Overseas Operations (Service Personnel and Veterans) Bill

House of Commons

Ping Pong

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Introduction

1. JUSTICE is an all-party law reform and human rights organisation working to strengthen the justice system. It is the UK section of the International Commission of Jurists. Our vision is of fair, accessible, and efficient legal processes in which the individual's rights are protected and which reflect the country's international reputation for upholding and promoting the rule of law.

2. This briefing addresses JUSTICE's concerns with the Overseas Operations (Service Personnel and Veterans) Bill (the "Bill"). JUSTICE recognises the unique role and status of the UK's armed forces, and the difficulties faced by service personnel. However, this Bill is deficient in two important respects, as it both fails to support current and former service personnel whilst also depriving victims of serious crime access to appropriate remedies. In particular, the Bill would:

    a. damage the standing of the armed forces by acting contrary to established legal norms – both domestic and international. It would do so by introducing a threshold which would be near-impossible to meet where claims for torture and other serious crimes are made after five years. By affording effective impunity for UK overseas military operations, the Bill signals that, rather than adhering to a strict human rights framework in the rules of engagement, the UK is prepared to relax, or worse, disregard, protection from torture and inhuman and degrading treatment. The Bill risks contravening the UK's obligations under the European Convention on Human Rights (the "ECHR") and other international legal instruments, many of which the UK helped to create; and

    b. restrict the ability of service people to bring claims for personal injury and death during the course of overseas actions. Rather than protecting and enhancing the rights of service personnel, it would weaken their key avenue for proper compensation, thus serving only to shield the Government from potential liability.

3. JUSTICE also notes the context in which this Bill arises. The recent granting of Royal Assent to the Covert Human Intelligence Sources (Criminal Conduct) Act 2021, which creates a mechanism by which covert operatives, who can be members of the public, seasoned criminals, or even children, will benefit from a broad immunity, signals a worrying disregard for the UK's commitment to human rights standards. This risk was equally present with respect to the Internal Markets Bill, which would have allowed the Government to derogate from the UK's obligations under international law. In sum, this Bill

actively deepens these anxieties, especially at a time of great political and constitutional uncertainty.

4. JUSTICE welcomes the House of Lords' significant amendments to the Bill, such as

    a. **Lords Amendment 1** (exclusion of torture, genocide, crimes against humanity or war crimes);
    b. **Lords Amendment 3** (deletion of the duty to consider derogation from the Convention); and
    c. **Lords Amendment 4** (restrictions on time limits for actions brought against the Crown by service personnel).

5. These changes are necessary to limit the significant damage this Bill could incur to overseas victims of crimes and service personnel alike. Nevertheless, it is clear that the policy, overall, remains inherently problematic for the UK's adherence to domestic and international human rights norms. **As such, we continue to strongly resist the passage of the Bill and urge parliamentarians to vote against this proposal.**

Purpose of the Bill: the so-called problem of 'lawfare'

6. The Bill seeks to address the so-called problem of 'lawfare', defined in the Explanatory Notes as the "judicialisation of armed conflict" evidenced by the "cycle of reinvestigation" of historic operations.[1] The Bill intends to give service personnel and veterans "greater certainty" against "claims and potential prosecution for historical events, that occurred in the complex environment of armed conflict overseas".[2] However, it is far from clear that the Bill is necessary or appropriate.

7. **First**, the Bill would not stop the so-called cycle of investigations: its restrictions apply solely to *prosecutions*.[3] The Bill does not address measures that could be taken to ensure that allegations are properly investigated and resolved within a reasonable period of time. Service personnel would benefit from reforms that enable prompt and thorough

[1] Overseas Operations (Service Personnel and Veterans) Bill Explanatory Notes, paragraph 6, *see* - https://publications.parliament.uk/pa/bills/lbill/58-01/147/5801147en.pdf

[2] *Ibid*, paragraph 2.

[3] Centre for Military Justice, 'Briefing on the Overseas Operations Bill', *see* - https://centreformilitaryjustice.org.uk/guide/briefing-on-the-overseas-operations-bill/

investigations - rather than a limitation on prosecutions – to resolve any concerns with respect to uncertainty and delay for soldiers and victims.

