Amnesty International UK

Independent Human Rights Act Review

Submission to the
Call for Evidence

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Amnesty International UK

Amnesty International UK is a national section of a global movement of over seven million people who campaign for every person to enjoy all rights enshrined in the Universal Declaration of Human Rights and other international human rights standards. We represent more than 670,000 supporters in the United Kingdom. We are independent of any government, political ideology, economic interest or religion.

Introduction

1. Since coming into force, the Human Rights Act 1998 has been highly successful in its purpose; the protection of people's human rights. Victims of abuses[1] and failures[2] by the state, women[3] and same-sex couples[4] facing the discriminatory consequences of outdated legislation; and disabled[5] and seriously ill[6] people denied the support and treatment that they need have all benefitted from legal protection that would otherwise have been unavailable to them.

2. Moreover, despite the hostility that the Act has faced from governments of all parties, the HRA is in fact very well designed for its particular place in the UK's constitutional arrangements. As will be discussed below, the Act carefully and precisely treads the line of promoting and protecting the human rights of people affected by the decisions, actions and inactions of the state, while ensuring that UK parliamentary sovereignty is maintained.

3. There is, therefore, no constitutional demand for change to the Act. Despite the impression that may be given by government ministers and some newspapers, there is also no significant public demand for change. Recent opinion polling commissioned by Amnesty International, found that just 18% of respondents thought that reviewing human rights legislation should be a priority over the coming years.[7] At the same time, the public and political debates in both Northern Ireland and Scotland are centred

[1] MA v SSHD [2019] EWHC 1523 (Admin)
[2] Commissioner of Police of the Metropolis (Appellant) v DSD and another (Respondents) [2018] UKSC 11
[3] In the matter of an application by the Northern Ireland Human Rights Commission for Judicial Review (Northern Ireland) [2018] UKSC 27
[4] Ghaidan v Godin-Mendoza [2004] 2 AC 557
[5] Burnip v Birmingham City Council [2012] EWCA Civ 629
[6] Tracey v Cambridge University Hospitals Foundation Trust and Anor [2014] EWCA Civ 822
[7] https://www.theguardian.com/commentisfree/2021/mar/03/government-hell-bent-diluting-human-rights-act

around extending legalised rights protections, in various differing ways, rather than curtailing them.[8] It seems, then, that the only drivers for curtailment of the HRA are the Executive at Westminster and a small group of media outlets and influential but opaque think tanks.

4. In this context, while we welcome the commitment given in the Review to the UK's remaining a signatory to the European Convention on Human Rights (ECHR) and to maintaining the articles of the ECHR that the Human Rights Act relates to, Amnesty International remains respectfully very concerned by the announcement of this Review and its terms of reference. The commissioning of this Review cannot be viewed in isolation, but must be seen alongside a number of measures threatening curtailment of checks on Executive power.[9] It also comes from a backdrop of long-term efforts by governments to erode human rights protections in the UK; efforts that started almost as soon as the HRA came into force.[10] More specifically, we would express concern that the current review has no specific focus on the implications of reform of the HRA for the devolution settlement with the constituent nations of the UK and the peace and stability of Northern Ireland. We would urge the Review Panel to heed the warnings from expert commentators from both Scotland and Northern Ireland as to the complications and the dangers posed by tampering with the constitutional arrangements currently in place.

5. Finally, as an international organisation, we would note that there is concern from human rights defenders around the world, many of whom operate in far more hostile environments than that which we have the privilege to find in the UK, about the consequences internationally of the UK being seen to be weakening human rights protections, increasing Executive power and undermining constraints on that power.

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[8] A 'Bill of Rights for Northern Ireland' is currently the subject of deliberation by the Ad Hoc Committee on a Bill of Rights at the Northern Ireland Assembly, established as a result of the *New Decade, New Approach* agreement of 2020, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/856998/2020-01-08_a_new_decade__a_new_approach.pdf; meanwhile a Bill to incorporate the UN Convention on the Rights of the Child (UNCRC) into Scots law has been introduced to the Scottish Parliament, https://www.gov.scot/news/un-convention-on-the-rights-of-the-child/

[9] See eg https://www.gov.uk/government/groups/independent-review-of-administrative-law; https://bills.parliament.uk/bills/2727; https://bills.parliament.uk/bills/2783

[10] See eg https://www.theguardian.com/politics/2001/nov/12/uk.september11; https://www.independent.co.uk/news/uk/politics/rights-laws-to-be-overhauled-as-blair-says-the-game-has-changed-304031.html; and https://webarchive.nationalarchives.gov.uk/20130206065653/https://www.justice.gov.uk/downloads/about/cbr/uk-bill-rights-vol-1.pdf

6. Having set out these preliminary points, we will now go on to address each of the Review panel's questions in turn. As will be clear, Amnesty International's view is that the HRA does not require revision and should be retained.

