

REDRESS

Ending torture, seeking justice for survivors

GOVERNMENT CONSULTATION ON “LEGAL PROTECTIONS FOR ARMED FORCES PERSONNEL AND VETERANS SERVING IN OPERATIONS OUTSIDE THE UNITED KINGDOM”

REDRESS response, 11 October 2019

The Government is clear that the Armed Forces are not above the law. It is right that whenever the Armed Forces embark on operations overseas our people and their chain of command are bound to abide by the criminal law of England and Wales, as well as international humanitarian law as set out in the Geneva Conventions. Our service men and women are required to conform to the highest standards of personal behaviour and conduct. And when they fall short they must be held to account. Justice must be served.

Rt Hon Penny Mordaunt MP, in Foreword to consultation¹

INTRODUCTION

1. REDRESS is in agreement with the above statement made on behalf of the UK Government. The Government elsewhere suggests that it will continue to abide by its “obligations under domestic and international law”,² which we would assume amounts to an intention to abide by customary international law, and the treaties which it has ratified.
2. Essentially, together these “obligations under domestic and international law” establish that the UK Government must prevent, investigate and punish human rights violations, and require the State to ensure that there are no barriers to accountability. Imposing any barriers to accountability would risk creating impunity and risk the UK being in breach of its obligations under international law.
3. This response to the consultation will firstly consider the proposed restrictions on accountability, arguing that there is a well-established legal obligation to prosecute and punish human rights violations, and that high-quality investigations would obviate the need for the kind of restrictions being proposed. In fact, we suggest that the proposals risk undermining the UK’s influence on human rights in the global context, and would be incompatible with the decisions of a whole range of international legal tribunals. Secondly, this response will consider the proposals to restrict civil litigation claims, arguing that international law requires there to be reparative processes available, that existing UK legislation provides adequate safeguards on historic cases, and that highly meritorious cases could be prevented from being litigated if the proposed changes are introduced.

¹ Ministry of Defence, *Legal Protections for Armed Forces Personnel and Veterans serving in Operations outside the United Kingdom*, July 2019, p.2.

² *Ibid.*, p.5.

A. ACCOUNTABILITY (CONSULTATION QUESTIONS 1-2, 6-13)

The Government has suggested a presumption against prosecution in certain circumstances. This section argues that this would be in breach of the UK's legal obligations, and would be unnecessary if high quality investigations were the norm.

4. The international obligation to prosecute and punish violations of human rights predates the international human rights regime which emerged in the mid twentieth century,³ and is part of the “fundamental duty of the State in the obligation to combat impunity”.⁴ This would apply to the whole range of human rights violations. Nowadays, specific international human rights obligations prevent restrictions on accountability processes for the most serious of offences, for example:
 - a) the UN Convention against Torture (UNCAT) provides that statutes of limitation should not be applicable to torture, and there is an ongoing obligation to investigate which cannot be time-limited;⁵
 - b) the Rome Statute of the International Criminal Court states that “[t]he crimes within the jurisdiction of the Court shall not be subject to any statute of limitations”,⁶ which would apply to international crimes such as genocide, crimes against humanity, and war crimes.
5. However, it is worth noting that the obligation to investigate would not be limited only to the most serious offences. For example, the obligation to investigate allegations of torture, would equally apply to allegations of ill-treatment.⁷
6. As well as *obligations* being imposed on States, victims have *rights* to redress, including the right to “equal and effective access to justice” and “adequate, effective and prompt reparation for harm suffered”.⁸
7. Restrictions on accountability, which potentially exempt perpetrators from legal responsibility for human rights violations under international law, include ‘statutes of limitations’ and ‘amnesties’. Whilst the UK Government consultation does not use

³ See, for example: *Affaires des biens britanniques au Maroc Espagnol (Espagne c. Royaume Uni)*, Sentence du 1er mai 1925, Recueil de sentences arbitrales, Volume II, p.615, at 645; *Laura M.B. Janes et al (USA) v the United Mexican States*, Award of 16 November 1925, Recueil de sentences arbitrales, Volume IV, p. 82.

⁴ International Commission of Jurists, *The Right to a Remedy and Reparation for Gross Human Rights Violations: A Practitioners Guide No. 2* (2018), p.215, and see generally pp. 214-216.

⁵ UNCAT, Article 4; Committee against Torture, *General Comment No. 3 of the Committee against Torture: Implementation of article 14 by States parties*, CAT/C/GC/3, 19 November 2012, §40. The UK courts have also accepted that “the international prohibition of the use of torture enjoys the enhanced status of a *jus cogens* or peremptory norm of general international law” from which no derogation is permitted, and which may not be covered by a statute of limitations: *A v Secretary of State for the Home Department (No 2)* [2006] 2 AC 221, at §33, recently cited in *McGuigan & McKenna v Chief Constable of the PSNI* [2019] NICA 46, at §76. See also *Prosecutor v Ieng Sary*, Decision on Ieng Sary’s Rule 89 Preliminary Objections (Ne Bis In Idem, Amnesty and Pardon) ECCC Case File No. 002/19-09-2007-ECCC/TC (3 November 2011), §§38-39.

⁶ Article 29.

⁷ UNCAT, Articles 12 and 16.

