HOUSES OF PARLIAMENT

Joint Committee on Human Rights

Oral evidence: Legislative Scrutiny: Bill of Rights Bill, HC 611

Wednesday 7 September 2022

Watch the meeting

Members present: Joanna Cherry MP (Chair); Baroness Chisholm of Owlpen; Lord Dubs; Florence Eshalomi MP; Lord Henley; Baroness Ludford; Lord Singh of Wimbledon CBE.

Questions 1 – 8

Witnesses

I: Sir Peter Gross QC, Chair, Independent Human Rights Act Review Panel.

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Examination of witness

Sir Peter Gross QC.

Q1 **Chair:** Good afternoon, everyone. Welcome to this meeting of the Joint Committee on Human Rights. We are a Joint Committee of Peers and Members of Parliament. This afternoon we will be taking evidence on the Bill of Rights Bill that was introduced into the House of Commons on 22 June 2022. The Bill was due to have its Second Reading on Monday next, 12 September, but due to the change of Prime Minister and Cabinet we understand that will not now be happening, and there may indeed be a question mark over the Bill's future. That as may be, today we will look at the Bill. It would repeal the Human Rights Act and make various changes to the current human rights framework in the United Kingdom.

In this evidence session we will question a number of notable experts on the Government's Bill as part of our job as the Joint Committee on Human Rights, which is to scrutinise such legislation.

Our first session will be with Sir Peter Gross, who chaired the independent Human Rights Act review. We will seek his views on the Bill and the implications it will have for the relationship between the United Kingdom's domestic courts and the Strasbourg courts, and their relationship with Parliament, and the relationship between the UK courts and the Government. In our second session we will question a former Supreme Court judge, a barrister and a legal academic on the implications of the Bill.

For our first session, I start by welcoming Sir Peter Gross, whom we are delighted to have with us today. He was appointed in December 2020 to chair the independent Human Rights Act review. He will be well known to any lawyers watching this session. He has been a barrister since 1989 in commercial chambers and was appointed Queen's Counsel in 1992. He was appointed to the Court of Appeal in 2010, and from January 2013 to December 2015 he was a senior presiding judge for England and Wales. Thank you, Sir Peter. We are very grateful to you for giving up your time to be with us this afternoon.

We carried out scrutiny of your independent review some time ago, but, as I said earlier, we are meeting this afternoon in a state of uncertainty as to whether Dominic Raab's Bill of Rights will proceed at all. It has been reported by a number of reputable and well-connected political journalists that the Bill will be shelved. It has also been reported that a senior government source said it will not be coming back in its current form. Today seems a very good time to revisit the independent review of the Human Rights Act that you chaired in 2021.

I know that you reported on 14 December after a year of very detailed consideration of the law and a very significant amount of public engagement. I would like to start by asking you about the process of producing the review and to ask you to make any introductory comments you might like to make.

Sir Peter Gross: Thank you very much for this invitation. It is a great pleasure to be here today. If I may seek your indulgence, could I start with a few general words that will put my further remarks in context and probably speed them up as well? I will pick up fairly early on the methodology we adopted.

In my evidence to you today, my anchor is the IHRAR report—which, for our sins, is that. I am not freewheeling. I emphatically do not want that report to be lost in the crossfire surrounding the Bill. The recommendations we made endure, whatever view is taken of the Bill.

I was appointed by the Government—Robert Buckland was then Lord Chancellor—to conduct an independent, evidence-based review. Our terms of reference, importantly, were limited to the operation of the Act. The substance of convention rights fell outside our remit. If I may say so, my panel fulfilled the task entrusted to it and we urged Her Majesty's Government to implement its recommendations in full. That remains my position.

The panel's view in a nutshell was that, although generally the HRA had worked well, there was clear room for a coherent package of practical reforms designed to improve its operation, with benefits both domestically and to the UK's relationship with Strasbourg. These recommendations included, among others, amending Section 2 of the Act to give greater prominence to the common law, putting it centre stage; targeted proposals addressing concerns as to Section 3 of the Act, designed to generate light rather than heat; and recognition of an extraterritorial jurisdiction problem resulting from the course taken by the Strasbourg jurisprudence, while emphasising in the UK national interest the need for a multilateral rather than a unilateral solution.

