

# Overseas Operations (Service Personnel and Veterans) Bill: A Rule of Law Analysis

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## Executive Summary

The Overseas Operations (Service Personnel and Veterans) Bill restricts prosecutions of service personnel and restricts legal claims against the Ministry of Defence and service personnel. This Report sets out Rule of Law concerns about the contents of the Bill.

The uncomfortable truths behind this Bill are that sometimes service personnel have been the subject of prolonged legal jeopardy, and sometimes service personnel have broken the laws of war.

Under the Bill, where conduct took place more than 5 years ago, prosecutions are only to take place in exceptional circumstances. This undermines the Rule of Law principle of legality – the basic idea that we are all subject to the law, no matter our position in society.

The restriction on civil claims (i.e., a claim for damage) against service personnel and the Ministry of Defence likewise places certain classes of people above the law and undermines the principle of legality.

Looked at from the perspective of victims, this Bill makes it much harder for them to access justice. The only crimes excluded from the ambit of these restrictions are sexual crimes, meaning that murder, torture and other grave war crimes face substantial legal barriers before there can be a prosecution. This breaks the ancient promise of Magna Carta that “We will sell to no man, we will not deny or defer to any man either Justice or Right”.

The Bill breaches the long-standing principle of military law that soldiers are subject to the same laws as ordinary citizens.

The Bill contains an exception for crimes committed against British soldiers. This is the opposite of equality before the law where “our” victims have more rights than “their” victims. This lack of fairness is continued in the Bill where only those factors which tend against prosecution are to be given particular weight, but no reference is made to the weight to be given to factors which favour of the rights of victims.

The Bill grants a veto on prosecutions after the 5 year mark to the Attorney General. This undermines the value of our independent prosecution service and introduces a risk of political interference in what should not be a political decision.

Failure to properly investigate and prosecute murder and torture risks breaching our domestic and international obligations to protect the right to life, to ensure freedom from torture and to provide an effective remedy for breach of human rights.

The provision in the Bill which requires the Government to consider derogating from the European Convention on Human Rights is legally meaningless and only has rhetorical value.

The Bill undermines our obligations under the Geneva Conventions and the UN Convention Against Torture to investigate and prosecute grave breaches of international humanitarian law. It propagates the dangerous idea, recently attempted in the UK Internal Market Bill, that the UK can simply set aside international law. What is, in effect, a statute of limitations on the prosecution of war crimes, makes it much more likely that British soldiers will be prosecuted by the International Criminal Court – that Court only acts where countries are unwilling to prosecute their own citizens.

Recent findings in relation to UK troops by the International Criminal Court, and in relation to Australian troops by the Brereton Report show that although rare, abuses by the military do happen.

The Bill contains a Henry VIII clause granting Ministers the power to amend Acts of Parliament.

The UK has a long and proud reputation of decisive action against war crimes. This Bill weakens that reputation. It makes it harder, not easier to stamp out abuses that our own troops have committed. We do not protect British troops and British values by hiding from the truth or acting with impunity.



## About the Bingham Centre for the Rule of Law

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- We carry out independent, rigorous and high quality research and analysis of the most significant Rule of Law issues of the day, both in the UK and internationally, including highlighting threats to the Rule of Law.
- We make strategic, impartial contributions to policy-making, law making or decision-making in order to defend and advance the Rule of Law, making practical recommendations and proposals based on our research.
- We hold events such as lectures, conferences, roundtables, seminars and webinars, to stimulate, inform and shape debate about the Rule of Law as a practical concept amongst law makers, policy makers, decision-makers and the wider public.
- We build Rule of Law capacity in a variety of ways, including by providing training, guidance, expert technical assistance, and cultivating Rule of Law leadership.
- We contribute to the building and sustaining of a Rule of Law community, both in the UK and internationally.

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## Rule of Law Monitoring of Legislation Project

This Report is part of the Rule of Law Monitoring of Legislation Project. The project aims to systematically scrutinise Government Bills from the perspective of the Rule of Law, and to report on Bills which have significant Rule of Law implications. The goal is to provide independent, high quality legal analysis to assist both Houses of Parliament with its Rule of Law scrutiny of legislation. Previous Reports have been on the EU (Withdrawal Agreement) Bill and the Terrorist Offenders (Restriction of Early Release) Bill as well as on various coronavirus laws. Dr Ronan Cormacain is leading this Project.

The Report has been prepared by Dr Ronan Cormacain.

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## Introduction

The Overseas Operations (Service Personnel and Veterans) Bill is designed to offer legal protections to UK armed forces, and the Ministry of Defence, in relation to overseas military operations.

Part 1 places restrictions on prosecutions of service personnel. If the conduct took place overseas and took place more than 5 years ago, then those service personnel can only be prosecuted in exceptional circumstances.

Part 2 places restrictions on bringing civil claims against the Ministry of Defence and service personnel. If a claim is brought after three years, the Bill creates barriers to a claim being heard. There is an absolute bar on bringing these claims after 6 years. Similar limitations are introduced in respect of claims under the Human Rights Act 1998.

A note on terminology. The Bill uses many words to identify its beneficiaries: service personnel, veterans, members of the armed forces, regular and reserve forces, persons subject to service law etc. For the sake of brevity, the catch-all term “soldier” is used in this report, appreciating that this may not fully describe all members of the armed forces.

## Two Uncomfortable Truths

There are two uncomfortable truths behind this Bill.

The first is that some British soldiers have been subjected to mental stress and uncertainty as a result of protracted investigations and prolonged legal jeopardy. In some cases this has been because, as the Al-Sweady inquiry found, allegations of torture and murder have been found to have been fabricated. More commonly, it has been because, as the JCHR recently reported, investigations have been inadequate. The Government understandably wishes to protect British soldiers from such unnecessary stress and anxiety in future.

