



## BRIEFING PAPER

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# Overseas Operations (Service Personnel and Veterans) Bill 2019-2021: Lords amendments

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The purpose of the Overseas Operations (Service Personnel and Veterans) Bill is to protect service personnel and veterans from legal action relating to overseas operations. It would raise the threshold for bringing prosecutions, including introducing a presumption against prosecution after five years for alleged offences committed during overseas operations; it would create a hard time limit for civil and Human Rights Act claims; and it would require the Government to consider derogating from the European Convention on Human Rights (ECHR) in relation to significant overseas operations.

The Bill was unamended in its initial stages in the Commons but was subsequently amended in the House of Lords. The Commons considered those Lords amendments ([Bill 189](#)) on 21 April 2021.

The Bill was considered again in the House of Lords on 26 April 2021. A period of 'ping pong' will now commence with the Commons considering the Bill ([HCB293](#)) again on 27 April 2021.

For further background and commentary on the Bill's provisions see Library Briefing Papers:

- [Overseas Operations \(Service Personnel and Veterans\) Bill 2019-21](#)
- [Has anything changed in the Overseas Operations Bill?: Committee Stage Report](#)

### Box 1: Summary of Amendments

#### Lords consideration – 26 April 2021

- The [Lords](#) accepted the Commons amendments in lieu of amendment 1. However, Lord Robertson of Port Ellen tabled a further amendment (A1) which would also place war crimes in Schedule 1 of the Bill. The Government indicated that it would not oppose this amendment but that it would table its own amendment in lieu for consideration in the Commons on 27 April.
- The Lords disagreed with the Commons rejection of amendment 5 relating to a statutory duty of care standard. Lord Dannatt tabled a revised amendment (E1) which passed on division and will now be considered in the Commons.

### Commons consideration – 21 April 2021

- The [Commons](#) disagreed with Lords amendment 1 but proposed an amendment in lieu which would place crimes against humanity, genocide and torture within Schedule 1 of the Bill, and therefore not subject to the presumption against prosecution after five years. The Government's amendment did not include war crimes in Schedule 1.
- The Commons accepted the amendment removing clause 12 (derogation) from the Bill.
- The Commons disagreed with the remaining Lords amendments relating to investigations, civil claims and a duty of care standard.

### Lords amendments

A [number of amendments](#) were made to the Bill at Report stage in the House of Lords, including:

- Providing that the presumption against prosecution does not apply to war crimes, crimes against humanity, genocide or torture;
- Imposing additional requirements on investigators and prosecutors when determining whether to commence or continue with investigations into allegations relating to overseas operations;
- Removing clause 12 from the Bill, which would impose a duty on the Government to consider derogating from the European Convention on Human Rights in relation to significant overseas operations;
- Excluding claims brought by current and former service personnel from the application of Part 2 of the Bill, which would impose hard time limits on civil and Human Rights Act claims relating to overseas operations;
- Introducing a new duty of care standard in relation to legal, pastoral and mental health support to service personnel involved in investigations or litigation arising from overseas operations

## 1. Background

Prior to Second Reading in the Lords in January 2021, the House of Lords Constitution Committee and the Delegated Powers and Regulatory Reform Committee both published reports on the Bill.

In its conclusions the [Constitution Committee](#) made the following observations:

Clause 3 requires prosecutors to consider certain factors that would already be taken into account when deciding whether to prosecute. The House may wish to ask the Government about the extent to which this provision would make a difference to prosecutorial decisions.

The House may wish to seek the reasons for including most war crimes and crimes against humanity in the presumption against prosecution.

The House may wish to question the Government about the compatibility of the restrictions on time limits in Part 2 of the Bill with the principle of access to justice.

The Government should set out why it is inappropriate for the court to exercise its usual discretion to extend time limits in actions relating to overseas operations.

The House may wish to question the Government on the extent to which clause 12 [derogation] has any substantive effect.

In its [report](#), the Delegated Powers Committee examined the power conferred on the Secretary of State to add, and potentially remove, offences from Schedule 1 of the Bill (clause 6(6)). The Committee considered that “the power in clause 6(6) can be distinguished—and is of particular significance—because it would allow changes which

affect liability for criminal offences (and indeed liability for the most serious criminal offences)".<sup>1</sup> The Committee therefore concluded that:

the issue of which offences Part 1 of the Bill applies to is so fundamental to the effect of that Part of the Bill—and is of such significance in terms of the application of the criminal law—that it should not be determined by regulations but instead merits the fuller scrutiny to which primary legislation is subject; and

accordingly, clause 6(6) contains an inappropriate delegation of power.

