CENTRE FOR MILITARY JUSTICE
Justice - Welfare - Law

The Centre for Military Justice

Submission to the Independent Human Rights Act Review

Introduction:

1. The Centre for Military Justice (CMJ) is pleased to make this short submission to the Independent Human Rights Act Review (IHRAR).

2. The CMJ is a small, independent legal charity established to advise current and former members of the armed forces or their bereaved families who have suffered serious bullying, sexual harassment, sexual violence, racism or other abuse or neglect. The CMJ also undertakes educational and outreach work within the armed forces sector, promoting the rule of law, human rights and access to justice. Our charitable objectives include the promotion of the sound administration of the law and human rights.[1]

3. Through our work, we are regularly required to engage with members of the armed forces on matters pertaining to their activities both inside their military units and in the context of their overseas operations. We therefore have a reasonably good understanding of how certain court judgments are perceived inside the armed forces and, more importantly, how those judgments have been mischaracterised. Nowhere is this mischaracterisation more apparent than in the context of how the European Convention on Human Rights is said to apply overseas and in the context of our armed forces' activities.

4. We have had the opportunity to see the submission of The Law Society to the IHRAR. We unequivocally endorse their submission.

5. The CMJ will restrict itself to making this brief submission which goes only to the following question: *In what circumstances does the Human Rights Act apply to acts of public authorities taking place outside the territory of the UK? What are the implications of the current position? Is there a case for change?*

6. At the end of the document we briefly summarise some examples of where members of the armed forces have used the Human Rights Act to secure investigations, accountability and justice. It is important to make the point that service personnel are both bound by, and protected by, the Human Rights Act.

In what circumstances does the Human Rights Act apply to acts of public authorities taking place outside the territory of the UK? What are the implications of the current position? Is there a case for change?

7. The Panel will be familiar with the relevant legal principles applicable to this situation. The jurisprudence has been developed under the European Convention on Human Rights (ECHR) and applies domestically via the Human Rights Act (HRA), sections 2 and 3.

8. The ECHR, by virtue of Article 1, requires that a member state of the Council of Europe (i.e. a signatory to the ECHR) must secure to everyone within its jurisdiction, the rights and freedoms of the ECHR. This general duty requires the implementation of a national system that is capable of securing compliance with the ECHR for everyone falling within the jurisdiction.

9. Jurisdiction is primarily territorial. This principle was confirmed in *Bankovic & Ors v Belgium & Ors*, when the family members of some of the casualties of NATO bombs dropped by member states (inside a non-contracting state), sought a declaration that, among other things, their relatives had been unlawfully killed.[2] The European Court of Human Rights (ECtHR) was clear

[1] www.centreformilitaryjustice.org.uk

[2] Bankovic & Ors v Belgium & Ors, (admissibility) [GC] Application no. 52207/99 [2001] ECHR 890, §59

that the ECHR was not designed to be applied throughout the world in respect of the conduct of the contracting states, whenever and wherever they were operating.[3] There were exceptions to the territoriality principle, but they did not apply in this case. There was no violation.

10. That fundamental principle remains intact today. Jurisdiction is primarily territorial but there are exceptions. The exceptions to the territoriality principle are not new, although their applicability has been tested in recent years, particularly in the context of member states' armed forces' activities overseas.

11. The exception to the principle that jurisdiction is primarily territorial is engaged in essentially one of two ways: first of all, on the basis of the power or control that may be exercised by the member state over an individual person; and/or secondly, on the basis of the control exercised by the member state over a foreign territory. The exceptions to the territoriality principle were examined authoritatively in the case of *Al-Skeini v UK*. [4]

Power and control over an individual

12. When a member state, through its agents, exercises control and authority over an individual, the member state is under an obligation to secure to that individual the rights and freedoms that are relevant to their situation, pursuant to Article 1 of the ECHR. ECHR rights in this situation can be 'divided and tailored' so that the member state is only obliged to secure those rights that are relevant, not the full panoply of rights that would apply, were the person to be inside the territory of the member state. This is a practical, measured acceptance of the realities in which this type of jurisdiction can arise and avoids a situation whereby rights are applied in an 'all or nothing' manner. It is a proportionate and pragmatic approach.

13. The most obvious example is in relation to the activities of a member state's diplomatic or consular agents, when they are exercising authority and control over other people or their property.