⁸ UN General Assembly, *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, UN Doc A/RES/60/147, 21 March 2006 (UN Basic Principles on Reparation), Principle 11. This is also reflected in the UNCAT, Article 14, and the International Covenant on Civil and Political Rights, Article 3.

these terms with regard to its proposed presumption against prosecution, the proposal and the intention behind it would be recognised in international law as a *de facto* ‘amnesty’, and thus the international jurisprudence on amnesties (considered below) has great relevance.

Investigations

8. International tribunals have repeatedly argued not just that there should be investigations into alleged crimes, but also that these investigations should be prompt and effective.⁹ High quality investigations undertaken promptly after the events in question are likely to obviate the need for the kind of changes proposed by this consultation:

...the best route for the Government to pursue would be to increase the capacity and commitment for efficient, transparent and effective investigations that comply with procedural obligations and which are capable of weeding out quickly any spurious or clearly unfounded claims, and strengthening the capacity for robust, timely and transparent investigations where credible allegations are raised. Naturally there will be a mixture of quality in allegations made as there is with all criminal complaints. Strengthening investigative capacity would be the best way to protect soldiers from legal uncertainty and ensure full compliance with the UK’s legal obligations.¹⁰

9. In his evidence before the Defence Committee, military law solicitor Lewis Cherry stated that “prosecutions [in relation to the Iraq conflict] should have been brought much nearer to the date”, and suggested that the fact that they were not was, notwithstanding the difficult conditions on the ground, due to a “lack of proper investigation”.¹¹ Indeed, it has been recognised that “the main bodies responsible for criminal investigations – IHAT and later SPLI – have faced serious obstacles conducting effective investigations, partly due to structural constraints and political opposition – and in some cases reported interference”, and that the resulting uncertainty and delays have impacted soldiers and victims alike.¹²
10. In addition, it is crucial that the scope of such investigations is sufficient to ensure that it is not just those alleged to have carried out the abuses that are investigated, but also those whose commands may have led to the abuses being inflicted.¹³

UK Government’s stated position on international human rights violations

11. The UK prides itself on being a beacon of good practice in the field of human rights. In the latest FCO report on “Human Rights & Democracy”, the then Foreign Secretary, Jeremy Hunt, stated:

⁹ For example, see *Armani Da Silva v United Kingdom* (Grand Chamber), ECtHR, Appl. no. 5878/08, 30 March 2016, §§232 – 239.

¹⁰ Ferstman, Carla and Hansen, Thomas Obel and Arajärvi, Noora, *The UK Military in Iraq: Efforts and Prospect for Accountability for International Crimes Allegations?* (October 1, 2018), p.42. Available at SSRN: <https://ssrn.com/abstract=3272347> . See also pp. 29 et seq.

¹¹ Defence Committee, Oral evidence: ‘MoD support for former and serving personnel subject to judicial processes’, HC 109, 8 June 2016, Q28.

¹² Ferstman et al. *ibid.*, p.50.

¹³ Inter-American Court of Human Rights, *Case of Women Victims of Sexual Torture in Atenco v. Mexico*, Preliminary Objection, Merits, Reparations and Costs, Judgment of 28 November 2018. Series C No. 371, §294.

Since the turn of the millennium, the worldwide advance of human rights and democracy has slowed and, in some respects, gone into reverse... [T]his makes it even more important for the Foreign and Commonwealth Office to strive to uphold the values that define our country.¹⁴

12. The report speaks repeatedly about the UK Government's support for accountability for human rights violations in various geographical and thematic contexts. Its support for international criminal justice is explained as follows:

Our approach is not limited to punishing the perpetrators: it aims to help victims and their communities come to terms with the past, to contribute to lasting peace and security, and to deter those who might otherwise commit such violations in the future.¹⁵

13. This explanation emphasises the importance of accountability for the victims of human rights violations which we would echo from our own experience of working with the victims of such abuses.
14. In the context of the death of Jamal Khashoggi it is stated that the UK Government "called for accountability and for the launch of legal proceedings in accordance with international standards,"¹⁶ in Somalia it was stated that "[a]ccountability for the security forces remained crucial,"¹⁷ and in Sri Lanka there was criticism of the "lack of progress on accountability for conflict-related violations."¹⁸ There is an apparent disconnect between these clear calls for accountability for serious crimes and the exceptions which this consultation process is proposing in the case of the UK armed forces. Such a disconnect could easily be exploited by those wishing to undermine the UK's influence on human rights in the global context.

Comparative examples

15. We have been unable to find any examples of other States who have introduced 'presumptions against prosecution' (or other kinds of amnesty) save in transitional justice situations or as part of post-conflict peace agreements.¹⁹ Even in these situations, amnesties are not permissible in relation to international crimes, including torture.²⁰

¹⁴ FCO, *Human Rights & Democracy: The 2018 Foreign & Commonwealth Office Report*, Cp 104, June 2019, Preface.

¹⁵ *Ibid.*, p.29

¹⁶ *Ibid.*, p.54

¹⁷ *Ibid.*, p.55

¹⁸ *Ibid.*, p.57

¹⁹ Although reports in May 2019 suggested that US President Donald Trump was considering pardons for several soldiers already convicted for war crimes in the Iraq conflict. See, for example: Dave Philipps, "Trump May Be Preparing Pardons for Serviceman Accused of War Crimes", *The New York Times*, 18 May 2019, <https://www.nytimes.com/2019/05/18/us/trump-pardons-war-crimes.html>

²⁰ See, for example: Human Rights Committee, *General Comment No. 20 on Article 7*, UN Doc HRI/GEN/1/Rev.7 (1992), §15; Committee against Torture, *General Comment No. 2 on the Implementation of Article 2 by States Parties*, UN Doc CAT/C/GC/2 (2008), §5; Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea 2001, Article 40.