Coming to the methodology, the first thing to stress is that we were independent. Secondly, we had a panel of eight, of varied backgrounds and experience, and our conclusions were informed by a wide-ranging and transparent evidence-gathering exercise. Forgive me, I will belabour that for a moment.

We asked for evidence. We received over 150 written responses to the call for evidence from people across the entire spectrum of opinion. We were dealing with this during Covid and so, although this was a topic crying out for meeting people, we could not do that in person. We had 13 online round tables—what I would call targeted engagement—with interested groups. We had one round table of a special nature with individuals who had personal experience of relying on the Act for securing their rights. We also had seven online roadshows, as we called them. The roadshow was our equivalent of a town hall meeting—because we could not go to town halls—and these were generously facilitated by universities around the United Kingdom. We were UK-wide, so the roadshows and round tables covered England, Scotland, Wales and Northern Ireland. We also met judges from the Irish Supreme Court, the German Constitutional Court and the European Court of Human Rights. That was the work done before we came to our conclusions.

It is striking that the Government have not to date responded in a reasoned or iterative fashion to the IHRAR report. To the contrary, in important respects, the then Deputy Prime Minister simply went against it. To reiterate, reflecting our concerns about the operation of the HRA, IHRAR proposed specific targeted reforms, certainly not repeal of the Act.

Looking ahead, I am and remain happy to discuss with government the way forward. I hope that whatever increased time is available will provide the opportunity and the opening for dialogue and reasoned engagement with government, and consideration of—and, ideally, from my point of view, implementation of—the panel's recommendations.

If I may, Chair, it further goes without saying that I would be delighted to work with this Joint Committee as to its proposals to address the matter.

Chair: Thank you so much, Sir Peter. That is an offer we would be delighted to take up. The new Cabinet Office has a lot on its plate, particularly with the cost of living and energy crises and the war in Ukraine, but this is an important issue for the whole of the United Kingdom, as you say, because the Human Rights Act applies across the whole of the UK. As a Scots lawyer, I was very grateful that in your report you took the trouble to distinguish between common law and case law in Scotland. If the new Cabinet and Justice Secretary at present or over the next few days are wondering what to do, if they are going back to the drawing board, would you say to them that it would be a good idea to go back to your very detailed report, to consider it properly and produce a detailed response to it?

Sir Peter Gross: Yes please, is the answer. If they wanted a shorter read, the executive summary is probably more manageable than the full version.

Chair: I think the report runs to about 500 or 600 pages. You have explained to us the process that went into producing it. I believe Lord Carnwath described your report and the Government's consultation as ships that pass in the night because, rather than responding to your report, the Government issued their own consultation on the same day. Therefore, as yet, you have not had a response to your report in the normal way that one might expect.

Sir Peter Gross: That is correct.

Chair: If there were to be a pause at this stage, it might be a good opportunity to go back and do that.

Sir Peter Gross: We would welcome it. We would welcome reasoned engagement and dialogue with whoever in government is dealing with this.

Chair: Were you surprised that the Government came to a different view from your report? In some ways it seems a silly question, because your report landed on our desks on the same day as something rather radically different, but how did you feel about that?

Sir Peter Gross: Maybe I will be forgiven for saying that I am no longer surprised by anything. It is not really a question of surprise. We simply took the view that repeal of the Act was not something that we supported. It was actually not part of our terms of reference. We were never asked to consider it. As recorded in our report—for those who want the references, it is Chapter 1, paragraph 26, and Chapter 2, paragraph 19—there was an overwhelming body of support for retaining the HRA. The response to the government consultation appears to have been much the same. By contrast, IHRAR was not provided with evidence showing any depth of support for a Bill of Rights, nor were any detailed arguments put forward in favour of repeal of the HRA and its replacement by a Bill of Rights.

Chair: You have already said it was no part of your remit to look at the substance of the rights protected by the European Convention on Human Rights. I suppose then it was no part of your remit to consider a Bill of Rights for the United Kingdom.

Looking to the Bill of Rights Bill currently before us, are there any clauses in it that you welcome as important or necessary changes to the domestic human rights framework?

