

Written evidence from Reverend Nicholas Mercer (OOB0012)

Introduction

1. I was admitted as a solicitor in 1990 and served for twenty years in the Armed Forces in the Adjutant General's Corps (Army Legal Services). I was the Command Legal Adviser HQ 1st (UK) Armoured Division during the Iraq War 2003.
2. As a former military lawyer, with first-hand experience of International Armed Conflict and Peace Enforcement/Keeping Operations, I have serious concerns about the proposed Overseas Operations Bill (OOB).

False Narrative

3. At the heart of my objection is the premise that this Bill is somehow necessary to prevent false claims against the British Armed Forces serving overseas. In my view, the Government and Ministry of Defence (MOD) have been highly successful in creating a narrative that all such cases are "*vexatious*"¹ and have been brought by "*ambulance chasing lawyers*"². This narrative however does not bear closer inspection.
4. In the first instance, complaints about abuse by UK Forces were first made by members of the Armed Forces themselves as early as March 2003. I personally witnessed the abuse of Iraqi prisoners and similar abuse was also witnessed by other senior officers. The former SAS Trooper Ben Griffin³ also complained of prisoner mistreatment and rendition in both Iraq and Afghanistan. He is currently subject to a High Court Injunction.
5. Secondly, there have been a number of high profile cases where evidence of abuse has been overwhelming. These include Camp Breadbasket⁴ and Baha Mousa⁵. Furthermore, at the time of the Baha Mousa Inquiry in 2011, the British Government had paid out over £22 million in over 326 cases of abuse⁶. I would invite the JCHR to view those cases settled at the time of Baha Mousa.
6. In addition to military complainants, there have also been complaints made by the International Committee of the Red Cross (ICRC)⁷. It is known from the two Public Inquiries that complaints were made to the British Government both in 2003 and 2004. I would invite the JCHR to read *all* ICRC reports relating to Iraq and Afghanistan.

¹ Theresa May vowed to oppose "industry of vexatious allegations" against British troops during Iraq War, Guardian 21st September 2016.

² "Prime Minister must do more to end the hounding of Iraq troops, say military top as they welcome pledge to shut down ambulance chasing lawyers" Daily Mail 23rd June 2016

³ Ben Griffin – "British troops knowingly used for rendition" Daily Mail 25th February 2008

⁴ See photographs of abuse "Iraq abuse soldiers jailed" <http://news.bbc.co.uk/1/hi/uk/4296511.stm>

⁵ <https://www.gov.uk/government/publications/the-baha-mousa-public-inquiry-report>

⁶ <https://www.itv.com/news/2017-06-13/ministry-of-defence-paid-nearly-22-million-in-iraq-war-compensation-claims>

⁷ The Red Cross warned UK of Iraq abuse as early as May 2004 <http://news.bbc.co.uk/1/hi/uk/3694503.stm>

7. Despite the above, the focus has been almost entirely on the case of *Al Sweady*⁸. This case of *Al Sweady* however represents less than 1% of all the allegations against the British Army and yet has completely dominated the narrative. By way of analogy, it would be like discrediting all child sex abuse cases investigated by the Metropolitan Police because of the failure of Op Midland.
8. Since *Al Sweady* in 2014, there has been the subsequent case of *Alseran*⁹ in 2017 where it was found that each Iraqi claimant had been subjected to inhuman and degrading treatment by UK Forces. This received little or no coverage in the UK media. I understand that there have been numerous cases which the Government has settled in the meantime.
9. This Bill therefore seeks to remedy a “problem” which is politically contrived rather than based in reality. Worse still, this narrative is being used to introduce profound changes to International Humanitarian Law which are neither required nor desirable.

