WHY CIVIL CLAIMS ARE A NECESSARY PART OF THE ARSENAL TO ADDRESS MILITARY EXCESSES :

Assessing the UK Overseas Operations (Service Personnel and Veterans) Bill

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I. Introduction

The Overseas Operations (Service Personnel and Veterans) Bill was introduced in Parliament on 4 November 2020 by Mr Ben Wallace, Secretary of State for Defence of the United Kingdom.[1] The Bill sets out a series of measures intended to make it more difficult to prosecute current and former Service personnel for conduct occurring more than five years ago when operating overseas. The Bill sets out that it is to be exceptional for a prosecutor to determine that such prosecutions should proceed – in effect, a statutory presumption against prosecutions. It introduces factors that prosecutors are required to give particular weight to, when considering whether to bring a

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[1] HL Bill 147, 4 November 2020.

prosecution (e.g., the adverse effect or likely adverse effect of the exceptional demands and stresses of deployment on overseas operations; and the public interest in finality, where there has been a relevant previous investigation and no compelling new evidence has become available). It also specifies that there is a need for Attorney General consent to proceed with such prosecutions, and separately, compels the government to consider making a derogation under Article 15(1) of the European Convention on Human Rights for any future UK operations overseas.

The Bill also restricts judicial discretion to allow civil claims for personal injury and/or death and claims under the Human Rights Act 1998 in respect of overseas operations by requiring the court to consider additional factors (in addition to those that already exist in law) when deciding whether to allow a claim outside the set limitation periods. For civil claims concerning operations overseas, the Bill also introduces a limitation longstop of six years from the date of incident, or within six years of the date of knowledge. Additionally, when the limitation periods of another country are applied to these claims, there is an absolute limitation longstop of six years.

The Bill has provoked much discussion in both Houses of Parliament,[2] amongst former service personnel,[3] lawyers, academics, and civil society.[4] It has also been the subject of correspondence with officials of the Office of the Prosecutor of the International Criminal Court[5] and United Nations bodies.[6] We have also contributed to some of these debates.[7]

Much of the discussion surrounding the Bill has focused on the extent to which the proposed changes to how decisions about potential prosecutions are taken will negatively impact upon the capacity for the UK to implement its obligations under international human rights law and the International Criminal Court statute. In particular, it has been argued by some that the introduction of a presumption against prosecution in the way envisioned runs the risk of contravening the UK's obligations to carry out effective investigations capable of leading to prosecutions in accordance with Articles 2 and 3 of the European Convention on Human Rights, and Articles 5 and 7 of the UN Convention Against Torture.[8] None of these treaties that the UK has ratified envision statutes of limitation or presumptions against prosecution after the passage of a prescribed period of time. Other comments have emphasised that the Bill fails to tackle the crux of the problem which is understood to relate to deficiencies with in-theatre military investigations into alleged wrongdoing; have explained the inconsistencies between the factors set out in the Bill that prosecutors are required to take into

[2] The Joint Committee on Human Rights (JCHR), Legislative Scrutiny: The Overseas Operations (Service Personnel and Veterans) Bill, Ninth Report of Session 2019-21, 29 October 2020. See also, the debate on the bill, accessible at: https://bills.parliament.uk/bills/2727/publications.

[3] Helen Warrell, 'Former army chiefs attack UK move to limit torture prosecutions', Financial Times, 22 September 2020; Admiral Lord West, 'The Government must think again about its move to decriminalise military torture', the Telegraph, 19 January 2021; Nick Parker and Jeff Blackett, 'We must rethink ill-judged Overseas Operations Bill which will only make matters worse for troops', the Telegraph, 9 March 2021.

[4] See, e.g., Law Society, 'Parliamentary Briefing: Overseas Operations (Service Personnel and Veterans) Bill, Report Stage – House of Lords', April 2021; Ronan Cormacain, 'Overseas Operations (Service Personnel and Veterans) Bill: A Rule of Law Analysis', Bingham Centre for the Rule of Law, January 2021; Ceasefire Centre for Civilian Rights, 'Overseas Operations (Service Personnel and Veterans) Bill Briefing', September 2020; REDRESS, 'Upholding The Convention Against Torture: Briefing Paper On The Overseas Operations Bill', January 2021; Liberty, 'Liberty response to the MoD consultation on "legal protections for Armed Forces Personnel and Veterans",' October 2019; Rights and Security International, 'Briefing on the Overseas Operations Bill Report Stage', 2 November 2020; Freedom from Torture, 'Submission against UK government proposals of impunity for British soldiers', October 2019.

[5] Fatou Bensouda, Letter addressed to Rt Hon Ben Wallace MP, OTP2021/003417, 3 March 2021 ['I believe we would all lose, victims, the Court and ICC States Parties, were the UK to forfeit what it has described as its leading role, by conditioning its duty to investigate and prosecute serious violations of international humanitarian law, crimes against humanity and genocide on a statutory presumption against prosecution after five years. In terms of its stated objective, the perceived culture of vexatious litigation that the Bill purportedly seeks to curtail does not match the findings of our years long preliminary examination. Moreover, the existing mechanisms within the UK appear adequate to guard against the threat of baseless claims: the risks arising from historical investigation being rather the paucity of investigations leading to referrals for prosecution and the absence to date of any prosecutions arising from the work of IHAT/SPLI and the SPA.']; Fatou Bensouda, Letter addressed to the Rt Hon Harriet Harman QC MP, OTP2021/003488, 5 March 2021. See also, ICC, Office of the Prosecutor, 'Situation In Iraq/UK: Final Report', 9 December 2020.

[6] Office of the High Commissioner for Human Rights, 'UK Parliament must not introduce impunity for war crimes, say UN experts', 5 October 2020.

[7] Carla Ferstman, Thomas Obel Hansen and Noora Arajärvi, 'The UK Military In Iraq: Efforts and Prospect For Accountability For International Crimes Allegations? A Discussion Paper', 1 October 2018; Carla Ferstman and Thomas Obel Hansen, Written Evidence to the UK Parliament Defence Committee - Inquiry on Statute of Limitations and Veterans Protection, SOL0005, 18 July 2018.

[8] JCHR (n 2), para. 63.

account and how these matters are dealt with under international criminal law; or have expressed concern that the list of offences excluded from the purview of the Bill does not extend to torture or crimes against humanity, among other offences that should arguably have been excluded.

