Written evidence from Redress, Hogan Lovells International LLP (HRA0053)

Introduction

1. This submission is made in response to the call for evidence of the Joint Committee on Human Rights' in its inquiry regarding the Government's Independent Human Rights Act Review (the "**Review**"). This submission has been prepared jointly by REDRESS and Hogan Lovells International LLP ("**Hogan Lovells**") and draws from REDRESS and Hogan Lovells' lengthier submission in response to the call for evidence of the Review, which is available in its entirety here.

2. REDRESS is a UK charity that uses the law to seek justice and reparations for survivors of torture, to combat impunity for governments and individuals who perpetrate torture, and to develop and promote compliance with international standards. REDRESS has been at the forefront of developments in the law relating to victims of torture and reparations for 25 years and has developed expertise through detailed research, innovative litigation, and progressive standard-setting.

3. Hogan Lovells is an international law firm with a long history of pro bono work involving human rights in the UK and around the world. The firm's pro bono practice has made significant contributions to matters at the heart of human rights, including establishing the precedent for compensation payments for victims of transnational trafficking and representing women who experience gender based violence in domestic settings and in war zones.

4. In preparing this submission, REDRESS and Hogan Lovells consulted with a number of experts, including: Professor Helen Duffy of Leiden University (current trustee at REDRESS); Professor Sir Malcolm Evans KCMG OBE of the University of Bristol, formerly Chair of the UN Subcommittee on Prevention of Torture (current trustee at REDRESS); Reverend Nicholas Mercer, formerly the Command Legal Adviser to the 1st Armoured Division during the Iraq War of 2003 (current trustee at REDRESS); and Sudhanshu Swaroop QC, barrister at Twenty Essex chambers.

The Human Rights Act and the enforcement of individuals' human rights in the UK

5. By incorporating the European Convention on Human Rights (the "**ECHR**") into domestic law, the Human Rights Act 1998 (the "**HRA**") has made it significantly easier for individuals to enforce their human rights in the UK. Since coming into force just over two decades ago, the HRA has been extremely effective, ensuring the protection of individuals' rights across a wide range of areas. With regard to Article 3, through the existing framework of the HRA, protections have rightly been secured in relation to: child abuse; the ill treatment of individuals in need of medical care; domestic violence; the torture and ill treatment of prisoners; the torture and ill treatment of individuals held in military detention; the torture and ill treatment of asylum seekers; instances of extraordinary rendition; and many other circumstances. Others will no doubt be able to provide the Review with a great many examples of how the HRA's existing framework has secured justice and redress for individuals in relation to other of the ECHR rights.

The impact of the Human Rights Act on public authorities

6. The HRA has put human rights at the heart of public decision making, which is undoubtedly a positive development. As a result of the HRA, the UK's public authorities consider the human rights impacts of any decisions which affect a broad range of actors, from multinational companies investing and operating in the UK to the most vulnerable members of society. While judicial remedies exist as a backstop where things go wrong, the important preventative effect that the HRA has had must not be forgotten. In the context of Article 3, the HRA has ensured UK public authorities have paid closer attention to the prevention of torture and ill treatment, avoiding abuses that might otherwise have been committed.

The impact of the Human Rights Act on the relationship between the courts, Government and Parliament

7. The existing framework of the HRA maintains a careful and appropriate balance between the courts, the executive and Parliament, ensuring the rights of individuals are adequately protected, the executive remains accountable and Parliament remains sovereign. In other words, it carefully reflects, and protects, the existing constitutional framework. The key provisions of the HRA that achieve this balance are sections 3 and 4. These provisions provides for an efficient means of addressing points of detail via judicial interpretation which, if the courts were to get wrong, could then be clarified by Parliament, whilst also providing for appropriate deference to Parliament in instances of outright incompatibility.

The impact of the Human Rights Act on the relationship between the domestic courts and the European Court of Human Rights

8. The relationship between the domestic courts and the European Court of Human Rights (the "**ECtHR"**). is a healthy and productive one. The key provision of the HRA that governs the domestic courts' duties with regard to the ECtHR's jurisprudence is section 2, which imposes an obligation on the domestic courts to "take into account" that jurisprudence. The provision was deliberately drafted to ensure that the UK courts would not be bound to follow ECtHR judgments and other decisions, both so that the courts might depart from ECtHR decisions in appropriate circumstances and so that they might even lead the way in developing human rights jurisprudence where novel questions arise.[1] On the infrequent occasions where the domestic courts and the ECtHR have disagreed, both the UK Supreme Court and the ECtHR have proved willing and able to engage in judicial dialogue.

Altering the extraterritorial application of the Human Rights Act

9. The extraterritorial application of the ECHR rights under the HRA to the acts of UK public authorities should not be restricted any further than the limits already imposed by the ECtHR's own jurisprudence.

10. The ECHR rights generally apply to acts of UK public authorities taking place outside the territory of the UK where either: the UK exercises effective control over an area outside its territory; or the UK exercises control through its agents over an individual.[2]

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[1] See Lord Irvine's speech during parliamentary debate on section 2 at HL Deb 18 November 1997, vol 583, cols 514–515.