Theme One - The relationship between domestic courts and the European Court of Human Rights (ECtHR).

7. Amnesty International's primary concern in this field is with the practical protection and promotion of people's human rights. There are various different but valid ways in which countries around the world can achieve these aims, including different constitutional arrangements and approaches to international law and institutions. From this perspective, we consider that the relationship between the UK's domestic courts and the European Court of Human Rights, as envisaged in the Human Rights Act, appears to be working well and that there are no grounds for significant change.

How has the duty to "take into account" ECtHR jurisprudence been applied in practice? Is there a need for any amendment of section 2?

8. The UK courts' interpretation of the 'take into account' duty in HRA Section 2 has developed over time, but now appears to be settled.

9. Early interpretations of the duty as a 'mirror principle', in which the UK courts would 'keep pace with the Strasbourg jurisprudence as it evolves over time: no more but certainly no less'[11] have now given way to an understanding that the UK courts are free to diverge from the ECtHR in a number of contexts. While it continues to be the case that UK courts regularly follow clear, consistent and relevant case law from the ECtHR, UK courts have also diverged where no such pattern of case law exists,[12] where case law is considered to be out of date and overtaken by modern realities,[13] and where the ECtHR caselaw appears to be based on a misunderstanding or misconception of domestic law.[14]

[11] R (on the application of Ullah) v Special Adjudicator [2004] 2 AC 323
[12] R (Hallam) v Secretary of State for Justice [2019] UKSC 2
[13] (R (on the application of Quila) v Secretary of State for the Home Department [2011] UKSC
[14] R v Abdurahman (Ismail) [2020] 4 WLR 6

10. Applied in this way, the power of interpretation and implementation of Convention rights at domestic level remains with the UK's domestic courts, who are informed in their deliberations by the jurisprudence of the ECtHR at international level. The Section 2 duty also forms part of the recognition implicit in the Act that the UK would not ordinarily wish to legislate or otherwise act in a way that is in breach of its international obligations with regards to human rights.

11. As such we do not consider that there is any need for any amendment of section 2.

When taking into account the jurisprudence of the ECtHR, how have domestic courts and tribunals approached issues falling within the margin of appreciation permitted to States under that jurisprudence? Is any change required?

12. 'Margin of Appreciation' is a term derived from international law that does not properly apply to domestic courts applying and interpreting domestic legislation like the HRA. It is perhaps unfortunate that the terminology has been used both judicially and by some commentators in a more generic sense, to refer to the recognised spheres of competence between the judiciary, the legislature and the executive, as this risks creating ambiguity.

13. In our organisation's experience, the UK courts are very conscious of their constitutional role and competences and are strict in sticking to them.

14. We are aware that some have argued that the HRA can and should be amended to prevent the courts from finding legislation or government action to be incompatible in cases which it is said fall within the margin of appreciation at international level. Such argument however is premised on a misrepresentation of both the ECHR and the HRA. The margin of appreciation is a principle to be applied at the international level by the ECtHR as it is intended to ensure that the application of the ECHR is properly sensitive to the domestic context. The HRA is the application of the ECHR in the domestic context and so its interpretation and application by the domestic courts is inevitably engaged with the proper context. When considering judgments of the ECtHR, the UK courts must and do have regard to the margin of appreciation, so as to ensure that any domestic application of those judgments made at the international level has proper regard to the specific context in the UK. Beyond this, there is no margin of appreciation

to apply. Rather, there is the will of Parliament, which the domestic courts are obliged to respect and which includes giving effect to the will of Parliament as expressed by the HRA.

