

Equality and Human Rights Commission

Human rights and the military

Follow-up submission regarding
the Concluding Observations
adopted by the Human Rights
Committee on the seventh periodic
report of the UK
July 2016

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The role of the Equality and Human Rights Commission and the scope of this submission

1. The Equality and Human Rights Commission (EHRC) is one of the United Kingdom's (UK) three 'A' status accredited National Human Rights Institutions (NHRIs), alongside the Northern Ireland Human Rights Commission and the Scottish Human Rights Commission (SHRC). The EHRC's jurisdiction covers England, Wales and also Scotland in relation to equality, and those human rights matters outside the legislative competence of the Scottish Parliament. The EHRC's remit does not extend to Northern Ireland, which is therefore outside the scope of this report, and the SHRC has taken the view that this report falls outside the scope of their mandate.
2. This submission is intended to inform the UN Human Rights Committee (the Committee) of the EHRC's assessment of the UK Government's progress towards addressing the Committee's 2015 concluding observation to the UK on accountability for human rights violations committed by British forces abroad (paragraph 9).¹
3. This submission focuses on:
 - the applicability of the Covenant and the domestic human rights framework
 - the Overseas Detainee Inquiry
 - Iraq Historic Allegations Team
 - Camp Nama

¹ Human Rights Committee (2015), Concluding observations on the seventh periodic report of the United Kingdom of Great Britain and Northern Ireland, UN Doc. CCPR/C/GBR/CO/7. Available at: http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR/C/GBR/CO/7&Lang=En [accessed: 3 June 2016]. The Human Rights Committee noted its concerns over: the slow progress in proceedings before the Intelligence and Security Committee of Parliament in relation to the Detainee Inquiry; the adequacy of the Intelligence and Security Committee of Parliament as an investigation mechanism; the slow progress of the Iraq Historical Allegations Team and the very small number of criminal proceedings completed so far; and the lack of information on what investigations, if any, took place into allegations about British special forces personnel handing over detainees into United States custody at Camp Nama.

Applicability of the Covenant and the domestic human rights framework

Proposals to replace the Human Rights Act

4. As the Committee will be aware, the primary vehicle for securing the rights contained in the Covenant is the Human Rights Act 1998 (HRA) which incorporates the European Convention on Human Rights into domestic law in the UK. In December 2015, the UK Government reiterated its intention to consult on the proposal to replace the HRA with a British Bill of Rights.² The Prime Minister provided an update to Parliament in February 2016 that the UK Government would shortly be developing proposals 'to change Britain's position with respect to the European Court of Human Rights by having our own British Bill of Rights'.³ The Queen's speech in May 2016 reaffirmed that 'proposals will be brought forward for a British Bill of Rights'.⁴
5. The EHRC's position remains that any changes to our current human rights framework should not dilute the protections contained in the HRA. We consider the HRA to be well crafted and reflective of and embedded in the constitutional arrangements for the UK. Changing our human rights laws would have significant constitutional and social consequences, and should only be considered as part of a broad and participative public process.⁵ We welcome a

² This consultation is scheduled for 2016. Revised transcript of evidence taken before the Select Committee on the Constitution, oral evidence session with the Rt. Hon. Michael Gove, Lord Chancellor and Secretary of State for Justice, 2 December 2015. Available at: <http://www.parliament.uk/business/committees/committees-a-z/lords-select/constitution-committee/> [accessed: 1 February 2016].

³ Prime Minister David Cameron, 3 February 2016. Available at: http://www.publications.parliament.uk/pa/cm201516/cmhansrd/cm160203/debtext/160203-0002.htm#160203-0002.htm_spm2 [accessed: 11 February 2016].

⁴ Gov.uk, Speech, Queen's Speech 2016, delivered 18 May 2016. Available at: <https://www.gov.uk/government/speeches/queens-speech-2016> [accessed: 18 May 2016].