The focus of this paper

This paper focuses on civil claims for personal injury and/or death and claims under the Human Rights Act 1998 in respect of overseas operations. The Bill sets out several rationales for the introduction of the reforms to civil and human rights claims, and we saw value in scrutinising these justifications in some depth, given the significance of the proposed reforms and the limited attention they have received to date. As we will explain, 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.

To make this assessment, we have carried out a review of civil and human rights judgments pertaining to overseas operations, issued within the last twenty years. These have mainly concerned claims against the Ministry of Defence, though our sample has also included claims involving overseas engagements by the security services and other parts of government to the extent relevant.

Some might assume that that introducing time limits and related restrictions to civil claims or claims under the Human Rights Act in relation to overseas operations is a relatively minor access to justice intrusion. There is somewhat more acceptability of limitation periods in respect of civil claims for damages than with criminal investigations and prosecutions. Our research has led us to see these issues differently.

We argue that:

i) Considering the checks and balances within the UK legal system and how it operates as a whole, impeding access to civil and human rights claims ignores the vital role such claims play in ensuring that criminal investigations and prosecutions and related accountability processes are not shut down prematurely. A crucial means of oversight will be lost;

ii) Victims' access to reparation is an important value worthy of protection and a fundamental and obligatory aspect of UK human rights obligations. This is especially the case for claims involving wrongful death, torture, and ill-treatment; and

iii) The introduction of limitation periods for civil and human rights claims without a possibility for judges to be able to use their discretion to extend them where the exigencies of the circumstances so require, is a significant and unjustifiable limitation of claimants' access to reparation.

Conor Gearty wrote in 2020 that 'If the country is indeed swerving back to a past where affording a carte blanche to executive power in the field of security is once again to be the norm, we may be about to see the executive set itself the task of taming these out-of-date judges, men and women whose normative assumptions have been long left behind by "the real world".'[9] Indeed, the Overseas Operations (Service Personnel and Veterans) Bill is a clear sign that the executive has chosen the path of seeking to tame 'these out-of-date judges.' At the least, one must be cognisant of this turn against the rule of the law. Where possible, we argue that it is important to resist this turn and minimise its impact.

[9] Conor Gearty, 'British Torture, Then and Now: The Role of the Judges', (2020) *Modern Law Review* 1–37, 37.

II. Civil and human rights claims play a key role in fostering criminal investigations and prosecutions, and are a vital means for judicial oversight

There is a long history of civil and human rights claims being lodged against the UK Government. In addition to claims for damages arising from harm or injuries caused to individuals because of government action or inaction, judicial review and related court action is pursued to challenge the lawfulness of government policy, to seek orders for specific performance or injunctive relief, to seek public disclosure of facts or policies, and to prevent recurrence. In general terms, litigation through the courts has helped foster governmental accountability, to ensure that public bodies discharge their legal duties, do not abuse their powers and act compatibly with the rights of those affected by their actions. Civil and human rights claims thus serve a vital function in good governance alongside the range of additional administrative and parliamentary tools that operate in a democratic State.

A part of this picture is the resort to the courts to address concerns about the overseas operations of the military and/or security services. In our survey of claims lodged in the past twenty years, we observe a number of patterns emerging. Certainly, not all claims have been successful. Judges have ruled on preliminary issues, procedural matters and the substance of claims and have come to a variety of conclusions as is appropriate in the exercise of their functions. However, the importance of the judgments must be underscored, both for the remedies they have afforded to meritorious claimants, and for the broader judicial and public scrutiny the cases have engendered.

Extraterritorial application of human rights obligations

In the face of Government denial of the applicability of human rights law, civil and human rights claims have been vital in clarifying the extraterritorial reach of human rights obligations and the extent of the UK's investigative obligations under the Human Rights Act in respect of right to life and freedom from torture and other prohibited ill-treatment, and ultimately the European Convention of Human Rights. In *Al Skeini*, UK courts, and later, the European Court of Human Rights, affirmed that the UK's human rights obligations to carry out an effective investigation extended extraterritorially to events taking place in Iraq to instances such as deaths in UK custody where the UK forces exercised effective control.[10] Without resort to the courts, the Government's position that human rights have no or extremely limited extraterritorial application, and certainly no role on the battlefield, may have gone unchallenged. This was the position taken by Baroness Kennedy QC, in the Lords' chamber debate on claims against the Armed Services, who intimates that the *Baha Mousa* case

> was used to force the Government to have an inquiry, which in turn led to investigation and so on. That was the tool in the hands of the family of Baha Mousa, which enabled us to know fully what had taken place, and for us all to express the horror we are expressing today. Otherwise, could we be sure that something would have happened?[11]

[10] *Al Skeini & Ors, R (on the application of) v Secretary of State for Defence* [2004] EWHC 2911 (Admin) (14 December 2004), para. 344; ['we are unable to accept that the investigation has been open or effective. Other than in the early stages and at the autopsy, the family has not been involved. The outcome of the SIB report is not known. There are no conclusions. There has been no public accountability,' para 332]. See also, *Al-Skeini & Ors, R (on the application of) v Secretary of State for Defence* [2005] EWCA Civ 1609 (21 December 2005); *Secretary of State for Defence v Al-Skeini & Ors* [2007] UKHL 26 (13 June 2007); *Al-Skeini v. The United Kingdom (Grand Chamber)*, Appl. No. 55721/07, 7 July 2011. See in contrast, *Hassan, R (on the application of) v Secretary of State for Defence* [2009] EWHC 309 (Admin) (25 February 2009), para. 34, where it was determined that 'the UK role in Camp Bucca at the relevant time did not involve "such effective control of the territory of another state that it could secure to everyone in the territory all the rights and freedoms in section 1 of the Convention".'

[11] HL Deb, 24 November 2016, column 2086.

The courts' clarification of the extraterritorial application of human rights obligations has been important not only for foreign claimants seeking redress,[12] but also in respect of the State's duties towards its own soldiers.[13] With respect to the latter, the Ministry of Defence has argued that it did not owe a duty of care to soldiers because the deaths and injuries occurred overseas in battle and are therefore covered by the doctrine of combat immunity. It also argued that soldiers' claims raised issues about military resources and procurement, which are political rather than matters for the courts. These arguments were ultimately defeated.