8. **Second**, in any event, the Bill addresses a non-existent issue. As the Centre for Military Justice notes, there have in fact been hardly any criminal prosecutions brought against service personnel arising from the wars in Iraq and Afghanistan.[4] Moreover, the Joint Committee on Human Rights aptly identified in its report that "none of the MoD's current historical investigations (as concerns Iraq or Afghanistan) has resulted in a prosecution being brought".[5] It is therefore difficult to understand the need to legislate.

The Presumption Against Prosecution

9. Part 1 of the Bill contains a presumption against prosecution of personnel engaged in overseas operations once five years has elapsed from the date of the alleged criminal activity. Prosecution after this period would be "exceptional", and subject to a so-called 'triple lock'. This three-part test is as follows:

    a. there is a presumption against prosecution with respect to service members, meaning that it would be "exceptional" for a prosecutor to initiate proceedings after a period of five years (**Clause 2**);

    b. the prosecutor "must give particular weight to" (a) factors which may dilute the culpability of the potential accused service member, for instance "being exposed to unexpected or continuous threats, being in command of others who were so exposed, or being deployed alongside others who were killed or severely wounded in action)" and (b) where there has been a previous investigation, and no new evidence, a public interest in finality of such proceedings (**Clause 3**); and

    c. the consent of the Attorney General must be obtained to advance any prosecution (**Clause 5**).

[4] *Ibid*.

[5] Joint Committee on Human Rights, 'Legislative Scrutiny: The Overseas Operations (Service Personnel and Veterans) Bill', (29 October 2020), *see* - https://publications.parliament.uk/pa/jt5801/jtselect/jtrights/665/66506.htm#_idTextAnchor023

Concerns

10. JUSTICE is deeply concerned by the statutory presumption against prosecution after a limitation period of five years, as well as this 'triple lock', for the following reasons:

    a. *Clause 2 - Breach of Articles 2 and 3 ECHR*

        i. A statutory presumption against prosecution would breach the procedural obligations under Articles 2 and 3 ECHR to conduct an effective investigation into allegations of unlawful killings or torture.

        ii. *Da Silva v the United Kingdom* concerned the decision not to prosecute the individuals involved in the police shooting of Jean Charles de Menezes.[6] The European Court of Human Rights (the "ECtHR") held that the Article 2 procedural duty to carry out an effective investigation entails, *inter alia*, identifying and, where appropriate, punishing those responsible.[7] Where a suspicious death has been caused by a State agent, "particularly stringent scrutiny must be applied by the relevant domestic authorities to the ensuing investigation".[8] The ECtHR held that "national courts should not under any circumstances be prepared to allow life-endangering offences to go unpunished".[9] In addition, the obligation to investigate deaths caused by state agents, and ultimately prosecute where appropriate, was found to apply to the UK's investigations into deaths in Iraq in *Al-Skeini v the United Kingdom*.[10] It also found that the "Geneva Conventions also place an obligation […] to investigate and prosecute alleged grave breaches of the Conventions, including the wilful killing of protected persons".[11] Such obligations applied to armed conflict "despite the prevalence of violent armed clashes [and] the high incidence of fatalities".[12]

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[6] *Armani Da Silva v UK* (App No 5878/08) [2016] ECHR.

[7] *Ibid,* paragraph 233.

[8] *Ibid,* paragraph 234.

[9] *Ibid,* paragraph 239.

[10] *Al-Skeini v UK* (App No 55721/07) [2011] ECHR.

[11] *Ibid*, [92].

