

THE OVERSEAS OPERATIONS BILL: BRIEFING NOTES

Some may have noticed the Overseas Operations Bill is currently making its way through Parliament and that Keir Starmer, whose previous career was as a Human Rights Barrister, has remained strangely silent on the matter. This has been to the detriment of the Labour Party who on the main, have little to no understanding as to what the bill is actually about.

Labour MPs were whipped to abstain on the second reading with an instruction to attempt to amend the Bill at the committee stage. Several MPs broke the whip to vote against the bill, including Jeremy Corbyn, all making various hyperbolic claims about breaking international law, effective legalisation of torture and infringements of Human Rights. Inaccurate and unhelpful.

This is perhaps an attempt by Starmer to expose the superficiality of the 'Progressive Left' of the Labour Party, who seem incapable even of reading the Commons Library briefing prior to screaming irresponsible hyperbole about decriminalising torture. It may also be an attempt by the Conservatives to ensure that the provisions which back pedal on their 2016 commitment to provide adequate compensation to service men and women injured in combat overseas get lost in the noise. These political games are facile and British servicemen and women deserve better. The Labour Party has singularly failed to defend this injustice, unsurprisingly, preferring instead to obsess over the application of human rights laws, developed for peacetime, to wars abroad.

This document attempts to clarify and condense what is actually a complex area of law, into something that is more digestible for lay members of the Labour Party who have no legal training or expertise.

The stated aim of the bill is to provide greater legal protections to British Armed Forces personnel and veterans serving on military operations overseas. It is not controversial that the Bill is limited to overseas operations and is not concerned with the conflict in Northern Ireland as this conflict is within Britain's borders and conflicts at home and abroad are considered differently by the laws governing armed conflict. The controversy is essentially about the part of the bill that creates a presumption against prosecution when crimes have already been investigated and no culpability has been found. These crimes would not be prosecuted unless a prosecutor considers there is new and compelling evidence requiring a court hearing. In this section certain crimes are excluded from the presumption against prosecution, but war crimes and crimes against humanity, including torture are included in the presumption.

This does not mean that torture crimes committed by armed forces personnel during conflict overseas is going to be effectively decriminalised. Britain has a duty under international law to investigate crimes committed by its armed forces during armed conflict and this will not change. We would still be required to investigate allegations of this type. The main body of law regulating how armed conflict is conducted is International Humanitarian Law (IHL) which has a longstanding history, is widely accepted across the world, and consists of longstanding customs, the Geneva conventions and associated case law. These were the laws used to prosecute the Nazis for crimes committed during World War II.

Usually Britain discharges its duty to investigate breaches of IHL by its own armed forces through a combination of commanding officer decisions, internal military police investigations, specialist investigations and government inquiries. That these are usually conducted within the military itself is not necessarily for nefarious reasons, as understanding armed conflict and the law governing it requires specialist knowledge that civilian institutions and judges are not necessarily competent in understanding or applying. This is not without precedent in other sections of our legal system as this there are separate courts for civil law hearing and criminal law hearings for the same reasons.

The military apply their own rules of conduct and enforce their own systems of law which mirror civilian laws reasonably closely, but which are more appropriate to the unique circumstances of military operations. When it comes to many controversial conflicts in the Middle East limited public scrutiny may not inspire public trust, but this is a specialist area of law, allegations of this type can reach the International Criminal Court, are increasingly being heard by human rights bodies and issues have been found with the British system only rarely.

Increasingly International Human Rights Law (IHRL) has been being applied to armed conflicts in which the British state has been involved. This is especially true in relation to the conflicts in Iraq and Afghanistan where the British military and other state actors have been considered by IHRL bodies to have been acting as a public authority in these countries for lengthy periods. The main body of IHRL that applies to Britain is the *European Convention on Human Rights* (ECHR) which is given effect in the UK through the *Human Rights Act 1998*. IHRL is intended for use during peacetime and it's application to armed conflict is controversial. It is unsurprising that human rights organisations such as Liberty and Amnesty International have a negative view of the Bill since it is primarily designed to limit the application of IHRL to armed conflict abroad.