16. On the Government's own justification as set out in the Foreword to the consultation paper, the reasons for the proposals appear to boil down to:²¹
- The large number of allegations received;
 - The cost of the investigations;
 - The uncertainty created by the lengthy delays in the investigations.
17. These reasons (a) seem to run contrary to the UK's obligation to investigate all human rights violations, and (b) appear to ignore completely the rights and expectations of the alleged victims, at least some of whom we know to have suffered serious human rights violations at the hands of the UK armed forces.²² Indeed, we note that there is no specific mention of the need to consult with the victims on these proposals, or any apparent mechanism to do so.
18. Far from fulfilling a higher purpose, the government's proposals appear to be designed largely to avoid accountability, and to resolve a problem largely of the government's own making, namely, the State's own failure to investigate allegations promptly and effectively.
19. A number of States have now introduced into their law or constitutions specific prohibitions on amnesties or pardons for gross violations of human rights and/or humanitarian law.²³ The latest EU Policy towards third countries on torture and other ill-treatment states that third countries should be encouraged to "ensure that no amnesty, immunity, or statute of limitation or prescription is applicable to any act of torture".²⁴

The approach of international human rights mechanisms

20. Various international tribunals have tackled the question of amnesties or other efforts to limit prosecutions of alleged perpetrators of human rights violations. They have generally found that such amnesties are incompatible with international law and human rights, although no international convention (or such like) exists to prohibit them completely.

UN Committee against Torture

21. Based on the contents of the UNCAT, the Committee against Torture has stated that "amnesties for the crime of torture are incompatible with the obligations of States parties under the [UNCAT]..."²⁵ and moreover that:
- ...amnesties for **torture and ill-treatment** pose impermissible obstacles to a victim in his or her efforts to obtain redress and contribute to a climate of impunity. The

²¹ Ministry of Defence, *Legal Protections for Armed Forces Personnel and Veterans serving in Operations outside the United Kingdom*, *ibid.*, pp. 2-3.

²² See, for example, *The Baha Mousa Public Inquiry Report* (2011) HC-1452-I, available at: <https://www.gov.uk/government/publications/the-baha-mousa-public-inquiry-report>

²³ See International Commission of Jurists, *ibid.*, pp. 265-266.

²⁴ Council of the European Union, *Guidelines on EU Policy Towards Third Countries on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment – 2019 Revision of the Guidelines*, 16 September 2019, 12107/19, at §39. Available at: <https://www.consilium.europa.eu/media/40644/guidelines-st12107-en19.pdf>

²⁵ *General Comment No.3*, *ibid.*, §41.

Committee therefore calls on States parties to remove any amnesties for **torture or ill-treatment**.²⁶ [emphasis added]

Similarly, granting immunity, in violation of international law, to any State or its agents or to non-State actors for **torture or ill-treatment**, is in direct conflict with the obligation of providing redress to victims. When impunity is allowed by law or exists de facto, it bars victims from seeking full redress as it allows the violators to go unpunished and denies victims full assurance of their rights under [UNCAT] article 14.²⁷ [emphasis added]

22. For example, in *Urra Guridi v. Spain*, the Committee stated that the pardons granted to civil guards had the practical effect of allowing torture to go unpunished and encouraged its repetition, and were therefore violations of the UNCAT.²⁸

European Court of Human Rights (ECtHR)

23. The ECtHR has generally approached this on the basis of society's need to deter criminals, prevent the recurrence of the abuse, and defend the rule of law.²⁹
24. *Ould Dah v France* (2009)³⁰ was a case involving an amnesty passed in favour of members of the local armed forces for acts of torture committed in Mauritania. The ECtHR stated that "an amnesty is generally incompatible with the duty incumbent on ...States to investigate such acts".³¹ Having noted that "the Mauritanian amnesty law was enacted not after the applicant had been tried and convicted, but specifically with a view to preventing him from being prosecuted", the court continued:

...the prohibition of torture occupies a prominent place in all international instruments relating to the protection of human rights and enshrines one of the basic values of democratic societies. The obligation to prosecute criminals should not therefore be undermined by granting impunity to the perpetrator in the form of an amnesty law that may be considered contrary to international law."³²

25. In *Marguš v. Croatia* (2014)³³ the ECtHR's Grand Chamber considered an amnesty which had been granted "for acts which amounted to grave breaches of fundamental human rights such as the intentional killing of civilians and inflicting grave bodily injury on a child...".³⁴ The Court considered a wide range of jurisprudence and specifically took into account developments in international law such as those from the Inter-American Court of Human Rights (considered in more detail below), and concluded:

A growing tendency in international law is to see such amnesties as unacceptable because they are incompatible with the unanimously recognised obligation of States to prosecute and punish grave breaches of fundamental human rights. Even

²⁶ Ibid.

²⁷ Ibid., §42.

²⁸ CAT/C/34/D/212/2002, 17 May 2005, §§6.6-6.7, available at http://www.worldcourts.com/cat/eng/decisions/2005.05.17_Kepa_Urra_Guridi_v_Spain.htm

²⁹ Close, J, 'Crafting an international norm prohibiting the grant of amnesty for serious crimes: convergences and divergences in the case-law of international courts', 7 Queen Mary Law Journal 6 (2016), available at <https://www.qmul.ac.uk/law/media/law/docs/undergrad/10-Close.pdf>, p.114.