[12] *Ergi v Turkey* (App No 23818/94) [1998] ECHR, paragraph 85; *Kaya v Turkey* (App No 22729/93) [1998] ECHR, paragraph 91. Wallace, Stubbins Bates, Quénivet, 'Legal Protections for Armed Forces Personnel and Veterans serving in operations outside the United Kingdom Response to Public Consultation Questionnaire', p 5.

iii. Article 2 requires careful judicial scrutiny, so that the deterrent effect of the judicial system is not undermined.[13] **Making prosecution "exceptional" undermines this deterrent effect[14] and careful judicial scrutiny.**

b. Clause 2 - Discrimination under Article 14 ECHR

i. As is openly acknowledged by the Ministry of Defence (the "MoD"), the Bill would afford preferential treatment to service personnel alleged to have committed crimes overseas. The MoD believes that, to the extent that domestically deployed personnel are considered an 'other' status under Article 14 ECHR then the unequal treatment to which they are subjected is justified by the "uniquely challenging circumstances" faced by service personnel abroad.[15] This justification is not convincing. Veterans who served in Northern Ireland certainly faced a "high degree of hostility" and "threat of violence" yet they are not covered by the Bill.[16] JUSTICE believes that service personnel should be subject to the highest ethical standards regardless of whether they are stationed at home or overseas.

ii. Further, the Bill would weaken the rights of foreign national victims. Foreign nationals may suffer indirect discrimination regarding the discharge of the State's procedural obligations to investigate allegations of crimes which fall under Articles 2 and 3. The five year time-limit would apply regardless of the status of the victim, with foreign national victims facing a disproportionate effect because the Bill only concerns overseas actions.

c. Clause 2 - Breach of Other International Legal Instruments

i. A presumption against prosecution could be contrary to Article 29 of the Rome Statute[17], which cannot be derogated from. The Office of the Prosecutor of the International Criminal Court has warned that if proposals for a presumption against prosecution were introduced, it "would need to

[13] *Armani Da Silva v UK* (App No 5878/08) [2016] ECHR, paragraph 239.

[14] Written evidence from Professor Merris Amos, submitted to the Joint Committee on Human Rights. *See* - https://committees.parliament.uk/writtenevidence/11454/html/

[15] Ministry of Defence, 'Overseas Operations (Service Personnel and Veterans) Bill, European Convention on Human Rights Memorandum', (March 2020), paragraph 15.

[16] *Ibid*.

[17] Article 2 of the Rome Statute of the International Criminal Court 1998 – "*The crimes within the jurisdiction of the Court shall not be subject to any statute of limitations*".

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 Rome Statute".[18]

ii. The UK was complicit in the United States' rendition, detention and interrogation following 9/11. The Supreme Court in *Belhaj v Straw* held that the doctrines of state immunity and foreign act of state were not engaged to prevent an action against the UK, and, even if the doctrine of foreign act of state were engaged, the allegations would fall within a public policy exception for violations of international law or fundamental human rights.[19] It is distasteful to suggest that the UK can carve out an immunity for torture.

d. Clauses 2 and 4 - Entrenchment of Flawed Investigatory Practices

i. Clause 4, paragraph 1 provides that the presumption against prosecution would apply to investigations which have 'ceased to be active'. This creates a perverse incentive to leave investigations incomplete.[20]

ii. The UK does not have a good record when it comes to investigating armed forces operations, at home[21] or abroad.[22] This context makes the statutory presumption even more concerning.

e. Retrospective Application

i. While the Bill would not apply to investigations which are currently ongoing, the presumption against prosecution would apply to new cases arising from historical overseas operations, for instance in Iraq and Afghanistan.

ii. The presumption against prosecution could, therefore, hamper investigations into alleged criminal behaviour during those operations,

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[18] Office of the Prosecutor, International Criminal Court, 'Report on Preliminary Examination Activities 2019', paragraph 174. *See* - https://www.icc-cpi.int/itemsDocuments/191205-rep-otp-PE.pdf

[19] *Belhaj and another v Straw and others* [2017] UKSC 3, JUSTICE intervening.

[20] Stubbins Bates, 'Legislating by Soundbite: The Overseas Operations (Service Personnel and Veterans) Bill', *EJIL:Talk!* (18 September 2020). *See* - https://www.ejiltalk.org/legislating-by-soundbite-the-overseas-operations-service-personnel-and-veterans-bill/

[21] Regarding Northern Ireland, see *Hugh Jordan v UK* (App No 24746/94) [2001] ECHR; *McKerr v UK* (App No 28883/95) [2001] ECHR; *Kelly v UK* (App No 30054/96) [2001] ECHR; *Shanaghan v UK* (App No 37715/97) [2001] ECHR; *Finucane v UK* (App No 29178/95) [2003] ECHR.