14. Jurisdiction may also be engaged when, through the consent, invitation or acquiescence of a foreign government, the member state exercises some of the public powers that would normally be exercised by that foreign government.

15. If an individual is handed over to a member state's agent outside of its territory, the ECHR will apply to the agent/members state's treatment of that individual, on the basis that Article 1 of the ECHR can never be interpreted so as to allow a member state to perpetrate violations of human rights on the territory of another state, that it would not be able to perpetrate on its own territory. In this way, the former leader of the Kurdistan Worker's Party who had been arrested by Turkish security agents in Kenya and returned to Turkey, was found to be within Turkey's jurisdiction for purposes of the ECHR, even though its state agents were far outside of their own land. [5]

16. Some of the most common examples of the application of this principle arise in the context of detention. Examples of this jurisdiction having been established include the capture and detention of an individual by security forces or officials (see above), detention in a prison controlled by a foreign state,[6] and the seizure of a foreign vessel.[7] However, jurisdiction is not created by the mere use of physical force. Use of force *alone* does not amount to physical power and control such as to engage the ECHR extraterritorially, something worth emphasising given some of the statements made by the ECHR's critics, which we address, below.[8]

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[3] Bankovic, §75.
[4] Al-Skeini v. United Kingdom, [GC] App. No. 55721/07 [2011]
[5] Ocalan v Turkey [GC] App. No. 46221/99
[6] Al-Saadoon and Mufdhi v UK, App. No. 61498/08, 2 March 2010
[7] Medvedyev v France, App. No. 3394/03
[8] Al-Saadoon & Ors v Secretary of State for Defence [2016] EWCA 811

17. The application of this exception to the activities of our armed forces overseas was examined in the well-known case of *Smith & Ors v Ministry of Defence*.[9] Here, the question was what was the nature of the legal obligation owed by the Ministry of Defence (MoD) under the ECHR to soldiers that had been killed or injured as a consequence of what their families believed had been the provision of ineffective tanks and/or military equipment. The MoD argued that it did not have a positive obligation to protect the soldiers under Article 2 of the ECHR, because they were outside the jurisdiction of the UK while on overseas operations. Applying *Al-Skeini*, the Supreme Court disagreed. The UK had exercised almost complete control over the soldiers and their activities and, just as Iraqi civilians had fallen under UK control through the UK's occupation and control of southern Iraq, the soldiers fell within the UK's jurisdiction as a consequence of the principle of state authority and control over the soldiers. As a consequence, the Supreme Court ruled that the claimants would be able to bring a case arguing that there had been a violation of the positive obligation to protect their sons and the claims would not be struck out for want of jurisdiction.

18. The Supreme Court was extremely careful to recognise the very wide margin of appreciation to be given to the state in such circumstances. The Supreme Court did not rule on whether there had in fact been a violation and simply ruled that the case could go to trial. The MoD subsequently settled the claims. The Court said: '*the Court must avoid imposing positive obligations on the state in connection with the planning for and conduct of military operations in situations of armed conflict which are unrealistic or disproportionate. But it must give effect to those obligations where it would be reasonable to expect the individual to be afforded the protection of the Convention'* (§72).

19. A positive outcome of the IHRAR would be to improve politicians and the wider public's understanding of the *Smith* judgment. Certain influential commentators have, in the opinion of the CMJ, unfairly exaggerated the impact of the judgment, which is careful, measured and restrained. For example, in its report dated 28 June 2019, entitled 'Protecting Those Who Serve', the think tank Policy Exchange states that it is 'now understood', following *Smith*, that 'the ECHR might simply apply wherever UK forces were present …' and that *Smith* amounts to the Supreme Court being willing 'to take the HRA to extend anywhere and everywhere necessary to satisfy the European Court.'[10] The authors also describe the *Smith* judgment as extending the reach of what it described as the 'novel and highly destabilising' doctrine in *Al-Skeini*, characterising the judgment as extending the jurisdiction of the ECHR 'to any context in which the state exercised power, including by using force, in relation to another.' [11] There is also a suggestion, for which there appears to be no evidence, that 'states and non-state actors will make use of UK legal processes to undermine the operational effectiveness and morale of UK forces', a concern reiterated by Tom Tugendhat MP, during the 3rd reading of the Overseas Operations Bill on 3 November 2020. [12]

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[9] Smith and Others v Ministry of Defence [2013] UKSC 41

