.⁸⁶

Greater legal protections are also supported by the current Committee. While welcoming the “Government’s overall approach” to the proposed legislation, the Chair of the Committee, Tobias Ellwood, has, however, highlighted the Committee’s ongoing concern “that continued ambiguity leaves service personnel vulnerable. Our armed forces deserve absolute clarity when it comes to legislation and must feel supported by military organisations themselves when navigating the legal system”.⁸⁷

⁸⁴ Defence Committee, *Drawing a line: protecting veterans by a Statue of Limitations*, HC1224, Session 2017-19, para.13

⁸⁵ [Defence Committee press release](#), 6 May 2020

⁸⁶ *Ibid*, summary

⁸⁷ Defence Committee, Letter from the Chair to the Secretary of State, 6 May 2020

The Committee has also expressed regret that Northern Ireland veterans will be subject to separate legislation. In a [letter to the Secretary of State](#), the Committee called for clarity on a number of questions including:

- The likelihood that the provisions set out in the Overseas Operations (Service Personnel and Veterans) Bill will lead to prosecutions.
- Whether the factors outlined in the Overseas Operations Bill are comprehensive enough for a prosecutor to take a decision to prosecute.
- The likelihood of successful appeal in the event that the Attorney General refuses to grant consent for prosecution.
- The Government's strategy in the case of a ruling from the European Court of Human Rights that new legislation conflicts with our Convention obligations.
- Whether discussions have taken place with the International Criminal Court.
- What discussions the Government has had with parties in Northern Ireland.

In July 2020 the Committee sent a further letter to the Secretary of State in which it reiterated its concerns that the Bill "may not be an effective way" of achieving the aim of protecting personnel and veterans from vexatious or unnecessary investigations and prosecutions. The Committee also posed a further set of questions in relation to war crimes, the jurisdiction of the ICC and the decision to lower the prosecution cut off to five years, from the initial proposal of 10 years.

The Committee has also recommended that the Bill be scrutinised by an ad-hoc Select Committee, as is the customary procedure for the Armed Forces Bill, which comes before Parliament every five years.⁸⁸

[A response](#) to both letters from the Secretary of State was received on 22 September 2020.

During an evidence session with the Secretary of State in April 2020, member of the Committee, Mark Francois, also raised the Bill's exclusion of sexual offences. He expressed the following concern:

The Bill is pretty good, but it has one lacuna, which is that the protections it affords do not apply in the case of sexual offences—or allegations of sexual offences. The risk with that is that someone who wants to make a false claim does not say, "This person beat me up", but says, "This person tried to touch me in some inappropriate way." It is therefore be a sexual offence and some of the protections in the Bill do not apply.

In response, the Secretary of State committed to examining this issue again.⁸⁹

⁸⁸ Defence Committee, Letter from the Chair to the Secretary of State, 6 May 2020

⁸⁹ Defence Select Committee, [Introductory session with the Secretary of State](#), HC 295, 22 April 2020, Q.50

Joint Committee on Human Rights

The Joint Committee on Human Rights has issued a call for evidence on the Bill.⁹⁰ It is inviting evidence in particular on specific issues, including:

- Whether the presumption against prosecution is justified, and if it should apply to all offences, including serious ones which could amount to war crimes and crimes against humanity;
- Whether the presumption against prosecution raises issues under Article 2 or 3 of the ECHR, or has implications for the UK's compliance with other international legal obligations;
- Whether the courts should retain some discretion to determine if a longer limitation period is equitable in the circumstances of each case;
- Whether it is reasonable to prevent human rights claims being brought after six years, even if it would be equitable in all the circumstances;
- What the impact will be of requiring the court to consider the mental health of witnesses before a case can proceed, and if it is reasonable to differentiate between armed forces witnesses and others, such as victims;
- Whether the duty to consider derogating from the ECHR will have any meaningful legal effect, and what role Parliament should have in derogation decisions.