Clarification of the facts

In the face of government opacity, litigation has proved to be an important vehicle to clarify the facts and to understand the role of government and others in actions and omissions. For instance, the Court of Appeal's decision to order the disclosure of seven paragraphs based on US intelligence information describing aspects of the detention of former Guantanamo Bay detainee *Binyam Mohamed*. Binyam Mohamed's case led to the important revelations that 'BM was being subjected to the treatment that we have described and the effect upon him of that intentional treatment. The treatment reported, if had been administered on behalf of the United Kingdom, would clearly have been in breach of the undertakings given by the United Kingdom in 1972. Although it is not necessary for us to categorise the treatment reported, it could readily be contended to be at the very least cruel, inhuman and degrading treatment by the United States authorities.'[14]

Change to policies

Civil and human rights claims are essential to identify and investigate structural and institutional flaws in policy and practice that put soldiers and civilians overseas at risk. Some claims have led to changed policies, such as guidance to intelligence officers and service personnel on the detention and interviewing of detainees overseas and the practice of hooding,[15] and the "harsh" approach to tactical questioning and interrogation.[16] The government invited the Investigatory Powers Commissioner ('IPCO') to recommend improvements to the Guidance and the IPCO subsequently launched a public consultation which led to the adoption of Principles relating to the detention and interviewing of detainees overseas and the passing and receipt of intelligence relating to detainees.[17] Claims brought by service personnel—or their bereaved families have 'helped to improve practices, standards and equipment to help prevent future unnecessary deaths or injury of members of the Armed Forces, for example in relation to the use of Snatch Land Rovers in deployments overseas, or the inadequacy of technology to prevent fatalities or troops from "friendly fire" during overseas operations.'[18]

Apologies and settlements in aid of reconciliation

Some claims have led to formal apologies by government. For instance, following the proceedings instituted by Abdul-Hakim Belhaj and Fatima Boudchar in respect of the UK's role in their abduction, torture, and rendition to Libya,[19] on 11 May 2018, the British Government apologized:

> … The United Kingdom Government's actions contributed to your detention, rendition and suffering. The United Kingdom Government shared information about you with its international partners. We should have done more to reduce the risk that you would be mistreated. We accept this was a failing on our part. Later, during your detention in Libya, we sought information about and from you. We wrongly missed opportunities to alleviate your plight: this should not have happened. On behalf of Her Majesty's Government, I apologise

[12] E.g., *Alseran & Ors v Ministry of Defence* [2017] EWHC 3289 (QB) (14 December 2017); *Al-Saadoon & Ors v The Secretary of State for Defence & Ors* [2016] EWCA Civ 811 (09 September 2016); *Mohammed & Ors v Secretary of State for Defence* [2015] EWCA Civ 843 (30 July 2015).
[13] *Smith & Ors v The Ministry of Defence* [2013] UKSC 41 (19 June 2013).
[14] UK Parliament, Hansard, 'Binyam Mohamed', 10 February 2010, Column 913.
[15] *Equality and Human Rights Commission v Prime Minister & Ors* [2011] EWHC 2401 (Admin) (03 October 2011).
[16] Discussed in *Hussein, R (on the application of) v Secretary of State for Defence* [2014] EWCA Civ 1087 (31 July 2014).
[17] HMG, July 2019. Hansard, 'Overseas Detainees: Detention and Interviewing', 18 July 2019, Column 62WS.
[18] JCHR (n 2), para. 99.
[19] *Belhaj and another (Respondents) v Straw and others* (Appellants) [2017] UKSC 3 On appeal from [2014] EWCA Civ 1394.

> unreservedly. We are profoundly sorry for the ordeal that you both suffered and our role in it….[20]

Claims have also led to settlements intended to aid with reconciliation. Following the institution of proceeding by Mau Mau veterans to seek a remedy for torture and related abuses experienced under the colonial regime in Kenya, then Secretary of State for Foreign and Commonwealth Affairs, Sir William Hague explained in Parliament that:

> The agreement includes payment of a settlement sum in respect of 5,228 claimants, as well as a gross costs sum to the total value of £19.9 million. The Government will also support the construction of a memorial in Nairobi to the victims of torture and ill-treatment during the colonial era. The memorial will stand alongside others that are already being established in Kenya as the country continues to heal the wounds of the past. The British high commissioner in Nairobi is today making a public statement to members of the Mau Mau War Veterans Association in Kenya, explaining the settlement and expressing our regret for the events of the emergency period.[21]

Initiation of public inquiries

Several claims have resulted in or provided the public impetus for the initiation of public inquiries. While the mandates of some of the inquiries have been flawed or overly constricted and the Government has not always implemented recommendations, our view based on the evidence, is that public inquiries have served a crucial purpose in exposing what happened and promoting government accountability to the public.

The revelations from the *Binyam Mohamed* case and several others,[22] created the momentum for the establishment of the Detainee Inquiry. In setting up that inquiry about the degree to which British intelligence officers working with foreign security services may have been implicated in the improper treatment of detainees held by other countries in the aftermath of the events of 11th September 2001, former Prime Minister David Cameron made this clear in his speech to Parliament:

> About a dozen cases have been brought in court about the actions of UK personnel-including, for example, that since 9/11 they may have witnessed mistreatment such as the use of hoods and shackles. This has led to accusations that Britain may have been complicit in the mistreatment of detainees. The longer these questions remain unanswered, the bigger will grow the stain on our reputation as a country that believes in freedom, fairness and human rights. That is why I am determined to get to the bottom of what happened. The intelligence services are also keen publicly to establish their principles and integrity. So we will have a single, authoritative examination of all these issues.[23]

Despite its limited mandate and premature close, the Detainee inquiry led by Sir Peter Gibson identified that some UK intelligence officers were aware of inappropriate interrogation techniques and mistreatment of detainees by liaison partners, and continued to engage with partners despite the issues having been identified. It also determined that intelligence agencies may have been involved in some instances of US renditions or post-rendition liaison.[24] The Intelligence and Security Committee which considered these matters in somewhat greater detail,[25] found evidence of cases in which UK personnel were directly involved in detainee mistreatment administered by others, where UK personnel were told by detainees that they had been mistreated by others, where Agency officers were told by foreign