⁵ EHRC, Statement on the UK's implementation of the International Covenant on Civil and Political Rights, June 2015. Available at: <http://www.equalityhumanrights.com/about-us/our-work/human-rights/international-framework/international-covenant-civil-and-political-rights> [accessed: 1 February 2016].

debate on such an important issue and look forward to contributing to the development of ideas, but would not support a reversal of the leading global role Britain has long played in protecting and promoting human rights.⁶

6. In 2015, the Committee recommended that the UK Government should 'ensure that any legislation passed in lieu of the Human Rights Act 1998 – were such legislation to be passed – is aimed at strengthening the status of international human rights, including the provisions of the Covenant, in the domestic legal order, and provide effective protection of those rights across all jurisdictions'.⁷
7. While the UK Government is yet to publish its consultation document, it is likely to consider the extent of the jurisdiction of the State's human rights obligations, for example their applicability to the actions of British Forces abroad, and may propose other changes which, if implemented, might impact on the enforceability of Covenant rights within the UK.
8. **Recommendation: The Committee should ask the UK Government to clarify whether it accepts that domestic human rights law should apply to all territory under the UK's de facto effective control, and that it will take this, and all its obligations under the Covenant, into account in any proposals for new domestic legislation.**

Applicability of the Covenant: extraterritorial jurisdiction

9. A complaint often made against the HRA is that the UK courts have applied European Convention rights to armed conflict in a way that was never intended. In March 2014, for instance, the former Home Secretary Jack Straw gave evidence to the House of Commons Defence Committee that 'it was never anticipated that the Human Rights Act would operate in such a way as directly to affect the activities of UK forces in theatre abroad'.⁸

2016].

⁶ EHRC, Changes to the human rights framework, 19 February 2016. Available at: <http://www.equalityhumanrights.com/your-rights/human-rights/changes-human-rights-framework> [accessed: 23 March 2016].

⁷ UN Human Rights Committee, Concluding observations on the seventh periodic report of the United Kingdom, July 2015, para 9. Available at: [http://www.equalityhumanrights.com/sites/default/files/uploads/documents/humanrights/UN/CCPRC%20GB%20concluding%20observations%20\(1\).pdf](http://www.equalityhumanrights.com/sites/default/files/uploads/documents/humanrights/UN/CCPRC%20GB%20concluding%20observations%20(1).pdf) [accessed: 3 February 2016].

⁸ See House of Commons Defence Committee, *UK Armed Forced Personnel and the Legal Framework for Future Operations* (HC 931, 2 April 2014), Ev 15.

10. Section 6 of the HRA, however, makes clear that it is 'unlawful for a public authority to act in a way that is incompatible with a Convention right', unless it is required to do so by an Act of Parliament. The HRA exempts Parliament from the definition of 'public authority',⁹ but it does not exempt the armed forces or the Ministry of Defence and there is nothing in the Act that would otherwise prevent Convention rights applying.
11. Neither the HRA nor the Convention imposes personal liability on soldiers or commanding officers for violations of human rights. Although individuals may be liable under the criminal law for their decisions, only governmental bodies are accountable under the Convention for breaches of human rights. Similarly, the HRA imposes significant limits on the circumstances in which an award of damages may be made.¹⁰ In practice, awards of damages are uncommon in human rights cases and rarely involve significant amounts of money.¹¹
12. Recent political attention suggests that the UK Government may seek to legislate to change the applicability of human rights law to UK soil. This would necessitate departing from the approach taken by the European Court of Human Rights to the extra-territorial application of the Convention, and currently followed by the UK Supreme court, which is consistent with the approach taken by the Committee under the Covenant.
13. In 2008, the question of whether the HRA was intended to apply extra-territorially was addressed by the House of Lords in *Al Skeini and others v Secretary of State for Defence*.¹² A majority of the House of Lords held that the HRA had extra-territorial effect in those circumstances where the UK had 'jurisdiction' for the purposes of Article 1 ECHR.¹³ When *Al Skeini* was heard by the European Court of Human Rights in 2011, however, the Court

⁹ Section 6(3) HRA.

¹⁰ See especially section 8(3) HRA: 'No award of damages is to be made unless, taking account of all the circumstances of the case ... the court is satisfied that the award is necessary to afford just satisfaction to the person in whose favour it is made.'

