HOUSES OF PARLIAMENT

Joint Committee on Human Rights

Oral evidence: The Overseas Operations (Service Personnel and Veterans) Bill, HC 665

Monday 28 September 2020

Written evidence from witnesses:

- Martyn Day
- Mark Goodwin-Hudson
- Elizabeth Wilmshurst CMG
- Reverend Nicholas Mercer

Watch the meeting

2.30 pm

Members present: Ms Harriet Harman (Chair); Lord Brabazon of Tara; Fiona Bruce; Ms Karen Buck; Lord Dubs; Baroness Massey of Darwen; Lord Singh of Wimbledon; Lord Trimble.

Questions 1-12

Witnesses

I: Martyn Day, Senior Partner, Leigh Day; Mark Goodwin-Hudson, former British Army Officer; Reverend Nicholas Mercer, former Command Legal Adviser in Iraq; Elizabeth Wilmshurst CMG.

Examination of Witnesses

Martyn Day, Mark Goodwin-Hudson, Reverend Nicholas Mercer and Elizabeth Wilmshurst CMG.

Q1 **Chair:** Good afternoon, everybody, and welcome to this evidence session of the Joint Committee on Human Rights. We are a Select Committee of Parliament. Half of us are Members of the House of Commons and half are Members of the House of Lords. This is a public evidence session, and we are looking at the Overseas Operations (Service Personnel and Veterans) Bill, which makes changes to how the law applies to offences or wrongs that have allegedly happened on overseas operations.

We will join the national minute's silence at 2.33 pm for the police officer Matiu Ratana, who was tragically killed in Croydon police station.

Our witnesses today are Martyn Day, senior partner in the firm of solicitors Leigh Day, Mark Goodwin-Hudson, a former British Army officer, the Reverend Nicholas Mercer, a former command legal adviser in Iraq, and Elizabeth Wilmshurst, a fellow of Chatham House, and we will put our questions about this Bill to them.

The enforcement of the criminal law in respect of actions that took place overseas is a complex area, so I suggest that we begin with a thumbnail sketch of the current safeguards for defendants and how the Bill would change that position. That will give us context for our very specific questions. We know that we are talking about defendants, or potential defendants, who are currently members of the Armed Forces, or were at the time, but are we talking just about victims who are foreign nationals? Might the alleged victim be another member of the Armed Forces? Are foreign nationals in the same position as other members of the Armed Forces when an alleged offence has been committed?

A minute's silence was observed.

Q2 **Chair:** I will start with a question to all the witnesses. I am very grateful to you for joining us. This Bill introduced a statutory presumption against prosecution after five years from the date of the alleged criminal conduct. After that, it has to be exceptional for a prosecutor to proceed with a prosecution against a serviceperson or veteran for an offence committed during an overseas operation. In your view, in principle, is the introduction of a presumption against prosecution of service personnel and veterans justified or necessary?

Elizabeth Wilmshurst: No, it is not justified. There has been a problem, in that service personnel seem to have been the subject of inquiries and investigations, sometimes more than one in relation to the same incident. But the presumption is not the way to fix any problem that there may be. The presumption puts at risk the UK's reputation as an upholder of international law and puts UK service personnel at risk of being prosecuted not before our own courts but before the International Criminal Court.

Mark Goodwin-Hudson: I agree with Elizabeth. I come at it from a slightly different angle, in highlighting what we need instead of the presumption against prosecution. That is the ability to conduct accurate and timely investigations in theatre as the best means to stop this spiralling of reinvestigation and to understand and address the allegations against our soldiers. I can expand on that later. For me, the absence of the establishment of a form of conducting meaningful investigations is one of my problems with this Bill.

Chair: Can somebody answer my question about the potential victim in this situation? What if the victim is also a member of our Armed Forces at the time? Does this apply just to victims who are foreign nationals in the area of the overseas operation, or does it apply to members of our Armed Forces who are there at the same time?

Reverend Nicholas Mercer: I will try to address that. I have not practised law for 10 years, because I have been a clergyman, but as far as I am aware it applies only to foreign nationals. As for UK personnel, if they were subject to an investigation, ordinary domestic criminal law would apply.

Chair: Basically, if the allegation is that a member of the Armed Forces committed an offence against a foreign national more than five years ago, the prosecution would be restricted in the ways we will hear about. If the offence was against a fellow member of the Armed Forces, there would be no such restriction.

Reverend Nicholas Mercer: That is my understanding, because ordinary domestic criminal law would apply by virtue of military law. Wherever you are serving in the world, military law follows you around, and that incorporates English criminal law. I had not thought of that particular aspect.

I follow Elizabeth's lead on this, in that five years is totally unnecessary. Indeed, it is impractical, because of what Mark has already hinted at in relation to investigations. The UN rapporteur on torture said that this five-year limitation grossly underestimates the practical risks and difficulties experienced by many victims of torture. In some cases, people live with torture for years or decades. To have a presumption against prosecution would be grossly unfair to victims who are struggling to cope with such trauma.

As a matter of law, I am sticking my neck out here, but in my view a statute of limitations breaches the UN convention on torture, which expressly states that there is to be no statute of limitations. Therefore, as far as torture is concerned, this Bill violates that convention. There is a problem in reconciling the two. As far as ordinary criminal law goes, from my experience one of the problems encountered on battlefield investigations is, as Mark pointed out, how you investigate in a timely fashion in a warzone. It is no one's fault; it is just incredibly difficult,

particularly when the area in question might not be secure. Police have to go in in very difficult circumstances.