[22] Regarding Iraq, see *Al-Skeini and Others v UK* (App No 55721/07) [2011] ECHR. The UN Committee against Torture has also raised concerns over the effectiveness of allegations into torture in Iraq.

thereby retrospectively disapplying the procedural obligations which currently apply (i.e. Articles 2 and 3 ECHR). This would mean that victims who may be presently entitled to pursue action face an increased procedural bar, consequently limiting access to justice.

f. Clause 3 - Current Powers are Sufficient

i. The Bill would require prosecutors to "have proper regard to the uniquely challenging context" of overseas operations. The law already does this. At present, the Crown Prosecution Service's guidance on mental health grants prosecutors a wide discretion to consider such issues when making a charging decision.[23]

ii. The justification for an arbitrary five year limitation period acts as a blunt tool. The law is capable of making assessments of the "unique circumstances" on a case by case basis. JUSTICE therefore considers Clause 3 as at best unnecessary, and at worst a procedural bar for those with legitimate claims.

g. Clause 5 - Role of the Attorney General

i. JUSTICE is concerned by the requirement that any prosecutions after five years would need the consent of the Attorney-General. The Attorney General is supposed to act independently with respect to individual prosecutions - having the public interest as an overriding consideration. She is not supposed to have the interests of a particular group in mind, nor advance a party-political agenda.

ii. The Bill, therefore, could risk creating a conflict between the rights of victims to seek redress and the political circumstances surrounding any proposed prosecution. JUSTICE believes that victims' rights should not be subject to the uncertainty of future political considerations, and must instead be judged according to their own merits, on a case by case basis.

[23] Crown Prosecution Service, 'Mental Health: Suspects and Defendants with Mental Health Conditions or Disorders', (14 October 2019), *see* - https://www.cps.gov.uk/legal-guidance/mental-health-suspects-and-defendants-mental-health-conditions-or-disorders

h. Schedule 1 – Excluded Offences and Carve-out for Torture

i. The Bill, at Schedule 1 (*Excluded Offences for the purpose of Section 6*), would carve out an exception for sexual offences and certain war crimes and crimes against humanity.

ii. JUSTICE welcomes that such serious allegations would not be subject to a five-year time limit. However, we continue to have strong concerns with the exclusion of a number of offences from Schedule 1 – not least, torture.

iii. It is unacceptable that allegations of torture would be subject to the 'triple lock'. While the Government insists that the Bill would not 'decriminalise' torture committed by service people overseas, it misses the point. By creating such a high bar for allegations to be prosecuted, the Bill in practice makes it very difficult, if not impossible, to envisage a successful prosecution after the five-year limit.

iv. Such a bar would go against established international jurisprudence. For example, the UN Convention against Torture, ratified by the UK, contains an obligation not to apply statutes of limitation to torture, as well as an obligation to investigate which cannot be time-limited.[24] The passage of this Bill, would, therefore, lead to a breach of the UK's international obligations.

v. Likewise, the limited range of offences set out in Schedule 1 undermines the enforcement of international humanitarian law, which foresees no time limit on the obligation to prosecute those suspected of grave breaches of the Four Geneva Conventions 1949 and Additional Protocol 1.[25]

11. JUSTICE considers that no serious criminal offence should be subject to a limitation period. On the contrary, there is a positive obligation to investigate such allegations, enshrined in international law and present throughout the UK's own domestic jurisprudence. While some have argued that the Bill does not 'decriminalise' torture since the Bill does not affect cases brought before the five year limitation period, JUSTICE

[24] Wallace, Stubbins Bates, Quénivet, 'Legal Protections for Armed Forces Personnel and Veterans serving in operations outside the United Kingdom Response to Public Consultation Questionnaire', p.13