[20] Parliamentary Debates, HC, 10 May 2018, Column 926, 'Belhaj and Boudchar: Litigation Update'.
[21] Parliamentary Debates, HC, 6 June 2013, Column 1692, 'Mau Mau Claims (Settlement)'.
[22] *Mohamed, R (on the application of) v Secretary of State for Foreign & Commonwealth Affairs* [2010] EWCA Civ 65 (10 February 2010)
[23] Hansard, HC, 6 July 2010, vol 513, col 176.
[24] Sir Peter Gibson, 'The Report of the Detainee Inquiry,' December 2013, available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/267695/The_Report_of_the_Detainee_Inquiry_December_2013.pdf.
[25] ISC, 'Detainee Mistreatment and Rendition: 2001–2010', HC 1113, 28 June 2018.

liaison services about instances of detainee mistreatment, where UK personnel continued to supply questions or intelligence to liaison services or to receive intelligence from liaison services, after they knew or suspected detainee mistreatment. It also found evidence of cases in which intelligence agencies made, or offered to make, a financial contribution to others to conduct a rendition operation, suggested, planned, or agreed to rendition operations proposed by others and provided intelligence to enable a rendition operation to take place.[26] Debates about the need for a further judge-led inquiry continue.[27]

Both the Baha Mousa inquiry concerning the ill-treatment and death of Baha Mousa and ill-treatment of 9 other victims, and the Al-Sweady inquiry, were established following judicial decisions relying on the extra-territorial application of the Human Rights Act.[28] As has been underscored by the Public Law Project, 'those inquiries have served an important purpose by shining a light on deplorable behaviour, publicly exonerating of the innocent and instigating short and long-term change in culture and practice.'[29] The Mousa Inquiry depicted the events under review as 'an appalling episode of serious, gratuitous violence on civilians'.[30] It condemned the leadership, loss of discipline and moral failings of the 1st Battalion of the Queen's Lancashire Regiment in Iraq, revealed the use of unlawful conditioning techniques that had been banned since 1972, and helped to clarify the events surrounding the kicking, punching and beating of Baha Mousa which were a direct and proximate cause of his death.[31] It also issued comprehensive recommendations on the banning of hooding and stress techniques. The Al Sweady Inquiry into the Danny Boy incident came to different conclusions. Whilst it criticised the conduct of the army personnel whose actions were the subject of the investigation,[32] the inquiry also concluded that most of the allegations, including all of the most serious ones, were 'wholly and entirely without merit or justification'.[33] Inquiries are important regardless of how they find.

Opening of criminal investigations, and judicial oversight of criminal investigations

A significant number of claims which originated as civil or human rights claims led to the opening of criminal investigations, including the establishment of the Iraq Historical Allegations Team (IHAT) investigations, and predecessor investigative processes, and the opening of certain Afghanistan investigations.[34] There is no indication that largescale criminal investigations would have been opened, but for claimants' pursuit of justice in civil, administrative, and human rights proceedings. Furthermore, because some of the claims concerned the absence of effective investigations into killings and ill-treatment, in some cases judges hearing the matters suspended their decision on the quality of investigations until criminal investigations had concluded. This served as an important form of judicial scrutiny of the criminal investigative process.[35] Furthermore, inquiries, also opened because of civil and human rights claims, resulted in files being transferred to prosecuting authorities. At the conclusion of the Baha Mousa inquiry, for instance, the files on 14 of the serving soldiers named in the Report

[26] ISC, ibid, 2.
[27] See, e.g., Hansard, 'Detainee Mistreatment and Rendition', 16 July 2019, Column 152.
[28] *R (Al-Skeini) v Secretary of State for the Defence* [2005] EWCA Civ 1609 and [2007] UKHL 26; *R (Al-Sweady) v Secretary of State for Defence* [2009] EWHC 2387.
[29] Public Law Project, 'Independent Human Rights Act Review (IHRAR): Response to Call for Evidence,' March 2021, para. 64.
[30] Sir William Gage, Statement on the publication of 'The Report of the Baha Mousa Inquiry', reproduced in https://www.lancashiretelegraph.co.uk/news/9240526.baha-mousa-inquiry-chairmans-statement-full/.
[31] Sir William Gage, 'The Report of the Baha Mousa Inquiry', Vol III, HC 1452–III, 8 September 2011, para. 294.
[32] Sir Thayne Forbes, 'Report of the Al-Sweady Inquiry', HC 818, 17 December 2014, para. 735.
[33] Al-Sweady inquiry, ibid, para. 737.
[34] For example, AB, where 'no investigation of the incident by the Royal Military Police was begun in the immediate aftermath of the operation. Such an investigation was, however, begun on 7 December 2012. The investigation was triggered by a letter sent by the claimant's solicitors under the judicial review pre-action protocol on 3 December 2012, making the allegations of unlawful killing and ill treatment which are pursued in this action, and by an article published in The Guardian newspaper on 5 December 2012.' See, AB, R (on the application of) v Secretary of State for Defence [2013] EWHC 4479 (QB) (6 November 2011), para. 9.
[35] For example, *Al-Skeini & Ors, R (on the application of) v Secretary of State for Defence* [2005] EWCA Civ 1609 (21 December 2005): 'Court-martial proceedings are now pending, and for all we know, further investigations may then follow, depending on what emerges in those proceedings. In these circumstances it seems to me that it would be premature to give any substantive answer to the second preliminary issue directed by Collins J, and that we should remit that issue to the Administrative Court, with the recommendation that all further proceedings on that issue be stayed until after the conclusion or other disposal of the pending court-martial proceedings' [para. 178]. See also, *Al-Sweady & Ors, R (on the application of) v Secretary of State for the Defence* [2009] EWHC 2387 (Admin) (02 October 2009), paras. 61, 62.

were sent to the Crown Prosecution Service, and the files on the other five soldiers were sent to the Services Prosecuting Authority.