Another factor is that soldiers, even to this day, have put up what has been termed a wall of silence. We heard in the Saville inquiry about soldiers not breaking ranks, and we heard about it in Baha Mousa. If you put a statute of limitations on it, there is a temptation to run down the clock. The law is fine as it stands. Any attempt to put a time limit on it raises problems of its own and is unnecessary.

Chair: If the potential victim is a foreign national, the prosecution is restricted, but if the potential victim is a fellow member of the Armed Forces the prosecution is not restricted. Is that not a bit uncomfortable? The idea is that, if you are a foreigner, your opportunity to have justice as a victim can be happily restricted, but there is no such restriction when the alleged victim is a UK national or member of the Armed Forces. Does it feel fair to have a different situation for foreign nationals and members of the Armed Services in terms of whether they are victims?

Elizabeth Wilmshurst: No, it does not. Strictly speaking, it is not foreign nationals who are discriminated against. It is everyone except for UK service personnel. Theoretically, it could be a UK national who, as a victim, is being discriminated against. That is one form of discrimination. Another is that UK service personnel are being privileged altogether, whatever they do. It is not fair. It is one of the many oddities and unfairnesses, in my view, of the presumption against prosecution.

Chair: Since you have all said that it is not necessary or justified, perhaps this is a difficult question to answer, but if it was to be justified, would five years be a reasonable period? We have already heard a bit from Mark about that. What would be the practical impact of this five-year cut-off?

Mark Goodwin-Hudson: Nicholas Mercer talked about the practical difficulties, both of coming to terms with torture, for example, and of the time required to carry out investigations. Before I go forward, I will say one thing about this. Johnny Mercer should have some credit for trying to deal with the fact that we often have a cycle of investigations, as you said at the start; people are reinvestigated and reinvestigated. Major Bob Campbell is a good example of that. What Johnny Mercer is doing in this Bill to try to protect our soldiers is admirable.

One reason why there is a need to do so is because of the Ministry of Defence's absence of leadership. It lurches from one extreme to the other. Either it washes its hands of soldiers and leaves them to this constant cycle of reinvestigation, as with Bob Campbell, or, at the other extreme, it completely denies that anything has happened, denies any civilian harm or denies that there is anything to answer for.

It is admirable to try to do this. As I said, it is not necessarily the right answer; the answer lies in actually being able to carry out investigations properly.

I do not know what a better number would be. A better answer would be to do this swiftly and properly, so that we do not have it dragging on. In the case of Bob Campbell, this dragged on for years and years—17 years. That is not an adequate or decent way to treat our soldiers. I am not sure what the number should be, but I am coming at it from the point of view that we should not be in this space anyway. Does that make sense?

Chair: You believe that there is a problem, but that this is not the solution and in itself raises other issues while leaving the original problem unaddressed.

Mark Goodwin-Hudson: Yes. I can talk more about how we can deal with that, because I have led investigations in Afghanistan into allegations of civilian harm. I have a lot of experience of that.

Chair: We look forward to hearing about that in a moment.

Martyn Day, is it necessary or justified, in principle, to have restrictions that apply where the offence is alleged to have been carried out more than five years ago by a member of the Armed Forces in an overseas operation?

Martyn Day: First, I apologise that my system went down for a bit, so I did not hear everything said previously.

It is not justified at all. It seems totally clear to me that the main problem is the failure of the prosecuting authorities, the Royal Military Police, to do a thorough job at the start. It is even recognised by the Ministers that, if they had done their job at the start, there could have been a proper analysis of whether prosecutions could be brought on the evidence that they had.

The fact that the Royal Military Police were so poorly resourced and so non-independent meant that, first, the investigations were not carried out properly and, secondly, when they eventually came in front of the courts, the courts said, "This is not an independent body, and it needs to be an independent body to carry out these sorts of investigations". It is the wrong way to approach the problem, which I totally recognise for servicemen and servicewomen, as has been discussed.

Chair: What would the implication be of a five-year cut-off? Most people would have no idea what could happen before five years and what might need to happen after five years. What is your view about that as a timescale, albeit that you agree with Mark Goodwin-Hudson that there is a problem here but this is absolutely not the right way to solve it?

Martyn Day: I respect the point that five years for very minor assaults is probably sufficient. From my experience on the ground in these cases, after five years there is no real likelihood that relatively minor assaults will ever be prosecuted. For anything at all serious—murder, torture or inhumane treatment—the idea that we could stand by and say that after five years the burden is on the prosecutor, in the way described in the

Bill, is just monstrous. It totally goes against everything else that we as a society hold dear. If in the end there is evidence to say that somebody has committed a terrible crime, they should be prosecuted and there should be nothing to do with this burden that the Bill suggests. It is the most ridiculous idea in a civilised society.

Q3 **Fiona Bruce:** Good afternoon. My question touches on something that Martyn has just mentioned. The presumption against prosecution applies to all offences committed by service personnel or veterans during overseas military operations, with the exception of sexual offences. Should it apply to serious offences such as murder and torture, or where the alleged conduct may amount to a war crime or crime against humanity, or should these also be exceptions?

Elizabeth Wilmshurst: It is good that sexual offences are excluded, but it gives rise to the curious result that, for acts that involve both murder or torture and sexual offences, there can be prosecution for the sexual offences but not for the murder or torture. I am against the presumption against prosecution altogether, but if we have to have it we have to have more exclusions.