Allegations of prisoner abuse

10. At the conclusion of the Baha Mousa Inquiry, the Inquiry Chairman, Sir William Gage, blamed “*corporate failure*”¹⁰ at the MOD for the mistreatment of prisoners including the use of banned interrogation methods¹¹.
11. The finding by Sir William Gage led to changes in detention practises and interrogation techniques used by the British Army but, at the same time, meant that, potentially, all detentions/interrogations in Iraq/Afghanistan between 2003-2009/11 breached the Geneva Conventions (GC), UN Convention against Torture (UNCAT) and the European Convention on Human Rights (ECHR).
12. In 2016, according to the International Criminal Court (ICC), of the 1390 criminal allegations received by them, 1071 related to alleged ill-treatment of detainees. This amounts to 77% of the total claims made¹². This figure is hardly surprising however given the findings of “corporate failure” by the MOD in the Baha Mousa Inquiry.
13. These allegations however are very serious indeed and include:

⁸ <https://www.gov.uk/government/publications/al-sweady-inquiry-report>

⁹ *Alseran and Ors v MOD [2017] EWHC 3289 (QB)*

¹⁰ Baha Mousa Inquiry finds “corporate failure” by the MOD

<https://ukhumanrightsblog.com/2011/09/08/corporate-failure-by-mod-finds-baha-mousa-inquiry/>

¹¹ *Ireland v UK 1971*. The five techniques (hooding, stress positions, food and sleep deprivation and white noise) were all banned by the Heath Government in 1972

¹² See OTP Report 2016 paragraphs 87-97 https://www.icc-cpi.int/iccdocs/otp/161114-otp-rep-PE_ENG.pdf

*“beatings and other forms of battery, cuffing and other forms of restraining, sensory deprivation, sensory overstimulation, deprivation of clothes, deprivation of food, deprivation of medical care, deprivation of privacy, deprivation of sleep, deprivation of toilet, deprivation of water, forced exertion, harsh environment, forced immobility and/or silence, prolonged solitary confinement/isolation, stress positions, sexual violence, sexual humiliation/other forms of sexual assaults, electrocution and burning, suspension, water techniques/waterboarding, induced desperation, threats, religious and cultural humiliation, and verbal abuse. Other forms of alleged ill-treatment include forced (unnecessary) medical treatment; collective punishment; forced labour; inadequate bedding; use of pepper spray; and forced feeding”*¹³

14. However, whereas these “*corporate failings*” were accepted by the MOD in 2011 they became “*vexatious*” in 2014. This simply does not add up.
15. By way of assistance for the JCHR, it subsequently came to light in 2016 that many of the interrogations had been recorded. This was confirmed in a letter from the Minister of State for the Armed Forces (MSU/4/7/3/9sh dated 30th March 2017) and a subsequent assurance was received that such evidence would not be destroyed (MSU/4/7/3/0ap dated 16th May 2017). In my view, all these video recordings should now be examined by the JCHR.
16. The Parliamentary Report, “Who Guards the Guardians”¹⁴, made the following observation:

*“The admission that training material for interrogations contained information which could have placed service personnel outside of domestic or international law represents a failing of the highest order. We expect the MoD to confirm that no cases under consideration by IHAT are based on the actions of individuals who were following that flawed guidance. If there are, we ask the MoD to set out how it will support individuals who are subject to claims arising from actions which their training advised was lawful”*¹⁵.

17. In my view, it is now incumbent on the JCHR to clarify this issue once and for all. If over 75% of the allegations made against service personnel are in fact genuine then the MOD now needs to publically acknowledge their mistakes and set the record straight. It goes without saying that the Government potentially stands to benefit hugely from the OOB and to attempt to legislate their way out of their “*corporate failings*” would be unconscionable.

