

Overseas Operations (Service Personnel and Veterans) Bill: Consideration of Lords Amendments A Rule of Law Analysis

Dr Ronan Cormacain



Executive Summary

The Overseas Operations (Service Personnel and Veterans) Bill restricts prosecutions of service personnel and restricts legal claims against the Ministry of Defence. Commons consideration of the Lords amendments to the Bill takes place on 21 April 2021.

Lords Amendment No. 1 (“the Robertson amendment”, proposed by former Secretary General of NATO and UK Defence Secretary Lord Robertson) removed the presumption against prosecution for torture, war crimes, crimes against humanity and genocide. This amendment mitigated some of the Rule of Law defects in the Bill and is to be welcomed from a legal, military and pragmatic perspective.

The Government proposes an amendment in lieu of Lords Amendment No. 1. The proposed Government amendment will remove the presumption against prosecution for torture, crimes against humanity and genocide. However, it will retain the presumption against prosecution for war crimes. War crimes include some of the most grievous crimes on the British statute book. To date, the Government have offered no justification as to why torturers should not be protected, but those accused of war crimes should be protected. The Government says that the purpose of its amendment in lieu is “to reassure Peers of our pledge to the rule of law”. But exempting war criminals undermines the Rule of Law and should not be supported.

Furthermore, as war crimes are within the jurisdiction of the International Criminal Court, the amendment also fails to achieve one of the main aims of the Robertson amendment which is to protect UK troops from the risk of prosecution before the ICC. The Commons should reject the Government’s amendment in lieu and agree to Lords Amendment No. 1.

Lords Amendment No. 4 (“the Tunncliffe amendment”) removes the 6 year time limit on civil claims against the Ministry of Defence, but only where the claimant is a member of the armed forces. Although a laudable aim, granting one class of persons an exemption not enjoyed by others is clear discrimination and this has been rightly recognised by the Government.

However, rather than widening the exception in Lords Amendment No. 4 so that it applies to all, the Government instead invites the Commons to disagree with the Lords Amendment so that everyone suffers. Rule of Law principles indicate that everyone should have access to justice and that there should be no absolute time limit to bringing civil claims against the Ministry of Defence. The Government should have proposed an amendment in lieu of Lords Amendment No. 4 removing the unjustifiable discrimination to which it gives rise.



About the Bingham Centre for the Rule of Law

The Bingham Centre is an independent, non-partisan organisation that exists to advance the Rule of Law worldwide. Established in 2010 as part of the British Institute of International and Comparative Law (BIICL), the Centre was brought into being to pursue Tom Bingham's inspiring vision: a world in which every society is governed by the Rule of Law "in the interests of good government and peace at home and in the world at large." The Rt Hon Lord Bingham of Cornhill KG was the pre-eminent UK judge of his generation, who crowned his judicial career by leaving us arguably the best account of what the Rule of Law means in practice and why it is so important in any civilised society - too important to remain the exclusive preserve of courts and lawyers. One of our strategic aims is to increase discussion about the meaning and importance of the Rule of Law in the political process.

- 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.

www.binghamcentre.biicl.org

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.

Table of Contents

Executive Summary.....	2
Introduction.....	5
Comparing the Government amendment in lieu to the Robertson amendment	5
Definition of war crimes – what the Government amendment protects in the presumption against prosecution	6
Crimes which are not protected by the presumption against prosecution: genocide, crimes against humanity and torture	6
The relationship between including torture but excluding war crimes	7
The International Criminal Court and the legal effect of a presumption against prosecution for war crimes.....	7
Civil claims and the Tunncliffe amendment.....	8
Appendix 1 – Background on Robertson and Tunncliffe Amendments	9
The Robertson Amendment – Torture, War Crimes, Crimes against Humanity and Genocide	9
The legal argument in favour of the Robertson amendment.....	9
The military argument in favour of the Robertson amendment	10
The pragmatic argument in favour of the Robertson amendment	11
The Tunncliffe amendment – removing the 6-year time limit on civil claims by members of the armed forces.....	11
Appendix 2 – Definition of War Crimes	13

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. It does so by setting out circumstances where there is a presumption against prosecuting service personnel, and making it harder to launch a civil claim against the MoD after a certain amount of time has passed.