Let us just go through this. The crime that some people say is the worst in the world, genocide, is not in the list of exclusions. You may ask, "Why on earth could British service personnel ever be complicit in genocide?" That may be right, but then why is it not included in the exclusions? We give such a poor example to other countries. For example, the soldiers of Myanmar/Burma is before the International Criminal Court at the moment, charged with genocide; its soldiers are being considered before the International Criminal Court for genocide. Can they look to UK legislation, which will bar prosecution after five years, in effect?

Then we go to certain categories of war crimes and torture. The UK is explicitly obliged under international law to prosecute those crimes, which are grave breaches of the 1949 Geneva Conventions, drawn up after the Second World War, on the laws of war. All countries are parties. Each of those conventions has an obligation that the party will search for alleged offenders and bring them to its courts. That is not in an exceptional case. No exceptionality is required. It is an obligation. As has already been mentioned, there is an obligation in the torture convention. All these crimes should be added.

Then we come to the International Criminal Court. Now, the court's statute does not contain an express obligation on states to prosecute for international crimes. But if state parties, of which the UK is one, do not prosecute, the individuals concerned are vulnerable to prosecution before the International Criminal Court. That is what we are doing to our service personnel if we exclude them from prosecution under the presumption. I recognise that I am saying "exclude from prosecution", which is not what the Bill does in terms, but providing that prosecution will be exceptional after only five years almost amounts to a statute of limitations.

Chair: If other witnesses would like to answer that question, perhaps

they could also answer the point, which some people might be struggling to understand, as to why sexual offences are treated differently from murder or torture. If you have committed murder or torture, after five years there is a restriction on the prosecution, but if it is a sexual offence there is no restriction. There seems to be a hierarchy of offences in which sexual offences, for the purposes of this Bill, come higher than murder or torture.

Reverend Nicholas Mercer: The sexual offences stand out like a sore thumb. It is very hard to give rhyme or reason as to why that has been chosen. When I saw it, I simply assumed that, because Lord Hague and Angelina Jolie had spearheaded an initiative for victims of sexual violence in conflict, they did not want to get into a situation downstream where Angelina Jolie, for instance, would turn around and say, "We spearheaded this initiative. How dare you betray me?" It looks very odd.

Secondly, I understand that torture was originally in the same category as sexual offences and was therefore excluded. Someone has put torture back in the included offences. That in itself is very hard to understand, given the absolute prohibition on torture under international law.

Thirdly, looking to the Rome statute and the various war crimes that are categorised, we have crimes against humanity, which are not included; we have war crimes, which is another category; and then we have other serious violations of the laws of war, none of which appear in the excluded offences. As Elizabeth quite rightly pointed out, if we do not prosecute, the International Criminal Court will. All those offences should be excluded, in my view, under the Bill.

Chair: You are saying that there is no intellectual or legal justification for exempting sexual offences from this restriction. It was just the Government running scared of Angelina Jolie denouncing them from a global platform.

Reverend Nicholas Mercer: That is all I can assume. It makes no other sense.

Martyn Day: I totally agree.

Chair: Mark Goodwin-Hudson, can you shed any light as to the hierarchy of offences that we seem to have?

Mark Goodwin-Hudson: I agree with what Nicholas has said. Elizabeth made a subtle point earlier when she talked about our credibility. As a British Army officer, overseas you have huge credibility because of the esteem and the virtue we have been held in for generations. By watering down the rule of law, we effectively start to diminish the credibility, authority and respect that we carry as members of the British Army. That would be a mistake.

Elizabeth Wilmshurst: In pointing out that the exclusion of sexual offences is odd, that is not to say that we want it to be removed from the list of excluded offences.

Chair: There are two ways of dealing with it. Either one could be removed or others could be added.

Elizabeth Wilmshurst: The point is that international offences—genocide, war crimes, crimes against humanity, and torture—should all be excluded, and not only those offences by name but corresponding offences under our domestic law. We do not want to presume against prosecution of murder and say, "But the war crime of murder is excluded". Sometimes you can charge either for murder or for the war crime. We want to exclude both of those.

Chair: To be completely clear, you are saying that if a member of our Armed Forces rapes someone and then kills them, as far as the rape is concerned the prosecution would be able to go ahead unrestricted. The restrictions would apply for any murder prosecution, so they might be prosecuted for rape but not for murder because of these restrictions. Would that seem anomalous to you?

Elizabeth Wilmshurst: Yes. That is a very curious result, and that is what the Bill says at the moment. My point is that when you add to the exclusion list all the international offences—the war crimes, the crimes against humanity, the genocide, the torture—you have not only to include the war crimes under the International Criminal Court Act but to exclude murder and other domestic offences that could be interpreted as a war crime or one of the international offences.

Chair: That is understood. Perhaps the House can explore this at Committee stage.

Reverend Nicholas Mercer: For ease of reference, Articles 6, 7 and 8 of the Rome statute list the offences.

Chair: Then there are the offences in UK law as well.

Elizabeth Wilmshurst: Yes, the corresponding offences.

Q4 **Baroness Massey of Darwen:** Good afternoon. The UK has procedural obligations arising from the right to life, the prohibition of torture, and inhuman and degrading treatment under Articles 2 and 3 of the ECHR. Would a presumption against prosecution raise any issues in respect of these obligations to undertake effective investigations?