The second uncomfortable truth is that British soldiers have not always met the high standards expected of them. Baha Mousa was an Iraqi civilian who died whilst in the custody of British troops. The formal inquiry into his death found that he had been assaulted by a large number of troops, resulting in 93 separate injuries.<sup>1</sup> Although rare, this is not unique. A Royal Marine Sergeant was found guilty of manslaughter over the killing of a wounded Taliban fighter in Afghanistan.<sup>2</sup> Even within the UK, military abuses have happened. Colum Eastwood MP recently asked

Some Members of this House want an amnesty for veterans who served in Northern Ireland. In 1976, Majella O'Hare, who was 12 years old, was walking with her friends to church. She was shot twice in the back, and killed, by a British paratrooper. Does the Secretary of State believe that that paratrooper should be immune from prosecution?<sup>3</sup>

These truths are unpalatable. But simply ignoring them does not stop them from being true. In response to Bloody Sunday, an atrocity carried out on UK soil by British troops, David Cameron as Prime Minister said

Mr Speaker, I am deeply patriotic. I never want to believe anything bad about our country. I never want to call into question the behaviour of our soldiers and our army, who I believe to be the finest in the world ... But Mr Speaker, you do not defend the British Army by defending the indefensible. We do not honour all those who have served with such distinction in keeping the peace and upholding the rule of law in Northern Ireland by hiding from the truth.<sup>4</sup>

No-one wishes to see soldiers subjected to the anguish and uncertainty caused by unnecessarily protracted investigations or legal proceedings. However, this does not justify excluding overseas

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<sup>1</sup> The Report of the Baha Mousa Inquiry (HC 1452-1) (September 2011) available at [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/279190/1452\\_i.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/279190/1452_i.pdf)

<sup>2</sup> “Marine A, who killed wounded Taliban fighter, released from prison” The Guardian 28 April 2017, available at <https://www.theguardian.com/uk-news/2017/apr/28/marine-a-alexander-blackman-released-from-prison>

<sup>3</sup> House of Commons Hansard 30 September 2020 Vol 681 Col 330.

<sup>4</sup> House of Commons Hansard 15 June 2010 Vol 511 Col 789.

military operations from proper legal scrutiny. The problem has been correctly identified, but the solution is not to undermine the basic Rule of Law principle that if someone commits a crime, they should be investigated, prosecuted and punished for it. This Bill has the laudable aim of confronting the first uncomfortable truth. But in doing so, it pretends the second uncomfortable truth does not exist.

## The Principle of Legality

The most basic and core principle of the Rule of Law is the principle of legality – that we are all subject to the law. Tom Bingham expressed it thus:

All persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly made, taking effect (generally) in the future and publicly administered in courts.<sup>5</sup>

Unsurprisingly, this has been part of the British conception of the Rule of Law since Albert Dicey first utilised the phrase “rule of law” in 1885. Dicey said that

When we speak of “the rule of law” as characteristic of our country, not only that with us no man is above the law, but (what is a different thing) that here every man, whatever be his rank or condition, is subject to the ordinary law of the realm.<sup>6</sup>

This idea is reflected in the Venice Commission Checklist on the Rule of Law in its principle of legality.<sup>7</sup>

## Restrictions on prosecutions of soldiers

### Presumption against prosecution – clauses 2, 3, 5 and 6

Clause 2 introduces a presumption against prosecution in relation to conduct of a soldier which took place

- (a) whilst the soldier was deployed on overseas operations, and
- (b) more than 5 years ago.

Clause 2 states that it is to be “exceptional” for proceedings to be brought or continued against a person where these conditions are satisfied.

Clause 3 sets out particular matters for prosecutors to consider when making their decision to prosecute in these circumstances.

Under clause 5, even if prosecutors decide to prosecute, the consent of the Attorney General is also required.

Under clause 6, these restrictions apply to nearly all offences, other than some excluded offences set out in Schedule 1 to the Bill.

The Government says that these restrictions on prosecutions of soldiers are necessary, but the purported factual basis for this is false. After reviewing all the evidence, the All Party Parliamentary Group Drones reported

Not a single expert witness across both inquiries could name a prosecution that has been ‘vexatious’. Instead, multiple experts underlined the efficacy of the existing prosecutorial system in striking out unmeritorious claims and acting fairly in the public interest.<sup>8</sup>

<sup>5</sup> Tom Bingham, *The Rule of Law* (Penguin 2011)

<sup>6</sup> AV Dicey, *An Introduction to the Study of the Law of the Constitution* (1885).

<sup>7</sup> Venice Commission, ‘Report on the Rule of Law’ (2011). Benchmark A.

The alternative to restricting prosecutions outside the 5 year time limit is to have proper and effective investigations within a reasonable time period. In giving evidence to the Public Bill Committee on this Bill, Judge Jeff Blackett (retired Judge Advocate General) made a number of practical suggestions on how to improve military investigations. For example: the standard 6 month time limit on minor criminal matters that already exists for ordinary criminal trials, judicial oversight of investigations (with judicially mandated time limits), reconsidering legal aid funding, and raising the bar for reinvestigations.<sup>9</sup> These are all things which could be done to address the problem, without setting up a system which encourages impunity.

The conclusion reached by the Joint Committee on Human Rights on this point chimes with that of Judge Blackett:

there is little to no evidence that people are being prosecuted when they should not or that cases with no case to answer are being allowed to progress. Instead, we found that the real problem is that investigations into incidents have been inadequate, insufficiently resourced, insufficiently independent and not done in a timely manner.<sup>10</sup>

Taken together, the restrictions on prosecution in these clauses would make it nearly impossible to prosecute soldiers for crimes carried out overseas which satisfy these conditions. Indeed, this is the entire point of allowing prosecution only in exceptional circumstances. This is approaching state sanctioned impunity for agents of the state, even when it comes to the gravest of crimes. These clauses seriously undermine the principle of legality. The literal 'rank or condition' of the person affects whether or not they are subject to the law, and this directly contradicts the long-held understanding of the Rule of Law as requiring everyone to be subject to the law.

**The Bill's approach of only allowing prosecutions which satisfy these conditions in exceptional circumstances undermines the basic idea that we are all subject to law. It grants soldiers protections not available to anyone else and places them in a privileged position under the law.**

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<sup>8</sup> Written Evidence submitted by the APPG on Drones (OOB11) October 2020, available at < <https://publications.parliament.uk/pa/cm5801/cmpublic/OverseasOperations/memo/OOB11.pdf>>.

