The Independent Human Rights Act Review Round Table

with

UK Armed Forces and the Ministry of Defence

Date: 23rd April 2021 – 15:00-17:00

Attendees:

IHRAR Panel & Officials	Armed Forces / MOD
Sir Peter Gross	General Sir Nick Carter
Baroness Nuala O'Loan	Paul Wyatt
Lisa Giovannetti	Damian Parmenter
Sir Stephen Laws	Isabel Letwin
John Sorabji	Major-General Alex Taylor
Gethin Thomas	Edward Holder
Millie Rae	Brigadier Keith Eble
Iain Miller	Jennifer Chamberlain
	Junior MOD Official 1
	Junior MOD Official 2

Context

Given the specific expertise of those attending, it was agreed that the majority of the discussion would cover Theme 2 of the Independent Human Rights Act Review (IHRAR) Terms of Reference (ToR), specifically question d.):

'In what circumstances does the HRA 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?'

This was not restrictive. If attendees wanted to raise points on other sections of the ToR, then this was encouraged.

Introduction

The IHRAR Chair opened with brief remarks welcoming the Armed Force and Ministry of Defence (MOD) representatives.

Attendees had then prepared overviews for each of their areas of specialism. Each overview was followed by further discussion between Armed Forces / MOD attendees and IHRAR Panel members. The discussions have been grouped below by topic area, with the key points for each topic listed. ***An action is listed in bold.***

Overview

- It is a fundamental aim of the UK Armed Forces to comply with their legal and moral obligations. This underpinning has been echoed in the Integrated Review, which requires the Armed Forces to take an active role in 'supporting open societies and defending human rights'.

- Human rights and IHL obligations are central to the UK's response to its adversaries, who are increasing their military activities in ways that sit below the threshold of traditional State-on-State 'warfare'. This approach will also see the Armed Forces encouraging and engaging in public debate, given the rapidly changing face of warfare and related technological advances.
- The UK's adversaries will use the scrutiny of our Armed Forces which comes with the rise of social media and an increase in litigation, to their advantage. Our adversaries are adept at using disinformation effectively to target the perceived weakness that the UK Armed Forces are held accountable to legal standards.
- This continually evolving context has required the UK Armed Forces to develop and so various improvements have been identified as priority areas, such as:
    - More preparation and training for soldiers on how to operate in accordance with human rights law, most notably in the detention space.
    - Data capture and record keeping, allowing for greater insight into operational behaviours.
    - Understanding the legal context beyond simply the 'rules of engagement'.
    - The investigations process; understanding the operational and time constraints on investigators.
    - Providing adequate support to service personnel who are being investigated.

Future warfare

- Looking forward, a debate will be needed on how AI, automation, robotics, and other future tech affects the moral and legal obligations of the Armed Forces. There is an opportunity for the UK to be world leaders in understanding these challenges and to lead the public and academic debate on these issues.
- Law should evolve in tandem with the developing nature of warfare. In the context of future warfare, the UK Government has to develop policy with proper regard to the European Convention on Human Rights (the Convention).
- The traditional 'battlefield' is changing as modern-day adversaries seek to utilise threats above and below the threshold of war in international law and when using 'sub-threshold threats' they seek to operate in a 'grey zone' to pursue their national interests. In some ways this can be seen as good statecraft and perfectly legitimate operational techniques. There are, however, a vast area of new techniques and domains (for example space and cyber) which are being exploited because of the relatively underdeveloped understandings of operational norms in these contexts. This means more aggressive forms of statecraft are used with minimal repercussions. The Integrated Review has identified these underdeveloped areas and has begun to resource the UK Government's response to them.
- Battlefields where 'future tech', such as automated weaponry, is widely prevalent are still a thing of the future. Automation is largely only used in a very narrow context relating to self-defence. This does not, however, mean that we can be complacent to what our adversaries may be developing for the future, and we must be alive to the threat of being outmanoeuvred if our understanding of future technologies is not sufficiently developed.

Extraterritorial application of HRA

- The real issue for the MOD is its application to military activities abroad, i.e. extraterritorial jurisdiction. These are issues which emanate from the interpretation of the Convention rather than from the Human Rights Act (HRA); it is unclear how amending the HRA could have any impact on the development of Convention jurisprudence by the Strasbourg court.