In its [response](#) the Government stated:

The intent of the power is to ensure the Government is able to respond to new developments and fresh concerns that may emerge in relation to potential offences on future overseas operations, without the need to seek primary legislation each time a change may be required. The power to remove offences from Schedule 1 is the natural complement to the power to add offences to Schedule 1 [...]

Future amendments to the Schedule will still be subject to appropriate parliamentary scrutiny, via the affirmative procedure, meaning that Parliament may debate, approve or reject these as it chooses. If certain offences become the focus of wider public concern, and there is likely to be significant interest in any future changes to the offences listed in the Schedule, then it may be appropriate to engage with the public under these circumstances, for example, via a public consultation.<sup>2</sup>

## 2. Issues raised at Second Reading and Committee Stage

All the issues previously raised in the House of Commons were also debated at [Second Reading](#) and during the [Committee Stage](#) in the House of Lords.

Primarily, Peers raised concerns over:

- **The presumption against prosecution** – several Peers argued that a presumption against prosecution was unprecedented in domestic law and was in contravention of the UK's international legal obligations. Their Lordships asked whether the time period following which the presumption would apply should be raised to ten years, while others argued for its removal from the Bill, in its entirety.
- **War crimes and crimes against humanity** - Concerns were raised that the Bill could invite the jurisdiction of the International Criminal Court (ICC) and that, at a minimum, the Bill should be amended so that it does not apply to torture, war crimes and crimes against humanity. A number of Peers, such as Lord Faulks, disagreed over the reality of intervention by the ICC, however, suggesting that "the spectre of the ICC as a reason for wrecking this part of the Bill is unsound".<sup>3</sup>
- **Investigations** – many Peers acknowledged that one of the main difficulties for Service personnel and veterans is the investigation and re-investigation of alleged offences, which the Bill does not resolve.
- **Role of the Attorney General** - Some Peers felt that the role of the Attorney General, in giving consent to any prosecution, should be reviewed. They argued that the Attorney General is a political appointment and is responsible for the initial legal advice behind any overseas operation. Concerns were also expressed that any

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<sup>1</sup> House of Lords Delegated Powers and Regulatory Reform Committee, Overseas Operations (Service Personnel and Veterans) Bill, HL178, 30 November 2020, para.14

<sup>2</sup> House of Lords Delegated Powers and Regulatory Reform Committee, Overseas Operations (Service Personnel and Veterans) Bill, HL228, 22 February 2021, Appendix One

<sup>3</sup> HL Deb 9 March 2021, c1499

decision by the Attorney General not to prosecute, could be subject to judicial review or increase the risk that the matter is referred too, or taken up, by the ICC.

- **Longstop on civil and Human Rights Act claims** - Peers argued that the limitations on bringing civil claims would erode the rights of Service personnel and veterans and potentially breach the Armed Forces Covenant. Several Peers argued that the MOD would be the main beneficiary of Part 2 of the Bill.
- **Derogations from the ECHR** – Many also questioned the purpose of Clause 12. Lord Craig of Radley called it “worthless”,<sup>4</sup> while Lord Falconer of Thoroton suggested “it [the Government] pretends that derogations can help with the problem this Bill seeks to address, when they plainly cannot”.<sup>5</sup>

While a significant number of amendments were tabled at Committee Stage, the majority were either withdrawn or not moved. Of those amendments that were debated, none were put to a vote.

The Bill was therefore reported without amendment.

### 3. Amendments made at Lords Report Stage

A number of [substantive amendments](#) were made to the Bill at Report stage in the Lords. These were:

- **War crimes and crimes against humanity:** An amendment to clause 6 tabled by Lord Robertson of Port Ellen, which would provide that the presumption against prosecution would not apply to torture, war crimes, crimes against humanity or genocide.<sup>6</sup> Lord Robertson suggested that a presumption against prosecution for these most serious crimes risked undermining “some of the most basic international legal standards for which this nation was renowned” and would expose service personnel to the possibility of having to appear before the International Criminal Court.<sup>7</sup> Responding for the Government, Baroness Goldie explained that the decision to exclude sexual offences from the presumption, but not other serious offences, did not reflect their respective gravity. Rather, she explained that the Government wanted the presumption to have as wide an application as possible in order to reassure service personnel and veterans, but that taking into account the circumstances of overseas operations, sexual offences were a category of activity that could never have any place in such as operation. She also affirmed the Government’s commitment to human rights and the rule of law.<sup>8</sup> The amendment was passed on a division by 333 votes to 228.<sup>9</sup>
- **Investigations:** A new clause, tabled by Lord Thomas of Gresford, was inserted after clause 7, which would require investigators and prosecutors to consider whether an investigation has been timely and comprehensively conducted when considering whether to bring criminal proceedings.<sup>10</sup> It would also require periodic reviews of the investigation and referrals of any findings to the Service Prosecuting Authority, and provide that the same allegations could not be subject to further investigation unless there is new and compelling evidence or information. Moving the amendment Lord Thomas explained that it would fill a gap in the Bill, being that

