RIGHTS & SECURITY INTERNATIONAL

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JOINT COMMITTEE ON HUMAN RIGHTS
Call for Evidence on the Overseas Operations Bill – Submission

Rights and Security International (RSI) is a legal charity which works to promote just and accountable security policy, drawing on over 25 years' experience working in the field of human rights and national security policy in the United Kingdom. RSI has been closely involved in monitoring the Government's involvement in joint overseas military operations as well as measures taken under the ambit of its national security and counter-terrorism strategies, seeking to ensure that these measures are compliant with human rights standards and international law.

Due to word-limit restrictions, this submission addresses only the question of the limitation period for bringing civil and human rights claims, per the JCHR's Call for Evidence.

THE REASONABLENESS OF THE ABSOLUTE LIMITATION PERIOD FOR BRINGING CIVIL AND HUMAN RIGHTS CLAIMS

1. RSI is gravely concerned by the Bill's proposal of an absolute six-year limitation period on all civil (relating to death and/or personal injury) and human rights claims against the Ministry of Defence (MoD) or its responsible Minister arising out of overseas armed forces operations.[1] This is for two reasons. First, the proposal would result in the **barring of many meritorious claims**. Second, the proposal would **promote a wider culture of impunity** within the armed forces in the context of overseas operations. Both of these results risk placing the UK in **violation of its international legal obligations**.

I Impact on individual meritorious claims

2. The absolute limitation period removes all discretion on the part of judges to extend the time in which victims (under either the HRA or personal injury limbs) can bring a claim to beyond six years, even where it would be in the interests of justice to do so (e.g. where there has been a legitimate, explicable, or justifiable delay).[2] In doing so, it severs victims' access to justice for injury or harm caused to them as a result of human rights violations arising out of or in the course of the UK's deployment of its military forces in overseas operations.

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[1] See draft clause 11, inserting clause 7A into the Human Rights Act 1998, which rules that the time in which to bring a relevant claim cannot be extended beyond six years from the date the relevant act occurred, or one year from the date from which the event comes to be known; Part 1 of draft Schedule 2, amending the Limitation Act 1980 in respect of civil claims for personal injury or death, which prevents the extension of time in respect of such claims beyond six years from the date on which the relevant time starts to run.

[2] It should be noted that the Bill also attenuates a court's discretion to allow an HRA claim, which falls within the six year absolute bar, to proceed outside of the primary one year time-limit, requiring the court to take into account issues such as the mental health of individuals who may be required to give evidence (in military situations, this may well be the perpetrators of the conduct in question). This attenuation raises separate questions about how it affects the pursuit of accountability and reparations for victims, as well as the discriminatory impact of these considerations where they operate solely to the detriment of claimants seeking vindication of potential HRA violations.

3. Many claims resulting from overseas operations are subject to legitimate, explicable, or justifiable delays, which may bring them outside of the six-year limitation period. Such delays can be due to internal factors such as the delayed onset and/or diagnosis of PTSD, and/or external factors such as difficulties faced in bringing a case in a foreign jurisdiction. Such difficulties are further exacerbated in cases where it is difficult to access the necessary evidence to bring a claim (e.g. secret detentions, extraordinary renditions, targeted killing operations).[3] The reasons for such legitimate, explicable, or justified delays do not undermine the legitimacy of the claims.

4. As the law currently stands, judges are able to exercise their discretion to admit such claims. In contrast, the proposed absolute limitation period would arbitrarily and unjustifiably exclude such claims, leading to grave injustice. This is evidenced by a number of successful cases that have established human rights violations on the part of UK authorities, but in which the underlying HRA claim would have been precluded were the Bill in place. For example, the claim in *Alseran* (concerning a number of victims of serious human rights abuses perpetrated by British soldiers) was brought 10 years after the occurrence of the abuse due to logistical problems and a lack of access to information which could have assisted in bringing the claim sooner.[4] Similarly, some claims in *Multiple Claimants v. Ministry of Defence* (concerning injuries suffered by service personnel in the course of deployment) were instigated over 20 years after the fact as a result of delayed onset of injuries.[5] In both of these cases, the judge was able to exercise discretion and admit the claims despite the delay.[6] The absolute limitation period proposed by the Bill would have arbitrarily and unjustifiably barred these claims, preventing the claimants from being redressed.

5. In addition, in the context of employment claims, the proposed absolute limitation period would apply solely to the (families of) victims of injury or wrongful death in the course of deployment in overseas operations. Note should be taken, therefore, of the disadvantageous impact of the proposed absolute limitation period on members of the military bringing claims against the MoD vis-à-vis other employees who are not similarly barred from bringing civil claims in tort against their employers after six years.

