**UK ACCOUNTABILITY FOR WAR CRIMES IN DOUBT**

On 18 March the UK Minister for Defence introduced into the UK Parliament his promised package of new legislation designed to ‘protect veterans’. Entitled the *Overseas Operations (Service Personnel and Veterans) Bill (*<https://publications.parliament.uk/pa/bills/cbill/58-01/0117/cbill_2019-20210117_en_2.htm#pt1-pb1-l1g1>), the proposed law contains important restrictions on the ability to bring alleged UK war criminals – past and future - before the courts.

In particular, ss1-3 of the Bill introduce a “presumption” that once five (5) years have elapsed from the date of an alleged offence during overseas operations, it would be “exceptional” for prosecutors to decide that a serving or ex-soldier should be prosecuted. Indeed, any decision about prosecution would need to take into account matters which reduce culpability, such as the operating environment’s “exceptional demands and stresses” (such as being in a continuous threat environment, or serving alongside others who were killed or injured in action) which may reduce the ability to make sound judgments or exercise self-control, regardless of the soldier’s rank, length of service or personal resilience. Further, there is presumed to be a public interest in finality where no ‘new’ evidence is presented. Section 5 of the Bill requires that any criminal prosecution would require the consent of the UK Attorney General before it could proceed.

The Iraq Historic Investigations Team (IHAT) was responsible for investigating alleged violations of the rules of war in Iraq, and Operation Northmoor investigated alleged violations in Afghanistan. No Operation Northmoor cases were ever passed to the Service Prosecuting Authority (SPA) for prosecution, and the SPA declined to proceed with prosecution for the few IHAT cases put before it. The UK government closed IHAT down in 2017, leaving a caseload of around 20 cases to be investigated by a successor body, Service Police Legacy Investigations (SPLI). None of these have proceeded to court yet either, leading to allegations that the UK government is uninterested in pursuing any war crimes cases (<https://www.theguardian.com/law/2019/nov/17/british-government-army-accused-covering-up-war-crimes-afghanistan-iraq>).

The time limit in the Bill appears to eliminate any prospect of prosecutions from this legacy caseload. Additionally, given that any substantial UK troop commitment overseas is likely to lead to a large number of incidents requiring years to investigate, the presumption against prosecution after five years is likely to stymie prospects for holding future UK war criminals to account.

Accountability in the International Criminal Court (ICC)

There is a small possibility that an international process will hold UK commanders responsible for historic war crimes even if a domestic process cannot. The UK ratified the Rome Statute on 4 October 2001, making British nationals eligible for possible prosecution. In 2005 the Office of the Prosecutor (OTP) opened a preliminary investigation into UK war crimes in Iraq, but this was closed in early 2006 concluding *inter alia* that while there was “reasonable evidence” to believe there had been around 20 instances of wilful killing and inhuman treatment under Article 8 of the Rome Statute, this number was not of sufficient gravity and thus did not satisfy the Admissibility criteria of the Court (<https://www.icc-cpi.int/NR/rdonlyres/04D143C8-19FB-466C-AB77-4CDB2FDEBEF7/143682/OTP_letter_to_senders_re_Iraq_9_February_2006.pdf>).

Upon new evidence being presented in 2014, the OTP re-opened the preliminary investigation, concluding in 2017 that there was a “reasonable basis” to believe that members of UK forces committed a range of war crimes under Article 8 (para 194, <https://www.icc-cpi.int/itemsDocuments/2017-PE-rep/2017-otp-rep-PE-Iraq_ENG.pdf>). As to whether such evidence could support a prosecution, an Admissibility Assessment by the OTP dated December 2019 (<https://www.icc-cpi.int/itemsDocuments/191205-rep-otp-PE.pdf>) noted that while the UK has not been inactive in investigations of war crimes for domestic prosecution, recent investigative reporting by UK media outlets had alleged a deliberate effort to shield higher-level perpetrators from scrutiny, along with the destruction of potentially incriminating evidence (para 170). Further, legislation to limit prosecutions (such as the Bill just introduced) would be assessed during 2020 to see whether it evidences the standards of inactivity and genuineness set out in Article 17 of the Rome Statute (paras 173-175).

The new Bill is therefore on the radar of the ICC, and its bar on prosecutions over five years old except in “exceptional circumstances” certainly makes it more difficult now for the UK to argue that outstanding war crimes investigations will be seriously pursued. Of course whether the UK would cooperate if a formal investigation was launched and/or arrest warrants issued is an open question; in April 2019 the ICC’s Pre-Trial Chamber II rejected the OTP’s request to investigate war crimes in Afghanistan in part because the lack of cooperation received from the UK government and others meant the chances of successful investigation and prosecution were slim (<https://www.icc-cpi.int/Pages/item.aspx?name=pr1448>).

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