¹¹ See e.g. *R v Secretary of State for the Home Department ex parte Greenfield* [2005] UKHL 14 per Lord Bingham at para 19: 'First, the 1998 Act is not a tort statute. Its objects are different and broader. Even in a case where a finding of violation is not judged to afford the applicant just satisfaction, such a finding will be an important part of his remedy and an important vindication of the right he has asserted. Damages need not ordinarily be awarded to encourage high standards of compliance by member states...'

¹² [2008] 1 AC 153.

¹³ See e.g. Lord Roger at para 59: 'section 6 [of the HRA] should be interpreted as applying not only when a public authority acts within the United Kingdom but also when it acts within the jurisdiction of the United Kingdom for purposes of article 1 of the Convention, but outside the territory of the United Kingdom.'

disagreed with the conclusion of the House of Lords that UK forces did not have 'effective control' of Basra for the purposes of Article 1 ECHR. The Court found that, as a matter of both legal and practical reality, 'the United Kingdom assumed authority and responsibility for the maintenance of security in South East Iraq' and therefore enjoyed jurisdiction for the purposes of the Convention.¹⁴

14. In 2013, the Supreme Court heard the case of *Smith and others v Ministry of Defence*¹⁵ – which concerned the deaths of three soldiers in Iraq: two of whom had been killed in Snatch Land Rovers on patrol while one had died in a friendly-fire incident involving a Challenger II tank during a military offensive.¹⁶ The key human rights issue was whether the soldiers' deaths required the military to undertake an independent investigation in accordance with the right to life under Article 2 ECHR. This is important because a failure to adequately investigate a person's death where the UK Government is responsible is itself a breach of Article 2. A majority of the Supreme Court in *Smith* held that Article 2 *could* in principle apply to the soldiers' deaths. The Supreme Court was very careful to stress, however, that human rights standards should not be applied to the military in such a way as might compromise their effectiveness.¹⁷

15. Critics of the Supreme Court decision in *Smith* on the doctrine of combat immunity have pointed to the rising number of claims against the Ministry of Defence and the increasing cost of settlements and awards of damages. A 2013 report by Policy Exchange, the British centre-right think tank, noted that 'the costs of litigation have now risen out of all proportion with the number of claims brought against the MOD totalling 5,827 in 2012–2013'. The report stated that 'the MOD frequently settles cases' and that 'the average payment made to the 205 people who have made successful claims has been almost £70,000 including costs'.¹⁸

¹⁴ (2011) 53 EHRR 18 at para 149.

¹⁵ [2013] UKSC 41.

¹⁶ The Commission intervened in this case arguing, successfully, that the soldiers in question were legally within the Article 1 ECHR jurisdiction.

¹⁷ Para 66.

¹⁸ Tugendhat and Croft (2013), *The Fog of War: An introduction to the legal erosion of British fighting power*, pp. 35-36. Available at: <http://www.policyexchange.org.uk/publications/category/item/the-fog-of-law-an-introduction-to-the-legal-erosion-of-british-fighting-power> [accessed: 29 June 2016].

16. In 2015, the Committee stated that the UK Government should ‘engage in consultation with stakeholders at all levels to identify ways to give greater effect to the Covenant in all jurisdictions that fall under its authority or control or with regard to which it has formally undertaken to implement the Covenant’.¹⁹ The Committee also reiterated its view that ‘a State party had to respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party’.²⁰
17. The EHRC agrees with the Committee’s interpretation of the extent of the jurisdiction of ICCPR,²¹ as expressed in its General Comment No 31, para 10: ‘States Parties are required by article 2, paragraph 1, to respect and to ensure the Covenant rights to all persons who may be within their territory and to all persons subject to their jurisdiction. This means that a State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party’.²²
- 18. Recommendation: The Committee should ask the UK Government to clarify that it accepts that its obligations in international law under ICCPR extend to the operations of British forces overseas (other than in direct combat situations) and to foreign nationals when they are under de facto effective UK jurisdiction.**

¹⁹ UN Human Rights Committee, Concluding observations on the seventh periodic report of the United Kingdom, July 2015, para 9. Available at: [http://www.equalityhumanrights.com/sites/default/files/uploads/documents/humanrights/UN/CCPRC%20GB%20concluding%20observations%20\(1\).pdf](http://www.equalityhumanrights.com/sites/default/files/uploads/documents/humanrights/UN/CCPRC%20GB%20concluding%20observations%20(1).pdf) [accessed: 3 June 2016].