Parliamentary questions

On 16 July John Healey asked an urgent question about the impact of the civil liability provisions on the ability of those serving overseas to bring claims against the Ministry of Defence, and the implications for the Armed Forces Covenant.⁹¹

Responding, Johnny Mercer said that none of the measures in the Bill would prevent the MoD from being held to account. He disagreed with the assertion that the Bill would prevent personnel, veterans or their relatives from bringing claims, on the basis that the Bill does not change how the time limit is calculated.⁹² The time limit is calculated either from the date of the incident or from the date of knowledge. Therefore, it will still be possible to bring claims for conditions such as Post Traumatic Stress Disorder (PTSD), which are diagnosed later, he suggested.⁹³

He suggested that the concern about limitations was misunderstood, and pointed to the fact that the *Limitation Act 1980* already places limitation periods on particular types of claim (although, as noted

⁹⁰ Joint Committee on Human Rights, [Call for evidence on the Overseas Operations \(Service Personnel and Veterans\) Bill](#), 27 July 2020

⁹¹ [HC Deb 16 July 2020](#), c 1671

⁹² Ibid

⁹³ It is worth noting that the provisions in question would not differentiate between different categories of claimant, therefore they would inhibit service personnel and veterans from bringing claims to the same extent as they would other categories of claimant. The armed forces compensation scheme provides an alternative route to obtaining compensation.

above, the Bill would remove the court's current discretion to extend these where equitable to do so).⁹⁴

Carol Monaghan for the SNP also expressed concerns about the impact of the new limitation period. She acknowledged the Minister's point that it would run from the point of diagnosis or knowledge of a condition but suggested that the culture in the military means that some personnel are deterred from bringing a claim by more senior personnel. She also noted that certain conditions, such as deafness, asbestos poisoning and radiation exposure could worsen over time.⁹⁵

In response to a further question about how the Bill could be amended to enable service personnel and veterans to bring claims beyond six years, even when they were aware of the injury, the Minister suggested that he was willing to consider changes if there was evidence that they were necessary. However, he questioned whether such a scenario would arise in practice.⁹⁶

Following the UQ, the Law Society Gazette quoted a lawyer who has acted for veterans in personal injury claims, Hilary Meredith. She disagreed with Johnny Mercer's response, suggesting that he is "determined to bring in legislation which is clearly to the detriment of those who serve their country, despite his protestations to the contrary".⁹⁷

In response to a subsequent question in the House of Lords, Baroness Goldie explained that the Government's position was that it was unfair for service personnel and veterans to live under the shadow of vexatious claims for historical events, and that the proposed measures were a proportionate response.⁹⁸

Human rights groups

Several human rights groups have criticised the measures in the Bill, arguing that the proposals effectively place Armed Forces personnel above the law.

Kate Allen, UK Director for Amnesty International, argues:

Placing soldiers above the law helps no one and will have a devastating impact on the reputation of the UK armed forces.

"No respectable government should be seeking to shield one group of people from the normal workings of the criminal justice system where there are credible allegations of wrong-doing.

"The solution to ensuring investigations are not repeated is to get them right the first time. The Government cannot simply place one group of people above the law."⁹⁹

⁹⁴ HC Deb 16 July 2020, c1672

⁹⁵ Ibid, c1673

⁹⁶ Ibid, c1674

⁹⁷ [Limitation changes 'not an attack on veterans'](#), says forces minister, Law Society Gazette, 27 July 2020

⁹⁸ [HL Deb 20 July 2020, c1932](#)

⁹⁹ Amnesty International press release, "UK: military prosecutions bill will have devastating impact on reputation of armed forces", 18 March 2020

In response to the earlier consultation in 2019 Dr Thomas Obel Hansen and Dr Carla Frestman, had already pointed out that:

Even if some measure was to be enacted whereby investigation and prosecution of crimes committed in armed conflicts would somehow be restricted, it is a fundamental principle of law that the law must apply equally to all persons. Putting in place a legal framework that severely restricts the application of criminal law for certain categories of people accused of having committed serious offences, including international crimes, would blatantly violate the principle of equal application of the law.¹⁰⁰