Reverend Nicholas Mercer: That is a really interesting question about the right to life under article 2 and the prohibition on torture under Article 3. With regard to the right to life, obviously we are talking about murder here. As we have mentioned before, if there was a five-year limitation on that, it would cause really serious problems. If that were the case it would look very odd indeed, not only in this country but across the

international community. It is in conflict with the convention, in that it is a non-derogable right.

At the same time, there is also a corresponding right under Article 2 for a full and independent investigation, which can take many years, as we know from Baha Mousa. It would seem very strange indeed if, at the end of it, we found out things that we did not already know and there was this presumption against prosecution.

With regard to Article 3 and the prohibition on torture, the UN convention on torture prohibits a statute of limitations, so this Bill is illegal. It breaches international law. I know that this has already been pointed out in the press, but it is specifically stated that this is a bar to legal proceedings and therefore illegal. I can see difficulties arising from both those limbs.

Martyn Day: I have seen that the Government say, "This is all nonsense. If, in the end, there is evidence to suggest somebody has been murdered by a British soldier, of course the prosecution will happen". In reality, over the last 17 years since the Iraq war, hardly anybody has been prosecuted. Only a handful have. In the Baha Mousa case, one soldier went down for one year, despite the fact that clearly many soldiers were involved.

The hurdle for prosecution is already high, which, as I said, has much to do with the poverty of the prosecuting bodies. This added weight against the prosecution is simply one more nail in the coffin of the suggestion that there is justice to be had out of the British system if somebody is murdered in any war-type situation. The Government are wrong to suggest that this does not really make any difference and that, if the evidence is there, people will be prosecuted. The facts show that the reality is very different.

Elizabeth Wilmshurst: Articles 2 and 3 contain both a negative obligation, that states cannot themselves take away the right to life or the right not to be tortured, and a positive obligation, that states must provide an effective justice system. It is the positive obligation that is implicated by the presumption against prosecution. It is also relevant that no other ECHR states have anything equivalent to this presumption against prosecution, so far as the MoD has found. That is relevant to what the Strasbourg court will take into account when taking a case on Articles 2 and 3, if it ever does, in relation to this legislation.

Chair: That leads us quite neatly on to Lord Dubs's question.

Q5 **Lord Dubs:** I address my question in the first instance to Elizabeth, although you have probably partly answered it by what you just said. Beyond the ECHR, does the presumption against prosecution comply with the UK's international legal obligations under the laws of war and the prohibition against torture?

Elizabeth Wilmshurst: I probably have covered it, but I will sum up. The laws of war in the 1949 Geneva Conventions and the first protocol provide an obligation on the UK to prosecute for grave breaches of the conventions in international armed conflict. The torture convention has an obligation to prosecute. As has been pointed out, that has been interpreted by the UN committee on torture as rendering statutes of limitation, which this presumption effectively is, unlawful under the convention. The genocide convention requires us to prosecute and punish. So, yes, it would be unlawful under our international obligations. Added to that, as we have already mentioned, we are rendering our service personnel liable to prosecution by the International Criminal Court.

Q6 **Ms Karen Buck:** You have all been fairly clear on some of your principled concerns about this. Can I ask you to comment specifically on the practical critique of the exceptional cases rule? As I understand it, the decision is whether a case will be sufficiently exceptional to justify bringing prosecution after the five-year limit weights on either the adverse effect of the conditions of overseas operations and/or the public interest in finality. Would you comment on those, their practicality and what their practical implications would be?

Reverend Nicholas Mercer: It is a difficult question to answer. I obviously fundamentally have a problem with this Bill overall. Looking at the history of prosecutions and the state being willing to take action against someone, we always run the risk of the state itself being implicated in the crimes or in the cover-up. Would the state consider rendition, for instance, exceptional when the state itself was potentially implicated in the crime itself? The "exceptional" clause has to be treated with a degree of caution, to be honest.

It is worth mentioning the Mau Mau case. I know Martyn was involved in that. It took decades to come to light. It is only right that those people should be brought to justice for what happened, if they are still alive. I am very cautious about the word "exceptional", because politically there is an awful lot at stake when the state itself is in the midst of some of the crimes that we are talking about.

Elizabeth Wilmshurst: Looking specifically at the factors that have been introduced by the Bill, one could say that in certain circumstances the mental capacity of the alleged offender could make it unlikely that he or she would be found guilty, in that they did not have sufficient mental capacity to commit the crime. That would in any case be taken into account by prosecutors in any prosecution. The other factors are really ones for mitigation of sentence, rather than intending against guilt. In my view, they are inappropriate for inclusion in a prosecutorial decision.

Martyn Day: I totally agree with Elizabeth and Nick. To take some of what happened in Iraq, it would mean looking at soldiers' current mental health in instances involving murder, soldiers running across the backs of Iraqis, as in our case of Al-Sadoon[1], or the humiliation of people, as happened with Camp Breadbasket.

The fact that people subsequently find being prosecuted stressful is true for all prosecutions. People who are charged with criminal offences will always find that stressful. In my view, that can never be a factor to be taken on board in the decision by the prosecutor. As Elizabeth said, it would be a matter to be taken on board in relation to any criminal sanction, but it cannot be taken on board in relation to whether a person should be prosecuted in the first place.

Chair: Basically, you are saying that there is an issue about the terrible effects and conditions of overseas operations, but the time to take those into account is not when deciding whether to allow a prosecution to go ahead but after a prosecution has gone ahead and, if there is a conviction, when the judge comes to sentence.

Martyn Day: Yes, exactly.

Chair: What about the public interest in finality? Would that not be taken into account in the public interest test for prosecutors, or is that not something they would have in their mind anyway?