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<sup>4</sup> HL Deb 11 March 2021, c1863

<sup>5</sup> Ibid, c1864

<sup>6</sup> Amendment 1, [Lords amendments to the Overseas Operations \(Service Personnel and Veterans\) Bill](#)

<sup>7</sup> [HL Deb 13 April 2021](#), c1191

<sup>8</sup> Ibid, c1204-1206

<sup>9</sup> Ibid, c1207-1210

<sup>10</sup> Amendment 2

“it does not directly address the scandal of delayed investigations and reinvestigations of service personnel”.<sup>11</sup> He noted that in the context of overseas operations investigations may be protracted, and that the “possibility of prosecution cannot be held over a service man or woman indefinitely”. Baroness Goldie explained that the Government opposed the amendment, suggesting that it would create artificial timelines for the progress of investigations, and that it would be premature, given that a review of investigative and prosecutorial processes in relation to overseas operations was ongoing.<sup>12</sup> She stated that the Bill “creates a clear framework which everyone can understand around time limits for pursuing matters”.<sup>13</sup> The amendment was passed on a division by 308 votes to 249.<sup>14</sup>

- **Derogation from the ECHR:** An amendment to remove clause 12 from the Bill, tabled by Lord Hope.<sup>15</sup> Clause 12 would impose a duty on the Secretary of State to consider derogating from the ECHR in relation to any overseas operations that are considered to be significant. Lord Hope suggested that clause 12 would add nothing to the existing law, given that the power to derogate already exists, and that it might lead to the use of derogation orders when it could not be justified in accordance with the ECHR.<sup>16</sup> Baroness Goldie confirmed that the Government would accept the amendment, noting the general consensus in agreement with it.<sup>17</sup>
- **Long stop on civil and Human Rights Act claims:** An amendment tabled by Lord Tunnicliffe, which would insert a new clause after clause 12 to exclude claims brought by current or former service personnel from the provisions in Part 2 of the Bill.<sup>18</sup> Lord Tunnicliffe explained that it would reintroduce the normal approach to limitation for these claimants, namely that the court can extend the limitation period indefinitely if it is just and equitable to do so. He suggested that this was necessary to avoid a breach of the armed forces covenant. The Advocate General for Scotland, Lord Stewart, explained the Government’s opposition to the amendment, suggesting it would have little practical impact because it would apply to very few claims. It would also, he suggested, be incompatible with the UK’s obligations under the ECHR, because it would discriminate against non-service personnel who bring claims, with no justifiable reason.<sup>19</sup> The amendment was passed on a division by 300 votes to 225.<sup>20</sup>
- **Duty of care standard:** An amendment tabled by Lord Dannatt that would require the Secretary of State to establish a duty of care standard in relation to legal, pastoral and mental health support provided to service personnel involved in investigations or litigation arising from overseas operations.<sup>21</sup> This would have to be laid before Parliament after six months, as well as an annual update on its operation to be included in the Armed Forces Covenant Annual Report. The amendment defines “duty of care” as the legal and moral obligation of the Ministry of Defence to ensure the wellbeing of service personnel. Lord Dannatt explained that the clause would “bring into law the good ideas and intentions of well-meaning Ministers and officials with whom we are currently united in common cause but who are strangely reluctant to enshrine the fruits of their endeavours in a Bill ... to protect our people for all time from vexatious investigations and prosecutions”.<sup>22</sup> Responding, Baroness

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<sup>11</sup> HL Deb 13 April 2021, c1168-1170

<sup>12</sup> Ibid, c1179-1180

<sup>13</sup> Ibid, c1180

<sup>14</sup> Ibid, c1212-1215

<sup>15</sup> Amendment 3

<sup>16</sup> HL Deb 13 April 2021, c1232-1233

<sup>17</sup> Ibid, c1233-1234

<sup>18</sup> Amendment 4

<sup>19</sup> HL Deb 13 April 2021, c 1228-1230

<sup>20</sup> Ibid, c1240-1242

<sup>21</sup> Amendment 5

<sup>22</sup> HL Deb 13 April 2021, c1244

Goldie explained that the Government supported the intention behind the amendment, pointing to the Written Ministerial Statement of the same day setting out the support given the personnel and veterans.<sup>23</sup> However she suggested that the amendment would not address concerns about investigations and other legal proceedings, and expressed concern that it would lead to an increase in litigation. She suggested that the Armed Forces Bill would be a more appropriate mechanism for any discussion of the duty of care owed to personnel. The amendment was passed on a division by 303 votes to 223.<sup>24</sup>