In the *Ali Zaki Mousa* proceedings, to determine the issues before them (whether the Government was obliged to institute a public inquiry into allegations that persons detained in Iraq at various times between 2003 and 2008 were ill-treated in breach of article 3 of the European Convention on Human Rights by members of the British Armed Forces), the Court was regularly called upon to make assessments as to the character and quality of ongoing criminal investigations. For instance, Mr Justice Silber, President of the Queen's Bench Division, noted that '[t]he IHAT/IHAP arrangements are not hierarchically or institutionally independent. They do not enable the claimant's sufficient participation. Postponement of a public investigation would not achieve sufficient promptness where some allegations are already quite old, and where there is a substantial risk that IHAT's investigation will not be effective.'[36] In a later Court of Appeal ruling, it was held that 'under the IHAT arrangements, Provost Branch members are investigating allegations which necessarily include the possibility of culpable acts or omissions on the part of Provost Branch members. Nor is it a satisfactory answer (as counsel for the Secretary of State submit) that practical independence is underwritten by IHAT's recusal arrangements. If anything, their operation has compounded the cause for concern. Notwithstanding the relatively small numbers, there have been seven full recusals and nine partial recusals in relation to RMP members of IHAT. This simply goes to confirm the extent of the role of Provost Branch members in Iraq.'[37]

These and other judicial pronouncements led to close scrutiny of IHAT[38] and resulted in changes to IHAT and related procedures, to address the concerns raised. For instance, the Minister of State for the Armed Forces, Nick Harvey, informed Parliament on 26 March 2012 that the Secretary of State accepted the Court of Appeal's findings and would remove the Royal Military Police and replace them with the Royal Navy Police headed by the Provost Marshal (Navy).[39] The Iraq Fatalities Investigations was instituted in 2013 in order to fulfil the coronial duties demanded in *Ali Zaki Mousa (No.2),*[40] and the courts referred the cases of several claimants to that body.[41]

We hope not to have painted a picture that civil and human rights claims are the only route to accountability, or that they always produce accountability. That would not be accurate. What the history of civil and human rights claims in the UK shows is that they have helped bring about a measure of justice, they have contributed to the impetus for criminal complaints to be pursued and for inquiries to be opened, and to greater scrutiny (not only by the judges, but also by Parliament and civil society because of the greater access to information).

III. Victims' access to reparation is a fundamental and obligatory aspect of UK international obligations

The obligation to afford reparation is part and parcel of the UK's international obligations. It is set out in human rights treaties[42] and their interpretive bodies,[43] in declarative texts,[44] by independent

[36] *Mousa & Ors v Secretary of State for Defence & Anor* [2010] EWHC 1823 (Admin) (16 July 2010), para. 27.
[37] *Mousa, R (on the application of) v Secretary of State for Defence & Anor* [2011] EWCA Civ 1334 (22 November 2011), para. 37.
[38] See e.g., *Al-Saadoon & Ors v Secretary of State for Defence* [2015] EWHC 1769 (Admin) (26 June 2015); *Al-Saadoon & Ors v Secretary of State for Defence (Rev 1)* [2016] EWHC 773 (Admin) (07 April 2016).
[39] Hansard 26 Mar 2012 : Column 87WS.
[40] *Mousa & Ors, R (on the application of) v Secretary of State for Defence* [2013] EWHC 1412 (Admin) (24 May 2013), paras. 212-225.
[41] See, Iraq Fatality Investigations, 'Report into the death of ALI SALAM NASER', Cm 9410, March 2017, paras. 2.4 and 2.5.
[42] See e.g., Art 2(3) ICCPR; Art 14(1) UNCAT; Arts. 13, 41 ECHR.
[43] UN Human Rights Committee, 'General Comment 31' Nature of the General Legal Obligation Imposed on States Parties to the International Covenant on Civil and Political Rights (26 May 2004) UN Doc CCPR/C/21/Rev.1/Add.13; Committee Against Torture, 'General comment 3', Implementation of article 14 by States parties (13 December 2012) UN Doc CAT/C/GC/3.
[44] E.g., 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, UNGA Res 60/147 (16 December 2005); Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, UNGA Res 40/34 (29 November 1985) (adopted without vote) 4; Updated Set of principles for the protection and promotion of human rights through action to combat impunity (8 February 2005) UN Doc

experts[45] in academic studies,[46] and judicial decisions. It is also reflected in international humanitarian law treaties, particularly Article 3 of the *Hague Convention IV*,[47] largely reproduced in Article 91 of *Protocol I*.[48] In the case of wrongful death, torture or ill-treatment claims, compensation for the non-pecuniary damage flowing from the breach should in principle be available as part of the range of redress.[49]

Under human rights law, reparation entails two aspects: the right to a domestic remedy and the right to adequate and effective forms of reparation. Some texts focus on particularly heinous abuses whereas others specify that the rights apply to an array of violations. The connection between the procedure by which reparation is sought and the ultimate award is understood as indivisible.[50]

The right to reparation entails in part, the obligation to afford domestic remedies in response to human rights violations. All human rights treaties require, either explicitly or implicitly, States parties to provide remedies under national law. The *UN Basic Principles and Guidelines* explain the obligation to respect, ensure respect for and implement international human rights law and international humanitarian law as giving rise to a duty, *inter alia*, to '[p]rovide those who claim to be victims of a human rights or humanitarian law violation with equal and effective access to justice, ... irrespective of who may ultimately be the bearer of responsibility for the violation.'[51]

Components of the right to an effective domestic remedy such as the right to access a court may be restricted to the extent that the restriction pursues a legitimate aim and is necessary and proportionate to that aim, insofar as it does not 'reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired.'[52] For instance, reasonable limitation periods can be lawful,[53] as can restrictions on vexatious claims. However, unlike what the Government appears to argue when relying on the *Stubbings* case,[54] this does not mean that the introduction of a limitation longstop will necessarily be lawful. Indeed, in other cases on the examination of the facts, the European Court has come to the opposite conclusion.[55] Exceptions operate restrictively in the domestic sphere in relation to States' obligations to remedy those human rights violations they are directly responsible for perpetrating, and any restriction must be proportionate taking into account the exigencies of the particular circumstances and the nature of the rights that have been violated. The right to a remedy is required to the extent that it is necessary for the proper exercise of the primary obligation, even in the context of armed conflict and occupation[56] or states of emergency,[57] in the absence of any valid proportionality considerations. Thus, the procedural remedy is understood to require States to afford effective access to fair processes in which arguable claims can be

E/CN.4/2005/102/Add.1 [Impunity Principles] 31; Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions, ESC Res 1989/65 (24 May 1989) UN Doc E/1989/89, 20.