[10] https://policyexchange.org.uk/wp-content/uploads/2019/06/Protecting-Those-Who-Serve.pdf: page 24, §1. The CMJ notes that one of the IRHRA's panel members is a Senior Research Fellow on Policy Exchange's Judicial Power Project, which includes the organisation's work on what it calls, 'lawfare'. The CMJ is concerned that this may indicate that panel members may not have been selected on the basis that they will approach the important issues raised by the review impartially or with a genuinely open mind. For another example of a critical appraisal of the *Smith* judgment, see also: Dominic Raab, 'Allowing British soldiers to sue could put troops at even greater risk' Daily Telegraph, 20 June 2013. https://www.telegraph.co.uk/news/uknews/defence/10132326/Allowing-British-soldiers-to-sue-could-put-troops-at-even-greater-risk.html

[11] Ibid, page 20, §2

[12] Policy Exchange, Resisting the Judicialisation of War, 10 November 2019, page 8, §3; and Tom Tugendhat MP on 3 November 202 during 3rd reading: 'We can imagine a situation where the environment changes and the United Kingdom Government decide to change the order from merely supporting through training to taking an active part in peacekeeping or peace enforcement (in Ukraine). If they were to do that, we can imagine the next scenario: legal action bought and paid for by a Russian hand…We can absolutely see the possibility that a Russian hand will use the Human Rights Act, which is currently being deployed in various other ways, to stop our forces from deploying by arguing that kit is inappropriate and that operations are therefore too dangerous for soldiers to be deployed.' It is worth noting that Mr Tugendhat has been making the point that foreign powers may sponsor legal actions about kit as a way of paralysing the armed forces since 2013 when Policy Exchange

20. Statements like this are not accurate or fair reflections of the law. In particular, these statements give the impression that the ECHR will always apply to local populations wherever British armed forces may be deployed, without any consideration of the prior requirement of effective authority and control; and/or that the mere use of physical force by the state or by a state agent will create a situation of jurisdiction. That is manifestly not what the law requires, and, indeed, is a position that has been resoundingly rejected by the Court of Appeal in the case of *Al-Saadoon* in 2016.[13]

21. This mischaracterisation of the application of the ECHR in *Smith* is compounded by a similar mischaracterisation of the principle of combat immunity, also considered in *Smith*. The issue of combat immunity is not something that the Panel will be examining, however it is important that the Panel bear it in mind, because the suggestion that the concept of combat immunity has been eroded is often raised alongside suggestions that the ECHR now applies to the battlefield.[14] It has been suggested that critical decisions on the battlefield may be second-guessed in a court of law, ignoring the fact that there has not been a single case where a commander's decisions on the battlefield have been litigated. In the *Smith* case, the MoD was attempting to argue that the principle of combat immunity should be expanded, to cover situations of decision-making concerning procurement, decisions which were taken long before the commencement of hostilities and far away from the battlefield. All the Supreme Court did was make clear that there was nothing in the doctrine to suggest that the principle extended that far. Again, the Supreme Court simply determined that the issue could be litigated by the families and could proceed to trial. The MoD then chose to settle the claims.

22. These mischaracterisations carry considerable weight with the ECHR's detractors. While it is perfectly proper for there to be legitimate discussion and differences of opinion on how recent case-law may affect the activities of our armed forces overseas, that must proceed on the basis of a true and fair characterisation of the law. In the opinion of the CMJ, some of the most vocal participants in this debate do not appear to be committed to such an approach.

Power and control over a foreign territory

23. The ECHR may also apply to a member states activities overseas when a member state exercises effective control of a geographical area outside of its national territory. This principle is not a recent invention. [15] However, the more recent cases that have tested this principle have

produced their first report on this subject. No evidence has yet been produced to support this entirely speculative proposition. Complaints about kit have, of course, been made by the families of deceased soldiers or the soldiers themselves, and were entirely vindicated by Chilcott. The proposition also appears to ignore the obvious challenge of 'the Russians' being able to find a British soldier or military family willing to be funded by a foreign power, and the various procedural protections that would come into play, were 'a Russian hand' to attempt to embark on such an exercise.