³⁰ *Ould Dah v France*, Application No. 13113/03, Judgment of 17 March 2009.

³¹ Ibid., p. 17.

³² Ibid.

³³ *Marguš v. Croatia*, Application 4455/10, Judgment of 27 May 2014 (GC).

³⁴ Ibid., §139.

if it were to be accepted that amnesties are possible where there are some particular circumstances, such as a reconciliation process and/or a form of compensation to the victims, the amnesty granted to the applicant in the instant case would still not be acceptable since there is nothing to indicate that there were any such circumstances.³⁵

Inter-American Court of Human Rights (IACtHR)

26. The Inter-American human rights system has generally approached this from the point of view of the victims, and concluded that amnesty laws are incompatible with the rights of victims to justice, an investigation, and the punishment of the offender.³⁶
27. In *Barrios Altos* (2001),³⁷ the IACtHR dealt with an amnesty law which exonerated members of the army, police force, and civilians who had committed human rights abuses in Peru from 1980-1995. The applicants were victims of violations committed by members of the Peruvian Army. The court held that the amnesty law violated the American Convention on Human Rights, and stated that:

...all amnesty provisions, provisions on prescription and the establishment of measures designed to eliminate responsibility are inadmissible, because they are intended to prevent the investigation and punishment of those responsible for serious human rights violations such as torture, extrajudicial, summary or arbitrary execution and forced disappearance, all of them prohibited because they violate non-derogable rights recognized by international human rights law.³⁸
28. *Almonacid v. Chile* (2006) concerned an amnesty granted to perpetrators of crimes committed between 1973 and 1978, which resulted in there being no prosecution of those responsible for the extra-judicial execution of a professor. The court concluded that the State “may not invoke the statute of limitations ...to decline its duty to investigate and punish those responsible [for the victim’s death].”³⁹ The Court went on:

Indeed, as a crime against humanity, the offense committed against Mr. Almonacid-Arellano is neither susceptible of amnesty nor extinguishable... The damage caused by these crimes still prevails in the national society and the international community, both of which demand that those responsible be investigated and punished... [T]he Court believes that the non-applicability of statutes of limitations to crimes against humanity is a norm of General International Law (*ius cogens*)...⁴⁰
29. Similarly, the IACtHR condemned amnesty laws and statutes of limitation in *Moiwana Community v. Suriname* (2005) which concerned a case in which the armed forces of Suriname had massacred villagers and razed the village to the ground.⁴¹ More recently

³⁵ Ibid.

³⁶ Close, *ibid.*, p. 113.

³⁷ IACtHR, *Barrios Altos Case (Chumbipuma Aguirre et al. v. Peru)* (Merits), Judgment of 14 March 2001, Series C No. 75., available at: http://www.corteidh.or.cr/docs/casos/articulos/seriec_75_ing.pdf

³⁸ Ibid., §41.

³⁹ IACtHR, *Case of Almonacid-Arellano et al v. Chile* (Preliminary Objections, Merits, Reparations and Costs), Judgment of 26 September 2006, Series C, No. 154, §151.

⁴⁰ Ibid., §§152-153.

⁴¹ Preliminary Objections, Merits, Reparations and Costs, Judgment of 15 June 2005, Series C No. 124, §§167, 206.

in *Herzog v Brazil* (2018),⁴² a case concerning a journalist who had died in detention, the Court decided that amnesty laws could not be used to excuse a failure to investigate and punish those responsible, and several UN Special Rapporteurs commented that the lack of accountability in Brazil had created a collective sense that “law-enforcement officials are above the law, weakening society’s trust in public institutions and the rule of law”.⁴³

30. In *Gelman v. Uruguay* (2011) the IACtHR condemned (on similar grounds) an amnesty law, even though the law had been approved by a domestic referendum.⁴⁴

Other UN bodies

31. With regard to acts of torture, the UN Human Rights Committee (HRC) has stated that:

Amnesties are generally incompatible with the duty of States to investigate such acts; to guarantee freedom from such acts within their jurisdiction; and to ensure that they do not occur in the future.⁴⁵

32. It has also stated that failures “to investigate allegations of violations” or failures later to “bring to justice perpetrators of such violations”, could in either case give rise to separate breaches of the International Covenant on Civil and Political Rights (ICCPR), over and above the breach in relation to the violation itself.⁴⁶ In *Rodriguez v Uruguay*⁴⁷ the HRC found that a failure to investigate torture was a violation of the Covenant⁴⁸ irrespective of the existence of a law granting amnesty.

33. The UN Committee on the Elimination of Discrimination against Women has recommended that States parties “reject amnesties for gender-based human rights violations such as sexual violence against women and reject statutory limitation for prosecution of such human rights violations”.⁴⁹

34. In its guidance on the rule of law in post-conflict states, the Office of the United Nations High Commissioner for Human Rights (OHCHR) has recommended that:

Under various sources of international law and under United Nations policy, amnesties are impermissible if they:

⁴² Excepciones Preliminares, Fondo, Reparaciones y Costas, Sentencia de 15 de marzo 2018, Series C No. 353 (English judgment awaited).

⁴³ OHCHR Information Note, *Brazil: UN experts welcome regional court decision on Herzog case*, undated, available at: https://www.ohchr.org/Documents/Issues/Truth/HerzogCase_EN.docx#targetText=The%20Court%20ofurther%20ruled%20that,investigate%20and%20punish%20those%20responsible.

