

**RE: THE OVERSEAS OPERATIONS (SERVICE PERSONNEL AND VETERANS)  
BILL 2019-2021**

---

**INSTITUTE FOR CONSTITUTIONAL AND  
DEMOCRATIC RESEARCH  
BRIEFING**

---

**OVERVIEW**

1. The Bill will limit the right of service personnel to bring claims against the government and prosecutors to investigate and prosecute war crimes.
2. The Bill may be considered problematic for the following reasons:
  - (a) It increases the risk to soldiers both of negligence on the part of the government and investigation and prosecution by international organisations and courts;
  - (b) It promotes impunity and breaches international law;
  - (c) It does not solve a real problem and the case in favour is unsupported by evidence. The Bill will expose the UK to a substantial risk of litigation;
  - (d) It will diminish the UK's global standing and soft power.

## **ANALYSIS**

### **The Bill's Provisions**

3. The Bill does three things:

- (1) Limits prosecutions for war crimes. It imposes a “triple lock” taking effect five years after the alleged offence occurred. This applies to both proposed and ongoing prosecutions. The Bill imposes (1) a presumption against prosecution after five years, (2) a requirement for the prosecutor to seek the permission of the Attorney General before bringing/continuing the prosecution, and (3) a requirement for the prosecutor to specifically consider factors which mitigate against prosecuting/continuing.
- (2) Removes the discretion of courts to consider civil claims based on events that occurred more than six years ago (where those events occurred in the context of overseas operations).
- (3) Imposes a legal duty on ministers to consider derogating from the European Convention on Human Rights (ECHR) in respect of overseas operations.

### **Problem 1: Increased Risk to Service Personnel and Veterans**

#### ***Negligent Treatment of Service Personnel***

4. Clauses 8-11 amend the Limitation Acts in respect of the various UK jurisdictions. The Limitation Acts place time limits on when a claim can be brought. They acknowledge, however, that there are sometimes unavoidable delays in bringing a claim. Courts therefore have discretion to disapply the limitation periods when it is “equitable” (essentially a test of fairness and a balance of harms) to do so. Clauses 8-11 remove this discretion in respect of claims arising from overseas operations. This means that courts must dismiss claims even where to do so is unfair.

5. Clause 12 requires ministers to consider derogating from the ECHR in respect of overseas operations. This will remove the right of claimants to bring claims against to government for rights violations that took place in an overseas theatre.
6. These provisions will prevent the courts from dealing with claims brought by service personnel when the MoD fails in its duty towards them. The victims of this provision will likely primarily be soldiers and their families who have suffered as a result of MoD errors, failures, or unlawful actions. The sort of cases that will be blocked include:
  - (a) *Smith v Ministry of Defence* [2013] UKSC 41 – A soldier was killed while serving in Iraq because the equipment provided to him by the MoD was ineffective. His mother brought a claim against the MoD relying on both common law and the Human Rights Act 1998. She received a six figure out of court settlement.
  - (b) *Lance Corporal B<sup>1</sup>* - A soldier who suffered PTSD after his experiences serving in Afghanistan. Despite a medical officer noting signs of PTSD he was not referred to a psychiatrist until several years later, he brought a claim against the MoD. Only after his lawyers negotiated a settlement was he able to obtain psychiatric help.
  - (c) *Sergeant C<sup>2</sup>* – An army reserve sergeant suffered racial abuse at the hands of his comrades and superiors over a protracted period of time (including while serving abroad). Superior officers ignored his complaints. The MoD only acted when he brought a civil claim under the Protection from Harassment Act.
7. Complaints and allegations often take far longer than six years to come to light. One example is that of a woman who was raped and sexually abused by her instructor while taking part in an army cadet programme.<sup>3</sup> The victim did not disclose the abuse until she reached adulthood. It is essential for courts to retain their discretion in cases like this.

### ***Exposing service personnel to International Criminal Court indictment***

---

<sup>1</sup> <https://www.boltburdonkemp.co.uk/military-claims/success-stories/>

<sup>2</sup> <https://www.boltburdonkemp.co.uk/military-claims/success-stories/>

<sup>3</sup> <https://www.boltburdonkemp.co.uk/military-claims/success-stories/>

This briefing does not constitute legal advice. It raises a number of “headline” points and is kept brief for the convenience of MPs. Should you require a full legal analysis, please contact the author. Please note the ICDR takes no view on the desirability of voting for this bill. This briefing simply sets out the likely consequences in the personal view of the author. The ICDR is happy to publish contrary views if they are supported by analysis which meets our standards.