[2] *Al-Skeini and Others v the United Kingdom* [GC], No. 55721/07, ECHR 2011; *Al-Jedda v the United*

11. Following the ECtHR Grand Chamber's very recent judgment in *Georgia v Russia (II)*, ECtHR jurisprudence indicates that the protections of the ECHR may not apply outside the territory of a State to military operations occurring during the "active phase of hostilities" in an international armed conflict on the basis that "in a context of chaos" there is neither "effective control" nor "State agent authority and control."[3]

12. Importantly, the Grand Chamber's judgment in this case found that, if a person has been detained, even during the "active phase" of a conflict, then the situation of "chaos" in relation to that person no longer exists and the ECHR rights once again apply. Indeed, jurisdiction was found with respect to all persons who were being detained by Russian or pro-Russian forces at any stage of the conflict, and the ECtHR found Russia responsible for several ECHR violations, including violations of Article 3 with respect to detainees.[4] Extraterritorial jurisdiction was also found with respect to the procedural duty to investigate ECHR violations, including those committed during the "active phase" of the conflict.[5]

13. By comparison to other international courts and bodies, including those charged with the authoritative interpretation of treaty obligations binding on the UK (such as the International Covenant on Civil and Political Rights and the Convention on the Rights of the Child), the ECtHR's jurisprudence offers a restrictive view of the extraterritorial applicability of human rights.[6] With regard to the prohibition of torture and inhuman or degrading treatment or punishment, the more expansive approach taken by other international courts and bodies affords greater protection to survivors of torture and ill treatment and provides for a more effective right to a remedy.

14. With regard to Article 3, any attempt to limit the extraterritorial application of the absolute prohibition of either limb (i.e. torture *and* inhuman or degrading treatment or punishment) would soon put the UK in breach of the ECHR; Article 3 cannot be divided into constituent parts. As has been repeatedly affirmed by the ECtHR, Article 3 makes no provision for exceptions and no derogation from either limb is permissible under Article 15, even in the event of a public emergency threatening the life of the nation.[7] Indeed, the prohibition of torture has been recognised as a *jus cogens* norm, that is, one which cannot be derogated from in any circumstances,[8] and this has been explicitly accepted by

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Kingdom [GC], No. 27021/08, ECHR 2011.

[3] *Georgia v Russia (II)* [GC], No. 38263/08 (ECtHR, 21 January 2021) at para 137.

[4] Ibid at paras 239 and 269-281.

[5] Ibid at paras 331-332.

[6] By way of comparison, see for example: the UN Human Rights Committee's General Comment No. 36 on the right to life, where jurisdiction is derived from the states' direct and foreseeable impact on the right; the African Commission on Human and Peoples' Rights' General Comment No. 3 on the right to life, which determined jurisdiction in broadly similar terms to the UN Human Rights Committee; and the Inter-American Commission on Human Rights' focus for the purposes of jurisdiction on establishing a causal link.

[7] *Ireland v the United Kingdom*, 18 January 1978, Series A no. 25 at para 163; *Chahal v the United Kingdom* [GC], 15 November 1996, Reports of Judgments and Decisions 1996-V at para 79; *Saadi v Italy* [GC], No. 37201/06, ECHR 2008 at para 127.

[8] Vienna Convention on the Law of Treaties 23 May 1969 (entered into force, 27 January 1980), Article 53. See also: European Court of Human Rights, *Al-Adsani v UK*, App. No 35763/97 (21 November 2001), at paras 30, 60, 61, quoting International Criminal Tribunal for the former Yugoslavia, *Prosecutor v Furundzija* (10 December 1998, case no. IT-95-17/I-T) at paras 147, 153-

UK courts.[9] If the UK government and Parliament were to seek to limit the extraterritorial application of the absolute prohibition, this would also put the UK in breach of other international legal obligations.[10] Consequently, the failure, or inability as a result of changes to the HRA, of the domestic courts to address instances of torture or ill treatment allegedly committed by UK public authorities overseas would likely result in intervention by the ECtHR and other international human rights mechanisms and procedures. The same can be said of any failures by the UK government to investigate allegations of such Article 3 violations.

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154; *Prosecutor v Ieng Sary*, Decision on Ieng Sary's Rule 89 Preliminary Objections (Ne Bis In Idem, Amnesty and Pardon) ECCC Case File No. 002/19-09-2007-ECCC/TC (3 November 2011), at paras 38-39.

[9] *A v Secretary of State for the Home Department (No 2)* [2005] UKHL 71 [2006] 2 AC 221 at para 33, recently cited in *McGuigan & McKenna v Chief Constable of the PSNI* [2019] NICA 46 at para 76.

[10] See, for example, the Geneva Conventions of 1949 and their Additional Protocols of 8 June 1977, Articles 2 and 16 of the UN Convention against Torture, Article 7 of the International Covenant on Civil and Political Rights and Article 5 of the Universal Declaration of Human Rights, all of which the UK has ratified.