⁴⁴ Merits and Reparations, Judgment of 24 February 2011, Series C No. 221, §239.

⁴⁵ HRC, *CCPR General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment)*, 10 March 1992, §15, available at: <https://www.refworld.org/docid/453883fb0.html>

⁴⁶ HRC, *General comment no. 31 [80], The nature of the general legal obligation imposed on States Parties to the Covenant*, 26 May 2004, CCPR/C/21/Rev.1/Add.13, §§15 and 18, available at: <https://www.refworld.org/docid/478b26ae2.html>

⁴⁷ *HRC Communication No. 322/1988*, 19 July 1994, CCPR/C/51/D/322/1988, §12.3, available at <http://hrlibrary.umn.edu/undocs/html/vws322.htm>

⁴⁸ Article 7 in connection with Article 2(3).

⁴⁹ *General recommendation on women’s access to justice*, UN Doc CEDAW/C/GC/33 (2015), para 19(f). See also CEDAW Committee, *General Recommendation 30 on women in conflict prevention, conflict and post-conflict situations*, UN Doc CEDAW/C/GC/30 (2013).

(a) Prevent prosecution of individuals who may be criminally responsible for war crimes, genocide, crimes against humanity or gross violations of human rights, including gender-specific violations; ...or

(c) Restrict victims' and societies' right to know the truth about violations of human rights and humanitarian law.⁵⁰

35. The OHCHR refers to the decisions of other international tribunals in concluding that, in the case of international human rights and humanitarian law treaty obligations which require criminal proceedings to be instituted, "[i]t is generally accepted that an amnesty that foreclosed prosecution of an offence that is subject to this type of obligation would violate the treaty concerned."⁵¹

B. REPARATIONS (CONSULTATION QUESTIONS 24-26)

The Government has suggested the introduction of a limitation 'long-stop' to restrict civil cases being brought. This section argues that this would be in breach of the UK's legal obligations, is unnecessary in the light of existing legislation, and could stop meritorious cases being litigated.

36. The right to reparation and the corresponding obligation upon States to provide reparation is now widely acknowledged by international treaties,⁵² international humanitarian law,⁵³ international criminal law⁵⁴ and other international instruments.⁵⁵ It is a "well-established and basic human right"⁵⁶ and is firmly embodied in human rights treaties to which the UK is signatory, including the UNCAT,⁵⁷ and the ICCPR.⁵⁸

⁵⁰ OHCHR, *Rule-of-Law Tools for Post-Conflict States: Amnesties*, 2009, HR/PUB/09/1, p.11, available at: https://www.ohchr.org/Documents/Publications/Amnesties_en.pdf

⁵¹ Ibid. Reference is made, for example, to a 1998 decision by a Trial Chamber of the International Criminal Tribunal for the former Yugoslavia which suggested that an amnesty for torture (and, by implication, for other conduct whose prohibition in international law has the status of a peremptory norm) would be "internationally unlawful": see *Prosecutor v. Anto Furundžija*, case No. IT-95-17/1-T, Judgement of 10 December 1998, §155.

⁵² *Universal Declaration of Human Rights*, 10 December 1948, Article 8; *International Convention on the Elimination of All Forms of Racial Discrimination*, 21 December 1965, Article 6; *International Covenant on Civil and Political Rights*, Article 2; UNCAT, Article 14; *CRC*, Article 39; *International Convention for the Protection of All Persons from Enforced Disappearance*, 20 December 2006, Article 24(4).

⁵³ *The Hague Convention respecting the Laws and Customs of War on Land*, 18 October 1907, Article 3; *Additional Protocol I to the Geneva Conventions*, 12 August 1949, Article 91.

⁵⁴ *Rome Statute of the International Criminal Court*, 1 July 2002, Articles 68 and 75.

⁵⁵ *UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, A/RES/40/34, 29 November 1985; UN Basic Principles on Reparation, *ibid.*; Committee against Torture, *General Comment No. 3: Implementation of article 14 by States parties*, CAT/C/GC/3, 13 December 2012 (CAT General Comment No. 3); UN Human Rights Committee, *General Comment 31: Nature of the General Legal Obligation on States Parties to the Covenant*, CCPR/C/21/Rev.1/Add.13, 29 March 2004, para. 16. See also: *American Convention on Human Rights*, Article 63(1); *Inter-American Convention to Prevent and Punish Torture*, Article 9; African Commission on Human and Peoples' Rights, *General Comment No. 4 on the African Charter on Human and Peoples' Rights: The Right to Redress for Victims of Torture and Other Cruel, Inhuman or Degrading Punishment or Treatment (Article 5)*.

⁵⁶ International Criminal Court, *The Prosecutor v Thomas Lubanga Dyilo*, Decision establishing the principles and procedures to be applied to reparations, No. ICC-01/04-01/06, 7 August 2012, § 185.

⁵⁷ Article 14. See also *International Covenant on Civil and Political Rights*, Article 2(3).

Whilst the government’s proposal states that it is not intended to “restrict the Court’s discretion to extend the time limits for bringing claims relating to human rights violations”,⁵⁹ we are extremely concerned at how this would operate in practice given (a) the lack of detail provided, and (b) the fact that many legal actions in the UK in relation to human rights violations necessarily have to be framed as ‘tort’ actions, where the damage claimed relates to personal injury or death, rather than as human rights claims *per se*.

