

Written evidence from Elizabeth Wilmshurst (OOB0006)

Submission by Elizabeth Wilmshurst CMG, Distinguished Fellow, Chatham House, formerly Deputy Legal Adviser, Foreign and Commonwealth Office, in response to the call for evidence by the Joint Committee on Human Rights.

1. This note addresses two of the Committee's questions regarding the presumption against prosecution introduced in the Bill:

What would be the implications of this change in law on the UK's compliance with its international obligations?

Does the presumption against prosecution raise any issues in respect of the UK's obligations under the Rome Statute to prosecute international crimes?

2. This note discusses the UK's obligations under I. the Geneva Conventions 1949 and II. the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984, as well as considering III. the impact of the Statute of the International Criminal Court 1998.
3. **Summary:**
 - I. The UK has international obligations to bring to justice persons alleged to have committed grave breaches of the Geneva Conventions and torture. The practical effect of the presumption against prosecution in the Bill would be to put the UK in breach of these obligations.**
 - II. UK servicemen and women could be vulnerable to prosecution before the International Criminal Court if, as a result of the presumption against prosecution, a prosecution in the UK was not proceeded with where there was sufficient evidence of a crime having been committed.**

I The Geneva Conventions

3. Each of the four Geneva Conventions of 1949 imposes an obligation on the states parties to prosecute persons alleged to have committed grave breaches of the Convention. The obligation is that states shall 'search for persons alleged to have committed, or to have ordered to be committed, ... grave breaches [of the Geneva Conventions], and shall bring such persons, regardless of their nationality, before its own courts.'¹
4. The presumption against prosecution introduced by the Bill requires it to be shown that a case is 'exceptional' before a prosecution may go forward. The

¹ Art 49 GC I, Art 50 GC II, Art 129 GC II, Art 146 GC IV. 'Grave breaches' are listed in the four Conventions as the most serious war crimes; there are additional grave breaches listed in the Additional Protocol I to the Geneva Conventions, to which the UK is also a party. There are other treaties that require national authorities to bring proceedings, including the 1954 Hague Convention for the Protection of Cultural Property and its second Protocol and the The 1948 Convention on the Prevention and Punishment of the Crime of Genocide.

presumption in effect reverses the burden of proof for a prosecutor: in a case where there is sufficient evidence that allegations are well-founded, the authorities, after five years, will not be able to prosecute unless it can be shown that it is an 'exceptional' case. To state the obvious, however: the Geneva Conventions do not require that prosecutions be brought, but only in exceptional cases; the obligation is to bring before the courts every case where there is sufficient evidence.² To require exceptionality to be shown does not comply with the Conventions' requirements.

5. Prosecution practice that discriminates on the basis of membership of national armed forces – as does the Bill - would also seem at odds with the obligations in the Conventions.³ The Bill requires a prosecutor to treat alleged offenders who are British service personnel more favourably than those who are allied or enemy personnel. The Bill is giving different treatment to 'them' and 'ours', and encouraging the notion that crimes committed against our own soldiers must be treated more seriously than those committed by them.⁴
6. Victims are thus discriminated against in their ability to see justice done: if the alleged perpetrator is a UK serviceman or woman they are less likely to be given justice for crimes committed against them. Further, the Bill also discriminates by providing that if the victim of a crime is in the UK armed forces, the presumption against prosecution will not apply.
7. It should be noted that the UK does not accept statutes of limitations for such criminal offences. Indeed, in the view of the ICRC, it is a principle of customary international law that statutes of limitation do not apply to war

² The ICRC is of the view that the obligation is in effect absolute if there is sufficient evidence for a prosecution: 'The obligation to bring alleged offenders before national courts does mean ... that if the competent authorities have collected sufficient evidence to bring a criminal charge, they cannot rely, for example, on national rules of prosecutorial discretion and decide not to press charges. In those circumstances, they must prosecute the case. Any other conclusion would be at odds with' the obligations in the Conventions. Para.5128 of the Commentary on the Third Geneva Convention <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=FB2C21E0040F0217C125858400446E95>

³ Para. 5109 of the ICRC Commentary on the Third Geneva Convention (identical to the other three in this regard) suggests that the reason for the need not to discriminate is: 'to uphold the principle of equal application of the law and avoid the creation of a feeling of "victor's justice"'. <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=FB2C21E0040F0217C125858400446E95>

⁴ Insofar as prisoners of war are concerned, this offends against the 'principle of assimilation' whereby, in accordance with the Third Geneva Convention, prisoners must be treated in the same way as members of the Detaining Power's own forces with regard to a number of issues, including criminal justice. 'Prisoners of war are subject not only to the substantive provisions prescribing or proscribing certain conduct in the armed forces of the Detaining Power, but also to the procedural rules regulating their enforcement.' ICRC Commentary on Art. 82 of the Third Geneva Convention. <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=10629F9C8E0A4B4DC1258585005325BA>

crimes,⁵ that is, that the prosecution of war crimes may not be barred merely by reason of the passage of time. Although the Bill's presumption against prosecution is not strictly a statute of limitation, it comes very close to that in banning prosecutions after five years except in the exceptional case.