[45] See, UN Human Rights Council, 'Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism' (4 June 2012) UN Doc A/HRC/20/14, paras. 49-62; UN Human Rights Council, 'Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence' (9 August 2012) UN Doc A/HRC/21/46; UNGA, 'Interim report of the Special Rapporteur on torture' (11 August 2000) UN Doc A/55/290, paras 24-30; UNGA, 'Report of the Special Rapporteur on torture' (3 July 2003) UN Doc A/58/120, paras 29-35.

[46] Dinah Shelton, *Remedies in International Human Rights Law* (3rd edn, OUP 2015).

[47] *Convention Respecting the Laws and Customs of War on Land* (adopted 18 October 1907, entered into force 26 January 1910).

[48] *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts* (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 609.

[49] See, *Z. and Others v. the United Kingdom* [GC], App no. 29392/95, 10 May 2001, para. 109; *Keenan v. the United Kingdom*, App no. 27229/95, 3 April 2001, para.129.

[50] Shelton (n 46); HRC, General Comment 31 (n 43) para 16.

[51] *Basic Principles and Guidelines* (n 44) 3(c).

[52] *Al-Adsani v UK* App no 35763/97 (ECtHR, 21 November 2001) [53].

[53] *Stubbings v United Kingdom* App nos 22083/93,22095/93 (ECtHR, 22 October 1996) [50].

[54] Ministry of Defence, 'Overseas Operations (Service Personnel and Veterans) Bill: European Convention on Human Rights Memorandum by the Ministry of Defence', (undated) available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/920358/ECHR_Memo_-_OO_SPV__Bill_-_FINAL.pdf.

[55] See, e.g., *Roman v. Finland*, App no 13072/05, 29 January 2013.

[56] *Judicial Guarantees in States of Emergency* (Advisory Opinion) OC- 9/87, Ser A no 9 (IACtHR, 6 October 1987) paras 22–4; *Al-Skeini v. The United Kingdom (Grand Chamber)*, Appl. No. 55721/07, 7 July 2011 [164] –[167]; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Reports 136 [106].

[57] UN HRC, 'General Comment 29' Derogations during a state of emergency (31 August 2001) UN Doc CCPR/C/21/Rev.1/Add.11, para 14.

determined. The remedy should be prompt, accessible and capable of offering a reasonable prospect of success.

Jurisprudence and standard-setting texts also recognise the need to consider the quality of victims' access to and experience of justice processes. Victims must receive adequate information,[58] they must be treated with humanity and dignity[59] and their privacy and safety, both physical and psychological, must be safeguarded.[60] Remedies must be available to all persons within a State's jurisdiction, which is understood to also include instances when a State exercises effective control over an area outside its national territory.[61]

IV. The introduction of limitation periods for civil and human rights claims without a possibility for judges to be able to use their discretion to extend them where the exigencies of the circumstances so require, is a significant and unjustifiable limitation of claimants' access to reparation

The Bill does two things: i) it introduces mandatory factors a Court must consider when exercising any discretion to consider a case where the ordinary time limit (1 year for claims under the Human Rights Act and 3 years for tort claims) has expired but before the expiry of the 6-year absolute time limit; and ii) it introduces an absolute time limit of six years beyond which there can be no discretion exercised to allow a claim to proceed.

a) Introduction of mandatory factors to consider when exercising discretion

The mandatory factors that judges will need to consider when exercising discretion are:

First, the effect of the delay on the likely cogency of any evidence adduced, with particular reference to:

i) the likely impact of the operational context on the ability of individuals who were serving in the Armed Forces at the time to remember relevant events fully or accurately;
ii) the extent of dependence on the memories of such individuals, taking into account the effect of the operational context on the ability of such individuals to record relevant events or actions; and

Second, the likely impact of the proceedings on the mental health of the witness (or potential witness) who was at the time a member of the Armed Forces.

The requirement to have regard to the mental health of potential Defence witnesses when determining whether a claim should be capable of being brought against the Ministry of Defence is unwarranted considering the range of ways and means to protect and support witnesses suffering from trauma in legal proceedings; it has no precedent. It is also unbalanced, taking into account the failure of the Bill to reflect the principal reason for delays to the lodging of claims in cases involving wrongful death, torture or ill-treatment: the trauma of the claimant presents hurdles to proceed with litigation in a timely way. In *Mocanu v Romania*, for instance, the European Court acknowledged that:

> the psychological effects of ill-treatment inflicted by State agents may also undermine victims' capacity to complain about treatment inflicted on them, and may thus

[58] *Anguelova v Bulgaria* App no 38361/97 (ECtHR, 13 June 2002); See also, *Zontul v Greece* App no 12294/07 (ECtHR, 17 January 2012) [115].
[59] HRC, General Comment 31 (n 43) para 15; *Basic Principles and Guidelines* (n 44), 12(c).
[60] *Basic Principles and Guidelines* (n 44) 10, 12(b).
[61] *Ilaşcu v Moldova and Russia* (GC) App no 48787/99 (ECtHR, 8 July 2004); *Al-Saadoon v United Kingdom* App no 61498/08 (ECtHR, 2 March 2010).

constitute a significant impediment to the right to redress of victims of torture and other ill-treatment. Such factors may have the effect of rendering the victim incapable of taking the necessary steps to bring proceedings against the perpetrator without delay. Accordingly, … these factors are increasingly taken into account at national level, leading to a certain flexibility with regard to the limitation periods applicable to claims for reparation in respect of claims for compensation for personal injury. … the Court considers that the applicant's vulnerability and his feeling of powerlessness, which he shared with numerous other victims who, like him, waited for many years before lodging a complaint, amount to a plausible and acceptable explanation for his inactivity from 1990 to 2001.[62]

In *Forti v. Suarez Mason*, a civil action brought against a former Argentine general by two Argentine citizens, when assessing the applicable limitation period, the Court took into account the principle of equitable tolling, the difficulty for the claimants to access Argentine courts during the period of the military junta rule, 'Plaintiffs present facts indicating that the court retained of its powers over the military in form only and that effectively, no relief was or could be granted by the Argentine courts. Additionally, given the pervasiveness of the military's reign of terror, it may be possible for plaintiffs to demonstrate that members of the judiciary neglected to apply laws granting relief out of fear of becoming the next victim of the "dirty war".'[63]

b) The six year long-stop

The Bill specifies that cases must be brought within a maximum of 6 years or 1 year from knowledge of the facts (whichever is later). This differs from the current law. Both the Human Rights Act and the Limitation Act set out that a limitation period can be disapplied when the circumstances so require; neither have a fixed end period to such flexibility;[64] the ability to exercise discretion to disapply limitation periods is, as the Bingham Centre has noted, 'a non-controversial rule which is designed to remove the harshness of automatic rules which would otherwise lead to an injustice.'[65]

The limitation of rights is only justifiable under the strict conditions stipulated in human rights instruments. Limitations of the right of access to court must be prescribed by law, they must not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired.[66] Any limitation must also pursue a legitimate aim and there must be a reasonable relationship of proportionality between the means employed and the aim sought to be achieved.