15. While one of the oft stated benefits of the HRA is that it reduces the number of cases that end up going to the ECtHR, under the Act the UK courts are not merely a triage service for the ECtHR, applying what they think the ECtHR would do in a particular case in order solely to head off cases ending up at the international level. They are domestic legal arbiters interpreting and applying domestic statute, developing its own case law while taking into account the case law of the international ECtHR.

16. In our view the appropriate balance has been struck in this regard, whereby the UK courts, as domestic courts implementing Convention rights under domestic statute, take account of any margin of appreciation likely to be applied at international level when considering their own competence to rule on an issue, while recognising that the issue of competence may not be the same for an international court such as the ECtHR and thus reaching their own conclusions.

Does the current approach to 'judicial dialogue' between domestic courts and the ECtHR satisfactorily permit domestic courts to raise concerns as to the application of ECtHR jurisprudence having regard to the circumstances of the UK? How can such dialogue best be strengthened and preserved?

17. Amnesty International does not have a strongly held position on this issue. It appears to be broadly satisfactory. There is evidence of institutional dialogue over the course of a series of cases informing and changing the interpretation the courts produce, alongside less formal 'dialogue' in terms of judicial discussion, publications etc. From the point of view of the practical protection and promotion of the human rights of the people under the UK's and ECtHR's jurisdictions, we would note that while this judicial dialogue may be important from a jurisprudential standpoint, it is arguably slower than would be ideal for the people whose rights are affected, given the widely recognised problem of delays in cases progressing through the court systems.

Theme Two - the impact of the HRA on the relationship between the judiciary, the executive and the legislature.

18. The HRA is a remarkably finely crafted statute, specifically tailored to provide appropriate human rights protections while maintaining the UK's particular constitutional arrangements. Rights are vindicated and promoted through the courts' interpretative powers in sections 2 and 3 along with the section 6 duties on public authorities to act compatibly with Convention rights and the section 19 duties on Ministers to declare when legislating whether or not the provisions of a bill are compatible with those rights. At the same time Parliamentary sovereignty is preserved through the power to re-legislate an issue following section 3 interpretations; the limitations of the courts' 'declaration of incompatibility' power in section 4, which leave legislative provisions that are incompatible with Convention rights for Parliament to correct if it so chooses; and the overarching capacity in section 19 for Parliament to legislate in a way that is consciously incompatible with Convention rights. This latter power is, thankfully, very rarely used.

Should any change be made to the framework established by sections 3 and 4 of the HRA? In particular:

Are there instances where, as a consequence of domestic courts and tribunals seeking to read and give effect to legislation compatibly with the Convention rights (as required by section 3), legislation has been interpreted in a manner inconsistent with the intention of the UK Parliament in enacting it? If yes, should section 3 be amended (or repealed)?

19. As part of primary legislation, the UK courts are abiding by Parliament's intentions when applying section 3 of the HRA. The section was introduced by Parliament both in order that in so far as is possible previous legislation should be re-interpreted in line with Convention rights and that future legislation should be so interpreted, subject to any express wording to the contrary by a future parliament. Parliament is free to use such wording, and is indeed prompted to consider the issue by section 19 of the Act, in which a Minister of the Crown in charge of a Bill in either House of Parliament must declare whether or not the provisions in the bill are compatible with Convention rights and if not, that the government nevertheless wishes to proceed with the legislation. In

the absence of any express wording to the contrary it is therefore entirely appropriate for courts to proceed on the basis that Parliament intended legislation to be interpreted in so far as is possible in line with convention rights, as section 3 requires.

20. The limitation in the court's power of interpretation included in section 3 is also important. Courts can only interpret legislation 'so far as it is possible to do so' in line with Convention rights. It is implicit in the existence of section 4, the 'declaration of incompatibility' power, that the section 3 power is not infinitely extendable to fundamentally alter legislation or otherwise remove it from Parliament's express intentions.

