

Written evidence from Mr John Cubbon (OOB0001)

Author

1. John Cubbon works on criminal justice issues arising in fragile and conflict affected states. He held legal positions in the UN from 1995 to 2015. More recently he has undertaken assignments for the Stabilisation Unit and Timothy Shilston Associates. He is writing here in a personal capacity.

Introduction

2. The statutory presumption against prosecution set forth in clauses 1-7 of the Overseas Operations (Service Personnel and Veterans) Bill is inconsistent in several respects with the obligations of the UK under international law. This Note will outline some of those inconsistencies.
3. The Bill follows a Public Consultation in 2019,¹ which contained a similar proposal. Several of the Responses to the Consultation drew attention to violations of international law that apply equally to the Bill.² The arguments to be presented here repeat points made in those Responses and they will doubtless also resemble other submissions that will be made to the Joint Committee on Human Rights but a degree of overlap is a price worth paying to ensure that the message is put across.

Does the presumption against prosecution raise any issues in respect of the UK's procedural obligations under Articles 2 (right to life) and 3 (prohibition on torture, inhuman and degrading treatment or punishment) of the ECHR?

4. It is a long-established principle of the jurisprudence of the European Court of Human Rights (ECtHR) that Articles 2 and 3 of the ECHR combined with Article 1 create a procedural obligation whereby in the case of use of lethal force by State authorities or an arguable claim of unlawful serious ill-treatment by the police or other State agencies there must be an effective official investigation that is capable of leading to the identification and punishment of those responsible.³ The proposed presumption would tend to prevent an investigation from being capable of identifying and

¹ Ministry of Defence, *Public Consultation on Legal Protections for Armed Forces Personnel and Veterans serving in operations outside the United Kingdom*, 22 July 2019 <<http://www.gov.uk/government/consultations/legal-protections-for-armed-forces-personnel-and-veterans-serving-in-operations-outside-the-united-kingdom>>.

² Stuart Wallace, Elizabeth Stubbins Bates and Noëlle Quéniwet, *Legal Protections for Armed Forces Personnel and Veterans serving in operations outside the United Kingdom: Response to Public Consultation Questionnaire* <papers.ssrn.com/sol3/papers.cfm?abstract_id=3463638>; Thomas Obel Hansen and Carla Ferstman, *UK Ministry of Defence Consultation on Legal Protections for Armed Forces Personnel and Veterans serving in operations outside the United Kingdom* <https://www.ulster.ac.uk/data/assets/pdf_file/0006/476700/UK-Ministry-of-Defence-Consultation-on-Legal-Protections-for-Armed-Forces-Personnel-and-Veterans-serving-in-operations-outside-the-United-Kingdom-Submission-by-TO-HANSEN-AND-C-FERTSMAN.pdf>; Liberty, *Liberty's Response to Ministry of Justice Consultation on 'Legal Protections for Armed Forces Personnel and Veterans Serving in Operations Outside the United Kingdom'* <www.libertyhumanrights.org.uk/wp-content/uploads/2020/02/LIBERTYS-RESPONSE-TO-THE-MINISTRY-OF-DEFENCE-CONSULTATION-ON-LEGAL-PROTECTIONS-FOR-ARMED-FORCES-PERSONNEL-AND-VETERANS-October-2019.pdf>.

³ *McCann and Others v UK* (1996) 21 EHRR 97, para 161; *Al Skeini v UK* (2011) 53 EHRR 18, paras 163-166; *Assenov and others v Bulgaria* (1999) 28 EHRR 652, para 102.

punishing those responsible because it would terminate the process just because five years have expired. The ECtHR has in fact found that the expiry of a fixed period of time is an insufficient reason for terminating investigations of alleged violations of Articles 2⁴ and 3.⁵ The proposed presumption would accordingly give rise to significant breaches of the ECHR.

What would the implications of this change in the law be 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?

5. The presumption conflicts with a number of the obligations of the UK under international law as well as those arising from the ECHR.⁶ Customary international law on war crimes is of major relevance to overseas military operations. Under Rule 158 of the ICRC Customary International Humanitarian Law Database, States have an obligation to investigate war crimes allegedly committed by their armed forces and, if appropriate, to prosecute suspects;⁷ and under Rule 160 statutes of limitation may not apply to war crimes.⁸ The proposed presumption operates in essentially the same way as a statute of limitations.⁹ It seems clear then that failing to prosecute an alleged war crime solely on the basis of the presumption would be a violation of customary international law.
6. The Prosecutor of the International Criminal Court (ICC) is undertaking a preliminary examination of alleged war crimes committed by UK nationals in the context of the Iraq conflict and occupation from 2003 to 2008.¹⁰ It is currently at the stage of addressing admissibility.¹¹ A case is inadmissible before the ICC if, *inter alia*, it is being prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the prosecution¹² or if it has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness of the State genuinely to prosecute.¹³
7. In December 2019 the Office of the Prosecutor (OTP) commented on an earlier proposal for a presumption against prosecution that if it were enacted the OTP would need to consider its potential impact on the ability of the UK authorities to investigate

⁴ *Association "21 December 1989" and Others v Romania* App no 33810/07 (ECtHR, 24 May 2011), para 144. cf *Šilih v. Slovenia* (2009) 49 EHRR 996, para 157.