37. The Government’s own justification for the civil litigation long-stop proposal appears to be based on:⁶⁰
- The large number of claims made for personal injury/death arising from the Iraq conflict;
 - The difficulty in assessing the claims (due to insufficiently detailed records and fading memories);
 - Concerns about calling current and former personnel to give evidence on behalf of the MOD;
 - Concerns relating to settling unmeritorious claims (including in relation to costs).
38. However, the concern about the number of claims needs to be considered in the light of the decisions in 2011 in *Al Jedda v UK*⁶¹ and *Al Skeini v UK*.⁶² These decisions effectively meant that all those detained by British forces in Iraq at least had an arguable claim for unlawful detention. As the law developed, that changed, but even after *Alseran*⁶³ (discussed below), all civilians detained in the active hostilities period for more than 10 days have a good claim for unlawful detention because the judge identified that the test being used to decide whether or not to hold them was flawed.⁶⁴ Because the ill-treatment appears to have been a matter of policy and/or practice at the time, it is logical to assume that many people detained at the relevant times would have been subjected to similar forms of ill-treatment. To the best of our knowledge, the UK government has never published information on how many people they detained in Iraq – so it is impossible to determine how many of those who might have had a good claim actually brought such a claim.

The approach of international human rights mechanisms

ECTHR

39. In *Aksoy v Turkey* (1996), the ECtHR recognised that the notion of an effective remedy under the European Convention on Human Rights (ECHR) Article 13 includes the

⁵⁸ Article 9(5): “Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.” See also European Convention on Human Rights, Article 5(5) and Article 13.

⁵⁹ Ministry of Defence, *Legal Protections for Armed Forces Personnel and Veterans serving in Operations outside the United Kingdom*, *ibid.*, p.18.

⁶⁰ Ministry of Defence, *Legal Protections for Armed Forces Personnel and Veterans serving in Operations outside the United Kingdom*, *ibid.*, pp. 2-3.

⁶¹ *Al-Jedda v UK*, Application No. 27021/08, Judgment of 7 July 2011 [GC]

⁶² *Al-Skeini v UK*, Application No. 55721/07, Judgment of 7 July 2011 [GC]

⁶³ *Alseran and others v Ministry of Defence* [2017] EWHC 3289 (QB)

⁶⁴ *Ibid.*, §313 and §537(vi).

payment of compensation,⁶⁵ and in the earlier case of *Tomasi v France* (1992), the ECtHR made it clear that a domestic remedy to claim compensation must comply with the fair trial standards in ECHR Article 6.⁶⁶

UN Committee against Torture

40. Based on the contents of the UNCAT, the Committee's General Comment No. 3 on redress states that:

On account of the continuous nature of the effects of torture, statutes of limitations should not be applicable as these deprive victims of the redress, compensation, and rehabilitation due to them. States parties shall ensure that all victims of torture or ill-treatment, **regardless of when the violation occurred** or whether it was carried out by or with the acquiescence of a former regime, are able to access their rights to remedy and to obtain redress.⁶⁷ [emphasis added]

41. This position has been reinforced by the Committee's recent decision in *Mrs A v Bosnia and Herzegovina* in which they cited General Comment No. 3, and concluded that statutes of limitation should not apply to civil claims in torture cases, on the basis that the effects of torture are continuous.⁶⁸

Other UN bodies

42. With regard to acts of torture, the UN Human Rights Committee has stated that:

States may not deprive individuals of the right to an effective remedy, including compensation and such full rehabilitation as may be possible.⁶⁹

43. In its guidance on the rule of law in post-conflict states, the OHCHR has recommended that:

Under various sources of international law and under United Nations policy, amnesties are impermissible if they... [i]nterfere with victims' right to an effective remedy, including reparation...⁷⁰

44. The UN Special Rapporteur on the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms, has argued that statutory limitations create real obstacles to obtaining human rights reparations:

...for many victims of gross violations of human rights, the passage of time has no attenuating effect; on the contrary, there is an increase in post-traumatic stress, requiring all necessary material, medical, psychological and social assistance and support over a long period of time...⁷¹

⁶⁵ *Aksoy v Turkey*, Application No. 21987/93, Judgment of 18 December 1996, at §98.

⁶⁶ *Tomasi v France*, Application no. 12850/87, Judgment of 27 August 1992, at §§121-122.

⁶⁷ *General Comment No.3*, *ibid.*, §40.

⁶⁸ Committee Against Torture, *Decision adopted by the Committee under article 22 of the Convention, concerning Communication No. 854/2017*, CAT/C/67/D/854/2017, 22 August 2019 available at <https://trialinternational.org/wp-content/uploads/2019/08/Decision-CAT-A-BIH-2August2019.pdf>

⁶⁹ HRC, *CCPR General Comment No. 20*, *ibid.*, §15.

⁷⁰ OHCHR, *Rule of Law Tools for Post-Conflict States: Amnesties*, *ibid.*, at p.11.

⁷¹ *Final report submitted by the Special Rapporteur on the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms*, UN Doc E/CN.4/Sub.2/1993/8 (1993), §135.