[13] *Al-Saadoon & Ors v Secretary of State for Defence; and Rahmatullah & Anr v Secretary of State for Defence, [2016] EWCA Civ 811*. Concerningly, in its 2019 report, the Policy Exchange authors cite the High Court authority in Al-Saadoon (*Al-Saadoon & Anr v Secretary of State for Defence, [2015] EWHC 715*), in which it had been held that the mere use of force might be enough to create a situation of jurisdiction, apparently ignoring the fact that the decision was overturned on appeal in 2016 and the Court of Appeal clarified that mere force was insufficient and there would need to be a situation of prior authority and control before jurisdiction could be found. See Policy Exchange report cited above, page 24, footnote 63.
[14] See the Government's position in a white paper document, *Better Combat Compensation*, published in December 2016, which stated, without evidence, 'Judges are required to second-guess military decisions using criteria, appropriate in civilian life, to decide whether there was negligence or not in a battlefield situation. Our military advisers warn that this "judicialisation of war" could weaken the Armed Forces' readiness to take the rapid and high risk decisions essential to operational effectiveness, with consequent risk to lives'. See also Policy Exchange, Protecting Those Who Service, page 21, §3: 'The same is true, in a different context, for claims made by the families of deceased soldiers, which alleged that deaths on the battlefield result from negligence….They also in effect expose the actions of personnel to second guessing in a court of law, which is not the right forum for such review.' And, 'The Supreme Court judgment in Smith exposed the MoD to liability in relation to the death of soldiers on the battlefield ….' page 27, §2.
[15] See *Loizidou v Turkey (preliminary objections)*, 23 March 1995, §§ 52, 62, Series A no. 310; *Cyprus v Turkey* [GC], no. 25781/94, § 76, ECHR 2001-IV, *Banković and Others v. Belgium and Others* [GC] (dec.), no. 52207/99, § 66, ECHR

largely arisen in the context of overseas armed conflicts and have included a number of cases involving the UK and its activities in Iraq and Afghanistan. Whether a sufficient level of control over an area exists to amount to jurisdiction is a question of fact.

24. If jurisdiction is established, there is created both a negative obligation on the member state to refrain from committing violations of the ECHR, and a positive obligation to guarantee respect for the rights contained in the ECHR.

25. As indicated, the principal case is *Al-Skeini & Ors v UK* which concerned the deaths of a number of people in Basra during the Iraq war at a time when the UK was an occupying power. The ECtHR held that the UK was exercising of some of the public powers normally exercised with a sovereign government, including holding power and responsibility for maintaining security in the relevant part of the country. For those reasons, the UK had jurisdiction and there was therefore an obligation to secure the protection of human rights during the occupation, which amounted to an exception to the territoriality principle.

26. Following the same principle, and also following the principle arising from power and control over an individual, in the case of *Al-Jedda v UK*, an interned Iraqi civilian was found to be within the jurisdiction of the UK because the UK (along with the USA) had retained control over security for the relevant region at that time, and because the applicant had been under the authority and control of the UK for the duration of his detention.[16]

27. One of the most important cases to examine the application of these principles and practice, particularly insofar as it pertains to Article 5 of the ECHR, is *Hassan v UK*.[17] A suspected insurgent had been detained by British armed forces. His detention amounted to an internment. Internment is not one of the specified grounds for detention under Article 5.

28. The ECtHR analysed the circumstances of his detention to determine if it could nonetheless be considered lawful within the meaning of Article 5. The ECtHR made clear that the ECHR had to be interpreted in harmony with other rules of international law, which included international humanitarian law. In a situation of international armed conflict, the ECtHR was clear that ECHR safeguards continued to apply, however, in that context, they would be interpreted against the background of international humanitarian law. Through this reading, even though there was no permitted ground of detention under Article 5, the ECtHR read Article 5 with the 3rd and 4th Geneva Conventions (which concerned the taking of prisoners of war and the detention of civilians who posed a security risk). In this way, a detention that complied with the rules of international humanitarian law would not be arbitrary and therefore could fall within Article 5. The procedural safeguards of Article 5 could also be interpreted in a manner which took into account the context and the applicable rules of international humanitarian law. On the facts of this case, the ECtHR found that the UK did have legitimate grounds to detain under the Geneva Conventions, the detention had not been arbitrary, and there had been no violation of Article 5. *Hassan* is a very important example of how ECHR and international humanitarian law can be read compatibly in the context of an international armed conflict - and operate to protect and govern both the detainee and those responsible for the detention. It is a judgment that takes into account the realities of armed conflict and, we suggest, does not indicate that reform is needed to the operation of the ECHR overseas.