Sir Peter Gross: If I can be brief, I welcome Clause 25, which imposes a duty on the Secretary of State to notify Parliament of failure to comply with the convention. The politics of such notifications may be another matter. The politics are not for me, but the duty to make sure Parliament knows about it struck me, speaking personally, as a good thing.

I am also obviously content with the areas where the Bill is in agreement with the IHRAR report: broadly speaking, remedial orders in Clause 26, derogation orders in Clause 27 and suspended quashing orders—they are not in the Bill, but that is simply because they are appropriately provided for in the Judicial Review and Courts Act, and that is explained in the Explanatory Notes. That is the bit I welcome.

Chair: Those are the bits that you like.

Sir Peter Gross: Yes.

Chair: Are there any clauses in the Bill of Rights that you are particularly concerned about, and might that be a longer list?

Sir Peter Gross: This is a longer answer, so please bear with me. I put to one side some provisions that are more show than substance. For instance, there is Clause 1(2)(a) on the role of the Supreme Court. It says something like "the Supreme Court will be the supreme judicial authority for domestic law". Well, it is; it always has been. The Bill changes nothing and adds nothing, so that is just show. I put that to one side. It can be there or it can be absent; it matters not. But there are a number of clauses that, as a matter of substance, give rise to particular concerns. Let me give you three that go directly to our report and three

that trouble me, even though we were not particularly focused on them. The first three go directly to matters we have dealt with.

The first one is the repeal of Sections 2 and 3 of the HRA, which increases the likelihood of the development of a substantive gap between domestic rights and the convention. We dealt with the question of repeal of Section 2 and rejected it. The reference is paragraphs 145 to 150 of Chapter 2 of our report. We were, we think, very clear on that point, saying in paragraph 145 that it would result in there being no formal link between the HRA and the convention and that, while the United Kingdom remains a party to the convention, that option had nothing to commend it. For good measure, we added at paragraph 150 that it could not sensibly be contemplated. So, yes, we are concerned about the abolition of Section 2. We are also concerned about Section 3; I will say more on that presently.

The second point is the uncertainty flowing from the repeal of these provisions, which is not in any way cured in the case of Section 3 by Clause 40 of the Bill, which, to me at least, appears to be an open-ended Henry VIII power. I will come back to Section 3 as you have specific questions on it.

The third point is that Clause 14 troubled me. Again, I will come back to it because I would like to say something much later about extraterritorial jurisdiction. Clause 14 risks the UK scoring an own goal by straying into unilateralism. For my part, I am not sure that Clause 39 provides a sufficient safeguard.

Those are the matters—repeal of Sections 2 and 3 and uncertainty in Clause 14—that go directly to matters we covered.

Chair: I think we have some specific questions for you in a moment about Sections 2 and 3 in particular. I did not mean to interrupt.

Sir Peter Gross: All I was going to add is that there were certain other clauses of concern, but not as directly in conflict with what we were saying. I will just list them very briefly.

First, there is the importance attached to what might be called originalism. That is the mandatory requirement for courts to have particular regard to the text of the convention right, in Clause 3(2)(a).

Secondly, Clauses 5 and 7 both appear to involve micromanagement of the domestic judicial process, as I think one commentator called it. There are further problems about Clause 5. What is a positive obligation? Is Clause 5 for ever, so we can never have another positive obligation? Will Clause 5 fall foul of Article 13 of the convention on proper remedy? As to Clause 7, much depends on how the courts might apply it. That is the balance and who sets it. At best, given the philosophy of judicial restraint, it might be said that Clause 7 is unnecessary and rather strange surplusage.

Chair: Originalism is a very old-fashioned way of looking at and interpreting fundamental statutes or constitutions. I remember hearing a

lecture by Justice Scalia in Edinburgh many years ago in which he advanced that approach, but it is not really an approach we see much in the civilian or common-law tradition, is it?

Sir Peter Gross: The way I would seek to put it is that, of course, one starts with the text and then looks at the context, but the oddity perhaps is that, if you look at Clause 3, it is one of the only two things that are mandatory. You must look at the text and the travaux préparatoires. The other thing that is mandatory is idiosyncratic, but I will come to that in a minute. Originalism is simply a starting point, one might think.