- The Government tabled a number of minor and technical amendments to improve drafting and correct errors in the Bill.<sup>25</sup>

## 4. Consideration in the Commons and the Lords

### 4.1 Commons consideration

The [Commons considered](#) the Lords amendments ([Bill 189](#)) on 21 April 2021.

#### War crimes and crimes against humanity

In considering Lords amendment 1, the Government tabled its own amendment in lieu that would place crimes against humanity, genocide and torture within Schedule 1 of the bill, and therefore not subject to the presumption against prosecution after five years. The Government's amendment did not, however, include war crimes in Schedule 1. In speaking to the amendment, the Minister said:

Let me make it clear that the presumption against prosecution created by part 1 does not prevent investigations or prosecutions for any category of crimes. It creates a higher threshold for prosecution, not a bar. It therefore does not prevent the UK from investigating crimes of any nature, whether they are in or out of the list of excluded offences in schedule 1. I have listened with sympathy to the concerns of many hon. Members that failing to expand the list of excluded offences makes UK service personnel more likely to face prosecution by the International Criminal Court, but it does not. Cases are only admissible to the ICC when a state is unwilling or unable to investigate or prosecute, so the presumption against prosecution created in part 1 does not prevent investigation, and cases can still be prosecuted. We will therefore not be considered by the ICC to be unwilling or unable to investigate and prosecute war crimes.<sup>26</sup>

Several Members, including Shadow Defence Secretary, John Healey, welcomed the Government's amendments but also called for the Government to re-think its position on war crimes. John Healey stated:

torture and genocide should never have been included as offences within this Bill. Like sexual offences, there is no justification—there can never be justification—for them, so the decision now to exclude them is certainly a good step forward, and we welcome it and will support the Government's amendments in lieu of Lords amendment 1. But can I urge the Minister, in the time between the consideration of these Lords amendments in this House and their being discussed again in the other place, to accept in full those crimes specified in Lord Robertson's amendment 1, including war crimes, as excluded offences?<sup>27</sup>

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<sup>23</sup> Ibid, c1252-1257

<sup>24</sup> Ibid, 1260-1262

<sup>25</sup> Amendments 6, 7 and 8

<sup>26</sup> HC Deb 21 April 2021, c1057-8

<sup>27</sup> Ibid, c1024

### **Box 2: What is the difference between a war crime and a crime against humanity?**

The international crimes of war crimes and crimes against humanity can be similar in some of the elements of the crimes that underpin them. The [Rome Statute of the International Criminal Court](#) sets out the definitions of these crimes at **Article 8** (War Crimes) and **Article 7** (Crimes Against Humanity). These are largely based on how those crimes are defined in wider international law (such as customary international law, or under the [Geneva Conventions](#), for war crimes).

One of the main differences between the two is that war crimes are committed as part of an international or non-international armed conflict, whereas crimes against humanity can be committed in either peace time or within conflict. Similarly, the acts underpinning crimes against humanity must be committed as part of a 'widespread or systematic attack' which is 'directed against any civilian population'. Whereas war crimes involve 'grave breaches' of the Geneva Conventions, or other serious violations of the laws and customs of war in conflict, where they are committed as part of a plan or policy or the large-scale commission of such crimes. War crimes are focused much more on the conduct of hostilities during conflict, and the protection of civilians against military attacks.

#### **Examples of war crimes**

Grave breaches of the [Geneva Conventions](#), including: wilful killing; torture or inhuman treatment; wilfully causing suffering or serious injury; Prisoner of War violations; unlawful deportation; taking of hostages.

Other violations of laws and customs of war, including: intentionally directing attacks against civilians or civilian objects; intentionally directing attacks against humanitarian aid or peacekeeping; killing a combatant who has laid down arms / surrendered; targeting cultural objects; pillaging; using indiscriminate weapons; using certain biological or chemical weapons; sexual violence; use of child soldiers.

#### **Examples of Crimes against Humanity**

Numerous inhumane acts, including: murder; extermination; enslavement; deportation or forcible transfer of population; illegal imprisonment; torture; rape, sexual offences; persecution; enforced disappearance; apartheid; other inhumane acts of a similar character.