29. In a situation of non-international armed conflict (where the Geneva Conventions do not apply), UN Security Council Resolutions authorising certain security (including detaining) measures to be taken by the detaining armed forces could provide the authority to detain. This was examined in the case of *Mohammed No 2,* where the Supreme Court held that, for the purposes of Article 5(1) of the ECHR, UK armed forces had the legal power to detain the claimants pursuant to UN

2001- XII) and § 70; *Ilaşcu*, cited above *Ilaşcu and Others v. Moldova and Russia* [GC], no. 48787/99, § 311, ECHR 2004-VII, §§ 312-316.

[16] Al-Jedda v UK, App. No. 27021/08

[17] Hassan v UK, App. No. 29750/09

Security Council Resolution 1546, where the detention was necessary for imperative reasons of security.[18] The Supreme Court went on to find that as a consequence of Article 5 applying, there would need to be an initial review of the appropriateness of detention, followed by regular reviews thereafter, and that the reviews should be conducted by an impartial body in accordance with a fair procedure. The initial detention and authorisation had been appropriate, but after a period of time it had become unlawful according to these criteria and this led to the finding of a violation.

30. This analysis was then followed in the civil claims that were considered by Mr Justice Leggatt in *Alseran, Waheed, MRE & KSU v Secretary of State for the Home Department* on 14 December 2017.[19] In a lengthy, detailed judgment which displayed considerable deference to the need to enable soldiers on the ground to make split-second decisions that should not be second-guessed by the courts, Leggatt J concluded that the initial detentions, screenings and authorisations were lawful but there came a point when the detention had become arbitrary. Ten days without a review to establish the lawfulness of the basis of detention would cross that line, he ruled, because there had been no effective opportunity for the detainee to challenge his detention and make representations and the detaining panel had applied an incorrect test for deciding whether or not to release. Further, during their detention, some of the claimants had been subjected to inhuman and degrading treatment, which violated Article 3 and which included hooding, being made to lie down on their front on the ground while soldiers ran across their backs and sexually humiliating treatment.

31. As we say below, these judgments have ensured that, during a situation of armed conflict, detainees are less likely to disappear into a legal black hole.

Concluding remarks on extraterritoriality

32. Concerns about the applicability of the ECHR overseas have led to calls for the UK to derogate entirely in relation to all future overseas conflicts.[20] The Government now proposes enshrining in statute a legal obligation on the Secretary of State to consider doing this, in clause 12 of the Overseas Operations Bill, that is currently passing through Parliament. Some commentators have spoken of the need for the UK to take a stand of 'principled defiance' of the ECtHR when it delivers what they consider to be unsatisfactory judgments. Alternatively, calls have been made for the UK to commit to withdrawal from the ECHR itself. [21] Now the possibility is being mooted of some sort of reform to the HRA that would limit the application of the ECHR overseas. The CMJ strongly disagrees with all of these proposals.

33. It is extremely difficult to see how the UK could remain within the Council of Europe while simultaneously limiting (though an amendment to the HRA) the applicability of the ECHR overseas. The reference, in the IHRAR's terms of reference, to the prospect that, if extraterritorial scope was limited, 'other legislative changes beyond the HRA may be required in order to comply with the UKs obligations under the Convention' is not entirely understood. If the UK were to deviate from the clear and consistent jurisprudence of the ECtHR, either by refusing to abide by judgments in which it is a party, or by amending ss 2-3 HRA, this would potentially breach Article 46 of the ECHR and/or seems likely to lead inevitably to the UK's departure from the Council of Europe. If the Panel is of the same view, it is invited to make that clear in its response.

34. Notwithstanding this substantial obstacle to any proposal to amend the HRA's application overseas, or the fact that ECHR derogation is already governed by a well-established regime

[18] *Al-Waheed and Serdar Mohammed (Mohammed (No 2)) v Ministry of Defence* [2017] UKSC 2, [2017] AC 821.
[19] *Alseran, Waheed, MRE & KSU v Secretary of State for the Home Department* [2017] EWHC 3289 (QB)
[20] In October 2016, in a joint announcement with the Prime Minister, the then Secretary of State for Defence Sir Michael Fallon MP announced this Government's intention to derogate from the European Convention on Human Rights (the Convention) in future military overseas operations.
[21] Policy Exchange, Protecting Those Who Serve, page 33, §3.

