Rights and Security International's Submission to the Joint Committee on Human Rights' Call for Evidence on the Independent Review of the Human Rights Act

Introduction and summary

1. Rights and Security International (RSI) is a London-based NGO with over 30 years of experience ensuring that measures taken in the name of national security respect international law, including international human rights law. RSI initially focused on national security in Northern Ireland, before expanding its mandate to the whole of the UK (as Rights Watch (UK)) and now internationally. We have direct and repeated experience of the extraterritorial application of human rights norms – particularly in respect of the Human Rights Act 1998 (HRA) – and we are therefore ideally placed to advise on matters relating to this question in response to the Joint Committee on Human Rights (JCHR) call for evidence.

2. RSI's submission to the JCHR mirrors our submission to the Independent Human Rights Act review ('IHRAR'),[1] and focuses on the question, 'Are there any advantages or disadvantages in seeking to alter the extent to which the Human Rights Act applies to the actions of the UK (or its agents) overseas?'

3. In summary, RSI submits that there would be no advantages in altering the extent to which the HRA applies to UK actions overseas. Contrary to alternative narratives, RSI submits that the HRA does not impose an unjust or excessive burden on decision-makers. Instead, extraterritoriality simply requires that the relevant public authority apply a decision-making process to overseas acts that is similar to the one it uses for acts within UK territory. This sensibly and logically requires consistent practice domestically and overseas.

4. Limiting the extraterritorial scope of the HRA would have harmful consequences for victims of human rights abuses, who, solely because of their location and regardless of merit, would be left unable to obtain justice. In this respect, we emphasise the importance of justice to preventing future violence and abuse by any party.

5. Moreover, the extraterritoriality of the HRA has made important contributions towards remedying systemic decision-making flaws, ensuring that future human rights violations are not perpetrated and that a culture of impunity does not fester.

6. In short, the advantages of the HRA's extraterritoriality greatly outweigh any claimed disadvantages. There is therefore no justification for limiting its scope.

Extraterritoriality of the HRA

7. The HRA incorporates the European Convention on Human Rights ('ECHR') into the UK's domestic law. Article 1 of the ECHR states that '[t]he High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms' set out in the Convention. The interpretation of this provision is essential in understanding the scope of the HRA's application. The European Court of Human Rights ('ECtHR') has defined jurisdiction as 'primarily' or 'essentially' territorial,[2] which encapsulates the general rule that a State is not responsible under the ECHR for

[1] Rights and Security International, 'Rights and Security International's Submission to the Independent Human Rights Act Review' (3 March 2021).

[2] *Banković and Others v. Belgium and Others* (App. No. 52207/99), Admissibility, para. 59

extraterritorial acts. There are two exceptions to this rule: when a State exercises 'effective control over an area' (the 'territorial model'),[3] or when there is 'state agent authority and control' over an individual (the 'personal model').[4]

8. The extension of jurisdiction beyond strict territorial bounds under the ECHR is consistent with other areas of international human rights law: for example, the International Covenant on Civil and Political Rights applies extraterritorially in cases of 'power' or 'effective control'.[5] Thus, were the extraterritorial scope of the HRA to be restricted, it would position the UK in a retrograde role regarding human rights, rather than putting the country in the vanguard.

Unpicking the perceived advantages of altering the extraterritoriality of the HRA

Impact on standards of conduct for armed forces

9. Some critics have suggested that the extraterritorial scope of the HRA should be restricted on the basis that it causes practical difficulties for the military in overseas operations.[6] This claim may be based on a mistaken belief that the HRA 'displac[es] the law of armed conflict [(IHL)] which UK forces are trained to follow and which is designed to take military realities and humanitarian considerations into account' and that the application of the HRA overseas 'undercut[s] the fighting capacity of UK forces' by 'undercutting the freedoms UK forces should enjoy under the law of armed conflict, and encouraging a culture of risk-aversion and compliance on the part of UK forces which will be deeply inimical to fighting prowess'.[7] This belief is mistaken for two reasons.

10. First, in many instances, the HRA and IHL require the same standard of conduct. For example, both regimes prohibit torture.[8] Thus the inquiry as to whether the provisions of the law of armed conflict have been 'displaced' or 'undercut' will have little practical consequence.