The Bingham Centre previously issued a Report evaluating the entirety of the Bill against Rule of Law standards.¹

On Tuesday 13 April 2021, the House of Lords passed two key amendments directly relevant to the Bill's Rule of Law compatibility:

- The Robertson amendment (Lords Amendment No. 1)
 - removing the presumption against prosecution for torture, war crimes, crimes against humanity and genocide
- The Tunncliffe amendment (Lords Amendment No. 4)
 - exempting service personnel from the 6 year maximum time limit for bringing civil claims against the Ministry of Defence

On Tuesday 20 April, the Government tabled its response to the Lords amendments:

- Government amendments in lieu of the Robertson amendment, removing the presumption against prosecution for torture, crimes against humanity and genocide
- Disagreeing with the other House of Lords amendments

On Wednesday 21 April, the House of Commons will consider these amendments.

Comparing the Government amendment in lieu to the Robertson amendment

The detailed arguments in favour of the Robertson amendment are set out in Appendix 1. Given that the Government has accepted the merit of the arguments made by peers, the detail of these arguments now have less relevance.

The key point is the differences between the Robertson and the Government amendments. Both amendments change the definition of excluded offences – offences to which the presumption against prosecution do not apply.

Under the Robertson amendment, the following are excluded offences:

- Torture
- War crimes
- Crimes against humanity
- Genocide

Under the Government amendment, the following are excluded offences:

- Torture
- Crimes against humanity
- Genocide

The fundamental difference is that the Robertson amendment makes “war crimes” an excluded offence, whereas in the Government amendment, war crimes are subject to the presumption against prosecution.

¹ Full report available at <https://binghamcentre.biicl.org/publications/overseas-operations-service-personnel-and-veterans-bill-a-rule-of-law-analysis> (issued on 19 January 2021).

Definition of war crimes – what the Government amendment protects in the presumption against prosecution

War crimes are defined in Article 8 of the statute of the International Criminal Court and s. 50 and Schedule 8 of the International Criminal Court Act 2001. The list is long and is set out in full in Appendix 2 to this Report. To read the list is to read a list of human infamy. It includes crimes such as:

- Wilful killing
- Wilfully causing great suffering, or serious injury to body or health
- Taking of hostages
- Employing poison or poisoned weapons
- Pillage
- Outrages upon personal dignity
- Using dum dum bullets

The Robertson amendment clearly states that there is to be no special treatment for war criminals.

The Government amendment makes war crimes subject to a presumption against prosecution.

This distinction between the Government amendment and the Robertson amendment is not obvious from the MoD statement explaining the Government's amendment in lieu of the Robertson amendment which simply says

The initial form of the legislation robustly held up the Government's commitment to International Humanitarian Law but we have listened to the views of the House of Lords and tabled an amendment to replace that proposed by Lord Robertson to reassure Peers of our pledge to the rule of law.

It is difficult to square a "pledge to the rule of law" with an amendment which grants special legal protections to a person accused of wilful killing, causing great suffering, taking hostages, or any of the myriad other terrible offences contained within the definition of a "war crime". Put very simply, the default position in the British criminal justice system is that if a person commits a crime, they are investigated, if there is sufficient evidence they are prosecuted, and if a court is convinced beyond reasonable doubt, they are convicted. This is one of the "golden threads" of our system as described by Viscount Sankey decades ago.² The Government amendment unravels this golden thread and makes it harder to prosecute those charged with war crimes.

Crimes which are not protected by the presumption against prosecution: genocide, crimes against humanity and torture

Genocide, within the meaning of the Genocide Act 1969, as well as within the meaning of the Statute of the International Criminal Court is expressly an excluded offence.

Crimes against humanity (another long list of infamy, also defined by the International Criminal Court) is expressly an excluded offence.

Torture, both within the meaning of our domestic law,³ as well as within the meaning of the International Criminal Court is expressly an excluded offence.

The Government has assiduously worked to define and exclude all these terrible crimes from being subject to the presumption against prosecution. This satisfies the Rule of Law requirement that everyone is subject to the law, and is to be welcomed.

² *Woolmington v DPP* [1935] UKHL 1

³ Section 134 of the Criminal Justice Act 1988, section 1(1) of the Geneva Conventions Act 1957, in relation to grave breaches of the Geneva Convention which relate to torture.

War crimes, however, are not excluded by the Government's amendment, and no justification has been offered for distinguishing between torture, genocide and crimes against humanity on the one hand and war crimes on the other.

The relationship between including torture but excluding war crimes

Perhaps the most troubling aspect of the Government's distinction between war crimes and other offences is the attention to detail in ensuring that torture is an excluded offence, but that war crimes are not excluded offences.