(Article 15 ECHR, which the CMJ believes is unlikely to apply in the kind of scenarios envisaged by the Government), or the fact that even if the UK did come out of the ECHR, there would continue to be other rules of international law that would bind it,[22] it might be worth briefly considering what benefit the ECHR jurisprudence on the actions of our armed forces overseas has had.

35. We have already touched upon how the *Smith* litigation, which exposed serious problems with procurement and decision making around the assignment of equipment for soldiers. Commonly described by the soldiers themselves as 'mobile coffins', the Snatch Land Rover vehicles were developed for use in Northern Ireland and then deployed in Iraq and Afghanistan, providing manifestly inadequate protection against IEDs. The families' concerns were entirely vindicated many years later when Chilcott produced his report and the failings were accepted by the then Secretary of State for Defence, who apologised for the failure to deploy better protected vehicles for use during these wars.

36. In relation to the treatment of detainees, in the *Alseran* case, above, it was the MoD's case that the continued use of one of the five banned interrogation techniques should not be considered unlawful. Hooding, it argued, would not necessarily constitute a violation of Article 3. The High Court (Leggatt J) dealt with this argument robustly, taking the opportunity make the legal position on hooding absolutely clear:

> *Despite its unequivocal published policy, the MoD felt able to submit at the trial of MRE and KSU that the hooding of captured persons does not amount to inhuman and degrading treatment under article 3 of the European Convention where it is done for short periods of time during transit for reasons of operational security, and also to deny that the hooding of MRE and KSU for the duration of the journey from Umm Qasr port to Camp Bucca was a breach of article 3.*
>
> *…*
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> *As the lessons of Northern Ireland, the Baha Mousa inquiry and the Al-Bazzouni case do not seem to have been fully absorbed by the MoD, I consider that the court should now make it clear in unequivocal terms that putting sandbags (or other hoods) over the heads of prisoners at any time and for whatever purpose is a form of degrading treatment which insults human dignity and violates article 3 of the European Convention. It is also, in the context of an international armed conflict, a violation of article 13 of Geneva III, which requires prisoners to be humanely treated at all times.*
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> *An incantation of "operational security" cannot justify treating prisoners in a degrading manner.*[23]

37. The public inquiries of both Baha Mousa and Al-Sweady, both brought about as a direct consequence of HRA litigation, produced outcomes that were positive. In particular, the Baha Mousa inquiry exposed abusive, unlawful conduct of the most serious nature that would have otherwise remained hidden. It also identified that there had been a significant number of individuals involved (that had not been prosecuted) and identified systemic failings, which led to improved practices. The Al-Sweady inquiry exonerated the accused soldiers and allayed the worst fears of those that would call into question the conduct of our forces overseas. The inquiry also made important recommendations and identified areas for improvement in the MoD practices and procedures in the area of ensuring procedural protections for detainees including

[22] Such as, for example, the Convention Against Torture which requires that measures be taken to ensure the effective investigation and prosecution of acts of torture.

[23] *Alseran, Al-Waheed, MRE, KSU v Ministry of Defence* [2017] EWHC 3289 (QB), paras 494-495

strip searching, providing notices of rights, interpreting facilities, and assessing fitness for interrogation.[24]

38. In addition, and drawing upon the above and from other cases, the Systemic Issues Working Group was an MoD body tasked with identifying and addressing systemic problems arising from military operations overseas and it specifically drew from 'judicial proceedings' and civil litigation – much or all of it founded upon HRA claims - in its reports, identifying practices that were of concern and what action was needed to address them. Without that litigation, those 'systemic issues' may not have been identified.

39. In relation to procedural protections for detainees during overseas operations, in circumstances where the Government has now successfully argued that Article 5 should, in effect, be read down so that the strict procedural requirements of Article 5 are not applied during international armed conflict, the CMJ suggests that the outcome of this litigation has been extremely positive. It is hard to see what objection there can possibly be. All that has been held to be required is, in essence, that there should be a fair process and that detainees should enjoy a certain level of protection. The courts have displayed a great deal of deference and recognise the limits of their competencies to rule on the practical realities of armed conflict. The judgments have enabled the armed forces to detain insurgents, combatants and civilians in the particular and difficult circumstances of armed conflict, subject to certain minimum safeguards. These safeguards are *not* onerous and comprise the need for independent review and the right of the detained person to participate in that review.[25]