The third point that troubled me was Clause 3(3)(a), which says we cannot give a meaning or force to a right going beyond where Strasbourg has put it unless the court has no reasonable doubt that that is where the Strasbourg court would go. This puts an absolute premium on second-guessing in advance what the Strasbourg court might do. We find that idiosyncratic. I think that is the best way I can describe it.

Chair: We have some specific questions for you on some of these clauses but, before we move on, I want to ask a general question. The panel that you chaired very much emphasised the role that the Human Rights Act has played in enabling people in the United Kingdom to enforce their rights in the UK courts. What impact do you think this Bill of Rights would have, if it was passed, on people trying to enforce their rights?

Sir Peter Gross: I am concerned about the likelihood of a greater gap between what our courts can give and what Strasbourg can do, and I am concerned about the uncertainty that will flow from the provisions in the Bill. Both gap and uncertainty would have an impact on people trying to enforce their rights domestically, which is one of the aims, rather than taking the slower and more expensive route to Strasbourg.

I would add that we certainly emphasised that human rights were for all, hence not least our recommendation for education, and that the Act or the convention should not be viewed through the prism of a few high-profile court cases. One of the most telling examples given to us was the position of care homes during the pandemic.

Chair: Thank you. That is very helpful.

Q2 **Baroness Chisholm of Owlpen:** Sir Peter, welcome and thank you for coming today, particularly as we are now rather uncertain about what is going to happen to this Bill. All of what you say will be very useful to us anyway, because I am sure something will appear at some stage and we can use your evidence to take forward.

Having said that, the Bill that was going to be before us would remove the obligation on the UK courts to take into account Strasbourg case law. I have two questions on that. First, what would be the impact on the dialogue between the Strasbourg court and UK courts? Secondly, what impact will it have on how much weight the Strasbourg court gives UK court judgments?

Sir Peter Gross: As already underlined, IHRAR was strongly against the repeal of Section 2 and removal of the formal link. We proposed an amendment to the section—I will come back to that. The removal of Section 2, if it went ahead, would be likely to have an unfortunate impact on the dialogue between our courts and the Strasbourg court, with the further risk that UK court judgments in the future would carry less weight in Strasbourg than they now do.

I would like to emphasise the importance IHRAR attached to judicial dialogue between the United Kingdom courts and Strasbourg. Please see in that regard Chapter 4 of the report. There is no doubt that such dialogue has proved effective. The best-known example probably concerns hearsay evidence and whole-life sentences where the United Kingdom view prevailed after what might be described as some initial disagreement. IHRAR's thinking is encapsulated, if a reference would be helpful, in paragraph 35 of the executive summary where we emphasise the mature equilibrium, as it was put to us, reached between UK courts and Strasbourg—the mutual respect and high regard in which Strasbourg currently holds UK court decisions.

As we expressed it there, that is a United Kingdom asset, probably underappreciated domestically. We are very keen on emphasising it because it is a point for us and I would be very unhappy to see the standing in which our courts are held in any way diminished. Currently, we have a good relationship with Strasbourg. No such relationship is ever proof against the odd unfortunate decision, or interim decision. It is the overall relationship that counts and you preserve that by maintaining dialogue between the parties.

Baroness Chisholm of Owlpen: That is very helpful and very well explained.

Q3 **Baroness Ludford:** Sir Peter, I add my sincere thanks for your presence today, notwithstanding the uncertainty about the future of the Bill. I agree with the remarks you made in your introduction and the Chair's comments about the value of your report because, whatever happens, it will be of continuing influence. I was going to ask you about a significant gap, but you have answered that point, so I will turn straight to the second part of my question.

What impact do you think the Bill would have had on the number of adverse rulings from Strasbourg and the number of declarations of incompatibility being issued by UK courts, and what do you think the implications of both those results would be?

Sir Peter Gross: I am grateful that you have gone ahead with this session because, whatever happens to the Bill, I would like to think that the IHRAR report will endure, and indeed there is scope for properly discussing it now.

The gap risks more friction, and hence a deterioration in the overall good relationship that I have described between our courts and Strasbourg. By creating or increasing that gap, the Bill runs contrary to one of the clear

purposes of the HRA, which was to enable those in the United Kingdom to enforce their rights here. The Bill is highly likely to lead to more cases going to Strasbourg with inevitable increases in costs and delay. The Bill further risks an increase in the number of adverse rulings from Strasbourg. The real point is not so much the adverse rulings but the fact that the cases should not be going there and should be dealt with here. There is a risk of an increased number of declarations of incompatibility, subject to the manner in which our courts interpret the new provisions, if they were or had been enacted in accordance with the Bill.

