

## Written evidence from CEASEFIRE Centre for Civilian Rights (OOB0013)

### About Ceasefire

The Ceasefire Centre for Civilian Rights (reg. charity 1160083) works to develop civilian-led monitoring of violations of international humanitarian law (IHL) and human rights, to pursue legal and political accountability for those responsible for such violations, and to develop the practice of civilian rights.<sup>1</sup> Working with partners on the ground in Iraq, Syria, Yemen, South Sudan and other jurisdictions, Ceasefire has particular expertise in the practical application of IHL /law of armed conflict.

### Introduction and summary

Ceasefire welcomes the Joint Committee's examination of the Overseas Operations (Service Personnel and Veterans) Bill. Significant attention has been given to the Bill's presumption against prosecution clauses which fail to comply with international law,<sup>2</sup> as well as the impact the Bill will have on veterans' ability to bring compensation claims.<sup>3</sup> Instead of restating these important issues, **this submission will focus on the impact of the civil litigation 'longstop' on the right to reparation under international law for victims of violations overseas.** Given that defence ministers have repeatedly stated that 'the Law of Armed Conflict will be the appropriate and specific choice for military operations', **this submission will also focus in particular on obligations under the law of armed conflict to conduct investigations and provide reparations,** complementary to submissions from human rights NGOs.

The submission argues:

- The Bill fails to recognize the extensive obligations to investigate, and provide reparation for, civilian death and injury that exist under the Geneva Conventions and other IHL instruments (separately from provisions under the Human Rights Act 1998).
- The Bill as a whole fails to take account of norms under international law which have the status of *jus cogens*. Redress and reparation for torture, war crimes and crimes against humanity cannot be subject to any statute of limitations or 'longstop'.
- Without the establishment of an alternative mechanism through which victims of serious violations of international law can claim reparation, the UK will be in violation of its legal obligations under both international humanitarian law and human rights law.
- In line with growing international practice, the UK should adopt a policy on reparations for civilian harm as a result of military operations overseas.

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<sup>1</sup> Ceasefire is supported by the governments of Switzerland and Norway, as well as UK FCDO.

<sup>2</sup> Alistair Carmichael, [A new bill will decriminalise torture rather than protect our soldiers. We can't let it pass](#), the Independent, (June 2020)

<sup>3</sup> House of Commons Hansard, [British Overseas Troops: Civil Liability Claims](#), 16 July 2020, Volume 678

## Questions addressed

This submission addresses the following questions and related issues:

- How would the right to an effective remedy for victims be impacted by the proposed change in law?
- Is the proposed limitation period of six years (without exception) in cases of personal injury and death, and for bringing human rights claims, in relation to overseas military operations reasonable?
- What will the impact be of requiring a judge to consider the mental health of witnesses before allowing a case to proceed?

## Civil claims and the right to reparation

1. The ‘longstops’ introduced by the Bill for civil litigation and claims under the Human Rights Act violate the UK’s obligations under international law to ensure victims of violations of IHL and human rights have access to a remedy and reparation. The obligation on States to provide reparation for violations of IHL is contained in, *inter alia*, Art 91 of Geneva Conventions Additional Protocol I which provides that: ‘A Party to the conflict which violates the provisions of the Conventions or of this Protocol shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces.’ It is also an established principle of customary international law, in both international and non-international armed conflict.<sup>4</sup> The UN General Assembly’s ‘Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law’ (the Basic Principles) further confirm the right to reparation.<sup>5</sup> The Basic Principles also state that ‘domestic statutes of limitations...including those time limitations applicable to civil claims and other procedures, should not be unduly restrictive.’<sup>6</sup>

2. The Bill fails to take account of extensive obligations under IHL to investigate and account for civilian harm, which exist independently from the investigatory obligations under Art. 2 ECHR.<sup>7</sup> These include the obligation to account for the dead and the missing, including holding an official enquiry into deaths of civilian detainees, in furtherance of ‘the right of families to know the fate of their relatives’,<sup>8</sup> and the obligation on parties to conflict to investigate all suspected IHL violations.

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<sup>4</sup> International Committee of the Red Cross (ICRC), Customary IHL Database, Rule 150: A State responsible for violations of international humanitarian law is required to make full reparation for the loss or injury caused.