Rather than attempting to balance the necessity of military action with the principles of humanity during an armed conflict, as IHL does, IHRL is intended to protect **the individual** from oppressive state power in domestic circumstances during times of peace. Though there is an international body of IHRL, it does not restrict the behaviour of non-state parties. When applied to recent conflicts, often involving state actors and insurgent forces this may complicate and frustrate military operations by applying higher standards to state actors. **Given neither body of law prohibits illegal and unjust wars, such as is widely believed to have happened in Iraq and Afghanistan, the application of IHRL merely puts the service personnel sent to fight in a difficult position.**

Neither IHRL, nor IHL is concerned with whether a decision to enter an armed conflict is just or lawful. **Neither IHL nor IHRL prevented the Labour government from sending troops into Iraq or Afghanistan or any other modern conflicts.** There was significant rhetoric around 'humanitarian intervention' emanating both from the American government and the British government during the course of both these conflicts.

IHL attempts to regulate the behaviour of all parties to an armed conflict so that civilian casualties and damage to civilian property is minimised **once armed conflict has commenced**. This is the meaning of 'proportionality' under IHL – proportionality is determined by assessing the use of force against those who are lawfully considered to be combatants compared to the potential damage to civilians and civilian property, which must be reasonably protected. The use of force, even lethal force, against enemy combatants is not prohibited under IHL but the impact on civilians of the use of force must be minimised. This provides clear and universally applicable rules, which potentially apply to all involved, not just nation states, and are easy to negotiate. Lethal force can be used against enemy combatants by all those engaged in armed conflict, providing damage to civilians is minimised.

IHRL also uses the term 'proportionality' in relation to the use of force, but it has a different meaning. Under IHRL proportionality is applied to the reasonableness, or otherwise, of force used against any individual. This requires a different set of judgements be made by those engaged in armed conflict against enemy combatants, including the need to make an accurate assessment of the level of threat posed by each person in the moment force is used and to limit the level of force used to that which is 'reasonable'. This may be a good rule during peacetime when governing the relationship between the individual and the state in domestic situations, but it is difficult to apply during armed conflict.

Both bodies of law regulate force and detention, and both bodies of law prohibit torture. They address some common concepts, but have different approaches which are not always complementary. IHL is meant to be given priority over IHRL in armed conflict, even by human rights bodies hearing cases brought under IHRL. Unfortunately judges hearing these cases often lack sufficient understanding of IHL and where it should be prioritised.

For example, the IHL definition of proportionality rather than the IHRL definition.

This is highly dependent on individual lawyers' and judge's knowledge of military law and IHL, which is outside their specialist area of knowledge (IHRL). This has the potential to result in injustice, especially where wars like Afghanistan and Iraq were conducted after the *Human Rights Act 1998* gave effect to the ECHR but before it was considered to apply in specific circumstance of overseas operations by the British state.

The current Conservative government, who inherited the mess in the Middle East caused by our wars in Iraq and Afghanistan, committed to legislating in order to protect British servicemen and women from repeated and drawn out investigation, which rarely finds fault, within 100 days of election. The Overseas Operations Bill is their attempt to make good on this promise.

The government is concerned with the rise of 'lawfare', especially since a series of legal rulings have extended the application of ECHR to armed conflict, particularly since a prominent solicitor responsible for bringing significant numbers of vexatious claims in relation to the conflicts in Iraq and Afghanistan has been struck off due to serious breaches of professional regulations. The government believes the rise in vexatious claims are an unhelpful perpetuation of the conflicts via the courts, which is in no-ones interests except the lawyers involved. It is hard to disagree with this position.

The main provisions of the Bill include;

1. Measures to provide certainty to armed forces personnel engaged in overseas conflict;
 - a presumption against prosecution for alleged offences committed more than five years ago,
 - a requirement for judges to give weight to the unique circumstances of armed conflict and their effect on servicemen and women when reaching decisions in these cases,
 - a requirement to obtain permission from the attorney general to proceed with these cases.
2. Time limits on civil claims for personal injury compensation in connection with overseas conflict.
3. A duty to consider derogating from the ECHR prior to engagement in significant overseas conflict.