Campaign group Liberty also suggests that the claim soldiers were unfairly burdened by vexatious claims was not backed up by the reality of the claims faced by the MoD. They noted that less than one per cent of the claims brought against the MoD between 2014 and 2019 related to Iraq, and that nearly half were brought by service personnel themselves against the MOD as an employer for injuries sustained while on active Service. Liberty also pointed to the fact that the courts already have powers to strike out vexatious claims.¹⁰¹

Clive Baldwin, Senior Legal Adviser at Human Rights Watch, suggested that the Bill would greatly increase the risk that “British soldiers who commit serious crimes will avoid justice”.¹⁰² Mr Baldwin noted that British civil courts and public inquiries had found extensive evidence of torture by UK forces in Iraq after 2003 and that the UK Government had paid millions of pounds to Iraqis who alleged abuse by UK forces. He suggested that the presumptive five-year time limit for prosecutions would encourage a culture of delay and cover-up of criminal investigations, and that the International Criminal Court prosecutor should consider investigating allegations that UK armed forces committed war crimes against detainees in Iraq.

The group Freedom from Torture also agree that the statutory presumption against prosecution could place the UK in contravention of its international legal obligations. A legal opinion provided to the group by Matrix Chambers stated:

If an alleged offence by a member of the Armed Forces had been identified which involved torture or other ill-treatment and would amount to a war crime or a crime against humanity, but the UK declined to prosecute based on the application of the presumption against prosecution, it is possible that: 1. another State Party to the CAT [Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment] could request the extradition of the alleged perpetrator (a request to which the UK would be obliged to accede under Article 7); or 2. the ICC [International Criminal Court] may find that it had jurisdiction in respect of the alleged offence because the UK was unwilling to prosecute.

This would, of course, undermine the MoD’s objective of providing Armed Forces personnel with ‘protection’ against

¹⁰⁰ [Dr Thomas Obel Hansen, Ulster University, Transitional Justice Institute and Dr Carla Frestman, University of Essex School of Law.](#)

¹⁰¹ Press release: [Liberty responds to plans to limit armed forces accountability: no deadline on justice](#), 18 March 2020, libertyhumanrights.org.uk

¹⁰² Clive Baldwin, [UK Bill a License for Military Crime?](#), hrw.org, 20 March 2020

prosecution, as well as exposing the UK to censure on the international stage.¹⁰³

In their consultation submission in 2019 Dr Hansen and Dr Ferstman also argued that, at the very least, the presumption against prosecution should not include:

international crimes and other serious violations of international law for which the UK is under an obligation under international law to investigate and prosecute. These include, as a minimum, the Rome Statute crimes of war crimes, crimes against humanity, and genocide as well as serious violations of international human rights law for which there is an obligation to investigate, such as, *inter alia*, torture and inhuman and degrading treatment or punishment, enforced disappearances, summary or extrajudicial killings.¹⁰⁴

In an article for [The Independent](#) on 18 June 2020, Liberal Democrat foreign affairs spokesperson, Alistair Carmichael MP, accused the Government of effectively decriminalising torture if this legislation is passed.

Media

In an article for *Prospect* magazine, legal commentator David Allen Green suggested that the focus of the debate on operational decisions in the field of battle is misleading. The real issue, he suggests, is how military personnel are treated, and what happens to those who are captured and under their control.¹⁰⁵ The article provides examples of cases in which British soldiers were involved in the mistreatment of Iraqi detainees in circumstances which were remote from the battlefield. It also notes cases in which soldiers have been abused or suffer from negligent management. David Allen Green suggests that such conduct is wrongful and counter-productive, and that the law provides a means of addressing and remedying it, and of exposing systematic faults and false cases.