## **Other amendments**

The Commons accepted the Lords amendment removing clause 12 (derogation from the ECHR) from the Bill.

On division, the Commons disagreed with the remaining Lords amendments relating to investigations, civil claims and a duty of care standard. See [Divisions 269, 270 and 271](#).

## **4.2 Lords consideration**

The Bill was considered again in the House of Lords on [26 April 2021](#).

The Lords accepted the Commons amendments in lieu of amendment 1. However, Lord Robertson of Port Ellen tabled a further amendment (A1) which would also place war crimes in Schedule 1 of the Bill. The Government indicated that it would not oppose this amendment but that it would table its own [amendment in lieu for consideration](#) in the Commons on 27 April. Baroness Goldie commented:

The Government have recognised the strength of concern that, by excluding only sexual offences and not other serious offences, the Bill risks damaging not only the UK's reputation for upholding international humanitarian and human rights law, including the United Nations convention against torture, but also the reputation of our Armed Forces.

While the other place rejected the amendment proposed by the noble Lord, Lord Robertson, they accepted the Government's amendments in lieu to add genocide, crimes against humanity and torture to the excluded offences in Schedule 1, and to remove the delegated power in Clause 6(6), which allows the Secretary of State to amend Schedule 1.

Although the Government were not supportive of excluding further offences at that stage, they have continued to reflect on the very real concerns in both Houses that all offences that fall within the jurisdiction of the International Criminal Court, including war crimes, should be excluded from the measures in Part 1. I can confirm to the House that the Government will therefore table an amendment in lieu of Motion A1 in the name of the noble Lord, Lord Robertson, to exclude war crimes also [...]

I can confirm that the Government will not oppose Amendments 1R to 1U in the name of the noble Lord, Lord Robertson, noting that they will table a further amendment in lieu tomorrow. I beg to move.<sup>28</sup>

While accepting the majority of the Commons considerations, the Lords disagreed with the Commons rejection of amendment 5 relating to a duty of care standard. Lord Dannatt tabled a [revised amendment \(5B\)](#), which passed on division and will now be considered in the Commons.<sup>29</sup> Introducing that revised amendment Lord Dannatt stated:

No one suggests for a moment that anyone is above the law. Indeed, soldiers take up arms only to protect the law, but when this new Bill passes into law it will singularly fail to provide the protection that serving and veteran members of the Armed Forces believe it should provide. For this reason, the duty of care standard amendment has been tabled to improve this Bill and enable it to achieve one of its original objectives. That it has been consistently opposed by government Ministers and the government majority in the other place is both puzzling and disappointing [...]

The purpose of the amendment is a purpose in principle to establish the desirability of a statement on a duty of care standard; this should stand on its own.

Going beyond that, the drafting of the amendment is such that the initiative remains with the Ministry of Defence to draft the duty of care standard in the way that it wishes [...]

I am therefore disappointed that the Government do not accept the need for the setting out of a detailed duty of care standard. I continue to press this issue, and therefore wish once again to test the opinion of the House and divide on this matter.<sup>30</sup>

In response, Baroness Goldie commented:

I listened carefully to the contributions across the Chamber. What I have not heard in response to my attempt to describe the wide range of support which is offered to our Armed Forces personnel and veterans—through a range of directly provided services, likely to be the case, for example, with serving personnel; or in conjunction and co-operation with veterans' charities; or through consultation with the devolved Administrations, many of whom are responsible for delivering the essential services and support which our veterans require; or through the Armed Forces Covenant and how we propose to develop that further in the Armed Forces Bill—is a detailed indication of where the MoD is falling short. I certainly feel it would be helpful to have greater clarity about what noble Lords think are the deficiencies of the MoD in this context.

I have also not heard a response to the Government's legitimate concerns about the unintended consequences and the potential legal implications of creating a statutory duty of care. As I pointed out, this has to exist alongside the common-law doctrine of

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<sup>28</sup> HL Deb 26 April 2021, c2090

<sup>29</sup> [Division 1](#), 26 April 2021. Content 312, Not Content 243

<sup>30</sup> HL Deb 26 April 2021, c2109, 2112-2113

combat immunity and the very real concerns that this well-intended amendment could stray into and inhibit activity in the operational theatre.<sup>31</sup>

## 5. Issues related to the Bill

There are a number of wider issues that continue to have relevance to the passage of the Overseas Operations Bill.