<sup>5</sup> Principle 18 provides for ‘full and effective reparation’, which includes restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition. UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (The Basic Principles), Adopted and proclaimed by General Assembly resolution 60/147 (2005)

<sup>6</sup> The Basic Principles, Principle 7

<sup>7</sup> See ‘The Duty in International Law to Investigate Civilian Deaths in Armed Conflict’, in Mark Lattimer and Philippe Sands (eds), *The Grey Zone: Civilian Protection Between Human Rights and the Laws of War* (Oxford, Hart, 2018).

<sup>8</sup> Geneva Conventions API, Article 32.

3. The proposed legislation greatly underestimates the difficulties faced by civilians in conflict or post-conflict environments in seeking redress in UK courts. There are numerous reasons why victims of rights violations would not bring a claim within six years, not least because civilians in Iraq and Afghanistan have lived in an almost constant state of armed conflict and insurgency for the majority of the past two decades. There are currently 1.4 million displaced people inside Iraq, with 6 million displaced at the height of the conflict with ISIS.<sup>9</sup> Recent conflicts across the Middle East and West Asia have been characterised by war crimes, large-scale displacement of civilian populations, and destruction of infrastructure and property, leaving many civilians facing a daily struggle to survive. Further obstacles include language barriers, lack of awareness of the UK's legal systems, access to communications technology to find or communicate with a lawyer, and the potential costs involved.

4. Aside from practical barriers, suffering rights violations can have significant and long-lasting psychological and medical impacts on victims. Stigma associated with mental health conditions, inadequate local healthcare facilities for the diagnosis of such issues, as well as fear of reliving the experience of rights violations, may all contribute to a delay in claims being brought. The six-year absolute longstop is unduly restrictive and unnecessary, especially as English courts have clearly demonstrated the ability to exercise their discretion to both allow and refuse the exclusion of time limits where appropriate for the interests of justice.<sup>10</sup> Importantly, the longstop should not apply to certain offences under international law, including torture, war crimes, and crimes against humanity, as the right to reparation for these crimes cannot be subject to any such statute of limitations. Without the development of an alternative mechanism through which victims can seek redress, the UK will be in violation of its legal obligations.

5. The Bill requires courts and tribunals to have regard to the impact of the operational context on memory and recall of UK personnel and on the impact of any legal action on the mental health of witnesses. The exceptional stresses to which UK personnel are submitted are not in dispute, but they are not unique to UK personnel. As the specialist law concerned with armed conflict, IHL already takes account of the exceptional conditions of conflict, its rules on violations are specifically elaborated with that in mind, and it is a fundamental principle of IHL that they should apply without distinction. Obligations to investigate and provide reparation for violations cannot be unilaterally limited or avoided by one party by pleading the mental state of members of its armed forces. Mental states may properly be taken into account in criminal proceedings (for example in assessing mitigation) but they should not be invoked to defeat the liability of the state or the Ministry of Defence for IHL violations.

6. Crucially, the Bill as a whole fails to take account of the status of certain prohibitions under international law which are *jus cogens* norms. By virtue of the Geneva Conventions and their Additional Protocols, customary international law, and the jurisprudence of international courts and tribunals, it has long been accepted that the prohibition of war crimes, crimes against humanity, genocide, and torture are peremptory norms of international

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<sup>9</sup> United Nations Office for the Coordination of Humanitarian Affairs, [About OCHA Iraq](#)

<sup>10</sup> See the courts differing rulings in two cases both concerning colonial-era human rights violations in Kenya- *Mutua and others v. The Foreign and Commonwealth Office* [2012] EWHC 2678 (QB); and *Kimathi and others v The Foreign and Commonwealth Office* [2018] EWHC 1169 (QB)

law.<sup>11</sup> The *erga omnes* obligations which flow from these norms effectively limit State powers to prohibit or evade investigation, prosecution, and the provision of remedy and redress for these crimes. Whilst the right to remedy for violations of IHL may be enforced through human rights treaties and mechanisms, these treaties merely reflect pre-existing obligations on States under IHL to provide remedy and reparation for violations of IHL. By restricting the right to remedy and reparation through the ‘longstop’, the UK not only violates its obligations under international human rights law, but also violates longstanding obligations under IHL.