45. The UN Updated Principles on Impunity state that statutes of limitation shall not be effective against civil or administrative actions brought by victims seeking reparation for their injuries.⁷²

Other tribunals

46. The African Commission on Human and Peoples' Rights has stated that "an amnesty law adopted with the aim of nullifying suits or other actions seeking redress that may be filed by the victims or their beneficiaries... cannot shield that country from fulfilling its international obligations under the [African Charter of Human and Peoples' Rights]" .⁷³

Existing tools available to UK civil courts

47. UK legislation already recognises the inherent difficulties in proceeding with claims which are commenced some years after the events which gave rise to the legal action, thus providing a presumption against the courts' ability to consider cases brought after certain time periods have passed, whilst providing for exceptions to these strict time limits where this is necessary. For example:
- a) The Limitation Act 1980⁷⁴ allows the normal three year period in cases relating to personal injury or death to be extended by judges considering "all the circumstances of the case", which would include:
 - i) the length of and reasons for the claimant's delay;
 - ii) the effect of the delay on the cogency of either party's evidence;
 - iii) the conduct of the defendant;
 - iv) the duration of any disability of the claimant arising after the date the cause of action accrued;
 - v) whether the claimant acted promptly and reasonably when he knew he might have a claim;
 - vi) any steps the claimant took to obtain medical, legal or other expert advice and the nature of any such advice received.
 - b) Under the Human Rights Act 1998 (HRA), claims must be brought within a year "or such longer period as the court or tribunal consider equitable having regard to all the circumstances"⁷⁵, and factors such as those in the Limitation Act (see above), including any delay, will be relevant in considering what is "equitable".⁷⁶
48. According to the facts of individual cases, the courts exercise their discretion under the legislation to take into account these factors, as can be seen in the following examples, involving abuses committed by the UK armed forces.

Mutua & others v FCO [2012] EWHC 2678 (QB)

49. This case involved claims against the UK Government in relation to torture and ill-treatment committed in the 1950s in Kenya. The court considered in great detail

⁷² Decision adopted by the Committee under article 22 of the Convention, concerning Communication No. 854/2017, 22 August 2019, CAT/C/67/D/854/2017, §7.5.

⁷³ *Malawi African Association et al v Mauritania*, AfrComHPR Communications 54/91 et al (2000), §83.

⁷⁴ Section 33.

⁷⁵ Section 7(5).

⁷⁶ See for example, *Alseran*, *ibid.*, at §852.

whether a fair trial of the claims was possible given that the incidents in question had occurred many decades previously. This included considering the documents available as well as the witnesses' ability to give evidence. The Judge concluded that the claims of three claimants should be allowed to proceed but that the claim of one of the claimants, who had died and in whose case there was therefore less evidence available, should not proceed. The Judge also took into account that in three of the claims, the fact that the claimants had been tortured was not in dispute (although liability for such mistreatment remained an issue) – and considered more broadly what the issues in dispute were and whether a fair trial of those issues was possible.

Alseran and others v Ministry of Defence [2017] EWHC 3289 (QB)

50. In this case which arose out of the Iraq conflict, Mr Justice Leggatt spent 50 paragraphs of his judgment discussing the issue of limitation periods, and concluded that the tort law claims were time-barred, but should be allowed under the Human Rights Act. He concluded that there were:
- a) “Good reasons for the delay”⁷⁷ due to the fact that it was impossible to bring the claim in Iraq and required an English law firm to be found to bring a claim in the UK, and that the claimant simply did not otherwise know of the possibility or means of bringing a claim;
 - b) There was no prejudice to the Ministry of Defence (MOD) as a result of the delay,⁷⁸ because, due to the “lack of any adequate effort by the MOD to investigate Mr Alseran’s claim”, the judge felt that he could not “be satisfied that its failure to adduce any factual evidence to answer Mr Alseran’s allegations is a consequence of the delay in bringing the claim rather than its own lack of diligence”;⁷⁹
 - c) The judge absolutely recognised that had “evidential prejudice” been shown to have arisen as a result of the delay in issuing the proceedings, he would not have treated the merits of the claim as weighing in the claimant’s favour:

*In a case where the delay in bringing proceedings has caused significant evidential prejudice to the defendant, it would plainly be wrong to treat the merits of the claim as a factor weighing in the claimant’s favour – at least insofar as the court’s assessment of the merits is based on findings of fact which might have been different if the claim had been begun promptly and the defendant had not been disadvantaged.*⁸⁰

- d) The Judge took into account that not extending time under the HRA “would prevent the claimants from obtaining any redress for proven violations of their fundamental human rights not to be subjected to inhuman or degrading treatment and not to be unlawfully and arbitrarily detained.”⁸¹

Kimathi & Others v The Foreign and Commonwealth Office [2018] EWHC 2066

51. Using the Limitation Act 1980, the court had to balance the prejudice to the defendant of facing a late claim against the prejudice the claimant would suffer if the claim was statute-barred. In this test case, Stewart J determined that it would not be equitable

⁷⁷ Ibid., §854.

⁷⁸ Ibid., §§856-861.

⁷⁹ Ibid., §861.

⁸⁰ Ibid., §869.

⁸¹ Ibid.

to extend time in the claimant's favour. The severe effects of the passage of time on the defendant's ability to defend the claim was a crucial factor, particularly due to the depleted cogency of the evidence available, as were the lack of good reasons (or indeed evidence of any reasons) for the delay, and the very substantial length of the delay itself.

Commentary

52. The above cases provide examples of how the UK courts are perfectly able to exercise their discretion, balancing the key issues involved, including that of delay, using the existing legislation. In some cases, all the factors having been taken into account, the cases have been allowed to proceed, in others, they have not. This is the mark of a sophisticated and nuanced approach to complex issues, not a weakness. It would be a seriously retrograde step to remove this discretion from the courts, and introduce a blanket limitation, as is being proposed, that does not take into account the rights of victims to justice, truth and reparations.