### 5.1 International Criminal Court – preliminary inquiry into the UK

In December 2020 the International Criminal Court's (ICC) Prosecutor, Fatou Bensouda, announced that she was closing the preliminary examination into allegations that UK soldiers had committed international crimes in Iraq. A full investigation will, therefore, not take place.

In announcing the decision, the Prosecutor stated:

The Office has previously [found](#), and today confirmed, that there is a reasonable basis to believe that members of the British armed forces committed the war crimes of wilful killing, torture, inhuman/cruel treatment, outrages upon personal dignity, and rape and/or other forms of sexual violence.

However, it is the role of the Prosecutor's Office to determine whether a State is unwilling or unable to genuinely investigate or prosecute alleged offences through its own domestic processes. The [Final Report](#) found that the Army's initial investigations were "inadequate" and lacked a "genuine effort" to be independent or impartial, and noted that this formed the basis for the Government's future decisions to set up other investigatory bodies.<sup>32</sup> However, the report also found that, despite a number of concerns, subsequent investigations carried out by the UK appeared to be genuine and the Office could not substantiate allegations that individuals had been "shielded from criminal justice".

In a [statement](#) the Prosecutor concluded:

Given the range and scope of the allegations examined by IHAT and its successor, the Service Police Legacy Investigations, the Office assessed that it could not conclude that the UK authorities had remained inactive. Instead, the more relevant question was their genuineness.

If shielding had been made out, an investigation by my Office would have been warranted. Following a detailed inquiry, and despite the concerns expressed in its report, the Office could not substantiate allegations that the UK investigative and prosecutorial bodies had engaged in shielding, based on a careful scrutiny of the information before it. Having exhausted reasonable lines of enquiry arising from the information available, I therefore determined that the only professionally appropriate decision at this stage is to close the preliminary examination and to inform the senders of communications. My decision is without prejudice to a reconsideration based on new facts or evidence.

### Relevance to the Overseas Operations Bill

There has been much debate during the passage of the Overseas Operations Bill over whether the presumption against prosecution, and the Government's decision not to

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<sup>31</sup> HL Deb 26 April 2021, c2111-2112

<sup>32</sup> Specifically, the Iraq Historic Allegations Team and the Service Police Legacy Investigations. These are both examined in greater detail in CBP8983, [Overseas Operations \(Service Personnel and Veterans\) Bill 2019-21](#), House of Commons Library, September 2020

include war crimes and crimes against humanity, including torture, in the Schedule 1 list of excluded offences, could potentially invite the jurisdiction of the ICC.

As outlined above, the Government did not support the amendment, passed on division in the Lords report stage, to include war crimes, crimes against humanity, genocide and torture in the list of offences excluded from the provisions of the Bill.<sup>33</sup> On reflection, the Government has subsequently tabled amendments that will place these crimes in Schedule 1 of the Bill.

### **ICC Prosecutor's previous comments on the Bill**

[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.

In 2019, the ICC Prosecutor referred to the Government's early proposals to introduce such legislation. The Prosecutor said:

were such domestic legislation to be adopted, the Office would need to consider its potential impact on the ability of the UK authorities to investigate and/or prosecute crimes allegedly committed by members of the British armed forces in Iraq, against the standards of inactivity and genuineness set out in article 17 of the Statute.<sup>34</sup>

The Prosecutor also said in 2020 that arguments in favour of the Bill to "curb the phenomena of vexatious litigation" were "[considerably exaggerated](#)".

In its [final report on the Iraq/UK situation](#), the ICC Prosecutor looked at the Bill again when considering whether the UK Government was unwilling to genuinely prosecute alleged crimes in Iraq. It had requested further clarification from the UK Government on how the Bill would operate in light of its obligations under the Rome Statute. In particular, the Prosecutor asked the Government whether the legislation would have an impact on: (i) the cases within the scope of the preliminary examination; and (ii) any new historical allegations that might emerge in the future concerning the conduct of British forces in Iraq.

In answering the first question, the UK Government said that "... all prosecutorial decisions that are within the scope of the Iraq preliminary examination will have been taken before the Bill becomes law. Therefore, UK processes will be completed before the Bill becomes law. Given this, the Bill will have no impact on any of those cases currently with the SPLI and/or SPA."<sup>35</sup>

On the question of whether the Bill would affect any new allegations about Iraq that could emerge in future, the Government argued:

The UK Government considers that such hypothetical allegations fall outside the scope of the Iraq preliminary examination and that the question of the Bill's impact upon them can therefore have no bearing on the OTP's [Office of the Prosecutor's] complementarity assessment.<sup>36</sup>

The UK Government also told the ICC Prosecutor:

... the statutory presumption measure is consistent with the UK's historic commitment to international criminal justice and the rule of law, and the UK's obligations under the Rome Statute. To reiterate, for the avoidance of all doubt: the UK's position is that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking

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<sup>33</sup> HL Deb 13 April 2021, c1204-5

<sup>34</sup> ICC, Office of the Prosecutor, [Report on Preliminary Examination Activities 2019](#), 5 December 2019, para [174].