7. The UK should take note of the recent judgment by the UN Committee Against Torture in a case concerning wartime sexual assault,<sup>12</sup> which took account of legislation and jurisprudence in Bosnia-Herzegovina that introduced a statute of limitations of five years for civil claims. The Committee found that Bosnia had violated the Convention Against Torture, stating that ‘*on account of the continuous nature of the acts of torture, statutes of limitations should not be applicable as these deprive victims of the redress, compensation, and rehabilitation due to them*’.<sup>13</sup> The longstop provisions in the Bill violate Article 14 of the Convention Against Torture which provides for the right to redress.<sup>14</sup>

8. As noted by others, the longstop also violates the International Covenant on Civil and Political Rights which provides for access to a court,<sup>15</sup> as well as the standards set by the European Court of Human Rights (ECtHR) on the right to a remedy,<sup>16</sup> and the right to a fair and public hearing.<sup>17</sup>

9. The Bill also discriminates against victims overseas, who are disproportionately impacted by the longstop. Claims in tort or under the Human Rights Act are currently the only avenue open to civilians to claim compensation, whereas veterans affected by the Bill will continue to have access to non-judicial remedies. A Ministry of Defence spokesperson stated in August 2019 that although the longstop will also apply to veterans, ‘our plans for a new compensation scheme will mean that personnel will receive compensation at the level a court would order anyway’.<sup>18</sup> Veterans will therefore still have access to a remedy in the form of compensation via dedicated schemes, whereas civilians will be left with no recourse to justice or remedy.

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<sup>11</sup> See, for example, [the Report of the International Law Commission](#) to the UN General Assembly on Peremptory norms of general international law, (2019), A/74/10, Chapter V p.141

<sup>12</sup> [Mrs. A v. Bosnia and Herzegovina](#), Communication No. 854/2017, Views of 22 August 2019, UN Doc. CAT/C/67/D/854/2017

<sup>13</sup> *Ibid.* para 7.5

<sup>14</sup> Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Adopted and opened for signature, ratification and accession by General Assembly resolution 39/46 of 10 December 1984, Article 14

<sup>15</sup> Article 14 of the ICCPR states: ‘All persons shall be equal before the courts and tribunals’. Furthermore, the UN Human Rights Committee have found that statutes of limitation are not acceptable where claimants are excluded from the outset- *Preiss v. Czech Republic* UN Human Rights Committee Gen Comm. 93, para 9, U.N. Doc. CCPR/C/93/D/1497 (2006).

<sup>16</sup> Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, (1950), Article 13

<sup>17</sup> *Ibid.* Article 6

<sup>18</sup> Ministry of Defence, [‘Defence in the media: Armed forces recruitment and compensation claims’](#), (2019)

10. In order to fulfil its IHL obligations and to ensure that the UK is not discriminating against victims of rights violations overseas, the UK should introduce a policy on reparations for civilian harm as a result of UK military operations overseas. Historically, the UK and many of its partner countries in overseas conflicts have provided compensation for civilian harm that has resulted from military operations overseas, in recognition of the fact that compensation can serve as a form of redress and provide benefits to both States and victims.<sup>19</sup> The Basic Principles provide that States should ‘endeavour to develop procedures to allow groups of victims to present claims for reparation and to receive reparation.’<sup>20</sup> There is growing international practice in this area, and the US Department of Defense is currently building on existing practice and policy by developing a comprehensive policy addressing civilian casualties resulting from US military operations.<sup>21</sup>

## Recommendations

11. As currently formulated, the Bill violates the UK’s obligations under international law. In particular, the Bill is incompatible with standards on the right to reparation, remedy and access to a court contained in international humanitarian law, the Basic Principles, the UN Convention Against Torture, the International Covenant on Civil and Political Rights and the European Convention on Human Rights.

12. Ceasefire recommends:

- A. The Bill should be amended to reflect the *jus cogens* nature of serious crimes under international law. These crimes must be exempt from the presumption against prosecution as excluded offences.
- B. The UK Government should develop a comprehensive policy on reparation for civilian harm caused by military operations overseas. The policy should include a mechanism to provide restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition for victims of violations. Any statute of limitations for compensation claims which would cover torture, war crimes and crimes against humanity will violate international law unless the UK provides an alternative mechanism through which victims can seek reparation.

09/09/2020

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<sup>19</sup> See, for example, CIVIC, [‘Addressing Civilian Harm in Afghanistan: Policies & Practices of International Forces’](#), (2010)

<sup>20</sup> The Basic Principles, Principle 13

<sup>21</sup> US Department of Defense Memorandum, [‘Development of a DoD Instruction on Minimizing and Responding to Civilian Harm in Military Operations’](#), (January 2020)