²⁰ Office of the High Commissioner for Human Rights, ‘The Human Rights Committee considers the report of the United Kingdom’, 2 July 2015. Available at: <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?LangID=E&NewsID=16185> [accessed: 3 June 2016].

²¹ Article 2(1) ICCPR provides that ‘[e]ach State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant’.

²² CCPR/C/21/Rev.1/Add.13, 26 May 2004. Available at: http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2f21%2fRev.1%2fAdd.13&Lang=en [accessed: 14 June 2016].

Overseas Detainee Inquiry

19. In December 2013, the Detainee Inquiry published a report on its preparatory work.²³ The UK Government announced the same day that the Prime Minister had ‘discussed and agreed with the Intelligence and Security Committee of Parliament that it will inquire into the themes and issues that Sir Peter has raised, take further evidence, and report to the UK Government and to Parliament on the outcome of its inquiry. Additional resources will be provided to the Committee to undertake that work.’²⁴
20. In 2015, the UN Human Rights Committee stated that it was ‘concerned about the slow progress in proceedings before the Intelligence and Security Committee of Parliament (ISC) in relation to the Detainee Inquiry and also the adequacy of the ISC as an investigation mechanism, given concerns about its independence from the executive power and the power of the government to withhold sensitive information from it’. The Committee recommended that the UK should ‘ensure that the proceedings before the Intelligence and Security Committee of Parliament meet the requirements of the Covenant, including an adequate balance between security interests and the need for accountability for human rights violations, and consider initiating a full judicial investigation in all relevant detainee cases’.²⁵
21. In October 2015, the ISC stated that the inquiry into the role of the UK Government and security and intelligence agencies in relation to detainee treatment and rendition was its ‘longer-term priority’.²⁶ The EHRC and NIHR

²³ The Detainee inquiry. 2013. About the inquiry [ONLINE] Available at:

<http://www.detaineeinquiry.org.uk/about/index.html> [accessed: 3 February 2016].

²⁴ Secretary of State for Justice Kenneth Clarke, 19 December 2013. Available at:

http://www.publications.parliament.uk/pa/cm201314/cmhansrd/cm131219/debtext/131219-0002.htm#131219-0002.htm_spmi0 [accessed: 3 February 2016].

²⁵ UN Human Rights Committee, Concluding observations on the seventh periodic report of the United Kingdom, July 2015, para 9. Available at:

[http://www.equalityhumanrights.com/sites/default/files/uploads/documents/humanrights/UN/CCPRC%20GB%20concluding%20observations%20\(1\).pdf](http://www.equalityhumanrights.com/sites/default/files/uploads/documents/humanrights/UN/CCPRC%20GB%20concluding%20observations%20(1).pdf) [accessed: 3 February 2016].

²⁶ Intelligence and Security Committee of Parliament. News Archive, 29 October 2015 [ONLINE]

Available at: <http://isc.independent.gov.uk/news-archive/29october2015> [accessed: 3 February 2016].

wrote to the Chair of the ISC noting that we consider it vital that 'a properly resourced inquiry is carried out within an expedited timetable'. We received a response on 16 December 2015, stating that 'whilst the Committee will make every effort to report in a reasonable timeframe, we can only do so once we have considered all of the evidence...it is preferable for us to take our time and follow the evidence rather than rush to meet a particular deadline'.

22. On 9 June 2016, the Crown Prosecution Service confirmed that there would not be any prosecution of security or intelligence officers in relation to the alleged rendition of Abdel Hakim Belhaj and Sami al-Saadi to Libya in 2004.²⁷ Both cases form part of the ISC's inquiry, and in the Commission's view these decisions underline the need for the inquiry to be given greater resources and greater priority.