<sup>9</sup> Public Bill Committee, Overseas Operations (Service Personnel and Veterans) Bill, 8 October 2020, session 2019–21, fourth sitting. Evidence of Judge Jeff Blackett.

<sup>10</sup> Joint Committee on Human Rights, Legislative Scrutiny: The Overseas Operations (Service Personnel and Veterans) Bill (Ninth Report, Session 2019–21, HC 665 / HL Paper 155),

## Restrictions on civil claims against the Ministry of Defence (and soldiers)

### Limitation periods and proposed changes to limitation periods

A limitation period is the legal name for the time period a person has to bring a civil claim – that is, a claim in court for compensation for harms done. It is regulated by the Limitation Act 1980. The normal limitation period for personal injuries is three years from the date of the injury. However, courts have a discretion to extend this time period if it would be fair to do so. For example, courts may look at the reason for the delay, whether the actions of the defendant contributed to the delay etc. This is a non-controversial rule which is designed to remove the harshness of automatic rules which would otherwise lead to an injustice.

The Bill proposes changes to these normal rules in clauses 8, 9, 10 and Schedule 2. The first change is that there is an absolute cut-off of 6 years from the date of the injury. There will be no judicial discretion to hear a claim after 6 years. Secondly, the Bill adds additional factors to consider when deciding whether or not it should exercise its discretion to hear a claim after 3 years but before 6 years. These factors include the impact of the “operational context” on the ability of soldiers to remember events fully, reliance on memory if the operational context restricts ability to keep proper records, and the likely impact upon the mental health of a soldier who has to give evidence as a witness.

The proposed change applies to civil claims against the Ministry of Defence, the Secretary of State for Defence, and soldiers.

This change mirrors the change to criminal law and makes it less likely that the MoD will be subject to the law. The same Rule of Law point applies in relation to this as it does to criminal trials.

**Placing restrictions on bringing legal cases undermines the principle that we are all subject to the law.**

## Access to Justice

The Rule of Law is meaningless unless rights can be vindicated by a court. The criminal law protects the public only if criminals are actually prosecuted. This is part of the principle of legality, but also part of what Tom Bingham talked about in terms of right to a fair trial, and respect for fundamental rights. Benchmark E of the Venice Commission Checklist is access to justice, and included in Benchmark E2(a) is access to courts.

This Bill substantially reduces access to justice for those who have been victims of crimes committed by UK service personnel. If the crime is committed overseas and 5 years have passed, only in exceptional circumstances will they have vindication in court. There is a short list of “excluded offences” to which these restrictions on prosecution do not apply. Several extremely grave crimes are not excluded.



### Excluded offences – Clause 6, Schedule 1

The starting point in clause 6 is that the restrictions on prosecution apply to all criminal offences. Schedule 1 then goes on to provide that certain offences are excluded offences, i.e. that those offences are not subject to the restrictions on prosecutions. The common theme linking the excluded offences are that they are all sexual offences. For example, all offences under the Sexual Offences Act 1956 and the Sexual Offences Act 2003 are excluded. So, if a soldier commits a rape, these restrictions do not apply.

Schedule 1 goes on to list crimes under the International Criminal Courts Act 2001 which are also excluded offences. In paragraph 17 of the Schedule, it refers to genocide, crimes against humanity and war crimes. However, rather than making every type of genocide, crime against humanity and war crime an excluded offence, this provision is restricted to 3 crimes:

- Rape and other serious forms of sexual offence when committed as part of a widespread or systematic attack against a civilian population (under Article 7.1(g) of the Statute of the International Criminal Court)
- Rape as a war crime in an international armed conflict (under Article 8.2(b)(xxii) of the Statute of the International Criminal Court)
- Rape as a war crime in an armed conflict which is not of an international character (under Article 8.2(e)(vi) of the Statute of the International Criminal Court)

This leaves a rather long list of war crimes which are not excluded offences. These include murder, torture, extermination, other inhumane acts, extensive destruction of property not justified by military necessity, hostage taking along with a host of other serious crimes. These are not excluded offences and therefore the restrictions on prosecution apply to all of these.

In very blunt terms, if a soldier commits rape, they will not gain the benefit of these restrictions on prosecution. But murder, torture and inhumane acts will be protected.

If an Iraqi or Afghan civilian is the victim of a crime perpetrated by a UK soldier, this Bill substantially restricts their access to justice. Equal access to justice is one of the most ancient rights recognised by English law. Magna Carta, the foundation of our modern conceptions of the Rule of Law, states

We will sell to no man, we will not deny or defer to any man either Justice or Right<sup>11</sup>

But the precise point of this Bill is to deny justice to victims of crimes perpetrated by British soldiers. Once the 5 year time limit has passed, those victims will only be able to get justice in exceptional circumstances.

Prosecuting sex offenders and terrorists will always be politically popular. Prosecuting our own troops is not. But this is why it is so important that our justice system is no respecter of persons, and that cases are also brought against “our own” side. When it comes to heinous crimes like murder and torture, committed by agents of the state, the absolute priority of the state has to be to investigate and prosecute, not to use the passage of time as an excuse to deny justice.

**Restricting access to justice for the victims of crimes committed by UK soldiers undermines the Rule of Law. Excluding sexual offences from the ambit of these restrictions means that we include murder, torture and other grave breaches within the range of crimes subject to prosecutorial restrictions.**

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<sup>11</sup> Magna Carta, Clause 39. This clause is still included in statutes in force in the UK and available to read as a standard UK piece of legislation at <https://www.legislation.gov.uk/aep/Edw1cc1929/25/9/section/XXIX>

## Equality Before the Law

The Rule of Law requires equal treatment before the law. Tom Bingham said

The laws of the land should apply equally to all, save to the extent that objective differences justify differentiation.

In a slightly more colourful way, he also said that it does not matter if I am the Archbishop of Canterbury, if I maltreat a penguin, I will still be prosecuted.

Benchmark D of the Venice Commission Rule of Law Checklist concerns equality before the law and the principle of non-discrimination.

This important general principle has a particular manifestation in military law.