[25] Stubbins Bates, 'Legislating by Soundbite: The Overseas Operations (Service Personnel and Veterans) Bill', *EJIL:Talk!* (18 September 2020). *See* - https://www.ejiltalk.org/legislating-by-soundbite-the-overseas-operations-service-personnel-and-veterans-bill/

maintains that it creates a substantive procedural barrier to justice for serious crimes, and may result in victims being deprived of an effective remedy. **JUSTICE therefore welcomes Lords Amendment 1, which would exclude torture, genocide, crimes against humanity and war crimes from the presumption of prosecution. However, we note that this would still leave many crimes shielded, which remains unacceptable.**

Personal Injury and Human Rights 'Longstops'

12. Part 2 of the Bill would amend s.33 of the Limitation Act 1980, thereby curtailing the courts' discretionary power to disapply time limits for former and current members of the armed forces to bring claims concerning personal injury and death during overseas actions. Currently, there is a three-year limit on bringing personal injury claims[26] and a one-year limit for human rights claims.[27] Both limits can, however, be extended through judicial discretion. When exercising this discretion, judges have regard to a list of factors.[28]

13. While the present three and one year primary limits will remain, the Bill would introduce a new six-year absolute bar on bringing a claim. For claims under the Human Rights Act 1998 (the "HRA") there is an alternative of a one-year limit from the date of knowledge, whichever is later. The courts would be required to take into account factors such as the cogency of evidence under the new limitations (even though these are factors which are already considered by the courts under the current rules). [29]

14. The MoD relies on the case of *Stubbings v United Kingdom* to assert that the new limitation periods would not constitute a violation of Article 6 ECHR.[30] Borrowing words from the judgment, the Government argues that the right of access to a court is not fettered because

[26] Limitations Act 1980, s 11. There is also a special limit of 15 years for latent damage under s 14A which could be relevant for issues of armed forces personnel and cases of PTSD.

[27] Human Rights Act 1998, s 7(5)(a).

[28] Limitations Act 1980, s 33. As noted in Ministry of Defence, 'Overseas Operations (Service Personnel and Veterans) Bill, European Convention on Human Rights Memorandum', (March 2020), paragraph 26: "Although no equivalent provisions exist in the HRA, the case law indicates that courts do already have regard to the factors set out in section 33(3) when considering whether to exercise discretion to extend the primary limitation period" (*see also - Rabone v Pennine Care NHS Trust* [2012] UKSC 2, JUSTICE intervening)'.

[29] For example, under clause 11(2) of the Bill.

[30] Stubbings v United Kingdom, (Application no. 22083/93; 22095/93) [1996] ECHR.

the 'essence' of the right is not impaired.[31] The MoD's analysis of the case, however, is inapposite. The ECtHR found that a six-year absolute limitation on intentional injury claims (in this case for a historic sexual abuse claim) was not a violation of the right to access a court under Article 6(1). A crucial part of the court's reasoning, instead, was that the claimant had the alternative route of criminal prosecution open to them:[32]

> *"In the instant case, the English law of limitation allowed the applicants six years from their eighteenth birthdays in which to initiate civil proceedings. In addition, subject to the need for sufficient evidence, a criminal prosecution could be brought* ***at any time*** *and, if successful, a compensation order could be made (see paragraphs 38-42 above). Thus, the very essence of the applicant's right of access to a court was not impaired".*

15. It is clear from this excerpt that the availability of criminal sanctions which were not time-limited was an important factor for the ECtHR in finding that the six-year absolute bar was a proportionate measure. Further, the rule in *Stubbings* applied to anyone seeking to bring an intentional injury claim. The current Bill would apply a six-year limit *only* for overseas armed forces proceedings.

16. There are two reasons why this measure would likely be inconsistent with the UK's human rights obligations:

    a. unlike in *Stubbings*, the presumption against prosecution would mean that the criminal prosecution option becomes more restricted, making the procedural obligations under Article 2 ECHR less likely to be fulfilled; and

    b. even if a legitimate aim exists, the measure would be discriminatory in its focus on claims relating to overseas operations. Potential victims of this discrimination could include non-military organisations acting overseas (for example, the Red Cross), foreign nationals, armed personnel who served overseas with claims against the MoD and the families of those personnel who have claims against the MoD. For families, this is particularly concerning in light of the fact that the Government has

[31] Ministry of Defence, 'Overseas Operations (Service Personnel and Veterans) Bill, European Convention on Human Rights Memorandum', (March 2020), paragraph 33.