<sup>35</sup> ICC, Office of the Prosecutor, [Situation in Iraq/UK - Final Report](#), 9 December 2020, para [475].

<sup>36</sup> *Ibid*, para [475].

measures at the national level. It remains the UK's position that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes. As such, the statutory presumption measure will have no bearing on the ability or willingness of independent investigators or prosecutors in the UK to investigate or prosecute alleged crimes within the jurisdiction of the ICC, bearing in mind the admissibility provisions of Article 17 of the Rome Statute.

Rather, it creates a rebuttable presumption which leaves a prosecutor with full discretion to prosecute where they consider it would be appropriate to do so. It bears no resemblance to a legislative bar to investigations or prosecutions, such as a statute of limitations or amnesty.

Allegations of serious offences, including crimes within the jurisdiction of the ICC, will be investigated and, where appropriate, prosecuted.<sup>37</sup>

In its Report, the Prosecutor responded to the Government's arguments by stating:

... there remains some scope for uncertainty as to the extent and execution of that duty in the light of the wording of the proposed legislation. Indeed, the inclusion of a section on 'excluded offences' suggests that the legislation has the potential to impact the ordinary course of criminal inquiries into certain categories of conduct. The UK's assurance that "all allegations of serious offences, including those within the jurisdiction of the Court, will be investigated and, where appropriate, prosecuted" would be clearer, for example, if the crimes within the jurisdiction of the Court were set out in the exceptions section of the draft legislation.<sup>38</sup>

The Office of the Prosecutor also warned that using such a law to block future investigations or prosecutions of crimes in Iraq could allow these cases to be brought before the ICC.<sup>39</sup> In concluding its assessment of the Overseas operations Bill, the ICC Prosecutor warned:

Should new facts or evidence become available, this assessment may be revisited in the light of the Prosecutor's functions and powers under article 15(6). In this context, the Office views with particular concern the possible passage of legislation that could effectively provide an amnesty to current and former service personnel for allegations arising from Iraq. The Office will study the future impact of such legislation, if passed, in order to consider whether the re-opening of the preliminary examination is warranted on the basis of the State's unwillingness or inability to pursue relevant lines of criminal inquiry genuinely.<sup>40</sup>

In a series of [letters published by the Joint Committee on Human Rights](#) on 5 March 2021, the ICC Prosecutor reiterated these concerns.

On 12 April 2021, the UN High Commissioner for Human Rights also issued a statement urging the British Government not to undermine "key human rights obligations that the UK has committed itself to respect".<sup>41</sup>

### Box 3: Further reading

The Prosecutor's report is examined in greater detail in the following Commons Library papers:

- [UK war crimes in Iraq: the ICC Prosecutor's report](#), House of Commons Library Insight, 15 January 2021
- [Recent developments at the International Criminal Court](#), House of Commons Library, 15 January 2021

<sup>37</sup> *Ibid*, para [476].

<sup>38</sup> *Ibid*, para [477].

<sup>39</sup> ICC, Office of the Prosecutor, [Situation in Iraq/UK - Final Report](#), 9 December 2020, para. 479

<sup>40</sup> ICC, Office of the Prosecutor, [Situation in Iraq/UK - Final Report](#), 9 December 2020, para. 489

<sup>41</sup> [UN Human Rights Office of the High Commissioner](#), 12 April 2021

## 5.2 Review of investigations

In October 2020 the MOD [announced](#) that a judge-led review had been commissioned to examine the investigation of alleged offences which occur on overseas operations. The review will not feed into the Overseas Operations Bill directly but will “complement” its provisions.<sup>42</sup> Any recommendations of the review into investigations will build upon, but not reopen, those set out in the [Service Justice System Review](#) (Lyons review). A number of Lyons’ recommendations are being taken forward as part of the [Armed Forces Bill 2019-21](#), which is currently before Parliament (see below).