### Military law principle that ordinary law applies equally to soldiers

When it comes to the armed forces, there is a long-standing principle of military law that soldiers are subject to the ordinary criminal law. They are to be treated no differently from any other citizen. The modern restatement of this principle is contained in s. 42 of the Armed Forces Act 2006. Section 42 provides that a person subject to service discipline commits an offence if the person does anything which is punishable under the law of England and Wales, or if it was done in England or Wales, would be so punishable. The context may be different and the procedure may be different, but soldiers are as liable for their crimes as anyone else.

In written evidence to Parliament, Martin Hemming, a former Government lawyer at the MoD stated

[service personnel] are bound by the criminal law of England and Wales wherever in the world they are serving. There is no special treatment or dispensation for Service personnel. If they break the criminal law, they can face the consequences in court just like any other citizen.<sup>12</sup>

An even more authoritative statement is contained in Halsbury's Laws of England

It is one of the cardinal features of the law of England that a person does not, by enlisting in . . . the armed forces, thereby cease to be a citizen, so as to deprive him of his rights or exempt him from his liabilities under the ordinary law of the land.

This is an important principle, and one of which Lord Lloyd was rightfully proud, speaking in the House of Lords in a debate on chain of command in the armed forces when he said

In a free country there is not and cannot be one law for soldiers and another for citizens. I believe that all noble and gallant Lords who have made such powerful speeches today would accept that basic point. Indeed, we frequently boast of the fact that our soldiers are citizens in uniform.<sup>13</sup>

Part 1 of this Bill deviates from this fundamental principle and provides that there would be two different laws, one for ordinary citizens and one for soldiers. If an ordinary citizen steals, tortures or murders, they will be prosecuted. But if a soldier does so overseas, and avoids prosecution for 5 years, they will only be prosecuted in exceptional circumstances. This creates a "privileged class"<sup>14</sup> within our constitution, one whose status gives them special protections from the criminal law that ordinary citizens do not have.

### Equality before the law and crimes of universal jurisdiction

The UK observes the international legal principle of universal jurisdiction. Under this principle, there are a small number of crimes which can be prosecuted in any country, regardless of where the crimes were carried out, or who carried them out. In the UK, there is universal jurisdiction over torture,<sup>15</sup>

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<sup>12</sup> UK Armed Forces Personnel and the Legal Framework For Future Operations, Written Evidence to Defence Select Committee, Session 2013-2014, available at <https://publications.parliament.uk/pa/cm201314/cmselect/cmdfence/writtev/futureops/law17.htm>

<sup>13</sup> Hansard House of Lords, 14 July 2005 Vol 673 Col 1251

<sup>14</sup> British Soldiers above the Criminal Law? (Criminal Justice Notes, University of Kent, 1 October 2020) available at <https://blogs.kent.ac.uk/criminaljusticenotes/2020/10/01/british-soldiers-above-the-criminal-law/#>

<sup>15</sup> Criminal Justice Act 1988, s. 134.

hostage taking,<sup>16</sup> and grave breaches of the Geneva Conventions.<sup>17</sup> A person who commits these crimes, no matter where in the world, can be prosecuted in the UK.

This Bill would remove equality before the law because UK service personnel would have the benefit of these restrictions on prosecution. But service personnel (and civilians) from other jurisdictions would not have this protection. Once 5 years had passed, the British soldier could only be prosecuted in exceptional circumstances, but not so an American soldier, or an Iraqi civilian. British soldiers would be granted rights not granted to either allies or enemy combatants.

### Not all victims are equal

The general approach of Part 1 of the Bill is to make it harder to prosecute UK service personnel, regardless of who was the victim of the crime. However, there is an exception. In clause 6(2) there is a carve-out to the definition of excluded offences. An offence is not an excluded offence if it is committed against someone who is a member of the armed forces, a Crown servant or a defence contractor. A Crown servant is defined as a person employed by the UK Government<sup>18</sup>, and a defence contractor is defined as a person providing goods or services to UK armed forces.<sup>19</sup>

This is clearly unequal treatment, and it is difficult to know the justification for it. If a soldier shoots an Iraqi child, then, after 5 years, they can only be prosecuted in exceptional circumstances. But if the same soldier shoots another soldier, there are no restrictions on prosecution. This creates a hierarchy where 'our' lives matter much more than 'their' lives.

In an oft-cited judgment, the American Judge Jackson said

I regard it as a salutary doctrine that cities, states and the Federal Government must exercise their powers so as not to discriminate between their inhabitants except upon some reasonable differentiation fairly related to the object of regulation. This equality is not merely abstract justice. The framers of the Constitution knew, and we should not forget today, that there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally. Conversely, nothing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected. Courts can take no better measure to assure that laws will be just than to require that laws be equal in operation.<sup>20</sup>

This provision is a clear example of a law which elevates the rights of a favoured group over the rights of a less favoured group. There will rightly be complaints if soldiers literally get away with murdering other soldiers. As was seen in the case of the Royal Marine Sergeant, there is not the same sense of outrage if the victim is a Taliban fighter.<sup>21</sup>

### Fairness and tilting the system against victims

Clause 3 sets out the matters to be considered when a prosecutor is deciding whether or not to bring a decision after the 5 year time limit.

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<sup>16</sup> Taking of Hostages Act 1982.

<sup>17</sup> Geneva Conventions Act 1957.

<sup>18</sup> Clause 7(4)

<sup>19</sup> Clause 7(4).

<sup>20</sup> *Railway Express Agency Inc v New York* 336 US 106, 112-113 (1949)

<sup>21</sup> Marine A could be FREED next week: Soldier who has already served three years in jail will be resentenced for manslaughter after he is CLEARED of murdering Taliban fighter (Daily Mail 15 March 2017). Available at <https://www.dailymail.co.uk/news/article-4315700/Appeal-Court-Judges-clear-Sgt-Alexander-Blackman.html>

### **Matters to be given particular weight – clause 3**

Clause 3 sets out the matters prosecutors should consider in particular when deciding whether or not to bring a prosecution after the 5 year time limit.

Clause 3(1) expressly states that these have particular weight “so far as they tend to reduce the person’s culpability or otherwise tend against prosecution”.

Clause 3(2)(a) lists the adverse effects that deployment may have, for example, being exposed to threats and seeing comrades wounded or killed.