[32] Stubbings v United Kingdom, (Application no. 22083/93; 22095/93) [1996] ECHR, paragraph 52.

announced that it will not proceed with plans to introduce a new combat compensation scheme for armed forces personnel and veterans pursuant to the 'Better Combat Compensation' consultation.[33] Currently, the scales are tipped in favour of the Government prioritising shielding itself from liability over ensuring adequate redress mechanisms for allegations of human rights violations or breaches of its duty of care towards armed services personnel.

17. Far from being protected, armed forces personnel who served abroad would be placed in a *worse* position under this Bill as they will be barred from bringing claims for negligence against the MoD where their domestic counterparts are not. The same would apply to families of those personnel who died while serving abroad on account of negligence by the MoD. The measure would also have a disproportionate effect on foreign nationals seeking to bring civil claims against the MoD.

18. Finally, and importantly, we recall the Government's announcement, in October 2020, of a judge-led review by Sir Richard Henriques with respect to this part of the Bill.[34] As noted by the Minister, Baroness Goldie, in the Second Reading debates, his review will consider "options for strengthening internal processes and skills while ensuring that our Armed Forces continue to uphold the highest standards of conduct when serving on complex and demanding operations around the world."[35] While this is welcome, we are concerned that its findings will only be reported in the summer, and that the Bill continues to progress through Parliament notwithstanding. **To remedy this flaw in the Bill, JUSTICE welcomes Lords Amendment 4 which would remove any restrictions on time limits for actions brought against the Crown by service personnel.**

[33] Ministry of Defence, 'Public consultation on Legal Protections for Armed Forces Personnel and Veterans serving in operations outside the United Kingdom: Ministry of Defence Analysis and Response', (18 September 2020), *see* - https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/918790/20200907-MOD_Analysis_and_Response-FINAL__accessible_.pdf.

[34] Ministry of Defence, 'Judge-led review to provide greater certainty for troops being investigated', (13 October 2020), *see* - https://www.gov.uk/government/news/judge-led-review-to-provide-greater-certainty-for-troops-being-investigated

[35] HL Deb (20 January 2021) Vol.809, Col. 1254, available here - https://hansard.parliament.uk/lords/2021-01-20/debates/3CCFD6D5-5182-484F-8F0C-28DB13339980/OverseasOperations(ServicePersonnelAndVeterans)Bill

Duty to Consider Derogation

19. Part 2 of the Bill would, by amending section 14 of the HRA, impose a duty on the Secretary of State to consider derogating from the ECHR with respect to future "significant" overseas operations through Article 15 ECHR. While Baroness Goldie stated in the Second Reading debates that the measure is "intended to avoid imposing a duty in relation to any operations that manifestly would not meet the criteria for derogation set out in Article 15 of the convention",[36] it remains a highly concerning mechanism with unclear justification, as noted by peers such as Lord Hope of Craighead.[37]

20. Article 15 allows state parties to derogate in a "time of war or other public emergency threatening the life of the nation". To date no state has derogated from the ECHR in respect of an overseas military operation. It is therefore unclear whether "war" would cover non-traditional forms of conflict such as non-international armed conflicts, peacekeeping operations and counter-terrorism operations,[38] particularly as it is unclear whether the references to "war" and "public emergency which threatens the life of the nation" are to be read disjunctively. The UK courts have expressed doubt that certain overseas operations would be able to satisfy the conditions for derogation.[39]

21. In addition, the rights from which states are able to derogate are limited. No derogation is permitted from Article 2 ECHR (right to life) other than in respect of lawful acts of war, Article 3 ECHR (freedom from torture and inhuman or degrading treatment and punishment), Article 4(1) ECHR (freedom from slavery) and Article 7 ECHR (no punishment without law). In any event, with respect to torture, even if partial derogation were possible, other international obligations such as those under the Geneva Convention and the UN Convention Against Torture would subsist.[40]

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[36] *Ibid*, Vol 809, Col. 1258.

[37] *Ibid*, Vol. 809, Col. 1186.