Baroness Ludford: I will not risk bringing you into Brexit, but the fact is that our position in the Council of Europe is due partly to our standing with the court. You have explained the mature equilibrium in the judicial dialogue between the UK courts and the Strasbourg court, and the influence of our rulings in Strasbourg that permeates through the judicial systems of other member states of the Council of Europe. Do you see that whole scenario, which I would have thought is very positive, even to the proponents of the Bill, putting at risk and reducing our stature across the whole of wider Europe?

Sir Peter Gross: I cannot comment on Brexit.

Baroness Ludford: Do not worry.

Sir Peter Gross: That was certainly outside IHRAR's jurisdiction, thankfully, but in paragraph 35 of the executive summary we describe that relationship and single out an unusual feature where the Strasbourg court made particular use of a UK decision in a case in which the UK was not a party. I do not think that is the only instance, but it is certainly the most notable one. That was cited to us as proof of the high regard and, dare I say, influence that our courts have there, and the influence that our courts have there is part of the influence the UK enjoys. That is why I describe it as an asset.

Q4 **Lord Dubs:** Thank you, Sir Peter, for a very interesting session. Your panel recommended a greater role for the common law when deciding human rights cases. If it were to go through, do you think the Bill would enable judges to use common-law rights more effectively than they do now?

Sir Peter Gross: No. To elaborate a little, in fact, it is an unhesitating no. The Bill does nothing for the common law. Importantly, we recommended in Chapter 2, dealing with Section 2, giving the common law greater prominence and putting it centre stage. That was our recommendation for amending Section 2.

There were good reasons for doing so. First, it is the right thing to do for confidence in our own law. Secondly, it would enhance domestic support. We were very much alive to the fact that the Act has not enjoyed the sort of support one might have expected, and if things are couched in familiar terms rather than terms that some see as different, that would help. Thirdly, from a Strasbourg point of view, looking at the common law first

was a principled application of the doctrine of subsidiarity, on which we and Strasbourg are in full agreement. That is what we proposed.

In stark contrast, if I can bother you with Clause 3 of the Bill, Clause 3(2)(a) makes it mandatory to look at the text of the convention rights—that is the originalism point. Clause 3(2)(b) says, "may have regard to the development under the common law". Of course, "may" is different from "must". It is interesting that the common law gets only a "may". In our view on the wording, it is an also-ran in the Bill; Clause 3(2)(b) is a meaningless provision because of course the court may have regard to the common law. In our proposed amendment of Section 2, we put it right up at the top so that it is the first thing you look at.

Chair: The first thing you look at is your own common law, in England and Wales, and case law in Scotland to see if it provides an answer to the question and, if it does not, you move on to look at the convention rights.

Sir Peter Gross: Indeed. In doing that, we were intending to codify two Supreme Court decisions: Osborn and Kennedy.

Chair: Sorry, Lord Dubs, I interrupted.

Lord Dubs: No. Thank you, Sir Peter.

Q5 **Chair:** That is extremely helpful. Perhaps I could now come back to your deliberations on Section 3 of the Human Rights Act. The Bill of Rights Bill would remove Section 3, which requires the court to interpret legislation compatibly with convention rights. The Bill of Rights Bill would take that out completely. You considered doing that, but you did not recommend the removal of Section 3. Can you explain for us in short compass why you reached that view?

Sir Peter Gross: Yes, we devoted some time to that. We were very much alive to the concerns about Section 3. It is an unusual provision. It is a very strong interpretative rule because it says that our domestic legislation, in broad terms, is to be interpreted compatibly with convention rights whenever possible—putting the emphasis on "possible". Our usual rule is that, in the case of ambiguity, one interprets compatibly with our international obligations. This was a stronger power and duty placed on the courts, and one can readily understand the concerns expressed by those who were alarmed about the risk of the courts straying into a legislative function.