The Government amendment includes this technically dense provision:

(aa) torture within—

- (i) article 8.2(a)(ii)-1 (which relates to grave breaches of the Geneva Conventions of 12 August 1949), or
- (ii) article 8.2(c)(i)-4 (which relates to armed conflicts not of an international character),

The reference to article 8.2(a)(ii)-1 means, in Article 8 of the Statute of the International Criminal Court, paragraph 2(a), entry (ii), element 1 in that entry.

The reference to article 8.2(c)(i)-4 likewise means Article 8, paragraph 2(a), entry (i), element 4 in that entry.

The full version of article 8.2(c)(i) reads:

- (i) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture

Element 1 is violence to life and person, element 2 is mutilation, element 3 is cruel treatment and element 4 is torture. The Government have gone through this definition with a fine toothcomb for the purposes of excluding torture, but including everything else.

- Violence to life and person – not excluded offence
- Mutilation – not excluded offence
- Cruel treatment – not excluded offence
- Torture – excluded offence

What is the justification for distinguishing between horrendous crimes and setting up a two tier system where some are subject to a presumption against prosecution, but others are not? What justification can there be for providing that torturers ought always to be prosecuted, but mutilators only in certain circumstances?

The International Criminal Court and the legal effect of a presumption against prosecution for war crimes

As is set out in more detail in Appendix 1, one pragmatic argument in favour of the Robertson amendment is that it will protect UK troops from prosecution for war crimes by the International Criminal Court. In bald terms, the ICC will only become involved if a country refuses to launch prosecutions itself. The ICC have found the UK to be prepared to investigate wrong-doing by its own forces in the past and consequently have never felt the need to charge any British forces.

This will remain the case when it comes to torture, crimes against humanity and genocide. UK troops will not face the ICC. However, when it comes to war crimes, with the Government's proposed legislative 'shield' restricting prosecutions within the UK, the ICC will be duty-bound to prosecute cases which properly come before it.

The Government says that the purpose of its amendment in lieu is “to reassure Peers of our pledge to the rule of law.” But exempting war criminals undermines the Rule of Law and should not be supported. As war crimes are within the jurisdiction of the International Criminal Court, the amendment also fails to achieve one of the main aims of the Robertson amendment which is to protect UK troops from the risk of prosecution before the ICC. The Commons should reject the Government's amendment in lieu and agree to Lords Amendment No. 1.

Civil claims and the Tunncliffe amendment

The Bill introduced a 6 year absolute time limit for bringing civil claims against the Ministry of Defence.

The Tunncliffe amendment (Lords Amendment No. 4) provides an exception to this – the 6 year absolute cut-off does not apply if the person filing the claim is a member of the armed forces. The amendment was introduced by Lord Tunncliffe with substantial cross-party support, with 300 “contents” and 225 “not contents”.

Unfortunately, the effect of the Tunncliffe amendment is to unlawfully discriminate between UK service personnel and civilians or foreign citizens. The Ministry of Defence is correct in stating that:

We believe that excluding actions brought against the Crown by serving or former service personnel from the limitation measures introduced by Part 2 of the Bill (in relation to personal injury/death and Human Rights Act (HRA) claims) connected with overseas operations, would render the Bill incompatible with the UK’s obligations under the European Convention on Human Rights as to do so would be to discriminate against non-service personnel caught up in overseas operations.

The Government had two options in responding to this amendment. If it wanted to allow access to justice for service personnel who have suffered due to negligence of the MoD (the majority of cases against the MoD), then it would also have to allow access to justice for foreigners who have suffered due to the negligence of the MoD. Instead, the Government took the option to simply deny justice to everyone.

Denying any class of person the right to bring a legal action against someone who has caused them harm is a breach of the Rule of Law. Rather than reject the Tunncliffe amendment, the Government should have widened it so that all victims of negligence, regardless of their status or nationality, would have a route to justice.

The Government should have proposed an amendment in lieu of Lords Amendment No. 4 removing the unjustifiable discrimination to which it gives rise.

Appendix 1 – Background on Robertson and Tunncliffe Amendments

The Robertson Amendment – Torture, War Crimes, Crimes against Humanity and Genocide

The default position in the British criminal justice system is that if a person commits a crime, they are investigated, if there is sufficient evidence they are prosecuted, and if a court is convinced beyond reasonable doubt, they are convicted. This is one of the “golden threads” of our system as described by Viscount Sankey decades ago.⁴

This Bill seeks to unravel that golden thread by introducing a presumption against prosecution where the alleged perpetrator is a member of the armed forces, and the alleged crime took place whilst they were deployed on overseas operations more than 5 years ago. This presumption strikes at the Rule of Law principle of legality – that we are all subject to the law.