Potential loss of opportunities for redress

53. In fact, there have been few cases brought in the UK in such circumstances. This may in large part be due to the existing legislative restrictions discussed above. It is worth bearing in mind that individuals may have severe difficulties in bringing a civil claim where a conflict is ongoing. For example, where UK armed forces have occupied an area (as was the case in Iraq), people may fear bringing a claim and might only contemplate doing so once the UK armed forces have left.
54. The *Alseran* case is a good example of one which could not have been brought if there was an absolute 10 year long-stop in civil claims. Mr Alseran was in detention in the period March to May 2003, but proceedings only commenced in March 2013, by which time his claims in tort were adjudged to be time-barred, but his claims under the HRA were not. Eventually he was awarded damages for inhuman and degrading treatment, and unlawful detention.
55. Such was the severity of the case that Mr Justice Leggatt concluded:
- ...much worse than the physical pain was the humiliation that Mr Alseran suffered. The nature of the abuse – involving an exercise of power over defenceless prisoners, trampling them underfoot for what appears to have been the sadistic amusement of the assailants and onlookers – showed extreme contempt towards the victims.⁸²
56. The key role of the civil courts in holding UK armed forces to account is made plain in the following comments made by Mr Justice Leggatt:
- As the lessons of Northern Ireland, the Baha Mousa inquiry and the Al-Bazzouni case do not seem to have been fully absorbed by the MOD, I consider that the court should now make it clear in unequivocal terms that putting sandbags (or other hoods) over the heads of prisoners at any time and for whatever purpose is a form of degrading treatment which insults human dignity and violates article 3 of the [ECHR].⁸³

⁸² *Alseran*, §953.

⁸³ *Ibid.*, §495.

...[the Claimant] was subjected to the following practices which were routinely used at the relevant time in handling prisoners, but which amounted to inhuman and degrading treatment:

- (a) “harsh” interrogation, which involved a deliberate attempt to humiliate the detainee by insulting and shouting personal abuse at him;
- (b) being deliberately deprived of sleep for the purpose of interrogation during the first day and a half of his detention; and
- (c) complete deprivation of sight and hearing by being made to wear blacked out goggles and ear defenders for most of the first 12 hours following his arrest and thereafter whenever he was taken out of his cell while undergoing interrogation during the first 13 days of his detention.⁸⁴

Without access to the civil courts, such abuses may not be brought to light.

57. Whilst the *Alseran* case (and others like it) may be uncomfortable for the UK Government and the UK armed forces, the treatment was severe and it is not the kind of case where litigation should be prevented by a government whose starting point (as per Ms Mordaunt’s Foreword to the consultation process) is that

Our service men and women are required to conform to the highest standards of personal behaviour and conduct. And when they fall short they must be held to account. Justice must be served.

58. It is exactly these kind of cases which should be before the courts. The MOD should be accountable. The UK’s obligations under the UNCAT and other international law instruments should be protected, and processes to assess claims for redress and reparations should be allowed to run their course. The courts have ample powers to prevent such claims from proceeding if the balance of justice requires it, whether for reasons of delay or otherwise.
59. It is also worth noting that the courts are well used to assessing whether or not a fair trial is possible when dealing with historic cases, for example, in cases of historic sexual abuse. In such cases, the courts have taken into account, as part of their decision under section 33 of the Limitation Act, the impact of the sexual abuse on the claimant and whether he or she could have brought the claim earlier – or whether the claimant’s mental health issues were so severe as to make it impossible or impractical to do so. The consultation proposals do not appear to take into account the psychological impact on the victims of abuse, including sexual abuse, in their ability to bring the claim within a limited time period.⁸⁵

⁸⁴ *Ibid.*, §17(ii).

⁸⁵ See, for example, *A v Hoare* [2008] UKHL 6, which prompted the Law Commission to consider whether there should be special consideration in sexual abuse cases to take into account such difficulties.

CONCLUSION

60. It is important that the UK State does not limit the possibility of making UK armed forces (individually or collectively) accountable for wrongs that they have committed. The UN Special Rapporteur on the question of impunity has described the dangers of going down this road:

“Impunity” means the impossibility, de jure or de facto, of bringing the perpetrators of human rights violations to account - whether in criminal, civil, administrative or disciplinary proceedings - since they are not subject to any inquiry that might lead to their being accused, arrested, tried and, if found guilty, sentenced to appropriate penalties, and to making reparations to their victims.⁸⁶

61. Whilst the Government states that it will continue to abide by its “obligations under domestic and international law”⁸⁷ and apparently intends that its civil litigation proposals will not extend to human rights violations,⁸⁸ we cannot help but conclude that the proposals will inevitably lead to the UK breaching its existing treaty obligations, along with its legal and moral obligations to foster a respect for international human rights law. The UK Government should not be encouraging impunity.

⁸⁶ *Revised final report of the Special Rapporteur on the question of impunity of perpetrators of human rights violations (civil and political)*, UN Doc E/CN.4/Sub.2/1997/20/Rev.1 (1997), p.17.

⁸⁷ Ministry of Defence, *Legal Protections for Armed Forces Personnel and Veterans serving in Operations outside the United Kingdom*, *ibid.*, p.5.

⁸⁸ *Ibid.*, p.18.