11. Second, in the limited instances of alleged conflicts between the HRA and IHL, the ECtHR and the UK Supreme Court have amply accommodated the rules of IHL and the exigencies of conflict.[9] As a result, and in response to the concerns detailed above, the courts have incorporated a consideration of overseas military realities into HRA standards. Thus, the concerns that the freedoms and 'fighting prowess' of UK forces will be undercut are overstated and mistaken.

Involvement of courts in military operations overseas

12. Critics of the extraterritorial application of the HRA in armed conflict have further alleged that this practice has led to a proliferation of legal claims by enemy combatants.[10] In reality, in the context of armed activities outside the UK's borders, the HRA is typically used by injured civilians and UK military personnel seeking to access justice for

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[3] *Al-Skeini and Others v. the United Kingdom [GC]* (App. no. 55721/07), paras. 138-141; *Jaloud v. Netherlands [GC]* (App. no. 47708/08). The paradigmatic example of the territorial model is occupation, which applied during part of the UK's involvement in Iraq, see *Al-Skeini and Others v. the United Kingdom [GC]* (App. no. 55721/07), paras. 9-23. The Court has furthermore applied this model to cases of *de facto* control, which assesses the degree of military presence, economic and political support; see *Loizidou v. Turkey [GC]* (App. No. 15318/89) (1995) 20 EHRR 99, paras. 16 and 56; *Ilaşcu & Ors v. Moldova and Russia [GC]* (App. No. 48787/99), paras. 387-394; *Al-Skeini and Others v. the United Kingdom [GC]* (App. no. 55721/07), para. 139. For further outline, see Council of Europe, *Guide on Article 1 of the European Convention on Human Rights* (last updated 31 December 2020), pp. 18-19.

[4] *Al-Skeini and Others v. the United Kingdom [GC]* (App. no. 55721/07), paras. 133-137. The paradigmatic examples of the personal model involve detention (*Al-Saadoon and Mufdhi v. the United Kingdom* (App. No. 27021/08), paras. 86-89) or other restrictions on an individual's movements (*Öcalan v. Turkey [GC]* (App. No. 46221/99), para. 91).

[5] Human Rights Committee, 'General Comment No. 31: The Nature of General Legal Obligation Imposed on States Parties to the Covenant' (29 March 2004) CCPR/C/21/Rev.1/Add.13, para. 10.

[6] For example, see Richard Ekins, Jonathan Morgan and Tom Tugendhat, *Clearing the Fog of Law: Saving our armed forces from defeat by judicial diktat* (Policy Exchange, 2015); Richard Ekins and Julie Marionneau, *Lawfare: Resisting the Judicialisation of War* (Policy Exchange, 2019); Richard Ekins and John Larkin, *Ten Ways to Improve the Overseas Operations Bill* (Policy Exchange, 2021).

[7] Richard Ekins and Julie Marionneau, *Lawfare: Resisting the Judicialisation of War* (Policy Exchange, 2019), p 6.

[8] The prohibition of torture is a *jus cogens* norm, which means that it must be complied with in all circumstances, without exception; see *Prosecutor v. Anto Furundžija*, Trial Chamber, Judgement, IT-95-17/1-T, 10 December 1998, paras. 144, 153-157

[9] For the approach of the ECtHR, see *Hassan v. UK [GC]* (App. no. 29750/09); and for the UK Supreme Court, see *Serdar Mohammed v. Ministry of Defence* [2017] UKSC 1.

[10] Richard Ekins and Julie Marionneau, *Lawfare: Resisting the Judicialisation of War* (Policy Exchange, 2019), p 6.

rights violations that have occurred as a result of potentially systemic flaws in decision-making.[11] Access to UK courts is essential to vindicate the rights of both service personnel and civilian victims of human rights abuses.[12] Therefore, the extraterritorial application of the HRA serves an important role in facilitating justice – a longstanding UK value and crucial element of long-term peace.

Reasserting the disadvantages of altering extraterritoriality of HRA

Access to justice for victims of human rights abuses

13. The extraterritorial application of the HRA in the limited circumstances detailed above is logical and desirable given that, in instances where a public authority has control over a territory or individual, it will be in a position to influence respect for human rights. The extraterritorial application of the HRA avoids the absurd outcome of officials being granted licence to act in a manner that violates Convention rights overseas, when they would have been prohibited from the acting in the same way within UK territory.[13] This ensures that victims of human rights abuses committed overseas are not left unable to obtain justice simply by virtue of their location and regardless of merit.