¹³ Ibid 12 above para 91 which documents 25 of the most common practises

¹⁴ <https://publications.parliament.uk/pa/cm201617/cmselect/cmdfence/109/10904.htm>

¹⁵ See para 86

Rendition

18. Rendition is defined as “unlawful deportation or transfer or unlawful confinement” of prisoners of war/detainees. It is a war crime under Article 8 of the Rome Statute 1998 and a grave breach of the GC. The ICC has jurisdiction over such crimes when committed “as part of a plan or policy”¹⁶.
19. Following the case of *Belhaj*¹⁷ and the report of the Intelligence and Security Committee (ISC) into “Detainee Mistreatment and Rendition 2001-2010”¹⁸, it is now beyond any doubt that “*the UK security services and military personnel have colluded in rendition, torture...both as part of the CIA’s rendition and interrogation programme and at military detention facilities in Afghanistan and Iraq*”¹⁹
20. After I returned from Iraq, I subsequently became aware that UK Forces had been involved in the transportation of prisoners to a “black site” known as H1 in the UK Area of Operations (UKAO)²⁰. At roughly the same time, I was made aware that prisoners had been brought into medical facilities by Special Forces without medical files being opened in breach of medical protocol. After treatment, the prisoners were simply removed from the facility. I reported both allegations to the Iraq Historic Allegations Team (IHAT).
21. In January 2019, I was advised that my allegations of rendition had been dismissed. I repeatedly asked for confirmation that the prisoners had subsequently been put into the PW chain as required under the GC. Despite repeated requests I have received no such assurances. In the circumstances, I strongly suspect that these prisoners were either rendered or possibly worse. I have heard of other black sites in the UKAO and do not believe that was a one off event.
22. The OOB however will effectively close down all allegations of rendition arising from Iraq and Afghanistan as well as elsewhere in the world. Put another way, it could be used to cover up war crimes. As rendition could have only have been sanctioned by the British Government, the State is effectively legislating to cover up their own war crimes. This is again unconscionable and, in my view, will lead to all allegations of rendition in Iraq and Afghanistan being taken over by the ICC.

Unlawful killings

¹⁶ <https://www.icc-cpi.int/resource-library/documents/rs-eng.pdf>

¹⁷ <https://www.supremecourt.uk/cases/docs/uksc-2014-0264-judgment.pdf>

¹⁸ See report published June 2018 <http://isc.independent.gov.uk/committee-reports/special-reports>

¹⁹ See The Political Quarterly. “The prohibition against Torture: Why the UK Government is Falling Short and the Risks that Remain” <https://onlinelibrary.wiley.com/doi/full/10.1111/1467-923X.12688>

²⁰ See report of Sir George Newman (which inquired into the death of Tariq Mahmud (death only)) <https://www.gov.uk/government/publications/iraq-fatality-investigations-investigation-into-the-death-of-tariq-sabri-mahmud>

23. I am aware of the recent reports into alleged unlawful killings in Afghanistan but am unable to comment other than to express concern at the reported similarity of accounts given by those investigated. I would draw the Committee's attention to the case of the Columbian military using tactics similar to those alleged against UK Special Forces. Interestingly, they also complained (spuriously) about "legal warfare".²¹ The Committee also needs to ask itself to what extent were UK Special Forces involved with Australian Special Forces in the light of the imminent publication of the Brereton report?²²

Conclusion

24. In my view, the OOB undermines International Humanitarian Law and damages our International reputation abroad. The OOB is designed to shield the Government from deserving claims and could be used to deliberately shut down investigations into war crimes. It also prevents soldiers from seeking legal redress. This, in turn, will increase litigation and, above all, invite the ICC to take over UK investigations.

25. The OOB therefore is neither required nor desirable. We have brought the vast majority of these problems upon ourselves and creating a statutory presumption against prosecution, a five year time limit and amending International Humanitarian Law is not the answer. Indeed, it will add to the culture of cover up in the UK that already exists. If we had complied with the Law of Armed Conflict in the first place then all these problems largely fall away. The OOB is contrary to everything we stand for as a professional army and, in my view, should be abandoned.

07/09/2020

²¹ <https://www.hrw.org/news/2018/12/07/poor-memory-colombias-ex-army-chief>

²² The Brereton Report is expected shortly and will make for "uncomfortable reading".
<https://www.theguardian.com/australia-news/2020/aug/16/australias-special-forces-problem-why-the-sas-is-facing-a-crisis>