The inclusion of war crimes and crimes against humanity in those crimes where the proposed presumption against prosecution would apply is controversial. Not because it decriminalises torture, but because it may amount to a statute of limitations which may cause international tension, embarrass Britain, render the British duty to investigate such crimes ineffective, and create the risk British servicemen and women alleged to have committed such crimes would be prosecuted by the International Criminal Court. This does not achieve the stated aim of protecting British Servicemen and women from prolonged investigation and it could arguably be seen as an attempt to frustrate British accountability for such crimes. **The Bill should be amended to exclude war crimes and crimes against humanity from the presumption against prosecution.**

The MOD's position that the circumstances of servicemen and women involved in overseas operations are so unique that they justify preferential treatment in law when compared to those working in the same circumstances but for, for example, NGOs may not be justified. The armed forces perform a variety of roles during overseas operations, not all of these roles are directly involved in armed combat. **This provision may need further scrutiny and consideration as it may amount to unjustified discrimination.**

The introduction of time limits on civil claims would achieve the precise opposite of the government's previous commitment to clarify the law on combat immunity and to provide equity for servicemen and women injured or killed on overseas operations as compared to those who are injured or killed outside of combat. It, in fact, seems to place this group of service personnel in a worse position than civilians bringing personal injury claims. **The Bill should be amended to provide the promised statutory clarification on combat immunity and to provide combat veterans and families with access to no fault compensation equivalent to that which they would be awarded through the courts, as promised in 2016.**

The duty to consider derogation from the ECHR prior to engagement in significant conflict overseas is entirely acceptable. This does not mandate that future governments actually do derogate (suspend certain aspects) from the ECHR. Derogation is already often considered and applied widely. The application of the ECHR to overseas operations is rapidly developing, and may conflict with the application of IHL. This provision, if enacted, would potentially provide future governments with a prompt to consider the current application of ECHR to the particular circumstances of the conflict, and to provide the armed forces and institutions which apply IHRL with necessary clarity regarding the application of IHRL. This could protect the planning of military operations and service men and women from uncertainty and confusion which could negatively affect operations.

A MOTION FOR SUGGESTED AMENDMENTS TO BE FORWARDED TO COMMITTEE STAGE OF THE OVERSEAS OPERATIONS BILL

This Constituency Labour Party's Position:

This Constituency Labour Party notes;

- The progress of the Overseas Operations Bill through Parliament.

This Constituency Labour Party believes;

- Armed Forces personnel are workers.
- Armed Forces personnel risk paying a high price for service to the British state during overseas operations, which should be recognised appropriately.
- Armed Forces personnel who are injured, or who die, in overseas operations deserve proper compensation for their injuries, which have occurred in service to the British state. This includes proper provision of compensation to the families of those who have been killed and fair pensions, which are a form of compensation, for war widow/ers.
- It is politicians who are responsible for sending service personnel to fight in illegal and unjust imperialist wars, and it is politicians who should be held accountable for this.
- Service men and women already have a duty to act within the confines of military law and International Humanitarian Law in conflict overseas, and there is provision to hold them accountable if they do not, whether this Bill passes or not.
- Human rights laws have no useful application in armed conflict overseas, which is already more than adequately governed by International Humanitarian Law.

This Constituency Labour Party Resolves that;

- The Labour Party pressure the Conservative government to make good on it's 2016 commitment to provide statutory clarification on combat immunity and equity in the provision of compensation to service personnel injured and killed in overseas operations as a priority.
- Clarification of the application of human rights laws to overseas operations via the duty to consider derogating from ECHR prior to engagement in significant overseas conflict offers future governments the opportunity to provide clarity in planning and conducting military operations overseas and should be supported by the party whether this provision in the Overseas Operations Bill passes or not.
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- The presumption against prosecution for war crimes and crimes against humanity in the Overseas Operations Bill should be opposed, as this provision fails to achieve the stated aim of protecting British servicemen and women from prolonged and unnecessary investigation, as it may effectively create a statute of limitations and bring Britain into conflict with the International Criminal Court.
- The Labour Party support the War Widows Association's demand that the 300 families who lost their compensatory pensions have this compensation reinstated.
- That this constituency's Member of Parliament forward these recommended amendments to the Labour Party Shadow Defence Team.