Clause 3(2)(b) refers to the public interest in finality, where there has been a previous investigation and no compelling new evidence.

In clause 3(3) prosecutors must have regard to “the exceptional demands and stresses” placed on service personnel on overseas deployment.

This is not a fair and balanced list of all the factors that prosecutors ought to have in their mind when deciding whether it is in the public interest to bring a prosecution against a soldier. This is a partial list of what are expressly exculpatory factors only – that is, only those factors which would suggest not to bring a prosecution.

In particular, there are three extremely relevant factors which are not included in this list.

Firstly, there is the difficulty of gathering and preserving physical evidence in a war zone. While the battle is raging, it is sometimes impossible to gather all the necessary evidence. An investigation may need to wait until the cessation of hostilities before it can be properly carried out. The likelihood of this time delay should be taken into account and provides reasons why prosecutions may still be justified long after the event. As Fatou Bensouda, prosecutor at the International Criminal Court of Justice has noted, “As the UK authorities have admitted, a significant and recurrent weakness in the cases investigated was the dearth of forensic evidence and inconsistencies in witness testimony given the historical nature of the investigations, years after the events”.<sup>22</sup>

Secondly, witnesses may find great difficulty in giving evidence about military crimes to that military. This may be compounded by the trauma that they have experienced. As noted by the International Committee of the Red Cross “it is also well-known that victims of war crimes often take many years before they can come forward to bear witness”.<sup>23</sup>

Thirdly, serving troops will be understandably unwilling to give evidence against their comrades in arms. Particularly when they are still serving together in the conflict, witnesses from within the military may be loathe to come forward. Direct evidence of this comes from the Baha Mousa Inquiry, where Sir William Gage said

In this way I hoped that it would be possible to breach the “more or less obvious closing of ranks” referred to by the Judge Advocate (Mr Justice McKinnon) at the Court Martial. This closing of ranks has often been referred to in the press as the “wall of silence”. To some extent this was successful and the evidence of some soldiers went a great deal further than hitherto. However, I have concluded that a number, not all, continued to hide behind oft-repeated phrases such as “I can’t remember” or “I did not see anything untoward”. This was, to say the least, regrettable and cannot be excused or justified.<sup>24</sup>

This code of silence prevents soldiers from giving evidence against their colleagues and makes it much more difficult to secure successful prosecutions. It may take a considerable passage of time before they feel able to give candid evidence to investigators.

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<sup>22</sup> Statement of the Prosecutor, Fatou Bensouda, on the conclusion of the preliminary examination of the situation in Iraq/United Kingdom, 9 December 2020, available at < <https://www.icc-cpi.int/Pages/item.aspx?name=201209-otp-statement-iraq-uk>>.

<sup>23</sup> Written Evidence: International Committee of the Red Cross (OOBO4) October 2020, at paragraph 7.

<sup>24</sup> Report of the Baha Mousa Inquiry, Volume 1, paragraph 2.4.

If this Bill was a fair attempt to secure justice in difficult circumstances, it would set out a fair and balanced list of factors to consider in bringing prosecutions. The fact that it only sets out those factors which tend against prosecution show that it is an attempt to weight the system in favour of UK troops, but against victims.

**Granting a special status for soldiers accused of a crime breaches equality before the law and breaches the military law principle that soldiers are citizens in uniform. This inequality is exacerbated when civilian victims are denied rights that soldier victims are not denied. In the list of factors to consider when deciding whether or not to prosecute, only factors in favour of the alleged perpetrators are to be given particular weight, no factors in favour of the alleged victims are identified as deserving particular weight. There is no equality under the law in this Bill.**

## Independence of Prosecutors

The Rule of Law requires fair trials, independent judges and independent prosecutors.

The Venice Commission Checklist specifically mentions the importance of independence and autonomy in the prosecution service.<sup>25</sup>

One of the restrictions on prosecution set out in this Bill is the requirement that the consent of the Attorney General is required before instituting proceedings for an offence where the conduct took place on overseas operations more than 5 years ago. The Joint Committee on Human Rights made this point very firmly

If an independent prosecution authority determines that it has sufficient evidence to bring a prosecution and that a prosecution is in the public interest (having regard to all the relevant factors), we do not see why the Attorney General should be given a veto over those efforts to bring someone to justice. This is all the more concerning when this may apply where the Attorney has herself previously advised on the alleged unlawful conduct and therefore may have a pronounced conflict of interest.<sup>26</sup>

Although the Attorney General for England and Wales is a law officer, they are also a political figure (generally an MP). The decision to prosecute a soldier will nearly always be an unpopular one. If this decision is to be taken by an MP who is also the chief legal adviser to the Government, it cannot be said to have the appearance of independence. There is a further potential conflict of interest here. A successful prosecution of a soldier may have an impact upon a civil claim against the Ministry of Defence. Vetoing a prosecution makes it easier for the Government to resist a civil claim for damages, but the power to veto rests with the legal officer for the Government.

This lack of prosecutorial independence is highlighted by the application of this provision to Northern Ireland.<sup>27</sup> Where the offence is one which is punishable under the law of Northern Ireland, the consent of the Attorney General for Northern Ireland is not required. Instead it is the consent of the Advocate General for Northern Ireland. The Advocate General for Northern Ireland is a non-political figure. The office of Advocate General for Northern Ireland is automatically occupied by the Attorney General for England and Wales.<sup>28</sup> The intention is clear – prosecutions are only allowed if a politician and member of the Government consents to them.

**Requiring the consent of a politician member of the Government before one of these prosecutions goes ahead undermines the independence of that prosecution.**

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<sup>25</sup> Benchmark E1(d).

<sup>26</sup> Joint Committee on Human Rights, Legislative Scrutiny: The Overseas Operations (Service Personnel and Veterans) Bill (Ninth Report, Session 2019–21, HC 665 / HL Paper 155), para 87.

<sup>27</sup> Clause 5(3).

<sup>28</sup> By virtue of s. 27 of the Justice (Northern Ireland) Act 2002.