Remedying systemic decision-making flaws

14. In addition to the beneficial impact on individual victims, the HRA's extraterritorial application has also proved essential in ensuring that systemic decision-making flaws are highlighted and remedied. This has been particularly important in the context of military operations, where the HRA assists in avoiding impunity and ensuring that flaws are identified before future violations occur.

15. The Baha Mousa Inquiry is the seminal example in this context. The inquiry made factual findings about the extensive use of hooding, beating, stress positions and conditioning techniques,[14] whilst also illuminating systemic issues relating to training, discipline and detention processes.[15] Many of the inquiry's 73 recommendations related to systemic issues of training, policies and practices,[16] and changes were ultimately implemented with long-standing positive effects on military practice.[17]

16. It is unlikely that this inquiry and its beneficial outcome would have taken place without the extraterritorial application of the HRA.[18] It was only after Baha Mousa's family successfully appealed to the House of Lords,[19] relying on the ECHR obligation to carry out an adequate and effective investigation into deaths of those within the UK's jurisdiction,[20] that the inquiry was launched into the circumstances of the man's death. Without the extraterritorial application of the HRA, there would have been no Baha Mousa Inquiry and, as a result, likely no change in decision-making, policy or training.

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[11] For example, the *Smith & Ors v. Ministry of Defence* [2013] UKSC 41 case, referred to consistently as an aspect of the 'lawfare' or 'fog of war' critique (see the Policy Exchange reports cited above), in fact concerned the ability of British troops to claim against the Ministry of Defence in relation to pre-battlefield decision-making flaws, rather than by 'enemy combatants'.

[12] For example, the International Committee of the Red Cross has raised concerns about a 'growing indifference to torture'; see International Committee of the Red Cross, 'Global survey reveals strong support for Geneva Conventions but growing indifference to torture' (ICRC, 5 December 2016).

[13] In relation to the ECHR, see *Issa and Others v. Turkey* (App. No. 31821/96), para. 71. This viewpoint is consistent among the international human rights landscape; see also the discussion in *López Burgos v Uruguay*, Comm. No. 52/1979 (29 July 1981), CCPR/C/13/D/52/1979.

[14] For example, in relation to 1st Battalion The Queen's Lancashire Regiment; see The Rt Hon Sir William Gage, *The Report of the Baha Mousa Inquiry*, HC 1452 (2011) ('Baha Mousa Inquiry'), pp. 1314-1318.

[15] Baha Mousa Inquiry, pp. 1315-1318.

[16] Baha Mousa Inquiry, pp. 1267-1286.

[17] Elizabeth Stubbins Bates, 'The British Army's Training in International Humanitarian Law' (2020) 25(2) Journal of Conflict and Security Law 291.

[18] Huw Bennett, 'The Baha Mousa Tragedy: British Army Detention and Interrogation from Iraq to Afghanistan' (2014) 16(2) British Journal of Politics & International Relations 211.

[19] *Al-Skeini & Ors v. Secretary of State for Defence* [2007] UKHL 26.

[20] As required by Article 2 of the ECHR. Stemming from the case of *McCann and Others v. United Kingdom [GC]* (App. No. 18984/91), para. 161.

Impact on the UK's position on the international stage

17. It is also important to note that the removal of human rights protections for extraterritorial actions – regardless of the context, but most notably in relation to military operations – carries institutional risks for the UK internationally. The implications of the change would be two-fold: firstly, there would be a risk of a 'race to the bottom', in which other States and non-State actors likewise failed to carry out their overseas actions in a manner compliant with human rights law. In times of conflict, this could place British soldiers in danger. Second, the UK's international standing and engagement could be impacted by such a policy: as General Sir Nick Parker has recently noted,[21] international coalition partners may be less likely to engage with the UK if it does not uphold its human rights obligations during conflict.

18. The UK should seek to maintain its standing as a leader in international human rights protection by ensuring extraterritorial compliance with the HRA.

If you have any further questions, then please do not hesitate to contact Emily Ramsden, RSI's Legal and Policy Officer, at eramsden@rightsandsecurity.org or Jacob Smith, Research and Development Officer, at jsmith@rightsandsecurity.org

[21] Helen Warrell, 'Former army chief attacks UK move to limit torture prosecutions' (*Financial Times*, 22 September 2020).