We looked at that rather closely, and, in our view, which we set out at length in Chapter 5, it emerged that of the two cases that gave the most concern and were always relied on, one went back to 2000 or 2001, Re A, and the other was a few years after that, called Ghaidan. In both decisions, it could have been said that a declaration of incompatibility might have been more juristically pure, but both decisions had important pragmatic advantages. Be that as it may, those were the two decisions that were always relied on when people wanted to say that there had been judicial overreach.

With respect, and whatever one thinks of the decision, the Ghaidan case produced a measured set of principles as to how the law should be applied. It seemed to us that there was not a good case for simply repealing the Act, with the inevitable uncertainty—a point rather proved by the existence in the Bill of Clause 40—so we came out against it.

We were also rather struck by the amount of heat generated in the debate on Section 3, which we thought was probably unmerited. We therefore proposed three things in respect of Section 3. The first was a rule requiring clarification by the court of whether it was in fact using the Section 3 rule of interpretation or the ordinary rule of interpretation, which would often be the case. Chair, you will know that courts will often say, "We can deal with this quite simply. We don't need to worry about the Section 3 rule". Our suspicion is that Section 3 is actually applied in only a very limited number of cases, so we thought that the clarifying amendment would bring into sharp focus whether or when it was.

The second recommendation was a database of Section 3 cases. To keep it manageable, one could always put the floor at either the High Court or the Court of Appeal, or wherever you wanted, to make sure that you were not overwhelmed with trying to research it.

I am afraid that the third recommendation involved this committee. We suggested that just as it does the most valuable work on Section 4 cases—declarations of incompatibility—with respect, it could with profit look at Section 3 cases, certainly those of the higher courts.

A few other points on Section 3 are worth mentioning today. The first is that, despite the criticisms of Section 3, the Government normally prefer Section 3 to Section 4.

Chair: They would prefer to invite the court to read the Act down, in a sense, as opposed to finding it incompatible.

Sir Peter Gross: Precisely. That has been seen routinely. The second point is that in this jurisdiction, the United Kingdom, if a legislature does not like the result of a court decision, it can reverse it. It does not need a constitutional amendment; it just needs to pass an Act of Parliament. Strikingly, whatever the criticism of Section 3, we could not help but note that we are not awash with reversals of decisions on Section 3. We therefore thought that, rather than getting into repeal, if our package was adopted, one could then pause and see what the result was and whether there really was a problem—in which case you could target it—or whether this was simply a matter of perception.

Chair: Thank you, that is very helpful.

Q6 **Florence Eshalomi:** Good afternoon, Sir Peter. You have touched on this briefly, but you may remember, when the Government announced the consultation paper that preceded the Bill, it was stated that the Bill of Rights would essentially give powers back to UK judges. There was a lot of press about freedom of speech, giving more permission to the courts

to intervene in what they called trivial legal cases and not wasting taxpayers' money. Do you think this is an accurate representation of the Bill?

Sir Peter Gross: It is not one that satisfies me, if I could put it that way. The reason I say so is this. If it was said that it would give power back to UK judges, that assumes that power had been taken away. But no power was ever taken away. If it is based on the assumption that the courts were bound by Strasbourg, the courts were not. I have difficulty with that way of looking at it, with respect to those who said it.

I also know that courts, without the clause about a permission requirement, have their own ways of getting rid of hopeless cases. My answer to your question is that I was not attracted, if I can put it that way, to the way it was put, and I think it may be based on a fallacy.

Q7 **Lord Henley:** Thank you very much, Sir Peter. In the report to which you have alluded, your panel made recommendations that the role of Parliament and, for that matter, this committee, in protecting human rights could be enhanced. The Government have stated that their Bill, which we now think is likely to be dropped, will increase the role of Parliament. Do you agree with that assessment by the Government? How do you think Parliament's role should be enhanced, and what do you think is the right balance between government, Parliament and the courts?

Sir Peter Gross: Thank you for the question. Subject to the reforms we suggested, it struck us that the balance between the branches of state appear to be in good order. Parliament passes a law, the Executive carry it out and the judiciary interprets the law and applies it. Two important considerations underpinned our views: institutional respect between the three branches, and judicial restraint, which is a concept we spoke in favour of quite warmly in the report, and which is certainly the prevailing philosophy in the Supreme Court at the moment.