## Human Rights

Tom Bingham included respect for fundamental human rights as principle 5 in his exposition on the Rule of Law. The Venice Commission Checklist regards the Rule of Law and human rights as being interlinked: the Rule of Law would be an empty shell without permitting access to human rights and, vice-versa, respect for the Rule of Law is vital to the protection of human rights. Many specific human rights, such as the right to a fair trial, can also be categorised as elements of the Rule of Law.

The UK is also a signatory to the European Convention on Human Rights (the ECHR), which imposes international legal obligations on the UK, and the Rule of Law requires States to abide by their international obligations.

It is therefore reasonable to briefly analyse this Bill through the prism of human rights.

### Right to life

Article 2 of the ECHR guarantees the right to life. This will be violated if an agent of the state commits an unlawful killing. The European Court of Human Rights has also specifically ruled “that there should be some form of effective official investigation when individuals have been killed as a result of the use of force by, inter alia, agents of the State”.<sup>29</sup>

It is also violated if the state fails to carry out an effective investigation into a killing.<sup>30</sup>

It is hard to square the positive obligations of the UK to properly investigate and prosecute in cases where its own agents have carried out unlawful killings with a presumption against prosecution after 5 years in all but exceptional circumstances.

The European Court of Human Rights has specifically considered the legal protections given to Turkish police officers who use firearms. The court considered legislation which “listed a wide range of situations in which a police officer could use firearms without being liable for the consequences. This legal framework would not appear sufficient to provide the level of protection “by law” of the right to life that is required in present-day democratic societies in Europe”.<sup>31</sup> The Turkish legislation is not the same as this Bill, but the principle of granting substantial legal protection to state actors who use force was rejected by the court in that case.

In a case concerning the use of amnesties for the killing of civilians, the European Court has found that this runs contrary to Article 2.<sup>32</sup>

The guidance issued by the European Court summarises this point as follows

This stems from Article 2 which imposes a duty on that State to secure the right to life by putting in place effective criminal-law provisions to deter the commission of offences against the person, backed up by law-enforcement machinery for the prevention, suppression and punishment of breaches of such provisions. This obligation requires by implication that there should be some form of effective official investigation when there is reason to believe that an individual has sustained life-threatening injuries in suspicious circumstances.<sup>33</sup>

### Prohibition of torture

Under Article 3 of the ECHR, both torture and inhuman and degrading treatment are prohibited. (The UK are also a signatory to the Convention Against Torture, discussed further below.) UK service personnel were found by the European Court of Human Rights to have breached Article 3 in their use

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<sup>29</sup> *McCann v United Kingdom* (Application 18984/91) 1995 at para 61, a point reiterated in *Armani Da Silva v United Kingdom* (Application no. 5878/08) 2016.

<sup>30</sup> *Armani Da Silva v United Kingdom* (Application no. 5878/08) 2016.

<sup>31</sup> *Erdogran and others v Turkey* (Application 19807/92) 2006

<sup>32</sup> *Marguš v. Croatia* (Application no. 4455/10) 2014.

<sup>33</sup> European Court of Human Rights, Guide on Article 2 of the ECHR (31 August 2020) available at [https://www.echr.coe.int/Documents/Guide\\_Art\\_2\\_ENG.pdf](https://www.echr.coe.int/Documents/Guide_Art_2_ENG.pdf)

of the so-called 5 techniques against prisoners in Northern Ireland in the 1970s.<sup>34</sup> The 5 techniques were again used by UK service personnel in Iraq in the death of Baha Mousa in 2003.<sup>35</sup>

Torture is not an excluded offence under the terms of this Bill. This means that if no proceedings are instituted within 5 years, only in exceptional circumstances will a soldier be prosecuted for torture.

The same points made above in respect of effective investigations and the right to life also apply in relation to investigations of torture. It is hard to see how a law which substantially restricts prosecution of alleged torture is compatible with Article 3.

### Obligation to respect human rights and the right to a remedy

Article 1 of the ECHR obliges the UK to protect human rights. Article 13 requires the UK to provide an effective remedy for anyone whose rights have been violated.

Restrictions on prosecutions and restrictions on bringing claims against the state undermine both these rights.

**The UK's international legal obligations to protect the right to life and to prohibit torture are undermined if restrictions are placed on the prosecution of persons alleged to have committed these crimes.**

## Derogations

Clause 12 of the Bill imposes a duty upon the Secretary of State to keep under consideration whether, in the context of a significant overseas operation, it would be appropriate to derogate from the European Convention on Human Rights.

It is difficult to see the legal point of this provision. The Secretary of State should always have in mind whether there should be a derogation from the Convention in any emergency situation. Whether it is a natural disaster, a medical emergency like coronavirus, a war, or armed conflict falling short of war: a proper consideration of the range of the facts should always include derogation as an option if the nature of the public emergency is such that, in the words of Article 15 ECHR, it "threatens the life of the nation". Derogations should never be entered into lightly, but they remain within the range of options for a reasonable Secretary of State. To frame this point another way – without this provision, would the Secretary of State NOT have the option to consider a derogation?

As well as being unnecessary, this provision doesn't actually have any legally operative effect. It requires the Secretary of State to consider a derogation. But this does not affect the legal test for entering into a derogation. That test is set out in Article 15 of the European Convention on Human Rights, and requires there to be a public emergency threatening the life of the nation, and that a derogation is strictly required by the exigencies of the situation. This test is not removed by clause 12. As concluded by the House of Lords Constitution Committee, "It is therefore not clear what new purpose clause 12 serves".<sup>36</sup>

**Without a legal point to the derogation provision in clause 12, it is little more than a piece of rhetoric. Legislation should contain legal provisions, not words for the sake of words. Without legal effect, this provision is simply virtue signalling.**

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<sup>34</sup> *Ireland v United Kingdom* (Application 5310/71) 1978

<sup>35</sup> See the Baha Mousa Public Inquiry, full documents available at [https://webarchive.nationalarchives.gov.uk/20120809191149/http://www.bahamousainquiry.org/key\\_documents/index.htm](https://webarchive.nationalarchives.gov.uk/20120809191149/http://www.bahamousainquiry.org/key_documents/index.htm)

<sup>36</sup> House of Lords, Select Committee on the Constitution, Overseas Operations (Service Personnel and Veterans) Bill, 20<sup>th</sup> Report of Session 2019-2021, HL Paper 186 at paragraph 20.