Martyn Day: You can look at many instances in British society, such as Hillsborough or what happened with the Guildford Four, where finality only arises after a long while. In the end, for these big issues, including the war with Iraq, society demands that we get to the truth of what has happened, even if that takes many years. As Nick Mercer said about the Mau Mau case, it took 50 years before that was resolved. It is unrealistic to think about getting some sort of finality in the first few years when you are talking about a very serious issue like murder or inhumane treatment. When you are weighing the balance, it is not an issue for the prosecutor.

Mark Goodwin-Hudson: Could I make a small point in the margins in relation to prosecution? We always talk about prosecuting soldiers. What happens is that some poor trooper ends up in the dock. Yet people such as me, the officers, actually make the decisions, give the directions, set the atmosphere and define how our soldiers conduct themselves on operations. There is always too much appetite to go after the individual who pulled the trigger, rather than holding the leader to account.

When I was in Iraq, for example, my general would run around saying, "Don't use two rounds if you can use 200 rounds. Don't fire twice if you think you can fire 200 times". That is a very provocative and deliberate attempt to increase the violence, yet the soldier is often the fall guy for mistakes and innocent people getting killed in those situations. I am a former officer. We should be held to account just as much as the person who pulls the trigger.

If I can expand on that, remote and digital warfare has taken us further and further away from the actual scene of the incidents. The person who

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[1] Correction from witness: The case is "Alseran". The full case reference is Alseran & Others v Ministry of Defence [2017] EWHC 3289 (QB).

is calling in the airstrike is basing it on a long chain of decisions made by other people, some of whom might be sitting in Las Vegas flying a drone. We need to examine and hold to account not just the individual who is at the Schwerpunkt of what has happened. Does that make sense?

I know that this is not directly answering your question, but as we talk about prosecution we need to be clear and informed about who we are bringing to account. It is not just the poor 18 or 19 year-old soldier who has actually pulled the trigger at the other end of a series of decisions made by those in command above him.

Q7 **Lord Singh of Wimbledon:** Good afternoon. This question is open to all of you. The Bill provides that in addition to the barriers already mentioned, the Attorney-General will make the final decision as to whether to prosecute after five years. In your view, what are the implications of this?

Reverend Nicholas Mercer: Having taken part in an international armed conflict as the senior legal adviser, my experience was that the Attorney-General was directly involved in military operations. I would propose something for the 1st Armoured Division headquarters, it would be staffed to PJHQ, and if the Ministry of Defence did not like it it would seek advice from the Attorney-General. Certainly in one instance the Attorney-General overruled the advice I was giving about having a judge in theatre to oversee detention. I was overruled by the Attorney-General on that occasion, I am led to believe.

There is a slight irony here, because the Attorney-General has to give consent anyway to a prosecution for breaches of the Geneva Conventions, but the Attorney-General is also involved in military operations. As I said earlier, one of my problems with the whole Iraq business, being the chief lawyer in theatre, was that there were black sites being set up for prisoners. We had a prisoner of war camp and then there were other prison sites. If the Attorney-General was involved in that—I do not know—he or she would be ruling on a potential prosecution that they were involved in. You can see the conflict of interest very clearly there, so I have difficulties with this.

Lord Singh of Wimbledon: That is a very interesting point.

Martyn Day: When the courts have looked at the prosecution and investigative processes, they have often found that the existing system, not least the Royal Military Police and the way they pass on to the prosecuting authority, lacks independence. That is why they have so often overturned the position of the Ministry of Defence.

The problem for the Ministry of Defence in putting this forward is that we will just see that carrying on. I do not think the courts will accept that this has the element of independence they would expect in a process. The Ministry of Defence is setting itself up to fail by having this system. As Nick Mercer was saying, there are so many conflicts of interest within that process. Generally, it is a poor idea. An independent person, who is

seen and known to be independent, should make that decision, not the Attorney-General.

Chair: Martyn, the DPP, for example, would not be involved in advising about the legality of various operations. Therefore, would the DPP be a more independent person and not come in with the conflict of interest that Nick Mercer has pointed out would affect the Attorney-General?

Martyn Day: Yes, exactly. More recently, a person like the DPP has been appointed to deal with military matters. That may be the more appropriate independent person. We have not quite seen yet how that has been operating, but there is some suggestion that that person is rather more independent than what we have seen in the past.

Chair: There are various people around, but the Attorney-General is not the right one. The DPP could be one, or it could be somebody else.

Martyn Day: Exactly, it would be somebody like the DPP.

Chair: Again, this could be explored in the House.

Elizabeth Wilmshurst: The consent of the Attorney-General is already required, not only for prosecution for breaches of the Geneva Conventions but for prosecutions on torture, genocide and crimes against humanity. It is quite a big ask to take away the Attorney-General.

Chair: Was the issue of the conflict of interest addressed in the forum where that was being considered? Is the fact that there might be some other conflicts of interest somewhere else a reason to add one?

Elizabeth Wilmshurst: No, I do not disagree with what Nicholas has said. I am only saying that almost all prosecutions in this kind of area are anyway subject to the Attorney-General's consent.

Chair: If we want to add a consent, adding a consent that is not conflicted is better than adding a conflicted consent. There might be other areas where there are conflicts of interest.

Elizabeth Wilmshurst: I agree.

Mark Goodwin-Hudson: Could I champion what Martyn said about the requirement for independence? The MoD's problem is that not having independent means, an independent body or an independent individual to conduct its investigations makes it look like it is marking its own homework. That is one of the reasons why it lacks credibility.