8. The International Criminal Court has jurisdiction to prosecute soldiers for war crimes where the soldier's home state is "unable" or "unwilling" to do so. The Bill will, by demonstrating the UK's inability and unwillingness to prosecute certain offences, open the door to prosecutions of UK service personnel in the Hague. This will be both humiliating for the UK on the international stage and unnecessarily traumatic for the soldiers, witnesses, and victims concerned.

### ***Respect for the norms of armed conflict***

9. The Bill indicates that the UK no longer respects the norms of war in the same way that it once did. This creates a risk that other combatants will take a similar attitude in respect of British service personnel. If our enemies expect our forces to murder and torture with impunity, then they may feel entitled to do the same to our servicemen and women (and possibly even civilian contractors and aid workers). When a state like the UK resiles from the established rules of armed conflict, it reduces the incentive globally for other states to follow those rules.

### **Problem 2: The Bill Promotes Impunity**

#### ***Impunity for war crimes***

10. Part I of the Bill effectively prohibits prosecutions for war crimes after a period of 5 years. It often takes far more than this for information to come to light which would make a prosecution viable. In some cases, this is the inevitable result of the "fog of war", in others it is because the MoD deliberately does not release relevant information. For example, in August 2020, documents disclosed in an ongoing case revealed that the MoD had been aware, for almost 10 years, that UK special forces may have executed civilians in Iraq.<sup>4</sup> Prosecution for crimes like this will be effectively outlawed by the Bill.
11. Criminal prosecution is an important deterrent. It creates an incentive not to commit crimes. This Bill removes the deterrent effect. The incentive not to commit crimes is replaced with an incentive not to be found out for five years. Courts have found that military authorities

---

<sup>4</sup> <https://www.bbc.co.uk/news/uk-53597137>  
[www.icdr.co.uk](http://www.icdr.co.uk)

@ICDR

This briefing does not constitute legal advice. It raises a number of "headline" points and is kept brief for the convenience of MPs. Should you require a full legal analysis, please contact the author. Please note the ICDR takes no view on the desirability of voting for this bill. This briefing simply sets out the likely consequences in the personal view of the author. The ICDR is happy to publish contrary views if they are supported by analysis which meets our standards.

have “closed ranks” to prevent the gathering of evidence against soldiers accused of war crimes [*Court martial proceedings concerning the death of Baha Mousa CM 79/22/19-23, per McKinnon J (the Judge Advocate General)*]. In these circumstances, it is conceivable that the MoD could protect war criminals simply by refusing to disclose relevant information for five years.

### **International Law**

12. The Bill will breach international law. In particular, the obligation in customary international law to investigate and prosecute war crimes allegedly committed by their nationals.<sup>5</sup> This rule is reflected inter alia in the following treaties:
- (a) The Geneva Conventions (First , Art. 29; Second, Art. 50; Third, Art. 129; Fourth, Art 146);
  - (b) Convention on the Prevention and Punishment of the Crime of Genocide (Art. VI);
  - (c) Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, (Art. 7);
  - (d) Rome Statute of the International Criminal Court (preamble);
  - (e) UN Security Council Resolutions 978, 119, and 1199 (all of which, as a permanent member, the UK voted in favour).
13. The Bill also creates the potential to violate, with impunity, a swathe of international human rights and humanitarian agreements including the International Covenant on Civil and Political Rights.

### **Increased risk of terrorism**

---

<sup>5</sup> International Committee of the Red Cross, Database of Customary International Law, Rule 158; ICRC, *Customary International Practice*, Vol. II, Ch. 44, S. C  
[www.icdr.co.uk](http://www.icdr.co.uk)

@ICDR

This briefing does not constitute legal advice. It raises a number of “headline” points and is kept brief for the convenience of MPs. Should you require a full legal analysis, please contact the author. Please note the ICDR takes no view on the desirability of voting for this bill. This briefing simply sets out the likely consequences in the personal view of the author. The ICDR is happy to publish contrary views if they are supported by analysis which meets our standards.