23. Recommendation: The Committee should ask the UK Government to outline what actions it is taking to ensure the allegations of complicity of British military personnel, security and intelligence services in the ill-treatment of detainees and civilians overseas are being investigated within a reasonable timeframe. It should state when the ISC will report and what resources are devoted to this work.

²⁷ Crown Prosecution Service, Crown Prosecution Service statement: Operation Lydd. Available at: http://www.cps.gov.uk/news/latest_news/crown_prosecution_service_statement_operation_lydd/ [accessed: 15 June 2016].

Iraq Historic Allegations Team

24. The Iraq Historic Allegations Team (IHAT), which is investigating allegations of abuse of Iraqi citizens by British service personnel that have been brought to the attention of the Ministry of Defence, started work in November 2010.²⁸ In 2015, the UN Human Rights Committee expressed its concern about ‘the slow progress of the Iraq Historical Allegations Team and the very small number of criminal proceedings completed so far’. The Committee recommended that the UK should ‘address the excessive delays in the investigation of cases dealt with by the Iraq Historical Allegations Team and consider establishing more robust accountability measures to ensure prompt, independent, impartial and effective investigations’.²⁹

25. The IHAT updated the information on its website about its investigations in May 2016, reporting that it is investigating allegations relating to 1,558 potential victims.³⁰ The IHAT has closed or is in the process of closing investigations into 59 allegations of unlawful killing. In 56 cases the allegation of criminal behaviour was not sustainable. Two soldiers were referred to the Director of Service Prosecutions for consideration of prosecution but the cases were discontinued on legal grounds and one case has been referred to the RAF Police for further investigation. The EHRC does not consider current progress to be consistent with the prompt investigative duty under Articles 2 and 3 of the ECHR.³¹

²⁸ Ministry of Defence, Announcement: Iraq Historic Allegations Team starts work, 1 November 2010. Available at: <https://www.gov.uk/government/news/iraq-historic-allegations-team-starts-work> [accessed: 10 June 2016].

²⁹ UN Human Rights Committee, Concluding observations on the seventh periodic report of the United Kingdom, July 2015, para 9. Available at: <http://www.equalityhumanrights.com/about-us/our-work/human-rights/international-framework/international-covenant-civil-and-political-rights> [accessed: 2 February 2016].

³⁰ May 2016 update statistics reference 6 May 2016. Ministry of Defence (2014), The Iraq Historic Allegations Team quarterly update: January to March 2016. Available at: <https://www.gov.uk/government/publications/iraq-historic-allegations-team-quarterly-updates> [accessed: 6 June 2016].

³¹ EHRC, Statement on the UK’s Implementation of the International Covenant on Civil and Political Rights, June 2015. Available at: <http://www.equalityhumanrights.com/about-us/our-work/human->

26. Recommendation: The Committee should ask the UK Government to outline what action is being taken to ensure prompt investigation of torture allegations in Iraq, in compliance with its investigative duties under Articles 2 and 3 of the ECHR, and Articles 6 and 7 ICCPR, and in accordance with HRC General Comment 20.

Camp Nama

27. In 2015, the UN Human Rights Committee expressed its concern about ‘the lack of information on what investigations, if any, took place into allegations about British special forces personnel handing over detainees into United States custody at Camp Nama, a secret prison at Baghdad International Airport (arts. 2, 6, and 7)’. The Committee recommended that the UK Government ‘ensure that the allegations in connection with Camp Nama are thoroughly, independently and impartially investigated’.³²

28. The EHRC has been unable to find any updates on this issue and is therefore unable to update the Committee on progress.

³² UN Human Rights Committee, Concluding observations on the seventh periodic report of the United Kingdom, July 2015, para 9. Available at: <http://www.equalityhumanrights.com/about-us/our-work/human-rights/international-framework/international-covenant-civil-and-political-rights> [accessed: 2 February 2016].

Contacts

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