21. Indeed, the UK courts have extensively discussed the limits of the interpretation powers given in section 3 and have been clear that any interpretation must at least go 'with the grain' or 'the thrust' of the legislation.[15] While there have been a small number of cases that have generated controversy about courts' section 3 interpretations,[16] we would first note that these have tended to come relatively early in the HRA's time in force, and that secondly Parliament had and continues to have the power to legislate to produce a different effect if it so wishes. The courts themselves have recognised that, 'Parliament has retained the right to enact legislation in terms which are not Convention-compliant.'[17] Yet, research has found that 'parliament rarely reacts to s 3 interpretations and, secondly, on the rare occasion when it does respond, parliament almost invariably defers to the judiciary's opinion about rights.'[18]

22. We are aware that some have argued that Section 3 should be amended to specify that it would not allow legislation to be interpreted in ways that depart from the intention of 'the enacting Parliament'. This is misconceived for Section 3 does not permit such departure. The HRA is the will of Parliament; and any Parliament that intends to legislate contrary to the HRA is free to do so, albeit doing so requires it to do so expressly and clearly. There is nothing especially novel in this. It is generally anticipated that Parliament intends to legislate in ways that are compatible with the UK's international law obligations albeit Parliament may choose not to do so and, in seeking to understand whether Parliament has so chosen, any court would be required

[15] Ghaidan v Godin-Mendoza [2004] 2 AC 557
[16] See eg 0 R v A (No. 2) [2001] UKHL 25
[17] Ghaidan v Godin-Mendoza [2004] 2 AC 557
[18] Christopher Crawford, 'Dialogue and Rights-Compatible Interpretations under Section 3 of the Human Rights Act 1998', Kings Law Journal 25(1), 2014

to consider whether the intention of Parliament was expressly and clearly to choose against compatibility.

23. Such an amendment would appear to be inspired more by theoretical abstraction than actual practical need or Parliamentary demand. Courts are strongly self-limiting in this area, and the unamended HRA leaves Parliament free to decide that the ruling of the court is no longer in line with the position that Parliament wishes to adopt. If the law passed by Parliament leads to a result that Parliament does not intend, it is within its power to amend that law. Section 3 fully respects these constitutional roles. The fact that Parliament has almost never done so speaks for itself.

24. It is therefore our view that Section 3 should not be amended or repealed.

If section 3 should be amended or repealed, should that change be applied to interpretation of legislation enacted before the amendment/repeal takes effect? If yes, what should be done about previous section 3 interpretations adopted by the courts?

25. As discussed in our answer to the previous point, it is our view that Section 3 should not be amended or repealed. The reasons for this are given above, but are reinforced by the inevitable jurisprudential chaos that this question itself alludes to.

Should declarations of incompatibility (under section 4) be considered as part of the initial process of interpretation rather than as a matter of last resort, so as to enhance the role of Parliament in determining how any incompatibility should be addressed?

26. The Section 4 ‘Declaration of Incompatibility’ power has been used relatively rarely. This is as the scheme of the Act intended, with the DoI power viewed as a last resort to be deployed only where the Section 3 interpretation power is not available. There are numerous practical reasons that are regularly given in support of the section 4 ‘DoI’ power being maintained as it is, that we are aware other respondents to this Review discuss in detail. These include:

- DoIs are not mandatory, in the sense that courts can refuse to issue one even where the legislative provision in question is recognised to be incompatible, and that in fact they are relatively rarely issued;
- The fact that DoIs do not 'strike down' a statutory provision and instead return the issue for Parliament to resolve;
- The huge delay in achieving appropriate satisfaction for claimants that replacing the section 3 interpretation power with a more regularly used section 4 power would inevitably produce;
- The huge, and entirely un-sought, additional burden such a change would place on Parliamentary time;
- The current availability to Parliament of the ability to legislate to a achieve a different result following a section 3 which in practice, as discussed above, is almost never used; and
- The need to expand the range of courts able to issue a DoI far wider than the current short list of the UK's most senior courts, resulting in inevitable uncertainty about the status of a given legislative provision

27. We agree with all of these arguments. We would also emphasise the fundamental difference between the powers in sections 3 and 4; the former identifying the court's proper role in interpreting and applying the law whereas the latter ensures respect for Parliament (and not the Executive) as sovereign in making the law.

28. In addition, we would also raise another issue with regard to the normative implications of a declaration of incompatibility being used as a 'last resort'.