For the reasons already discussed, we have been somewhat sceptical about the Bill improving matters. Will it increase the role of Parliament? I am not sure. Time will tell whether the Bill, in its current form, will increase the role of Parliament as opposed to the Executive. That is unclear to me.

Chair: You spoke about Clause 40 in relation to that earlier.

Sir Peter Gross: Indeed. That is a very open-ended provision. Which interpretations do you save? Which do you let go to the wall, and on what grounds?

Chair: You are essentially giving that decision to a Secretary of State.

Sir Peter Gross: That is indeed so. As for our recommendations—forgive me, because they would land work on this committee—the principal one looked at Section 3, but we also suggested that, subject to your views, it might be time to look again at the guidelines you had in respect of

remedial orders. We noticed that they existed but had not been referred to, so we invited you simply to have another look and see whether they were of use. I am sure they are out of date by now, but that is in our chapter on remedial orders—I forget the number.

Q8 **Baroness Chisholm of Owlpen:** Your panel talked about the extraterritorial applicability of the convention being unsatisfactory. Can you say a little about how this will prevent, say, victims of human rights violations, particularly with overseas military operations, being able to enforce their rights under the convention?

Sir Peter Gross: We took a strong view on this topic, perhaps from a slightly different angle. We were troubled, and said so, by what appeared to us to be an unwarranted expansion of convention jurisdiction. We thought that the convention was never intended to apply worldwide, and it has undeniably expanded. Moreover, it sits very uneasily in active combat operations, where it exists alongside international humanitarian law—IHL.

In our view, for the reasons we gave, there was a clear case for change, but the far more difficult question was how to achieve that change. Given the linkage between the HRA jurisdiction and the convention, although we understood the temptation simply to narrow the HRA jurisdiction and remove the extraterritorial aspects, we took the view very strongly indeed that that would result in an own goal—to use a footballing metaphor—potentially carrying very serious consequences for United Kingdom interests. The reason is that our Armed Forces and agencies would find themselves defending the case in Strasbourg but without the benefit of domestic court rulings or procedures, such as closed material procedures. In that, we felt we had the very strong support of those in the know on such matters.

We therefore proposed a multilateral solution at convention level. Technically, the ideal would be a protocol amending the convention along the lines of the Brighton declaration, which certainly succeeded on subsidiarity. We also noted in this regard that there had been strong dissenting voices in Strasbourg as to the course taken by its own jurisprudence, so we did not feel that we were raising a point on which all were necessarily unanimous over there.

Our concern about Clause 14 is that it flirts with a unilateral approach, and, speaking for myself, I am not confident that Clause 39 furnishes a sufficient safeguard against such an approach. I cannot overemphasise that the UK interests involved are of the first importance—the Armed Forces, the agencies and the police—and we certainly did not want to be party to damaging those interests. I certainly do not think that the view IHRAR favoured would leave complainants or victims without recourse. International humanitarian law applies anyway in situations where such concerns arise, and the country's Armed Forces and agencies are in any event subject to discipline and law. Without taking up your time on it, in Chapter 8, paragraph 58 of the report, we quoted from Lord Bingham's

dissenting judgment in Al-Skeini, on why, in his view, and the view that IHRAR shared, that was not a concern.

Chair: To summarise, you felt that it was in the United Kingdom's best interests to seek a multilateral solution to this problem and that, given previous dissenting opinions in Strasbourg, there were reasonable prospects that that might be achievable.

Sir Peter Gross: We certainly felt that it was in the United Kingdom's strong interest in very important areas to seek a multilateral solution. I could not give a percentage outcome on how the negotiations might go, but it was clear to us that that was the way to go, and there was reason to believe that other countries and views in Strasbourg might not be far apart from ours.

Chair: Thank you, that is very helpful. It brings this part of our evidence session to a close. It remains for me to thank you, Sir Peter, and your team—your panel—for the very thorough job that you did and to express the wish that, if it is correct that the Bill of Rights Bill will be shelved, the outcome of your deliberations will once more take place centre stage where, in my opinion, it deserved to be in the first instance. We are also very grateful to you for your offer to work further with this committee. We thank you for that and for your time this afternoon.

Sir Peter Gross: Thank you very much indeed and for the time this afternoon.