Q8 **Chair:** The next question has two aspects to it. First, the talk about the proposition of this Bill is about it being to deal with vexatious claims against service personnel and veterans. Do the courts have insufficient powers to protect against vexatious and unmeritorious claims? Do these powers need to be brought in, because the courts cannot deal with vexatious claims as the law stands?

Martyn Day: As my firm was mentioned by the Secretary of State in relation to vexatious claims at the beginning of his speech in Parliament the other day, it is a matter of much interest to us as a firm. I will just remind you of the history of all this. Back in 2003, the big mistake made by the Ministry of Defence was saying that the people it arrested would be subject to the five treatments of harshing in their interrogation. That included hooding people, putting them into stress positions before their interview, depriving them of sleep and depriving them of food and water at times. This harshing, not just in itself, led to a general atmosphere, as I think Mark described, where at times the military suggested that the soldiers should rough up the people arrested.

When that all happened, in hundreds and hundreds of cases if not thousands of cases, it is not surprising that the Iraqis were really upset about how they were treated. Hundreds of people have come forward to make claims against the British Government. Over the last 10 years, it has been up to the Supreme Court to decide in these cases whether this was right. Without any question, it has said that the treatment the Iraqi prisoners received was not right or appropriate, primarily under the terms of the Human Rights Act but just generally under the Geneva Convention.

Four cases went before Mr Justice Leggatt, the judge who was in charge of the Iraqi claims. He decided that the four individual cases he looked at as test cases were all compensatable. They all had experiences which the Government were obliged to compensate them for. Following his judgment, we sat down with the Ministry of Defence, because the judge very carefully set out the parameters for when people could be compensated. We looked at each claim in the light of that judgment. Case after case after case, we found people who had been hooded, had been treated terribly by the arresting authority and had a valid claim in compensation.

There was no suggestion that there were vexatious claims. We acted for around 1,000 claimants. Of the first 400, which have been made public, 300 were compensated and 100 were not. In the second group of just over 600, we have just finished that process. Unfortunately, we are bound by confidentiality, but we understand that the Secretary of State should announce the figures relatively shortly. The position is not dissimilar. The great majority of people were subject to the sorts of treatment which the courts have decided is a totally inappropriate way for the British Army to treat its detainees.

Reverend Nicholas Mercer: Being the commander legal in the Iraq war, I walked in on one of these interrogation sessions as early as March 2003 and saw 40 Iraqis being subjected to what are known as the five techniques, which, as Lord Trimble will know, came to the fore in Northern Ireland in the 1970s. I made a complaint; other senior officers made a complaint. We were overruled. When it came to the Baha Mousa inquiry in 2011, eight years later, Sir William Gage said there had been a corporate failure by the Ministry of Defence in relation to detention and

interrogation. That means that six years of military activity, when it came to interrogation and detention, was in breach of international law.

The term "vexatious claim" has been bandied around. You hear it all the time in the House of Commons. No one has actually told me how many vexatious claims there were. When I did an analysis of the figures, 77% related to detention and interrogation. I am sorry, but they all have legal merit, so they are not vexatious. Everyone has taken the "vexatious claim" tag as being accurate, but to date no one has told me how many vexatious claims there are.

Furthermore, I have had to make criminal complaints to the IHAT because I am a lawyer and I witnessed it first-hand, and other people have told me about the place. I take grave exception to being told that my allegations are vexatious at the same time. They are not. If we did carry out the five techniques of harshing, which we did, I am sorry but the vast majority of the cases that people are now branding as vexatious are all with legal merit. It means that the vast majority of them are valid claims against the state. I am afraid that no one has so far challenged the "vexatious" narrative tag that has been given to these cases.

There will always be exceptional cases, but the vast majority of these have legal merit. In any event, the criminal legal system will generally weed out these cases. The prosecutor looking at them in the first instance will know when a case is without merit and may close it. I hope some of them would be weeded out. Before I left the army, I gave legal advice on a number of prominent cases, including Camp Breadbasket, which is appalling. I invite you to go back and look at the pictures of abuse that took place. At the same time, I found a case that was without merit and I closed it. It was as simple as that. I do not need legislation to do that. It happens already.

People refer to al-Sweady as the exceptional case, but that is an exceptional case, just in the same way that Operation Midland was an exceptional case. That did not mean that all other cases of child sexual abuse were invalid. The law throws up these results periodically. I challenge the whole narrative of this Bill: that somehow there is a torrent of made-up cases. It is ridiculous. They are not made up. The vast majority are correct and have a legal basis in law. If they do not, there are mechanisms for dealing with them in the courts and judicial system anyway.

Chair: Could I have some clarification? In advocating for this Bill and recommending it to Members of Parliament, the Government have said that it is intended to prevent not only these vexatious claims, which you have addressed us on, but vexatious claims by ambulance-chasing lawyers. They have said that it is necessary because there are lawyers who are ambulance chasing and acting unethically.

Whose job is it to deal with unethical lawyers? Is that not supposed to be independent under the separation of powers and the rule of law? Is that

not the responsibility of the Solicitors Regulation Authority, rather than it being the job of the Government to pronounce some lawyers to be ambulance chasing and vexatious because they represent clients who are taking claims against the Government?