14. One of the most powerful ways in which we disincentivise terrorism is by modelling what a functioning democratic state, under the rule of law, looks like. An important part of this is the commitment to hold ourselves to account. Humans are naturally flawed and there is always a possibility that even the most highly trained and disciplined troops may break the law. The UK has hitherto stood apart from terrorist groups and authoritarian states because, when our troops or government breaks the law, we hold it to account (or at least have the mechanisms to do so). This Bill will have substantial symbolic value as a statement that we are no longer prepared to do so. In this sense the fact that the Bill leaves prosecutors a five-year window to investigate and complete a prosecution is irrelevant. The symbolism of the Bill is, in and of itself, problematic.
15. Failure to hold ourselves to account for war crimes increases the risk of incentivising terrorism. If the victims of crimes committed by British forces do not have confidence that the perpetrators will ultimately be prosecuted, then they may feel entitled to take extra-legal measures to achieve (what they will see as) justice. These may include support for terrorist organisations or attacks on UK troops.

### **Problem 3: The Bill is unnecessary**

16. The government have not put forward an evidenced case to justify this Bill. On review of the available evidence from other sources, it appears that the Bill does not address a real problem.
17. The Bill appears to flow from work undertaken by Policy Exchange based on a report called “The Fog of Law”. The thesis of this report is that increased litigation around the work of the armed forces is making it more difficult for them to operate effectively. The report’s assertions, however, are almost entirely unevidenced. It does not cite a single instance in which the decision of a court or even the threat of litigation has compromised the operational effectiveness of the armed forces. It’s case studies are limited to a policy requiring increased oversight of aviation safety measures and speculation about the effect of the *Smith* case. In fact, as is transparent simply from reading the footnotes in the PE paper, the aviation safety measures were implemented on the recommendation of a panel set up by the MoD itself. This

was not in response to either a decided or threatened claim. There is no suggestion that the outcome of *Smith* has, in fact, compromised operational effectiveness.

18. It has been suggested that the possibility of claims against the MoD for incidents that occur in training damage the armed forces' "train hard fight easy" ethos. This is not borne out by the facts. No civil claim has been brought simply because training was "too hard" and there is no way that such a claim could succeed in law.
19. There has, since *Smith*, been an increasing number of claims brought against the MoD. The justice system already has mechanisms to deal with unmeritorious claims. Such claims are struck out by the court without the need for a trial. Costs are almost always awarded against claimant. The very fact that there are a number of claims against the MoD which have been struck out as "without merit" shows that the existing system is effective.
20. The Bill will increase litigation against the MoD and the UK government as a whole:
  - (a) Clause 12 requires the Secretary of State to consider derogating from the ECHR in relation to any overseas operations they consider "significant". The ECHR only permits derogation "in a time of war or public emergency threatening the life of the nation" [**Art. 15**]. An attempt at derogation on the basis of a mere "significant" overseas operation is therefore unlikely to be effective. If domestic courts are prevented from dealing with them by the Clause 12 then claims will simply be settled at the European Court of Human Rights in Strasbourg.
  - (b) Clause 2 provides that, after the expiry of the limitation period of 5 years, "it will be exceptional" for a prosecutor to begin or continue proceedings. This is poor drafting. "Exceptional" has no legal meaning and is ambiguous. It is not at all clear how a prosecutor is supposed to determine whether a war crime (which are, by their very nature, exceptional acts of criminality) is "exceptional" such as to justify proceeding. Decisions of prosecutors will therefore be open to challenge, thereby increasing the potential for claims against prosecutors.

- (c) Given, as set out above, the Bill breaches, and authorises further breaches, of international law, it leaves the UK increasingly vulnerable to action against it in the International Court of Justice and International Criminal Court.

**Problem 4: The Bill will damage the UK’s global standing and “soft power”**

21. After the Second World War world leaders agreed that the primary mechanism for preventing humanitarian and human rights abuses would not be costly and arbitrary armed intervention but, rather, a system of laws. The survival of this system relies on moral leadership. The UK, for much of the second half of the 20<sup>th</sup> century, showed such leadership. In some instances, such as Winston Churchill’s work on the European Convention on Human Rights, and Tony Blair’s promotion of the International Criminal Court, the UK was a genuine world leader.
22. Moral leadership remains an important indicator of international status. The UK is able to exercise significant soft power because it is still, to a certain extent, seen as a moral leader. This Bill signals an intent to resile from the high standards promoted by Churchill and Blair. It is likely, therefore, that the Bill will have a deleterious impact on the UK’s soft power.

SAM FOWLES  
Cornerstone Barristers  
29 October 2020