When the Bill was introduced, it included two exceptions to this presumption: if the crime was one of rape or other serious sexual offence, or if the victim was also a member of the armed forces. It is difficult to sustain an argument in favour of a presumption against prosecution in either of these cases.

The House of Lords inserted an additional exception at Report stage on this Bill: the presumption would not apply in cases of torture, war crimes, crimes against humanity and genocide. This amendment was introduced by Lord Robertson and had considerable cross party support, being passed by 333 votes content to 228 votes not content.

The legal argument in favour of the Robertson amendment

The principle of legality, that we are all subject to the law, 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.⁵

This idea is reflected in the Venice Commission Checklist on the Rule of Law in its principle of legality.⁶

The presumption against prosecution strikes at the heart of the Rule of Law and makes the literal ‘rank or condition’ of a person a ground for giving them special exemptions. As Lord Robertson said

For the first time in the history of British law we would be creating a two-tier justice system in which troops acting for us abroad would be treated differently from other civilians in society.⁷

The UN High Commissioner for Human Rights has expressed grave concerns about this Bill. In a statement Michelle Bachelet said

As currently drafted, the Bill would make it substantially less likely that UK service members on overseas operations would be held accountable for serious human rights violations amounting to international crimes.⁸

Moreover, the UK has played a key role in the development of these international standards. November 2020 saw the 75th anniversary of the commencement of the Nuremberg trials. Speaking to mark that anniversary, Neil Bush, UK Ambassador to the OSCE stated

⁴ *Woolmington v DPP* [1935] UKHL 1

⁵ AV Dicey, *An Introduction to the Study of the Law of the Constitution* (1885).

⁶ Venice Commission, ‘Report on the Rule of Law’ (2011). Benchmark A.

⁷ Hansard, House of Lords, Vol 811 13 April 2021, Column 1190

⁸ UN High Commissioner for Human Rights, “UN Rights Chief urges UK Parliament to amend proposed law that limits accountability for torture and other war crimes” 12 April 2021, available at <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=26984&LangID=E>

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.⁹

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.

Torture is a crime under British law, as set out in section 134 of the Criminal Justice Act 1988. There is an absolute prohibition on both torture and inhuman and degrading treatment in the European Convention on Human Rights.

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. The passage of this Act was a sign of our repugnance of war crimes and crimes against humanity.

The International Criminal Court Act 2001 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. The remit of that Act was extended further by the Coroners and Justice Act 2009.

Torture, war crimes, crimes against humanity, genocide – these are all things which the UK has rightly recognised as heinous crimes. Removing the Robertson amendment would re-introduce a presumption against prosecution for these heinous crimes. How can one Bill extend protection to rape victims but deny it to torture victims?

The military argument in favour of the Robertson amendment

When giving evidence at committee stage on this Bill, General Sir Nick Parker did not argue in favour of the presumption of innocence. Instead, he spoke of the importance of the chain of command, of proper investigations and of accountability. He stated that

I do not think there is any serviceman or woman who would not accept that bad behaviour on the frontline must be treated quickly and efficiently. Nobody would want anything in the process that somehow allows people who have behaved badly on the frontline to get away with it.¹⁰

Military discipline requires adherence to military law, not presumptions against prosecution where a soldier has broken that law. Or as Field Marshall Lord Guthrie said more bluntly “I am dismayed that the government is proposing to enact legislation that, as currently framed, lets torturers off the hook”.¹¹

Removing the Robertson amendment makes it harder to work with allies and weakens the international reputation of British troops. As Lord Campbell of Pittenwee said at Report stage in the House of Lords “This country takes pride in our being advocates for the rules-based order in the face of other countries that simply want to ignore it or toss it aside”.¹²

As General Parker and His Honour Judge Advocate General Blackett stated:

By attempting to treat the problem misguidedly through the law - not only do we risk damaging our international reputation, but we are also letting down our troops. Ultimately, this Bill undermines the credibility of those giving orders ... Furthermore, by undermining

⁹ Nuremberg tribunal: UK statement, Delivered by Ambassador Neil Bush at the OSCE Permanent Council on 19 November 2020.

¹⁰ Hansard, House of Commons, 8 October 2020, Column 94.

¹¹ Letter to The Sunday Times, 7 June 2020.