Martyn Day: As we are centre stage on that, it falls to me to start off. As we have experienced ourselves, our regulator, the Solicitors Regulation Authority, has great responsibility in regulating solicitors to make sure that they operate in a proper manner. That is absolutely what it did in this instance. Indeed, we know that it led to Phil Shiner and his firm being closed down and him being struck off. It has clear and real power.

As you rightly say, it is very important that that is seen as independent of Government. The power of the regulator is to make sure that we operate within the rules as solicitors and that our conduct is befitting of a solicitor. It is very important, not least for a firm such as ours, where we spend a lot of our time acting for people who have a claim against the state, that the state cannot itself get involved in any regulatory reproach of our work. That has to be overseen by an independent body, which is obviously the SRA here. Your premise is quite right and it is very important. Here, it got very close to going over the line in the relationship between the Government and the SRA, when it came to what happened in Iraq.

Chair: Elizabeth, should the Government be trying to blacklist particular firms because they do not like the fact that those firms are taking cases against the Government? Is that an appropriate thing for them to do, or should they recognise that there is supposed to be a separation of powers?

Elizabeth Wilmshurst: I cannot add to what Martyn has just said.

Q9 **Lord Dubs:** The Bill amends the Human Rights Act to introduce an absolute limitation period of six years for bringing human rights claims in relation to overseas military operations. Similar limitations are introduced for claims in tort for personal injury and death. Is it reasonable to impose a six-year time limit on civilians and soldiers who may wish to bring claims against the MoD for breaches of their human rights? Are there circumstances when a six-year limit could lead to injustice?

Chair: We are moving from criminal law to claims under civil law.

Martyn Day: Our firm has dealt with quite a lot of historic claims, whether it was the Mau Mau claim that we discussed, the Kenyan freedom fighters 50 years ago, or acting for Japanese prisoners of war who ended up being compensated by the British Government. In these historic cases, where something really terrible has happened, particularly in warfare, what exactly happened often takes a long time to come out properly.

In the Mau Mau instance back in the 1950s, the Ministry of Defence did a fabulous propaganda job in persuading the British people that the real

horrors were the black-on-white horrors, where about 50 people were murdered during the emergency. It took 40 to 50 years for the truth to come out, when a Harvard professor of history and an Oxford University professor of history rewrote the history of exactly what had happened. They showed that tens of thousands of Africans had been killed by the British forces and the colonial regime during that period. That took decades to come out. Fortunately, we have now been able to rewrite the history and William Hague apologised to the Kenyans during a speech he gave in 2013. That is not unusual.

To give you one more example, in Iraq, the British Army, because it became the ruling power in part of south Iraq, absolved itself from any claims. It had immunity from suit. Only once did it become known to the Iraqis that law firms such as ours were available to bring claims, which they then instructed us, and it took many years.

Clearly, six years, even in Britain, can be held to be too short a period, because the courts are allowed an element of discretion if there is good reason for somebody not having brought the case within that period. Here it is far worse. You have a war-torn country, but people who may, very rightly, not have been able to make a claim before are then prohibited from making a claim after six years. It is totally wrong.

Reverend Nicholas Mercer: The case of the Mau Mau is very instructive. It is really good to have a historic case and a lawyer who has been involved in that. That took 50 years for all sorts of reasons. That speaks volumes about these limitations.

Chair: Would it be invidious if there was reconsideration of the situation and more evidence, with the Government apologising, as William Hague did, but then an absolute bar on anybody who had suffered in a way that had subsequently been admitted making any claim for recompense?

Reverend Nicholas Mercer: It would be unconscionable.

Lord Dubs: This question is particularly to Martyn Day and it concerns complicity. I think you have been involved in bringing claims on behalf of victims of rendition and torture in which the UK was alleged to be complicit. What are the implications of this Bill for cases such as those?

Martyn Day: That is a very good question. I must say that I have not read the Act as applying to rendition. I think its definition is warfare. To be frank, I would need to reread it with that in mind. In the time I have now, I do not think I would be able to do it. Perhaps I might write to you separately on the point—my apologies.

Lord Dubs: Thank you.

Q10 **Lord Trimble:** Before I ask the question, let me apologise to you, because I was otherwise engaged until this afternoon and I have not seen any of your papers about this. I will read out the question, because I came across the questions only a few minutes ago.

When a court is considering whether it would be equitable to allow a claim under the Human Rights Act, after the one-year time limit but before the expiry of the six-year deadline, the Bill requires the court to have regard to the effect of the delay on the likely cogency of any evidence. What is the impact of this requirement?

Martyn Day: In any case that one is bringing, the courts look early on at the cogency of the evidence. It is always open to the defence in any case, if it thinks there is a poverty of evidence for bringing it forward, to have a summary judgment against the claim or to strike out the claim. The question here is to do with issues such as mental health and whether it may cause damage to the soldiers who were a part of the incident that one is complaining about. It seems to me that the court already has enough power to gauge these things. I do not think it needs any additional powers to those that are already at its behest. This is rather unnecessary in the Bill.

Chair: Are you aware of any other cases or examples that the Government are praying in aid to justify the necessity for this particular requirement?

Martyn Day: No.

Lord Trimble: I am inclined to agree with that.

Reverend Nicholas Mercer: I take the same view as Martyn on that. Take Hillsborough: 30 years elapsed, I think, before David Duckenfield was brought to court and the victims got justice. The judges are more than capable of making that decision as each case requires.

Q11 **Chair:** Under the Bill, the courts also have to consider the likely impact of proceedings on the mental health of the serviceperson or veteran who will be a witness in the case. Is the impact on mental health a relevant consideration when deciding whether a claim under the Human Rights Act should be permitted? What about the impact on the alleged victim or other parties in respect of their mental health?