## International Humanitarian Law and International Obligations

### International Humanitarian Law

International humanitarian law is law designed for armed conflict. It is law which has been around for centuries and which already takes into account the practical realities of war. As the International Committee of the Red Cross stated in their evidence to Parliament on this Bill:

International criminal law contains well-established provisions that allow for taking into account the circumstances in which an accused acted, setting out specific grounds for excluding criminal responsibility and acknowledging the possibility of mistakes. It is worthy of note that courts are also able to take into account the individual circumstances of a convicted person in their sentencing consideration.<sup>37</sup>

The argument that the law doesn't work for UK armed forces in overseas operations doesn't hold water, when the law is already designed to take into account the realities of warfare.

The other aspect of the laws of war is reciprocity – “we” follow the law because “they” follow the law. If we were to pass this Bill, then we could not credibly object if other states passed similar legislation. Would we be content if the governments of Afghanistan or Iraq passed legislation making it harder to prosecute their soldiers for war crimes perpetrated against UK soldiers?

### Obligation to prosecute war crimes at the domestic level

The Geneva Conventions are part of international humanitarian law. They require all parties to them to respect the Conventions and to prosecute grave breaches of international humanitarian law.

The UN Convention Against Torture is an international treaty ratified by the UK. Under Article 2 all states must take effective legislative measures to prevent torture. Article 2 goes on to say that “no exceptional circumstances whatsoever ... may be invoked as a justification of torture”. Article 4 obliges states to ensure that torture is an offence under the criminal law of that state.

The Rome Statute of the International Criminal Court (the ICC) recalls that

it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes.

In particular, Article 29 of the Rome Statute states that there must not be any statute of limitations when it comes to crimes within the jurisdiction of the ICC.

The clauses in this Bill which place barriers in the way of prosecuting war crimes are arguably in breach of our obligations under international law. The Government set a dangerous precedent in the United Kingdom Internal Market Bill when it introduced provisions which breached international law. This precedent ought not to be followed when it comes to our obligations under international humanitarian law.

### Obligation to provide a remedy to victims of torture at the domestic level

Under the UN Convention Against Torture, there is an obligation to grant victims of torture the right to a remedy – i.e. the right to bring a civil claim for damages if they have been tortured. This is set out in Article 14 of the Convention which states

Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation

Those provisions in the Bill which introduce barriers to civil claims restrict this right.

### Prosecution of war crimes by the International Criminal Court

The procedural rules of the International Criminal Court prohibit it from launching prosecutions itself if a state launches its own prosecution. This is known as the principle of complementarity. Under Article 17 of the Rome Statute, a case is inadmissible “unless the State is unwilling or unable genuinely to carry out the investigation or prosecution”. The ICC followed this logic in its most recent investigation into alleged UK war crimes in Iraq. It found that, although there was evidence that war

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<sup>37</sup> Written Evidence: International Committee of the Red Cross (OOBO4) October 2020, at paragraph 11.



crimes had been committed, it “could not substantiate allegations that the UK investigative and prosecutorial bodies had engaged in shielding”.<sup>38</sup> Given that there were genuine attempts by the UK authorities to investigate and prosecute British troops, the ICC prosecutor concluded that the UK was not trying to shield its troops from prosecution. Therefore, there was no prosecution by the ICC.

However, if this Bill is enacted, there will be clear documentary evidence that the UK is unwilling to prosecute war crimes and a strong argument that its domestic legal framework makes it difficult to do so. Given these structural barriers to prosecution within the UK, it is much more likely that, where the ICC to consider this matter again, it would rule that prosecutions by it are necessary. As retired Judge Advocate General Blackett put it,

What [the Bill] actually does is increase the risk of service personnel appearing before the International Criminal Court.<sup>39</sup>

**The Bill potentially breaches our obligations under international law to investigate and prosecute torture and grave breaches of international humanitarian law, and to allow for effective remedies to the victims of torture. Creating legal barriers to prosecuting our own troops makes it more likely that they could be prosecuted by the International Criminal Court.**

## Recent Findings – Australian and UK forces

### The Brereton Report – Australia and Afghanistan

November 2020 saw the release of the Inspector General of the Australian Defence Force: Afghanistan Inquiry Report – known as the Brereton Report after its author.<sup>40</sup> This Report set out in great (albeit redacted) detail war crimes committed by Australian soldiers in Afghanistan between 2005 and 2016. The Report found there were 39 separate unlawful killings by these soldiers and separate cases of cruel treatment. According to the summary by the Inspector-General of the Australian Defence Force “None of these crimes were committed in the heat of battle. The alleged victims were non-combatants or no longer combatants”.<sup>41</sup> Included in the Report is the practice known as “blooding” where a junior soldier is required to make their first kill of a prisoner, this kill being covered up by placing weapons near the body of the victim. These are truly sickening war crimes, carried out not by Taliban fighters, but by Australian soldiers.

The following points arise out of this Report which are relevant to the present Bill. Firstly, war crimes were committed by our allies, and by troops which share similar values and ethos to British troops. Secondly, no soldiers (to date) have been prosecuted for those crimes. Thirdly, the “wall of silence” referred to by Sir William Gage within British troops is present in the Australian troops. Fourthly, these crimes stretch back to 2005, well beyond the 5 year window set out in this Bill for prosecuting UK troops.

If Australian troops can do these dastardly things, is it beyond the bounds of possibility that UK troops could also do them? If so, why are we making it nearly impossible to prosecute them after 5 years?

### The International Criminal Court Report – UK and Iraq

As mentioned above, the prosecutor of the International Criminal Court opened an investigation into the conduct of British troops in Iraq between 2003 and 2009.<sup>42</sup> The prosecutor ultimately decided not to prosecute UK troops on the basis that they could be prosecuted in the UK. However, the findings were damning.

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<sup>38</sup> Statement of the Prosecutor, Fatou Bensouda, on the conclusion of the preliminary examination of the situation in Iraq/United Kingdom, 9 December 2020, available at < <https://www.icc-cpi.int/Pages/item.aspx?name=201209-otp-statement-iraq-uk>>.