6. RSI's concern with the absolute limitation period extends beyond the imposition of a <u>six-year</u> timeframe. <u>Any</u> absolute limitation period will be inherently arbitrary and frustrate some meritorious claims, no matter the time set. This is because, in the interests of justice, it is important that any temporal admissibility requirement is able to adapt to the circumstances of an individual case. As touched on above, this is especially so in the context of claims arising from overseas operations due to the almost inevitable delays caused by logistical concerns – such as the need for foreign claimants to find a lawyer in the UK and file in (what is for them) a foreign court – and the fact that many potential foreign claimants do not initially

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[3] The importance of protecting such claims ought not be overlooked: in the UK Parliament Intelligence and Security Committee 2018 Report "HC 1114 Detainee Mistreatment and Rendition," the Committee, in recommendation NN, was unconvinced by the Foreign Office's insistence that the UK was absolved from complicity in rendition practices and suggested that the Government did not adequately recognise the seriousness of rendition and the potential for UK complicity in such practices. It noted there was no clear policy on, or even agreement as to, who was responsible for preventing UK complicity in rendition, and it found it "astonishing" that the Government had failed to take action on this issue (at 103). Note also the allegations that formed the basis of the claim in *Belhaj v Straw* [2017] UKSC 3, which, notwithstanding the question of immunities, raises legitimate questions about the involvement of the UK in such secret rendition practices.

[4] *Alseran & Ors v. Ministry of Defence* [2017] EWHC 3289 (QB) ('*Alseran*'), § 7.

[5] [2003] EWHC 1134 (QB).

[6] Other such cases include *Al Saadoon & Ors v Secretary of State for Defence* [2016] EWCA Civ 811; *Mohammed and others v Ministry of Defence* [2017] UKSC 1 and underlying decisions ([2015] EWCA Civ 843); and *Hassan v United Kindgom* (2014) ECHR (GC).

realise that what has been done to them is a human rights violation or that they are entitled to do anything about it.[7]

7. So far as it is necessary to respond to the Government's allegations of a proliferation of 'vexatious' claims arising from overseas operations, the imposition of an absolute limitation period is unnecessary, inappropriate and disproportionate. It is unnecessary because there are already judicial principles and practices in place that effectively dispose of such claims (see Limitation Act 1980, s 33; Civil Procedure Rules, rule 3.4, which give judges the power to strike out applications where allegations are unfounded or 'vexatious'). It is inappropriate because it does little to combat vexatious claims, which can still be brought within six years. It is disproportionate as it is wildly over-inclusive, precluding many legitimate claims, including from soldiers themselves.

8. The effective barring of meritorious civil claims is especially egregious in the context of claims arising from UK overseas operations, where relatively few prosecutions for criminal activity have arisen,[8] but where numerous civil claims have been brought either by foreign claimants alleging cruel, inhuman and degrading treatment,[9] or by service personnel or their families alleging wrongful death or injury in the context of their deployment.[10] As a result, it is hugely important to protect access to this avenue of redress by allowing judges to retain some discretion as to what is equitable in the circumstances of each case and as to whether to allow the claim to be brought.

II Impact on wider culture of impunity

9. In barring certain meritorious claims under the HRA, which the absolute limitation period will certainly do, the opportunity will be lost for robust oversight and scrutiny by courts of the policy decisions and operational practices of the UK armed forces and intelligence agencies in their overseas operations.

10. Courts are well equipped to identify structural issues. Indeed, several UK cases concerned with HRA violations have identified not only isolated instances of individual wrongdoing but also institutional policies (e.g. policies pertaining to detainee treatment and transfer) that implicate the military and security apparatus on a *systemic* level.[11] This is true even well after the fact (see the 'Mau Mau' litigation which

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[7] It should be noted that such barriers have been accepted by UK courts as being legitimate bases for delay and good reasons to extend time limits under the HRA on a discretionary basis: see specifically *Alseran v UK* [2017] EWHC 3289 (QB), wherein the question of lawful excuse for delay was analysed at length at [863] onwards, and also [769] where the judge set out at length the factors that created legitimate practical barriers on the part of Iraqi citizens bringing a claim in the English courts against the MOD in respect of the Iraqi limitation period, factors which apply in equal measure re bringing an HRA claim in a British court and which were referred to in the judge's reasoning on the HRA extension at [854]–[855] (see [785]–[786]).

[8] A spokesperson for the Ministry of Defence has confirmed that there have only been four publicly disclosed cases of UK soldiers facing courts martial over abuses in Iraq, with five soldiers convicted, see https://www.dailymaverick.co.za/article/2020-06-23-exclusive-british-army-sent-unqualified-investigators-to-iraq-where-troops-got-away-with-murder-veterans-say/#gsc.tab=0. In addition, there is a real possibility that none of the allegations of serious international crimes committed in Iraq will lead to prosecution, see Jonathan Beale, 'Iraq war: All but one war crimes claim against British soldiers dropped' <https://www.bbc.co.uk/news/uk-52885615> (BBC News, 2 June 2020).