Writing in *The Times*, former Attorney General Dominic Grieve was critical of the Bill.¹⁰⁶ He cited the civil litigation concerning Iraq detainee abuse as an example of what can go wrong when investigative and legal systems function in an atmosphere of public controversy. However, he suggested that the Bill's attempt to skew the legal system to give privileged protection to a particular group is unsatisfactory. Creating a system whereby British soldiers can avoid prosecution through time delay, whilst foreign soldiers cannot, will damage the UK's reputation as upholders of the Geneva Convention and its policy of bringing international war criminals to justice. He points out that the Government's human rights memorandum does not deal with this point

¹⁰³ ["Government to introduce five year limit on prosecuting Armed Forces personnel for human rights abuses"](#), *The Independent*, 13 March 2020

¹⁰⁴ [Dr Thomas Obel Hansen, Ulster University, Transitional Justice Institute and Dr Carla Ferstman, University of Essex School of Law.](#)

¹⁰⁵ David Allen Green, [The British Army should not escape the watchful eye of the law](#), *Prospect*, 1 April 2020

¹⁰⁶ Dominic Grieve, [Military prosecutions bill creates more problems than it fixes](#), *The Times*, 26 March 2020

and suggests the Government should be transparent about how it is approaching the issue.

Mr Grieve also suggests that the requirement to consider derogation from the ECHR in future conflicts will make little difference in practice, because the option to do so already exists if the circumstances justify it.

And he criticises the changes to time limits for bringing civil claims, suggesting that they undermine the discretion given to the courts. Further, he argues that the main beneficiary will be the government, rather than service personnel, who would not generally be personally liable in such cases. Mr Grieve cautions against giving the state special protection in litigation that others are denied, suggesting that it would be at odds with the principle of equality before the law.

He concludes that the Bill will achieve little and will create problems of its own.

The Times also reported on a leaked letter from the Judge Advocate General for the Armed Forces, Jeff Blackett, to the Secretary of State in which he sets out a number of significant concerns about the Bill as it stands. As well as opening up Armed Forces personnel to the jurisdiction of the ICC (see What is a relevant offence? above), he also reportedly expressed concern that serious offences would go unpunished if uncovered after more than five years, thereby undermining the reputation of the Armed Forces. He also cautioned that the proposed five-year timeframe could also potentially encourage an accused to frustrate an investigation in order to “engage a high bar for prosecution”. While acknowledging his unease at vexatious claims and investigations that went on for far too long, he reportedly concluded that “the bill as drafted is not the answer”.¹⁰⁷

Veterans groups

A number of veterans have expressed their anger at the exclusion of Northern Ireland from the scope of this Bill.

Following its publication, Northern Ireland veteran Dennis Hutchings announced that he would continue in his efforts to launch a legal challenge against the Northern Ireland Office “for allowing continuing discrimination against veterans by the Northern Ireland criminal justice system” in violation of the Human Rights Act.¹⁰⁸

Following publication of the Overseas Operations Bill, Mr Hutchings commented:

I have little confidence that such legislation extending to Northern Ireland will ever be passed given the tensions and historical stalemate between Westminster and Stormont on this issue.

Consequently, I have little choice but to proceed with his legal challenge against the Government...¹⁰⁹

¹⁰⁷ “Law to protect soldiers could leave them facing war crimes tribunal”, *The Times*, 4 June 2020

¹⁰⁸ <https://www.crowdjustice.com/case/justice4veterans/>

¹⁰⁹ <https://www.crowdjustice.com/case/justice4veterans/>

In early March 2020 the MOD confirmed that it would not fund Mr Hutchings' legal challenge against the NIO as "the Government could not fund a legal challenge against itself".¹¹⁰

Mr Hutchings case is discussed in greater detail in Library Briefing Paper, CBP8352, [Investigation of Former Armed Forces Personnel who served in Northern Ireland](#).

Academic views on derogation

A number of academics responded to an inquiry into the policy of derogating from the ECHR in future armed conflicts when it was first announced in 2016.¹¹¹

Whilst there was a general consensus that extraterritorial derogation might be possible legally, there was considerable scepticism as to whether it would achieve the Government's stated aim of reducing litigation relation to overseas operations.