40. Given what we know about what happened to Baha Mousa and other civilians who were unlawfully detained and ill-treated, (as well as what we now know about British involvement and assistance in the mistreatment of suspects during the War on Terror)[26] it is surprising and troubling that anyone would wish to argue that the UK ought not to be held to ECHR compliant standards. The reassurances that we should not be concerned because service law will still apply to the activities of our armed forces overseas ring hollow indeed. When British soldiers took Baha Mousa into their custody, they may not have thought that the ECHR applied but they can have been in no doubt that service law did. Service law did nothing to protect him or the others who died. The Army's own internal investigation that followed these and other cases were flawed. If basic Article 5 protections no longer apply to armed conflicts overseas, serious concerns arise about what will happen to detainees who risk disappearing into a legal black hole. As Lt Col Nicholas Mercer, the Army's former chief legal adviser observed of his experiences in Iraq, "it became clear that when a lesser standard was applied, there was room for legal debate, then there was the potential for abuse – with tragic consequences in the case of Baha Mousa."[27]

41. In that context, proposals put forward by critics of the Overseas Operations Bill to create a system of independent judicial oversight of detention decisions of suspected insurgents during

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[24] Al-Sweady report, Part 5: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/388306/43358_16b_Part_5_Chapter_2.pdf

[25] *Mohammed (No 2)* Lord Sumption (at para 107) (In Mr Waheed's case, those deciding on whether he ought to be maintained in detention were within the detaining authority's chain of command at all times, assisted by an MoD official whose job was, in part, to ensure the reputation of the British Army was protected. Unsurprisingly, the court found such a process to lack independence). In addition, the detainee himself ought to be informed (without divulging secret information) the gist of why he was being held, the procedure should be explained to him, he should be allowed to contact the outside world and he should be allowed to make representations. There was no such fair process in place for Mr Waheed and a violation was found.

[26] https://www.independent.co.uk/voices/editorials/iraq-war-torture-rendition-jack-straw-tony-blair-us-intelligence-agencies-a8421636.html

[27] Mercer, N., '*The future of Article 5 tribunals in the light of experiences in the Iraq War 2003*', in Contemporary Challenges to the Laws of War, Harvey, C., Summers, J., and White, N. (eds.), Cambridge: Cambridge University Press, 2014, pp. 149-68, p. 158

overseas operations warrant careful consideration. If such a system could be devised, this would protect both detainees and soldiers in future conflicts and would very significantly reduce the volume of civil claims being brought against the MoD in the aftermath, an outcome that would appear to benefit everyone.

42. The case-law that has flowed from the wars in Iraq and Afghanistan has established, essentially, that war is difficult and different – but it is not a legal black hole. The ECHR requires the accountable use of lethal force, with effective and realisable safeguards, which include investigations into credible allegations of abuse. It requires that victims and soldiers have a means of redress, where fundamental human rights and the laws of war are breached. Despite hyperbole from some quarters, the implications of these judgments are measured, limited and reasonable and essentially amount to the propositions: don't kill unless it's a lawful act of war, don't torture and ill-treat civilians or combatants under your control – ever - and enable some minimum procedural standards to ensure people are not held in indefinite extrajudicial detention. Far from creating uncertainty, the ECHR clarifies and structures the military's use of lethal force and its powers of detention in ways the authorities ought to recognise and to honour. They are entirely consistent with the reasons given for the UK's intervention in these conflicts in the first place. Any attempt to reduce the effect of our obligations under the ECHR overseas would fundamentally undermine such principles and safeguards and send a terrible message to rights-abusing regimes around the world. It would also be contrary to the wishes of the vast majority of service personnel that we are privileged to represent and/or engage with through our work.