[38] Joint Committee on Human Rights, 'Legislative Scrutiny: The Overseas Operations (Service Personnel and Veterans) Bill', (29 October 2020), paras 133-134 *see* - https://publications.parliament.uk/pa/jt5801/jtselect/jtrights/665/66508.htm.

[39] In *Al-Jedda v Secretary of State for Defence* [2007] UKHL 58, Lord Bingham expressed doubts that an overseas peacekeeping operation, from which it could withdraw, would ever satisfy the conditions for derogation at [38]. In *Smith v Ministry of Defence* [2013] UKSC 41, Lord Hope expressed similar views in respect of operations undertaken overseas with a view to eliminating or controlling threats to the nation's security ([59-60]).

[40] Wallace, Stubbins Bates, Quénivet, 'Legal Protections for Armed Forces Personnel and Veterans serving in operations outside the United Kingdom Response to Public Consultation Questionnaire', p 6.

22. A derogation would therefore most likely be made in respect of Article 5 ECHR (right to liberty and security). However, in light of *Hassan v United Kingdom* it is arguable whether there would be any need for the UK to derogate from this article.[41] If the Government decided to derogate from Article 2 ECHR in respect of lawful acts of war, then this would be unlikely to have the intended effect of insulating the actions of the armed forces from judicial scrutiny; instead the courts would be called upon to determine whether the deaths resulted from "lawful acts of war".[42]

23. Derogation from treaties is an extremely rare and carefully considered process, tailored to specific facts. This duty would therefore signal a blanket indication that Parliament generally supports the principle of derogation from human rights protection in our overseas operations, as opposed to taking a case by case approach. JUSTICE recalls the House of Lords deep concerns with the Internal Markets Bill, and its provisions which would attempt to derogate from international law. A similar level of scrutiny and concern is equally warranted in this case.

24. The only possible reason for the derogation would be to enable the UK to actively seek to violate the prohibitions on torture and degrading treatment, which would be wholly unacceptable in terms of the rules of engagement, protection of British troops and the protection of overseas civilians. Moreover, this is not a permissible derogation from the ECHR.

25. Far from 'protecting our troops', there is a danger that if the UK regularly expresses an intention to derogate before engaging in overseas operations, this will put troops at greater risk of human rights abuses. It is difficult for the UK to demand compliance with international laws from others when it does not follow them itself.

26. Derogation from the ECHR for any future overseas operation would set a damaging precedent for an international treaty which relies on the cooperation and consent of its signatory states. The Bill would threaten our international standing and signal a significant

[41] Hassan v United Kingdom [2014] ECHR 936. This case considered whether the nine-day detention of a combatant could be considered consistent with Article 5 ECHR in the absence of derogation. The ECtHR effectively read into Article 5(1) an extra permissible ground for detention where consistent with the Geneva Conventions and read down the requirements of Article 5(4) to allow for the administrative forms of review under the Fourth Geneva Convention. It was expressly confined to international armed conflicts, however in Serdar Mohammed v Secretary of State for Defence [2017] UKSC 2, Lord Sumption expanded the ruling to also cover non-international armed conflicts.

[42] Aurel Sari, 'The Duty to Derogate: Suspending Human Rights in a Very Limited and Specific Way?', EJIL:Talk!, 18 September 2020 – *see* https://www.ejiltalk.org/the-duty-to-derogate-suspending-human-rights-in-a-very-limited-and-specific-way/.

weakening in the UK's resolve to insist a no tolerance policy with respect to torture and other serious crimes committed in the theatre of war. **JUSTICE therefore welcomes Lords Amendment 3, which would delete the duty to consider derogation from the Convention as previously provisioned in Clause 12.**

Conclusion

27. There are serious problems with this Bill. Its measures would act contrary to the Government's expressed intention to enhance the rights of service personnel by creating a legal shield behind which wrongdoing and human rights abuses could hide. Moreover, they would also dilute the UK's commitment and adherence to international human rights laws and norms.

28. For the reasons set out in this briefing, JUSTICE strongly urges Parliament to vote against this Bill, in its entirety, in the interests of service personnel, victims and the UK's reputation as a country governed by the rule of law.

JUSTICE

20 April 2021