Dr Stuart Wallace (then) of Cambridge University concluded that the application of unmodified Convention obligations to overseas operations had the potential to create significant operational difficulties for the Armed Forces, noting that in such situations, limited territorial control and institutional support significantly reduces a state's capacity to guarantee human rights.¹¹²

He acknowledged a diversity of opinion among academics and judges on the question of whether the threat to the life of the nation requirement can be satisfied extra-territorially but suggested that there is a strong argument that as jurisdiction extends extraterritorially, so too should the ability to derogate.¹¹³

However, Dr Wallace cautioned that derogation may not achieve the Government's objective of protecting the armed forces from unfounded legal claims. This is primarily because much of the litigation has related to non-derogable articles of the Convention and would therefore still be possible with a derogation in place.

Further, the derogation itself would be subject to judicial oversight, including satisfying tests of necessity and proportionality. Therefore, it is likely that there would be litigation as to whether the measures taken were strictly required by the situation.¹¹⁴

He suggested that an alternative solution could be to interpret the Convention consistently with LOAC, noting that the ECtHR did this in *Hassan v UK* at the request of the UK Government. As a result, the list of legitimate reasons for detention under Article 5 was read to include prisoners of war and security detention in the context of an international armed conflict. Such flexible interpretation of the

¹¹⁰ Reported in the [Belfast Telegraph](#), 4 March 2020

¹¹¹ [The Government's proposed derogation from the ECHR inquiry](#), Joint Committee on Human Rights

¹¹² [Written evidence submitted from Dr Stuart Wallace](#), University of Cambridge (DRO0012)

¹¹³ Para 16

¹¹⁴ Para 18

Convention could mitigate the operational impact of its application to armed conflicts. However, Dr Wallace noted that the ECtHR does not typically engage in analysis of LOAC and suggested that states should therefore explicitly request such analysis in the future.¹¹⁵

Dr Lutz Oette and Elizabeth Stubbins Bates (then) of the Centre for Human Rights Law at SOAS also suggested that the proposal to derogate would give rise to litigation as to whether the conditions for derogating had been met, as well as on the question of whether deaths arose from 'lawful acts of war' in the context of Article 2 claims.¹¹⁶

They also questioned the premise of the proposal, suggesting that only a small number of the allegations arising out of the conflicts in Afghanistan and Iraq had been proven to be false, and that those that had been upheld in legal action had led to tangible reforms in military training. The submission argued that the real reason for the proposal was an institutional preference for IHL over human rights law, and a 'strongly-felt resistance to civilian judges adjudicating on cases involving the armed forces'. The authors pointed to the various Policy Exchange reports as evidence for this proposition.¹¹⁷

Dr Alan Greene (then) of Durham University suggested that litigation may arise particularly in relation to whether any derogation from Article 5 was 'proportionate to the exigencies of the situation', noting that in *A v UK*, both the House of Lords and the ECtHR found that the measures taken in derogation from Article 5 were disproportionate and discriminatory.¹¹⁸ This illustrates that a "state is not given 'carte blanche' to act as it sees fit once a valid emergency has been declared".¹¹⁹

Dr Greene also noted the approach of the ECtHR in *Hassan v UK* that the Convention should be interpreted in parallel with international instruments which applied at time of war. He argued that in light of that decision, it was hard to see how a derogation could lower the protection under Article 5 below that secured by IHL. Therefore, a derogation would make little difference, given that the Court already interprets Article 5 in line with IHL in the absence of a derogation.

¹¹⁵ Para 19

¹¹⁶ [Written evidence submitted from Centre for Human Rights Law](#), SOAS (DRO0006)

¹¹⁷ Para 10

¹¹⁸ [Written evidence submitted from Dr Alan Greene](#), Durham Law School (DRO0008)

¹¹⁹ Page 11

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