The fact that the proposed limitation concerns claims related to alleged war crimes, crimes against humanity and torture is highly relevant to the determination of reasonableness and proportionality. In this respect, it is important to note that the UN Committee Against Torture, the body of experts tasked with interpreting the obligations under the Torture Convention, has indicated:

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.[67]

Any limitation must be prescribed by law in clear and precise terms. A limitation therefore needs to have a basis in domestic law and must be compatible with the rule of law.[68] The interference or restriction must have a legitimate purpose. While the aim of a particular piece of legislation may be

[62] *Mocanu and Others v. Romania*, App. Nos. 10865/09 45886/07 32431/08, 17 September 2014, paras. 274, 275.
[63] *Forti v. Suarez-Mason*, 672 F. Supp. 1531 (N.D. Cal. 1987).
[64] Human Rights Act 1998, section 7(5)(1)(b); Limitation Act 1980, s. 33.
[65] Ronan Cormacain, 'Overseas Operations (Service Personnel and Veterans) Bill: A Rule of Law Analysis', Bingham Centre for the Rule of Law, January 2021.
[66] *Stubbings* (n 53).
[67] Committee Against Torture, 'General comment 3' (n 43), para. 40.
[68] *Belge v Turkey*, Application nos. 50171/09, 6/12/2016, 6 December 2016, para. 28.

legitimate, provisions 'that permit interference with Convention rights must be interpreted restrictively.'[69] This requires that the State produce evidence of sufficient probity to demonstrate that the aim is legitimate. For the restriction of the right of access to court to be valid, any aim to the extent that it is legitimate, must also be in a reasonable relationship of proportionality between the means employed and the aim sought to be achieved.[70]

This rationale for the Bill concerns the belief that service personnel and veterans have been subjected to unwarranted, "vexatious" investigations and re-investigations which has affected morale and impeded them from achieving legal closure.[71]

The Government appears to use the "vexatious" label mainly in respect to criminal investigations, nevertheless its use of the term has been mainly rhetorical as opposed to factual. As the Joint Committee on Human Rights has explained in its report, 'the Minister and MoD staff could not name one prosecution that they thought was vexatious.'[72] The "vexations" label was also taken up by the Prosecutor of the International Criminal Court, who in her comment to the Secretary of State for Defence, indicated that 'In terms of its stated objective, the perceived culture of vexatious litigation that the Bill purportedly seeks to curtail does not match the findings of our years long preliminary examination.'[73]

With respect to civil and human rights claims, the contention that there is an industry of "vexatious" claims is not supported by the evidence, considering that the majority of claims against the Ministry of Defence have been brought by soldiers and veterans, and a large proportion of the claims brought by Iraqi and Afghani civilians have been settled with the payment of large sums of compensation. Furthermore, the use of a limitation longstop is not the measure that would, as is required, be the least restrictive limitation of would-be claimants' rights. As was set out by the Joint Committee on Human Rights,

> Powers exist to strike out unmeritorious claims that are an abuse of process and to prevent vexatious litigants bringing repeated litigation. We are not aware of any suggestion that the Courts have allowed wholly unmeritorious or vexatious claims through any failure or reluctance to use these powers. We call on MoD Ministers to desist from using this politicised and inaccurate language in relation to claims where the MoD did have a case to answer.[74]

A similar view was taken by the Law Society. It noted that:

> We have seen no evidence to suggest the courts are unable or unwilling to use their discretion to sift out unmeritorious claims – they can and do reject claims with little chance of success, ones where the passage of time has affected the evidence or where the public interest outweighs the claim. … We have seen no evidence to suggest the courts are unable or unwilling to use this discretion to sift out unmeritorious claims – they can and do reject claims that have little chance of success, where the passage of time has affected the evidence or where the public interest outweighs the claim.[75]

Factors relevant in the determination of whether the restriction of the right is proportionate will include the nature of the right engaged (right to life, freedom from torture, inhuman or degrading treatment or punishment, freedom from arbitrary detention) and the existence of alternative remedies. In *Stubbings*, the European Court was mindful that the relevant provision of the European

[69] *Perinçek v Switzerland*, Application No. 27510/08 (Grand Chamber), 15 October 2015, para.151.
[70] *Ashingdane v. The United Kingdom*, App no 8225/78, 28 May 1985, para. 57.
[71] Bill documents - Overseas Operations (Service Personnel and Veterans) Bill 2019-21, Explanatory Notes.
[72] JCHR (n 2), para. 41.
[73] Fatou Bensouda, Letter addressed to Rt Hon Ben Wallace MP, OTP2021/003417, 3 March 2021
[74] JCHR (n 2), para. 116.
[75] Law Society, 'Parliamentary Briefing: Overseas Operations (Service Personnel and Veterans) Bill', Committee Stage – House of Lords, March 2021.