¹² Hansard, House of Lords, 13 April 2021, Volume 811, Column 1194.

international legitimacy, the Bill will impact the UK's capabilities and operational partnerships.¹³

The pragmatic argument in favour of the Robertson amendment

We have agreed to be subject to the jurisdiction of the International Criminal Court. That Court is a court of last resort, which only acts when a country is unwilling or unable to prosecute its own citizens.

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 crimes had been committed, it “could not substantiate allegations that the UK investigative and prosecutorial bodies had engaged in shielding”.¹⁴ 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.

If this amendment is rejected, the position will be reversed. 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 Judge Advocate General Blackett put it,

What [the Bill] actually does is increase the risk of service personnel appearing before the International Criminal Court.¹⁵

This is not idle speculation. The ICC Prosecutor has stated

the effect of applying a statute of limitations to block further investigations and prosecution of crimes allegedly committed by British service members in Iraq would be to render such cases admissible before the ICC as a result of State inaction or alternatively State unwillingness or inability to proceed.¹⁶

As Lord Robertson pointed out, the next chief prosecutor of the ICC is a British nominee, and the irony is that his first case may be to prosecute British soldiers.

Far from protecting British troops from vexatious prosecutions, a refusal to back this amendment makes it more likely that they will be prosecuted. And that prosecution will not be in a UK court, but in an international one because of the legislative barrier against prosecutions in the UK set out in this Bill.

The Tunncliffe amendment – removing the 6-year time limit on civil claims by members of the armed forces

The Bill introduced a 6 year absolute time limit for bringing civil claims against the Ministry of Defence.

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 replaces this judicial discretion to allow claims outside the time limit with an absolute 6 year maximum limitation period. After that, no claim can be made against the Ministry of Defence. The Bill also introduces other limitations and presumptions against late civil claims.

¹³ Parker and Blackett, “We must rethink ill-judged Overseas Operations Bill which will only make matters worse for troops” The Telegraph, 9 March 2021.

¹⁴ 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>>.

¹⁵ Public Bill Committee, Overseas Operations (Service Personnel and Veterans) Bill, 8 October 2020, session 2019–21, fourth sitting. Evidence of Judge Jeff Blackett.

¹⁶ International Criminal Court Office of the Prosecutor (9 December 2020) “Situation in Iraq / UK: Final Report”. Available at <https://www.icc-cpi.int/itemsDocuments/201209-otp-final-report-iraq-uk-eng.pdf>

The Tunnicliffe amendment provides an exception to this – the 6 year absolute cut-off and other limitations do not apply if the person filing the claim is a member of the armed forces. The amendment was introduced by Lord Tunnicliffe and also had substantial cross-party support, with 300 “contents” and 225 “not contents”.

It is absolutely to be welcomed that British troops will not be denied justice in their claims against the Ministry of Defence. As Carla Ferstman from the University of Essex explained,

The civil claim longstop would have the effect of shielding the Ministry of Defence from public scrutiny and legal accountability and would take away crucial means by which to ensure transparency and to promote institutional lessons learned.¹⁷

Civil law and criminal law both are subject to the Rule of Law value of legality – that the law applies to everyone, and everyone wronged has the right to go to court to challenge that wrong.

Unfortunately the Tunnicliffe amendment does not go far enough to meet the Rule of Law problem with this part of the Bill. In fact, in exempting British troops from these time limits, it only serves to highlight an iniquitous system which treats victims less favourably if they are not British. Before the Tunnicliffe amendment, the Bill was deficient, but it was deficient in equal measure to everyone. After the Tunnicliffe amendment, the law is only deficient for civilians and foreigners. This is the classic case of discrimination, where we protect those who it is politically palatable to protect, but not those who it is politically unpalatable to protect.

Consider a hypothetical case where the negligent provision of equipment means that a UK soldier and an interpreter working for the UK in Afghanistan are injured. After 6 years, it is still open for the soldier to bring a claim against the MoD, but the interpreter is completely time-barred and cannot bring that claim. These would both be seen as “deserving” cases. But it is a measure of how civilised a country is that it also affords equal treatment to those seen as less deserving.

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.¹⁸

In itself the Tunnicliffe amendment is a good thing as it prevents a denial of justice. But in favouring soldiers it automatically discriminates against others. As such there is a strong likelihood of a court ruling that it would be incompatible with the Human Rights Act 1998.