Martyn Day: The claims that we bring are against the Ministry of Defence, so this is obviously nothing to do with any prosecution. Any soldier will simply be a witness, if that is what is available. The reality is that in only a handful of the 1,000 cases we have resolved has any evidence been given where the person has had to appear in court. For 98% of all claims, the soldiers, I presume, have either been marginally involved or probably not involved at all. It seems to me a bit unrealistic to suggest that this should be a significant feature when you are talking about a compensation claim, which is obviously very different from the debate about what happens when there is a prosecution. This, again, is totally unnecessary.

Chair: You are not aware of any examples with which the Government sought to justify the inclusion of this provision in the Bill.

Martyn Day: We have the four individual cases where soldiers appeared in front of Mr Justice Leggatt when there was the hearing, but those were a very few examples. For the rest, the worst that happened was that the soldiers were contacted by Ministry of Defence lawyers to ask them about the events, which is hardly massively stressful. It seems to me that the issue of mental health, as for civil claims, is a bit of red herring. I understand the issue more in a prosecution, but we have already dealt with that.

Reverend Nicholas Mercer: If action is taken under the Human Rights Act, it is taken against the state. It is the state's duty to uphold those rights, so it does not really apply when the state is answering for the misdemeanours of the state.

Chair: Thank you. That is very illuminating.

Q12 **Lord Brabazon of Tara:** My question concerns the duty to consider derogation from the ECHR and it is open to all witnesses, please.

The Bill amends the Human Rights Act to introduce a new duty on the Government to consider whether it would be appropriate for the UK to derogate from the ECHR in relation to overseas operations. First, does this have any meaningful legal effect? Secondly, in what circumstances might it be appropriate for the Government to derogate from the ECHR, and from which ECHR rights in particular? Thirdly, what might be the impact of this clause?

Elizabeth Wilmshurst: Unlike many of the provisions in this Bill, I find this provision relatively harmless. The legal impact is a little uncertain. I suppose it might give rise to more applications for judicial review of whether the Secretary of State is right in what he decides. We have to recall that it is not possible to derogate from Articles 2 and 3 of the European convention. Article 2 is the right to life; Article 3 is the probation of torture and inhumane treatment. I suppose that this duty is directed more to derogating from Article 5 on the right to detain.

Whether you can derogate lawfully, in effect, is a matter of some debate in relation to non-international armed conflicts—civil war, civil unrest—and peacekeeping operations. There is no clear answer. The court has not taken a firm view on this kind of thing. If there were to be a case in relation to a derogation by the UK, we would see what the Strasbourg Court said about it.

What is the legal impact? I am not quite sure, but it is quite clear that you cannot derogate from Articles 2 and 3. That includes not just your duty not to offend against the right to life or torture but your duty to provide proper judicial systems for prosecuting those crimes.

Chair: It sounds as if you are saying that this is window dressing, rather than substantive, practical law.

Elizabeth Wilmshurst: Those are your words, Chair, but I would not disagree.

Reverend Nicholas Mercer: I have direct experience of this issue. I would say it is just window dressing. Making a proclamation about the Human Rights Act is always popular, but we could derogate anyway. We could have derogated at the time of the Iraq war and that would have been perfectly proper. However, there was no settled legal opinion on whether it applied extraterritorially, so that had to be resolved in the courts, as it was in 2006.

As Elizabeth said, you cannot derogate from Articles 2 and 3 anyway, and thank goodness we cannot. When it comes to Article 5, in terms of practical effect, one of my tasks was to resolve the issue of prisoner status within the prisoner of war camps. We had captured so many Iraqis in civilian clothing that we had to resolve whether they were combatants. That is an exceptionally difficult task, not least because the Iraqi military configuration meant that many of them came from the north of Iraq and we were carrying out tribunals in the south. We fell foul of the Human Rights Act when it came to the length of time they were held in detention pending resolution.

I would welcome a derogation from Article 5. It would be very sensible, but the Human Rights Act makes provision for that anyway. It is pretty straightforward and was a pre-existing path for us anyway. It does not need any great fanfare. It just exists as a matter of law.

I should say how important it is to have the Human Rights Act underpinning military operations as a whole. It is vital. One of the problems with Guantanamo Bay was that the Americans designed out combatant status for their prisoners and so fell outside the protections of the Geneva Conventions. At least with the Human Rights Act, we have that safety net underneath all those we detain, wherever that might be in the world. I cannot emphasise that too strongly.

Martyn Day: When we went to war with Iraq in 2003, the Motion passed by Parliament included two important provisions, in that one of the main reasons for us going into Iraq was to bring about the rule of law and the protection of the human rights of the Iraqi people. If we ever go into another country, I presume there will be similar provisions. Although I totally accept what Nick and Elizabeth are saying about the practical impact, the politics of it are all wrong. Where we go into a country, I hope it is to bring about the rule of law and the assurance of human rights. The idea that we would derogate from that responsibility in going into those countries seems totally and utterly wrong to me. Although I agree that it has no practical impact, the reality is that it is politically very wrong.

Chair: That brings us to the conclusion of our questions for this evidence session. I would like to thank you very much indeed, Martyn Day, Mark Goodwin-Hudson, Reverend Nicholas Mercer and Elizabeth Wilmshurst. We will be able to put questions to the Minister and draw on the advice you have given us in this evidence session, so thank you very much indeed.