8. Sexual offences are excluded from the presumption against prosecution in the Bill and thus may be prosecuted whenever they were committed. While the exclusion of any offence is to be welcomed, the curious result would be that if, for example, a course of acts comprised both sexual offences and murder or torture, the presumption against prosecution would bar prosecution on a charge of murder or torture, but allow prosecution of the preceding sexual offences. Further, victims of torture, for example, would be treated less favourably, in terms of achieving justice, than victims of sexual crimes.
9. Each of the four Geneva Conventions begins with the obligation on states 'to respect and to ensure respect' for the Convention. An important way of ensuring respect for the law by a country's own troops is by the provision of a properly functioning justice system to enforce the law if it is broken. A presumption against prosecution creates a large gap in the system and gives rise to criticism that the UK is not prepared to ensure respect for international humanitarian law by its own troops.
10. In the Ministerial Foreword to the 2019 Voluntary Report by the UK on the Implementation of International Humanitarian Law at Domestic Level, Lord Ahmed said:

This Government is committed to promoting and upholding the rules-based international system, and we believe that the proper implementation of, and compliance with, IHL is an important part of that system. We are proud of our strong record of IHL implementation and compliance.⁶

It can be doubted whether such a statement can still be made if there is to be UK legislation that blocks prosecution of war crimes allegedly committed by UK servicemen and women and that discriminates in its justice system between UK personnel and personnel of other countries, not only failing to meet the obligations of the Geneva Conventions but encouraging other countries round the world to do the same.

II The Torture Convention

11. Article 7 of the Convention requires that allegations of torture be submitted to a country's prosecuting authorities, who must take their decision as to

⁵ See Rule 160 of the ICRC Study on Customary International Law, Jean-Marie Henckaerts and Louise Doswald-Beck (at p 614) <https://www.icrc.org/en/doc/assets/files/other/customary-international-humanitarian-law-i-icrc-eng.pdf>

⁶ http://data.parliament.uk/DepositedPapers/Files/DEP2019-0307/Vol_Report_Implementation_of_Inter_Humanitarian_Law_Dom_Level_FINAL.pdf

prosecution ‘in the same manner as in the case of any ordinary offence of a serious nature under the law of that State.’⁷

12. It is difficult to see how a presumption against prosecution of UK service personnel for allegations of torture could be compatible with this provision. Arguments similar to those relating to the Geneva Conventions apply. But, in addition, the Torture Convention has the requirement that prosecuting decisions be taken in ‘the same manner’ as others. Under the Bill, UK service personnel in overseas operations will be treated differently from other suspects and for other offences.

III *The International Criminal Court*

13. The treaty establishing the International Criminal Court (the ICC Statute) does not impose an obligation on states to prosecute persons alleged to have committed international crimes (genocide, war crimes and crimes against humanity). The issue here is, rather, the vulnerability of British servicemen and women to prosecution by the ICC if they have not been investigated or prosecuted in the UK because of the operation of the presumption contained in the Bill.
14. The ICC Statute includes a principle of complementarity with national courts. This means that the ICC cannot try a case if it is being prosecuted or investigated within a state. If there has been an investigation but a decision has been taken not to prosecute, the Court will not be able to step in ‘unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute’.⁸
15. The effect of the Bill’s provisions will be that in the cases specified there will be no prosecution in the UK after five years and therefore, presumably, no new investigation. With no national prosecution and no national investigation, the principle of complementarity will not apply to stop the ICC instituting proceedings. Further, if there has been a past investigation in the UK but a decision not to prosecute is taken, purely because of the presumption, the Court is likely to be able to take the case since the UK will have been shown to be unwilling or unable to proceed with the case.⁹

⁷ Article 7 reads: ‘1. The State Party in the territory under whose jurisdiction a person alleged to have committed [torture and ancillary offences] is found shall ..., if it does not extradite him, submit the case to its competent authorities for the purpose of prosecution.

2. These authorities shall take their decision in the same manner as in the case of any ordinary offence of a serious nature under the law of that State.

3. Any person regarding whom proceedings are brought in connection with [torture and ancillary offences] shall be guaranteed fair treatment at all stages of the proceedings.’

⁸ Article 17(1)(b), ICC Statute.

⁹ Article 17 (2) provides in part:

‘ In order to determine unwillingness in a particular case, the Court shall consider...whether one or more of the following exist, as applicable: (a) the proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes....’ Article 17(3) provides: ‘In order to determine inability in a particular case, the Court shall consider whether, due to

16. This is not the result that was intended when the UK adopted its own legislation to implement the ICC Statute and when it became a party to the Statute. Because the principle of complementarity was included in the ICC Statute, the Foreign Secretary at the time was able to state in the House of Commons, when the International Criminal Court Bill was being introduced: 'British service personnel will never be prosecuted by the International Criminal Court because any bona fides allegation will be pursued by the British authorities.'¹⁰

Conclusion

17. If the presumption against prosecution is to remain in the Bill, there need to be amendments to avoid the consequences discussed above. To achieve compliance with the international obligations referred to, it would not be sufficient to exclude from the Bill charges of grave breaches or torture: it would be necessary to exclude all acts which could constitute grave breaches or torture, whatever the precise charge that is laid. The war crime of murder for example can be charged as the simple crime of murder: however it is charged, the obligations discussed above apply to it, so all acts constituting grave breaches or torture should be excluded from the presumption. Similarly, to avoid the ICC taking on cases, it would be necessary to exclude from the presumption all acts which could constitute the international crimes of war crimes, crimes against humanity and genocide, as those crimes are defined in the International Criminal Court Act 2001.

04/09/2020

...unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings.' The ICC is likely to consider that legislation that blocks proceedings for international crimes is either 'for the purpose of shielding the person concerned' or that the UK has made its judicial system unavailable for prosecution, thus triggering either Article 17(2) or 17(3).

¹⁰ Official Reports, House of Commons, 3 April 2001; vol 366 c.222. In the House of Lords, similar words were spoken by the Parliamentary Under Secretary of State: 'The ICC will be able to step in only when the national judicial system is unwilling or unable genuinely to investigate. I can foresee no circumstances under which that would apply to the United Kingdom.' (Official Reports, House of Lords, 8 March 2001; vol 623 c 361).