⁵ *Mocanu and Others v Romania* (2015) 60 EHRR 19, para 346; *Kosteckas v Lithuania* App no 960/13 (ECtHR, 13 September 2017), para 44.

⁶ For example, the Geneva Conventions and the Genocide Convention to which the UK is a party contain provisions that preclude the termination of criminal proceedings simply on the basis of the expiry of a period of time. Geneva Convention I arts 2, 49-50; Geneva Convention II Articles 2, 50-51; Geneva Convention III arts 2, 129-130; Geneva Convention IV arts 2, 146-147; Convention on the Prevention and Punishment of the Crime of Genocide art IV.

⁷ ICRC Customary IHL Database Rule 158 <https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule158>.

⁸ ICRC Customary IHL Database Rule 160 <https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule160>.

⁹ cf Wallace, Stubbins Bates and Quéniwet (n2) 11; Hansen and Ferstman (n2) 5.

¹⁰ www.icc-cpi.int/iraq.

¹¹ *ibid*.

¹² Rome Statute of the ICC art 17(1)(a).

¹³ *ibid* art 17(1)(b).

and/or prosecute crimes allegedly committed by members of the British armed forces in Iraq against the standards of inactivity and genuineness set out in article 17 of the Statute.¹⁴ The enactment of the presumption against prosecution would indicate a lack of commitment on the part of the UK to the domestic prosecution of crimes within the jurisdiction of the ICC thereby increasing the likelihood of an investigation.¹⁵ If it were to be applied so that proceedings were not brought or continued in relation to a crime within the ambit of the preliminary examination, it could have a far greater effect. The likelihood of this happening is difficult to assess.

8. There remains a possibility that the preliminary examination will lead to an investigation. The UK Government recognises that this would be embarrassing and it has taken and will take steps which are intended to lead the OTP to conclude that it is genuinely willing to prosecute.¹⁶ An investigation looks unlikely¹⁷ but it cannot be ruled out.

Context and implications

9. The proposed presumption would only apply to operations “outside the British islands in the course of which Her Majesty’s forces come under attack or face the threat of attack or violent resistance”.¹⁸ Hardly any of the current UK overseas military deployments belong to this category.¹⁹ The two largest recent deployments that do took place in Afghanistan and Iraq. There are a few ongoing investigations of UK service personnel resulting from them.²⁰ Only a tiny number have in recent years been referred to the Service Prosecuting Authority which has tended to decide not to bring charges.²¹ For the foreseeable future after enactment the presumption against prosecution can therefore be expected hardly to be applied. There could, of course, be unforeseen deployments in the future; but the importance of the presumption having the force of law may lie more in the approving emotional reaction in certain quarters domestically than in the termination of criminal proceedings.
10. The international impact would be immediate and harmful. The appearance of the presumption on www.legislation.gov.uk would damage the reputation and authority of the UK as an advocate of the international rule of law²² and it would encourage other States also to adopt laws that would restrict the prosecution of their past and present service personnel and thereby violate international law.

¹⁴ Office of the Prosecutor, *Report on Preliminary Examination Activities 2019* <<https://www.icc-cpi.int/itemsDocuments/191205-rep-otp-PE.pdf>> paras 173-174.

¹⁵ cf Liberty (n2) para 45.

¹⁶ cf Human Rights Watch, *Pressure Point: The ICC’s Impact on National Justice. Lessons from Colombia, Georgia, Guinea, and the United Kingdom* (2018) 137-151.

¹⁷ cf BBC Radio Four programme Law in Action on 2 June 2020 Interview with Andrew Cayley QC <www.bbc.co.uk/podcasts?q=law%20in%20action>.

¹⁸ Overseas Operations (Service Personnel and Veterans) Bill, cl 1(6).

¹⁹ www.army.mod.uk/deployments/.

²⁰ assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/891139/20200401-SPLI_QTR_RPT-31DEC19-31MAR20-FINAL_1_.pdf; Letter from the Ministry of Defence dated 15 July 2020 in response to FOI Request (on file with the author).

²¹ assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/891139/20200401-SPLI_QTR_RPT-31DEC19-31MAR20-FINAL_1_.pdf; Interview with Andrew Cayley QC (n17); <https://www.gov.uk/government/news/ministry-of-defence-response-to-allegations-relating-to-the-conduct-of-uk-forces-in-iraq-and-afghanistan>.

²² cf Hansen and Ferstman (n2) 5.

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