43. In our view, there is no case for amending the HRA. However, proposals for a system of independent judicial oversight of detention decisions during overseas operations should be explored.[28]

A note on the Overseas Operations Bill

44. The issue of our armed forces being bound by the ECHR overseas is a central part of the Government's thinking behind the Overseas Operations Bill. (The issue is also intrinsically connected to the situation in Northern Ireland and the differing views on how historic allegations of unlawful conduct by our armed forces should be approached, particularly in light of ECHR jurisprudence on the investigative obligations under Articles 2 and 3 ECHR.[29])

45. The Bill creates a presumption against prosecution for service personnel after 5 years, where an allegation of an offence is made in the context of an overseas operation, and does not exclude from that presumption the most serious offences (such as torture or crimes against humanity), appearing to risk placing the UK in breach of various international legal obligations. It also curtails the court's discretion to extend time in Human Rights Act proceedings; and creates a legal duty on the Secretary of State to consider derogation from the ECHR in future overseas operations. This is a very important and, in the CMJ's opinion, deeply flawed Bill which is founded upon a fairly basic misunderstanding of the nature of the problem it purports to address. It would not be appropriate to set out our concerns about the Bill here, however we simply remind the Panel of this important context and refer the Panel to our briefing on the Bill, below, as well as the clear and consistent concerns expressed by numerous other organisations, politicians, lawyers and, importantly, senior members of the armed forces. [30]

[28] Henriques J is currently undertaking a review of the conduct of investigations into allegations of abuse during overseas operations. It may be that this issue could be considered by him.

[29] While discussions about overseas operations of course do not apply to Northern Ireland (NI), the Government has been clear that it intends to introduce similar legislation to the Overseas Operations Bill, to address the handling of allegations of historic abuse during the conflict. This discussion is therefore highly relevant to NI.

[30] https://centreformilitaryjustice.org.uk/guide/briefing-on-the-overseas-operations-bill/;

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How the Human Rights Act has benefitted our armed forces

46. The *Smith* judgment showed how the ECtHR may provide protection for UK armed forces service personnel and other state agents deployed overseas.

47. The ECHR has required independent comprehensive investigations to be conducted into allegations of serious abuse by our armed forces overseas, in circumstances where service law had failed to protect detainees and had failed to produce competent investigations and accountability for abuses.

48. More generally, the Human Rights Act has assisted numerous bereaved military families to understand the wider circumstances in which their loved ones came to die, whether they died during the course of overseas operations or whether they died as a consequence of failures within their own units, at home. Article 2 of the ECHR has led to wider investigations into controversial deaths that would have remained hidden, but for the ECHR, in cases such as the deaths of the young trainees at Deepcut barracks in Surrey, who died amid allegations of bullying and abuse, or the case of Cpl Anne-Marie Ellement who died after reporting rape and bullying in her unit. Those families and many others like them were only able to get answers, and secure improvements in policies that protect other soldiers, after long battles with the state and because of the ECHR.

49. The ECHR was used by former naval veteran Joe Ousalice to get back the medals that the Ministry of Defence stripped from him when they discharged him because of his sexuality in 1995 (Article 8 and Article 1 of Protocol 1). The claim has also led to MoD to revising its entire medals policy so that other LGBT veterans can apply to have their medals restored. It was of course Article 8 that a number of LGBT servicemen and women relied upon to persuade the ECtHR that the UK's ban on LGBT people being able to serve was unlawful, in 2000. [31]

50. The CMJ advises service women every day on how they may use Articles 3 and 8 of the ECHR to improve the military's handling of investigations into their allegations of sexual assaults, and our clients rely upon those articles to demand accountability and compensation where there have been failings.

51. In that regard, the CMJ is encouraged by the assurance that it is not presently proposed to amend the substantive articles of the HRA. However, it is important to note that this review is the latest in a long line of proposals to repeal or amend the HRA, which have appear to have been characterised by misinformation and/or populist anti-Europeanism.[32]

52. Such proposals are harmful. They chip away at the UKs commitment to the international human rights framework and risk undermining the rule of law.

Centre for Military Justice

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https://www.lawsociety.org.uk/en/topics/human-rights/overseas-operations-service-personnel-and-veterans-bill; https://www.theguardian.com/commentisfree/2020/sep/20/overseas-operations-bill-uk-government-bend-rules-torture-soldiers

[31] Smith & Grady v UK, App. No. 33985/96, 33986/96

[32] See Rights and Responsibilities: developing our constitutional framework, March 2009; the Commission on the Bill of Rights (which failed to reach consensus) in 2012; previous Conservative Party policy to repeal the HRA; the Conservative Party's commitment to reconsider the UK's human rights framework, once the process of leaving the EU concluded (Conservative Party manifesto 2017); and the suggestion by Policy Exchange in 2019 that one option on the table should be to withdraw from the Convention entirely. The CMJ has also been struck by how often people, including those who we would expect to be better informed, continue to confuse the EU/Brexit process with the Council of Europe/ECHR.