¹⁷ Ferstman, Carla and Arajärvi, Noora, WHY CIVIL CLAIMS ARE A NECESSARY PART OF THE ARSENAL TO ADDRESS MILITARY EXCESSES : Assessing the UK Overseas Operations (Service Personnel and Veterans) Bill (April 13, 2021). Available at SSRN: <https://ssrn.com/abstract=3825470>

¹⁸ *Railway Express Agency Inc v New York* 336 US 106, 112-113 (1949)

Appendix 2 – Definition of War Crimes

For the purpose of this Statute, “war crimes” means:

(a) Grave breaches of the Geneva Conventions of 12 August 1949, namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention:

- (i) Wilful killing;
- (ii) Torture or inhuman treatment, including biological experiments;
- (iii) Wilfully causing great suffering, or serious injury to body or health;
- (iv) Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;
- (v) Compelling a prisoner of war or other protected person to serve in the forces of a hostile Power;
- (vi) Wilfully depriving a prisoner of war or other protected person of the rights of fair and regular trial;
- (vii) Unlawful deportation or transfer or unlawful confinement;
- (viii) Taking of hostages.

(b) Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts:

- (i) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;
- (ii) Intentionally directing attacks against civilian objects, that is, objects which are not military objectives;
- (iii) Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;
- (iv) Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated;
- (v) Attacking or bombarding, by whatever means, towns, villages, dwellings or buildings which are undefended and which are not military objectives;
- (vi) Killing or wounding a combatant who, having laid down his arms or having no longer means of defence, has surrendered at discretion;
- (vii) Making improper use of a flag of truce, or of the flag or of the military insignia and uniform of the enemy or of the United Nations, as well as of the distinctive emblems of the Geneva Conventions, resulting in death or serious personal injury;
- (viii) The transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory;
- (ix) Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives;
- (x) Subjecting persons who are in the power of an adverse party to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons;
- (xi) Killing or wounding treacherously individuals belonging to the hostile nation or army;

- (xii) Declaring that no quarter will be given;
- (xiii) Destroying or seizing the enemy's property unless such destruction or seizure be imperatively demanded by the necessities of war;
- (xiv) Declaring abolished, suspended or inadmissible in a court of law the rights and actions of the nationals of the hostile party;
- (xv) Compelling the nationals of the hostile party to take part in the operations of war directed against their own country, even if they were in the belligerent's service before the commencement of the war;
- (xvi) Pillaging a town or place, even when taken by assault;
- (xvii) Employing poison or poisoned weapons;
- (xviii) Employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices;
- (xix) Employing bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions;
- (xxi) Committing outrages upon personal dignity, in particular humiliating and degrading treatment;
- (xxii) Committing rape, sexual slavery, enforced prostitution, forced pregnancy as defined in article 7, paragraph 2(f), enforced sterilisation, or any other form of sexual violence also constituting a grave breach of the Geneva Conventions;
- (xxiii) Utilizing the presence of a civilian or other protected person to render certain points, areas or military forces immune from military operations;
- (xxiv) Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law;
- (xxv) Intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies as provided for under the Geneva Conventions;
- (xxvi) Conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities.

(c) In the case of an armed conflict not of an international character, serious violations of article 3 common to the four Geneva Conventions of 12 August 1949, namely, any of the following acts committed against persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention or any other cause:

- (i) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
- (ii) Committing outrages upon personal dignity, in particular humiliating and degrading treatment;
- (iii) Taking of hostages;
- (iv) The passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all judicial guarantees which are generally recognised as indispensable.

(d) Paragraph 2(c) applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature.

(e) Other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law, namely, any of the following acts:

- (i) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;
- (ii) Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law;
- (iii) Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;
- (iv) Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives;
- (v) Pillaging a town or place, even when taken by assault;
- (vi) Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2(f), enforced sterilization, and any other form of sexual violence also constituting a serious violation of article 3 common to the four Geneva Conventions;
- (vii) Conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities;
- (viii) Ordering the displacement of the civilian population for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand;
- (ix) Killing or wounding treacherously a combatant adversary;
- (x) Declaring that no quarter will be given;
- (xi) Subjecting persons who are in the power of another party to the conflict to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons;
- (xii) Destroying or seizing the property of an adversary unless such destruction or seizure be imperatively demanded by the necessities of the conflict.

Charles Clore House
17 Russell Square
London WC1B 5JP

T 020 7862 5151
E binghamcentre@biicl.org

www.binghamcentre.biicl.org

The Bingham Centre for the Rule
of Law is a constituent part of the
British Institute of International and
Comparative Law (www.biicl.org).

Registered Charity No. 209425