Convention 'does not necessarily require that States fulfil their positive obligation to secure respect for private life by the provision of unlimited civil remedies in circumstances where criminal law sanctions are in operation.[76] With respect to the potential claimants affected by the Overseas Operations Bill, their access to criminal law remedies are similarly restricted. Furthermore, with respect to alleged violations of the right to life and freedom from torture and other ill-treatment, unlike the rights at stake in *Stubbings*, the European Court has made clear that compensation for the non-pecuniary damage flowing from the breach should in principle be available as part of the range of redress.[77]

The caselaw of the European Court has also taken into account the (in)flexibility of the time-limit in determining whether a limitation period was a necessary and proportionate restriction of the right to access to court. In *Shofman v Russia*, the Court held that 'the domestic law in force at the material time made no exceptions to that time-limit, … The Government had not given any reasons why it should have been "necessary in a democratic society" to establish such an inflexible time-limit.'[78]

Hard limitations take away discretion from judges and ignore the reality that there will be justifiable reasons why claims are brought outside of limitation periods. It implies that to date, judges have not been capable of exercising their discretion effectively, which is inaccurate. The caselaw demonstrates a keen ability for judges to analyse the particular facts before them and come to a reasoned decision.

In some cases, claims have been allowed to proceed despite the formal expiry of limitation periods, in one instance more than fifty years after the events were said to have taken place.[79] In *Hassan*, the claimant explained how personal circumstances had made it impossible to bring the proceedings expeditiously, and the Court was satisfied with the claimant's explanation for the delay.[80] Similarly, in *Al Jedda 2*, the court held that it would be equitable to entertain a new claim notwithstanding the formal expiry of the limitation period, citing a variety of reasons, including the circumstances of detention which would have made it difficult for the claimant to pursue the claim and that 'any allegation of mistreatment of a detainee by British forces is a serious matter, for which a remedy should not be lightly denied. … That cannot by itself justify the grant of an extension of time, but it is, again, a relevant matter for me to take into account'.[81] In *Alseran*, the court decided to disapply the limitation period because 'it has not been shown that the MOD has suffered significant evidential prejudice as a result of the claimants' delay in bringing the proceedings. In these circumstances it seems to me legitimate to take into account in deciding whether to exercise the discretion to extend time the fact that a refusal to do so 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.'[82]

In other cases, on consideration of the particular circumstances, judges have refrained from allowing claims to proceed where the limitation period had expired, for instance where no cogent reasons were put forward to justify the delay,[83] or when the delay makes the prospects of an investigation capable of establishing the truth of what happened unfeasible.[84] For example, in *AB*, which concerned claims brought by veterans that they were exposed to fallout radiation from nuclear tests and that this exposure has caused illness, disability or death, the Supreme Court decided not to exercise its

[76] *Stubbings* (n 53), para 66.
[77] See, *Z. and Others v. the United Kingdom* [GC], App no. 29392/95, 10 May 2001, para. 109; *Keenan v. the United Kingdom*, App no. 27229/95, 3 April 2001, para. 129.
[78] *Shofman v. Russia*, App no 74826/01, 24 November 2005, para. 43.
[79] *Mutua & Ors v The Foreign & Commonwealth Office* [2012] EWHC 2678 (QB). However, see *Kimathi & Ors v The Foreign And Commonwealth Office* [2018] EWHC 2066 (QB) (02 August 2018); *Keyu and others v Secretary of State for Foreign and Commonwealth Affairs and another* [2015] UKSC 69 where the claims were dismissed because of the expiry of limitation periods.
[80] *Hassan, R (on the application of) v Secretary of State for Defence* [2009] EWHC 309 (Admin) (25 February 2009).
[81] *Al Jedda v Secretary of State for Defence* [2009] EWHC 397 (QB) (05 March 2009), para. 95.
[82] *Alseran & Ors v Ministry of Defence* [2017] EWHC 3289 (QB) (14 December 2017), para. 869.
[83] *Al-Sweady & Ors, R (on the application of) v Secretary of State for Defence* [2009] EWHC 1667 (Admin) (10 July 2009), para. 27.
[84] *Al-Saadoon & Ors v Secretary of State for Defence (Rev 1)* [2016] EWHC 773 (Admin) (07 April 2016).

discretionary power to override the applicable limitation period.[85] This was principally because of the very considerable difficulties facing the claimants in establishing their case on causation.

V. Conclusions and the future outlook

On 8 September 2011, when the report on the Baha Mousa inquiry was released, the Parliamentary Under-Secretary of State, Ministry of Defence, Lord Astor of Hever, made a statement for the Defence Secretary. It was stated:

> … I want to make it clear that Baha Mousa was not a casualty of war. His death occurred while he was a detainee in British custody. It was avoidable and preventable, and there can be no excuses. There is no place in our Armed Forces for the mistreatment of detainees, and there is no place for a perverted sense of loyalty that turns a blind eye to wrongdoing or erects a wall of silence to cover it up. If any service man or woman, no matter the colour of uniform that they wear, is found to have betrayed the values this country stands for and the standards that we hold dear, they will be held to account. Ultimately, whatever the circumstances, rules or regulations, people know the difference between right and wrong. We will not allow the behaviour of individuals who cross that line to taint the reputation of the Armed Forces, of which the British people are rightly proud.[86]

The Overseas Operations (Service Personnel and Veterans) Bill is a dramatic turn away from this affirmation of the crucial importance of the rule of law.

It is important to note that none of the provisions set out in clauses 1 to 11 of the Bill would apply to proceedings that started before the date on which these sections of the Bill enter into force. The limitations on bringing civil claims could not, therefore, be applied retrospectively to legal proceedings that are already underway. Nevertheless, as this report has demonstrated, it is likely that the denial of access to justice to victims of wrongful deaths, torture and ill-treatment will very likely bring the UK into breach of its international obligations. These are obligations that are not subject to derogation. They do a disservice to both service personnel and civilian victims of overseas abuses.

The UN High Commissioner for Human Rights has urged UK legislators in both Houses of Parliament, and the Government, 'to ensure that the law of the United Kingdom remains entirely unambiguous with regard to accountability for international crimes perpetrated by individuals, no matter when, where or by whom they are committed'. 'The ability of the UK's courts to resolve the most serious allegations against military personnel, with the independence and fairness for which they are known around the world, should be maintained and strengthened, rather than be cut back on such problematic grounds.'[87]

These wise words must be heeded.

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[85] *Ministry of Defence v AB & Ors* [2012] UKSC 9 (14 March 2012), paras. 26, 27.

[86] Hansard, 'Baha Mousa Inquiry, 8 September 2011, Column 460.

[87] 'UN Rights Chief urges UK Parliament to amend proposed law that limits accountability for torture and other war crimes', 12 April 2021, https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=26984&LangID=E.