The review will be led by Sir Richard Henriques. In summarising the [terms of reference](#) of the review, Baroness Goldie commented:

The Review, which is due to report by the summer, was commissioned by the Government to ensure that we have the most up-to date and future-proof skills and processes in place to investigate and, where appropriate prosecute, cases where serious allegations of criminal wrong-doing are made against UK forces on operations overseas. Where necessary, improvements will be made. Whilst there is no formal consultation process in place, it will be for the Judge to decide who can best help him with the review.<sup>43</sup>

In a letter to the ICC Prosecutor’s Office in January 2021, the Secretary of State for Defence, provided further detail:

You may be aware that, to complement the Bill, I announced on 13 October 2020 a review of the conduct of investigations relating to overseas operations and the prosecutorial process, to be led by Sir Richard Henriques. Sir Richard is a retired High Court judge with a vast amount of criminal experience, who sat regularly in the Court Martial Appeal Court, and has carried out reviews previously, including for the Crown Prosecution Service and the Metropolitan Police.

This review will help to provide greater certainty for Service personnel being investigated and for potential victims while ensuring that allegations are addressed without undue delay. One of the focuses of the review (the terms of reference for which are enclosed) is on setting the context for the future so that we can be sure that, for any complex and serious allegations of wrongdoing against any of our forces that may occur on overseas operations, the most up to date and future-proof framework, skills, and processes are in place. Particular attention will be paid to how the Armed Forces will facilitate timely consideration of serious and credible allegations of criminal misconduct and, where appropriate, their swift and effective investigation. Sir Richard’s review therefore builds on the review of the Service Justice System by His Honour Shaun Lyons and Sir Jon Murphy, and on the work to implement their recommendations.<sup>44</sup>

### Timing of the Armed Forces Bill

The [Armed Forces Bill](#) was introduced on 26 January 2021 and is currently being considered in Committee in the House of Commons.

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<sup>42</sup> [Ministry of Defence press release](#), 13 October 2020

<sup>43</sup> PQHL12010, Armed Forces: misconduct, 25 January 2021

<sup>44</sup> Secretary of State for Defence, Letter to Office of the ICC Prosecutor, 21 January 2021. Published by the [Joint Committee on Human Rights](#).

On 8 February 2021, alongside Second Reading of the Bill, a [carry over motion](#) was passed which will allow the Bill to continue into the next Parliamentary Session.<sup>45</sup> The Bill must receive Royal Assent by 31 December 2021.<sup>46</sup>

There has been speculation that carrying the Bill over into the next Parliamentary session could allow for any recommendations of the Henrique review that require primary legislation to be incorporated into the Armed Forces Bill in the autumn.

## 5.3 Review of the Human Rights Act

In December 2020 the Government launched an [independent review of the Human Rights Act 1998](#) (IHRAR).

IHRAR published a public [call for evidence](#) in January 2021, which included the question

In what circumstances does the HRA apply to acts of public authorities taking place outside the territory of the UK? What are the implications of the current position? Is there a case for change?

During debate in the House of Lords, Baroness Goldie noted that this aspect of the review would be relevant to the issues under consideration in the Overseas Operations Bill

The issue of extraterritorial jurisdiction under the ECHR has been the subject of complex legal debate, and it continues to be addressed and developed through European Court of Human Rights case law. This case law has led to some uncertainty about the ECHR's application and has extended the territorial scope of convention obligations beyond what was understood when the ECHR was originally drafted.

...

We have now launched the independent Human Rights Act review to examine the framework of the HRA, how it is operating in practice and whether any change is required. As part of this, the panel will examine the circumstances in which the Human Rights Act applies to acts of public authorities taking place outside the territory of the United Kingdom. It will consider the implications of the current position and whether there is a case for change.

The review does not change the commitment of the United Kingdom to the ECHR and human rights. We will continue to champion human rights at home and abroad. The review is expected to conclude in the summer, and we will consider its recommendations then.<sup>47</sup>

During Report stage, Lord Faulks suggested that a better way to resolve the mischief that the Bill seeks to address would be to amend the Human Rights Act to provide that it would no longer have extraterritorial application. He expressed hope that IHRAR would lead to such an amendment.<sup>48</sup>

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<sup>45</sup> The current session is due to end in May 2021.

<sup>46</sup> An Armed Forces Act must be passed every five years, with a Continuation Order passed annually in the intervening period. The Armed Forces Act extends and amends the Armed Forces Act 2006. Section 3(3) of the 2006 Act states that any Continuation Order may not provide for the continuation of this Act beyond the end of the year 2021. The Armed Forces (Continuation) Order 2021, which was passed on 8 February 2021, therefore extends the Act until 31 December 2021.

<sup>47</sup> HL Deb 11 March 2021, c1862-3

<sup>48</sup> HL Deb 13 April 2021, c1246-1247

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