<sup>39</sup> Public Bill Committee, Overseas Operations (Service Personnel and Veterans) Bill, 8 October 2020, session 2019–21, fourth sitting. Evidence of Judge Jeff Blackett.

<sup>40</sup> Full report available at <<https://afghanstaninquiry.defence.gov.au/sites/default/files/2020-11/IGADF-Afghanistan-Inquiry-Public-Release-Version.pdf>>.

<sup>41</sup> Letter attached to the Report at paragraph 7.

<sup>42</sup> International Criminal Court, Situation in Iraq / UK: Final Report (9 December 2020). Full report available at <<https://www.icc-cpi.int/itemsDocuments/201209-otp-final-report-iraq-uk-eng.pdf>>.

The preliminary examination has found that there is a reasonable basis to believe that various forms of abuse were committed by members of UK armed forces against Iraqi civilians in detention. In particular, as set out below, there is a reasonable basis to believe that from April 2003 through September 2003 members of UK armed forces in Iraq committed the war crime of wilful killing/murder ... at a minimum, against seven persons in their custody. The information available provides a reasonable basis to believe that from 20 March 2003 through 28 July 2009 members of UK armed forces committed the war crime of torture and inhuman/cruel treatment ... and the war crime of outrages upon personal dignity ... against at least 54 persons in their custody. The information available further provides a reasonable basis to believe that members of UK armed forces committed the war crime of rape and/or other forms of sexual violence ... at a minimum, against the seven victims, while they were detained at Camp Breadbasket in May 2003.<sup>43</sup>

As with the Brereton Report for Australia, this rather undermines the entire point of this Bill. Outside the 5 year window of opportunity for prosecution set out in the Bill, there were at least 7 murders, 54 instances of cruel treatment and 7 rapes or other violent sexual assault, committed by UK soldiers. What justification can there be for making prosecution of these crimes nearly impossible?

**There is clear evidence that British troops have, in a small number of cases, committed war crimes which have remained unpunished long outside the 5 year window of opportunity set out in this Bill. This Bill would make it nearly impossible to prosecute these abuses.**

## Henry VIII clause

A Henry VIII clause contains a power, granted to Ministers, to change primary legislation by way of regulations. Clause 13(2)(b) and (3) contains such a power.

Benchmark B4 of the Venice Commission Checklist requires that the supremacy of the legislature is ensured. A Report on the constitutional standards laid down by the House of Lords Select Committee on the Constitution<sup>44</sup> states that:

- Delegations of legislative power should be framed as narrowly as possible
- The scope of a Henry VIII power should be limited to the minimum necessary to meet the pressing need for such an exceptional measure
- Delegated powers should not be framed in such a way that gives little indication of how they should be used.

Clause 13 allows the Minister to make “consequential” changes to any Act of Parliament passed before this Bill. Although this sort of clause is now common, it does not prevent it from offending against our ideas of the Rule of Law and the supremacy of Parliament over the Executive. Under clause 13, a Minister could make changes to important legislation like the Geneva Conventions Act 1957 or the International Criminal Courts Act 2001 with only the most cursory amount of parliamentary scrutiny.

**The Henry VIII clause grants Ministers the powers to change primary legislation on war crimes with only minimal parliamentary scrutiny.**

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<sup>43</sup> Paragraph 2 of the Report.

<sup>44</sup> J Simson Caird, R Hazell, D Oliver “The Constitutional Standards of the House of Lords Select Committee on the Constitution” (UCL, 2017)

## Conclusion: The Arc of the Moral Universe and UK Legislation on War Crimes

Major General Brereton concluded as follows in his Report on Australian military abuses in Afghanistan

the failure to comprehensively deal with allegations and indicators of breaches of Law of Armed Conflict as they begin to emerge and circulate is corrosive - it gives spurious allegations life, and serious allegations a degree of impunity.<sup>45</sup>

Martin Luther King said that the arc of the moral universe is long but that it bends towards justice. In the UK the arc of the moral universe bends towards accountability for war crimes.

November 2020 saw the 75<sup>th</sup> anniversary of the commencement of the Nuremberg trials. Speaking to mark that anniversary, Neil Bush, UK Ambassador to the OSCE stated

The UK played a key role at Nuremberg, just as we have in the development of international law in the decades since. The struggle is far from over. We pledge to continue to bring an end to impunity for the worst crimes. And we do so in close partnership with every nation who shares those values and our collective vision of a safer and more just world.<sup>46</sup>

The UK has a proud history when it comes to legislating against impunity for war crimes.

Parliament passed the Geneva Conventions Act in 1957. Section 1 makes it a crime under UK law for any person, whatever their nationality, and wherever in the world, to commit a grave breach of the Geneva Conventions. We made our abhorrence for war crimes clear in passing an Act which very unusually had extra-territorial effect.

In 1991 Parliament enacted the War Crimes Act. This made it a crime under UK law to have carried out certain acts in Germany or German-occupied territory during World War 2. This was a law that was both extra-territorial (applying outside the UK) and retrospective (applying to actions which took place before the law came into force). The passage of this Act was a sign of our repugnance of war crimes and crimes against humanity.

This was followed by the International Criminal Court Act 2001. This Act provided for our co-operation and assistance with the International Criminal Court. Part 5 of that Act also made it a crime under the laws of the UK to commit genocide, crimes against humanity and war crimes. This jurisdiction extended to actions taking place outside the UK carried out by UK citizens, UK residents or UK service personnel.

In 2009, the Coroners and Justice Act amended the International Criminal Court Act 2001. The purpose of the amendment was to enhance accountability for war crimes. It did this by making the 2001 Act extend backwards in time to 1991, thus catching actions which previously would not have been a crime under UK law. This was an unashamedly retrospective law.

**The UK's role in helping set up the Nuremberg Tribunals 75 years ago and our legislative history since then have all been pointing in the same direction. Our arc bends towards justice and away from impunity. This Bill as it stands would be a serious setback. Instead of making it easier to hold to account those in uniform who break the laws of war, it makes it harder.**

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<sup>45</sup> Brereton Report, paragraph 80.

<sup>46</sup> Nuremberg tribunal: UK statement, Delivered by Ambassador Neil Bush at the OSCE Permanent Council on 19 November 2020.

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