



The Overseas Operations (Service Personnel and Veterans) Bill Brief to Members of Parliament, September 2020

Introduction

Freedom from Torture has grave concerns about the Overseas Operations (Service Personnel and Veterans) Bill in cases involving allegations of torture, or cruel, inhuman or degrading treatment (other ill-treatment). In our view, the Bill in its current form is incompatible with the UK's obligations under multiple international treaties, including the UN Convention against Torture, the Rome Statute and the Geneva Conventions.

Freedom from Torture is dedicated to healing and protecting people who have survived torture. We provide therapies to improve physical and mental health, we medically document torture, and we provide legal and welfare help. We expose torture globally, we fight to hold torturing states to account and we campaign for fairer treatment of torture survivors in the UK.

Summary

Freedom from Torture opposes the proposal for a presumption against prosecution of service personnel and veterans for any offences involving torture or other ill-treatment on the bases this:

- Risks creating impunity for torture in breach of the UK's obligations under the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment (CAT), the European Convention on Human Rights (ECHR), and customary international law;
- Further undermines the absolute prohibition on torture by encouraging other states to reproduce similar measures.

Any civil litigation "longstop" that prevents a potential victim from pursuing any civil cause of action would undermine torture survivors' rights to redress as enshrined in Article 14 of the CAT.

Breach of obligations under CAT / customary international law

The Bill cannot be considered without full recognition of the strength and significance of the prohibition on torture and other ill-treatment, and of the obligations that flow from it.

1. The prohibition against torture is recognised as a norm of *jus cogens* (or a "peremptory norm") and cannot be derogated from even in times of war or public emergency.
2. The prohibition contained in Article 3 of the ECHR pertains to torture, inhuman treatment and punishment, and degrading treatment and punishment without distinction.
3. The United Nations Committee Against Torture has confirmed that the imposition of a limitation period for the offence of torture is inconsistent with a State Party's obligations under the CAT. The UK is a State Party to the CAT. The effect of the presumption against prosecution is akin to a

statute of limitations because the presumption will prevent prosecution of alleged offenders due to the passage of time.

4. Article 7 of the CAT obliges a State Party to submit cases of alleged torture by individuals in territory under its jurisdiction to its competent authorities for the purpose of prosecution or to extradite the individual concerned (the obligation of *aut dedere aut judicare*). Consistent with the UK's obligation, decisions on prosecutions are to be made in the same manner as in the case of any ordinary offence of a serious nature under the law of that State. However, it is likely that the Bill's high "exceptionality" threshold will result in cases not being prosecuted, despite the fact that the usual conditions for prosecution are met (Full Code Test).
5. Torture and other intentional ill treatment will also constitute a war crime if they are committed during armed conflict, or a crime against humanity if they are committed as part of a widespread and systematic attack on a civilian population: see the 1949 Geneva Conventions and Articles 7 and 8 of the 1998 Rome Statute of the International Criminal Court (Rome Statute). Both war crimes and crimes against humanity are crimes that fall under the jurisdiction of the International Criminal Court (ICC). Article 29 of the Rome Statute, to which the UK is a State Party, states that crimes within the jurisdiction of the ICC shall not be subject to any statute of limitation. Any failure to prosecute a current or former member of the UK Armed Forces for such crimes would expose them to the risk of prosecution at the ICC, on the basis that the UK is "unwilling or unable genuinely to carry out the investigation or prosecution" (Article 17 of the Rome Statute).

The presumption against prosecution

In Freedom from Torture's view, if applied to offences involving torture or other ill-treatment, the presumption would be inconsistent with the UK's international legal obligations and may expose Armed Forces personnel to prosecution before international courts or tribunals.

According to the Ministry of Defence, overseas military operations had previously been thought to be governed purely by International Humanitarian Law (IHL) – which is said to impose "*realistic and reasonable*" obligations on Armed Forces personnel. However, this is irreconcilable with the Bill's "triple lock" on the prosecution of acts of torture or other ill-treatment, which constitute war crimes and crimes against humanity, in other words, serious violations of IHL. All serious international crimes, especially crimes against humanity and war crimes, should be excluded from the presumption against prosecution. Existing legislation ensures that vexatious claims are protected against. Justice – for both victim and accused – is best served by prompt and thorough investigations with due process.

Breach of obligations under Article 3 ECHR

In addition to potentially breaching of Article 7 of the CAT, the presumption against prosecution is incompatible with the UK's obligations under the ECHR where it applies to offences involving torture or other ill-treatment because of the limitation period and an extremely high threshold for prosecution. Given the high threshold of exceptionality, and as for any "relevant offence", there will be significant numbers of cases where the presumption is not displaced and a prosecution is discontinued or never initiated, despite the fact that the usual conditions for prosecution are met (Full Code Test). Such systemic limitation of accountability undermines the effectiveness of the prohibition on torture or other ill-treatment, and reduces the deterrent power of the judicial system, to such an extent as to be incompatible with Article 3 ECHR. Furthermore, the presumption against prosecution would give rise to differential treatment constituting unjustified discrimination pursuant to Article 14 ECHR, read with Articles 2 and 3 ECHR.

The “longstop” limitation period for bringing civil and human rights claims

The proposed period of six years to bring a civil claim in cases of personal injury and death or a human rights claim breaches the UK’s obligations under Article 14 CAT. For example, the UN Committee Against Torture, in its General Comment No. 3, affirmed the obligation of States Parties to the CAT to “ensure that the right to redress is effective” and identified statutes of limitations as potential “obstacles that impede the enjoyment of the right to redress and prevent effective implementation of article 14”.

A time limitation for bringing an action for personal injury or death and/or under the Human Rights Act (HRA) would be incompatible with Article 6 ECHR. This directly affects a victim’s access to the courts and an effective remedy pursuant to Article 13 ECHR. The time limitations for bringing an action for personal injury or death and/or under the HRA would give rise to differential treatment constituting unjustified discrimination pursuant to Article 14 ECHR, read with Article 6 ECHR and possibly Articles 2 and 3 ECHR.

A threat to the UK’s international standing

For centuries the United Kingdom led the way in the evolution of an absolute ban on torture. Torture was ruled out by the English common law, and proscribed by Magna Carta, as far back as the 13th century. The Crown practice of issuing torture warrants was finally ended in 1640. It was not until the 18th and 19th centuries that Continental Europe followed suit. Eventually the British stance prevailed in international law. The UK played a central role in the drafting of the European Convention on Human Rights, the International Covenant on Civil and Political Rights (ICCPR) and the United Nations CAT. As a major military player on the global stage and permanent member of the UN Security Council, the UK plays an important role in the continued promotion of the international rules-based system that it helped to build. The Armed Forces have a responsibility for upholding this global leadership, including by setting an example in relation to accountability for any torture or other ill-treatment committed by our personnel on the battlefield. If Britain is to deliver on what Foreign Secretary Dominic Raab described as a foreign policy guided by “a clear moral compass”,¹ it must demonstrate in both deeds and words the importance to peace and security of justice for victims of international crimes and serious human rights abuses.

This law would therefore create a risk of impunity for torture or ill-treatment committed by UK personnel and thereby damage the UK’s international standing, in relation to human rights and the rules-based international system more generally, undermine the global torture ban and and erode norms that protect UK personnel from torture or ill-treatment in the event of their own capture during hostilities.

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¹ See Speech of Rt Hon Dominic Raab MP, Foreign Secretary and First Secretary of State, Conservative Party Conference, 29 September 2019.