[9] This is demonstrated by reference to the collective actions taken by civilian litigants against the MOD arising out of the UK's involvement in Iraq. In *Al-Saadoon* (noted above), the claimants advancing ECHR claims numbered 1,230, and the personal injury claimants numbered 1,000. Notably, many of these claims were settled favourably to the claimants. Furthermore, *Alseran* (noted above) was a test case for over 600 claimants, with whom the UK Government has since settled. In light of these cases, it must be acknowledged that legitimate claims arose out of UK involvement in Iraq that could only be ventilated and settled following appropriate Court action. In the case of *Alseran*, the pursuit of justice directly implicated the question of timing, which presented a hurdle that needed to be overcome.

[10] See *Smith v MOD* [2013] UKSC 41, in which a number of negligence claims were brought against the Ministry of Defence. Note also the claimants in *Alseran*, a significant number of which were private law (personal injury) claimants.

[11] The central issues in *Al-Skeini*, for example, concerned detainee transfer and mistreatment. *Hassan* concerned, *inter alia*, the issue of whether there was a legal basis for detention, as did *SM v MOD*(both noted above). These cases concerned

proceeded over 50 years after the incident, but in which the courts were able to identify systematic rights abuses and systemic flaws on the part of the British colonial administration. This is evidence of the fallacy of claims that effective investigations can never take place well after the fact due to loss of, or increase in unreliability of, evidence over time).[12] As a result, it is clear that the ability of courts to proceed with individual human rights-related claims serves an important wider accountability function, ensuring that there is independent oversight of military policies and conduct on a structural and systemic level. Without the ability of judges to allow such appeals, there is a high risk of creating a culture of impunity within the military and permitting systemic problems to go unchecked (they will never be revealed and, thus, never improved). The reality of this is evident from, for example, the Baha Mousa inquiry, which confirmed that the 'five techniques' (including hooding and stress positions) had been deployed, despite past commitments by the UK in 1971 in respect of Northern Ireland not to use such techniques again.[13]

11. A further value of rigorous judicial oversight is evident from past institutional and governmental responses to litigation. For example, in the case of Baha Mousa it was only after court proceedings were brought,[14] and the House of Lords had confirmed the applicability of human rights, that a public inquiry was instigated. The inquiry went on to reveal wider issues regarding the way soldiers were trained and provided an opportunity to analyse and determine whether this training was plagued by systemic flaws.[15] The Bill's proposed absolute limitation period on civil and human rights-related claims thus reduces the chance of the important accountability mechanism of a public inquiry being triggered.

12. So far as it is necessary to respond to the Government's alleged need to protect soldiers from ongoing and repeat investigations, the best and most effective mechanism of achieving this is to ensure that there are strong upfront investigations which are competent and independent, within a reasonable time frame from the allegations being made. A better solution to this problem, therefore, is for the Government, MoD and military branches to ensure that such investigations can take place. This would obviate the need for an absolute limitation period, with its consequent negative effects.

III Relevant international legal obligations

13. The UK is subject to international legal obligations to prevent, investigate and punish violations of human rights (see art 2 ICCPR; arts 2, 3, 6, 13 ECHR; UN Basic Principles and Guidelines on the Right to a Remedy and Reparation, principles 6-7). These human rights obligations apply even in the context of overseas military operations (see *Al Skeini; Hassan v. UK*).

14. For the reasons detailed above, the Bill's proposed absolute limitation period risks placing the UK in breach of these international legal obligations as it prevents, with no room for discretion, victims of human rights violations from bringing legitimate claims. This limits their ability to receive an effective remedy, contrary to IHRL. The reality of this has been demonstrated above with reference to the case of *Alseran*,

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systemic approaches to detention and/or policy-level decisions about detention timing and the legal foundations for Army practices in a given context rather than specific instances of wrongdoing attributable to individual soldiers.

12 *Kimanthi & Ors v. Foreign and Commonwealth Office* [2018] EWHC 2066 (QB).

13 See http://news.bbc.co.uk/1/hi/uk_politics/4117611.stm referring to the public undertaking offered by then-Prime Minister Edward Heath to never again use the five techniques (2 March 1972). See the Parker Report at https://cain.ulster.ac.uk/hmso/parker.htm. Notably, a key finding of the Baha Mousa Report was that broad institutional knowledge of this ban on the five techniques (specifically, the ban on hooding) had "largely been lost" by the time of the Iraq War and no MOD doctrine on the interrogation of prisoners of war within the army was generally available at the time, despite the findings of the Compton Inquiry (https://cain.ulster.ac.uk/hmso/compton.htm).

14 *Al-Skeini and others v Secretary of State for Defense* [2007] UKHL 26.

15 The Baha Mousa Public Inquiry and corresponding report gave rise to 73 recommendations, including on institutional aspects of training with respect to prisoners.

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which would have been prevented from proceeding had the Bill's proposal been in place. Further, as well as threatening the structural protections for human rights within the UK, the Bill also sets a dangerous precedent for other States to bar access to justice in relation to human rights claims in the context of operations involving the use of force.

Evidence submitted on behalf of Rights and Security International
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