- The Article 5 'right to liberty' has come into conflict with the principle that IHL is the '*lex specialis*' for armed conflicts. Strasbourg judgments do not necessarily provide clear guidance on what States are permitted to do in a military context, in circumstances where the jurisprudence does not follow a consistent trail of thought from one judgment to another. *Al Jeddah* gave rise to significant concern; *Hassan* provided some ground for optimism.
- By contrast, the domestic developments in human rights law do allow for a more rigorous consideration of arguments and principles before the UK courts, as was the case in *Serdar Mohammed*.
- Article 2 creates an obligation to investigate allegations of an unlawful killing and to have effective investigations. It can be difficult to carry out Article 2 compliant investigations in an armed conflict. The practical realities of war are often overlooked, and Article 2 does not seem to have been developed with a military application in mind. The recent ECtHR judgments of *Hanan v Germany* and *Georgia v Russia No.2* have complicated the picture in relation to the extra-territorial jurisdiction of Article 2.
- *Smith* extended the jurisdiction in relation to the duty to protect service personnel outside the UK's territory under Article 2. The concerns with the effect of *Smith* were clearly articulated in the dissenting judgment.

Operational impact

- The legitimacy of the UK Armed Forces is underpinned by adherence to the rule of law. Clarity of the law, especially in the specific operational context of the military, is crucial to maintaining such adherence and therefore legitimacy.
- On Article 2:
    - In the context of the use of force, there is a stark contrast between the Convention and IHL (for example the Geneva Conventions). IHL allows for targeting of combatants based on status, in stark contrast with the necessity/proportionality tests under the Convention.
    - It was noted that IHL had not kept pace with the development of armed conflict and in particular, it had not developed in its applicability to non-international armed conflict and non-state actors. Convention states often do not want to protect the rights of non-state actors, and so resist any development of IHL.
    - Procedural obligations are uncertain given cases such as *Hanan* and *Georgia v Russia No.2*.
    - The military are well versed in the application of legal principles and are aware that their activity can and will be reviewed retrospectively.
- On Articles 3 and 5:
    - Clarity of the law is essential to comply with Article 5 obligations. For example, clarity over the 'power to detain' is essential when planning for detention in warzones. How and for how long to detain captured persons are key questions that have not always been clear in relation to Article 5 obligations.
    - In situations where there are large numbers of detainees straining military resources to their capacity, detainees may be moved to local facilities. These movements must be Article 3 and 5 compliant. The military are therefore put in harm's way as their resources for detention are stretched whilst they grapple with a 'Hobson's choice'; where transfer to local facilities is the only viable option but where there are questions as to whether transfer would be Convention compliant.
- A better 'no-fault' compensation scheme for injured armed forces personnel and the families of those killed in combat, is something that the MOD has looked at previously and consulted upon. Under the proposals considered, if eligible to apply under the compensation scheme,

Service personnel would have been barred by statute from bringing a negligence claim against the MOD.

- **MOD attendees offered to send material on this to the IHRAR Panel.**

Overseas Operations Bill[1]

- Part 1 of the OOB focuses on criminal prosecutions and introduces a new triple lock that ensures the unique context of overseas operations is considered when decisions are being made about whether to prosecute for alleged historical criminal offences. The measures apply once five years have passed from the date of an alleged offence, and do not apply to allegations of sexual offences, torture, crimes against humanity, genocide, or war crimes.
- Part 2 introduces limitation periods for personal injury and death claims and claims brought under the Human Rights Act, in connection with overseas operations. This includes an amendment to the HRA regarding a date of knowledge provision for a relevant claim under the Act. HRA claims will have to be brought either within six years from the date of the incident, or within one year of the date of knowledge of the incident, (whichever is later).

Further discussions and questions

- Inter-operability with other nations must be considered – for example, there are differences between states in the application of rights protection legislation.
- The UK is used to this complexity attaching to coalition operations and has operated in many contexts and scenarios in which the UK is required to comply with Convention rights while other states do not necessarily work to the same rules.

[1] The Overseas Operations Bill received Royal Assent on 29 April, 2021 and is now known as the Overseas Operations Act 2021.