29. It can be hoped and expected that the UK government would not ordinarily act, and the UK Parliament would not ordinarily legislate, in such a way as to violate a person's human rights. Such violations are grave matters; both for the people affected by them and wider UK society, let alone their implications for the UK's adherence to international standards and its global reputation. In the absence of a full strike down power or a duty on the government of the day to correct any incompatibility finding, it is necessary that the 'last resort' aspect of the DoI is maintained in order to normatively mark the gravity of the situation wherein the UK has legislated for something that is irreconcilable with minimum international human rights standards. Their rarity and the effective requirement for both executive and judicial effort to avoid them (through the section 19 declarations and the section 3 interpretation duties) serve to enhance the normative, and ultimately political, pressure for corrective action to be taken, and for it

to be taken swiftly. Changing them into part of the initial process of interpretation risks normalising what should be regarded as an aberrant situation requiring urgent remediation.

What remedies should be available to domestic courts when considering challenges to designated derogation orders made under section 14(1)?

30. Such derogations should be subject to full judicial review powers, including the capacity for such orders to be found unlawful and to be quashed. Derogations are, thankfully, extremely rare and are immensely serious matters when they occur. Their lawfulness is limited in terms of their legitimate scope, in the sense of which Articles of the ECHR can be derogated from, and in terms of their justification, in the sense of the circumstances in which a derogation can be considered legitimate and the duration for which they can be so considered. They must, therefore, be subject to full judicial scrutiny and there is no argument from either principle or practice to support the removal or curtailment of such scrutiny.

Under the current framework, how have courts and tribunals dealt with provisions of secondary legislation that are incompatible with the HRA Convention rights? Is any change required?

31. Secondary legislation has been dealt with in ordinary terms, as subordinate to primary legislation which includes the HRA. There is no case for change in that regard, as doing so would unduly disturb the UK's constitutional arrangements in granting excessive power to the Executive.

32. On this point it should be born in mind that secondary legislation is already used for a very wide range of purposes and to introduce policies that have a major impact on peoples' lives. This includes changes to primary legislation and, most recently, the creation of new criminal offences, as part of the government's efforts to deal with the coronavirus pandemic.[19] All this is done through a process that is widely

[19] https://www.cps.gov.uk/legal-guidance/coronavirus-health-protection-coronavius-restrictions-all-tiers-england-regulations

acknowledged to exclude serious parliamentary oversight.[20] By way of example, in connection with the recently passed Immigration and Social Security Coordination (EU Withdrawal) Bill, the House of Lords Constitution Committee commented that clauses were passed 'that would confer on Ministers the power to make whatever regulations they think appropriate, provided they have some connection with the legislation, however tenuous'.[21] In such circumstances full judicial scrutiny with regards to human rights compliance is not only legitimate, but essential.

33. There is also little justification for changing the current status of secondary legislation with regards to the HRA, from the point of view of the extent to which the HRA is in practice affecting such legislation. Claims from some, that secondary legislation is being regularly undone by the HRA, have been shown to have no basis in fact.[22] In applying the HRA the UK courts have shown themselves to be highly deferential to the Executive's law-making powers through secondary legislation.

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?

34. The HRA's geographic scope is in the main restricted to UK territory, with some very limited exceptions for areas where UK authorities exercise effective control.[23] These in practice tend to be connected to military operations. There is no case for change in this respect.

35. Removing HRA protections in those areas would remove rights protections from British servicepeople, promote impunity for rights abuses and executive failures and undermine the UK's international efforts to promote respect for rights. The UK courts already provide ample discretion to the executive in relation to military matters; the HRA does not apply, for example, in the field of combat. The UK courts have also ruled that it is possible to vary the applicability of different Convention rights to the particular

[20] See eg https://publiclawproject.org.uk/resources/plus-ca-change-brexit-and-the-flaws-of-the-delegated-legislation-system/
[21] https://hansard.parliament.uk/Lords/2020-09-30/debates/7A84FDAB-9954-4A64-8F33-24C37C38101B/ImmigrationAndSocialSecurityCo-Ordination(EUWithdrawal)Bill
[22] https://ukconstitutionallaw.org/2021/02/22/joe-tomlinson-lewis-graham-and-alexandra-sinclair-does-judicial-review-of-delegated-legislation-under-the-human-rights-act-1998-unduly-interfere-with-executive-law-making/
[23] Smith v Ministry of Defence [2013] UKSC 41

circumstances in these cases.[24] It is extremely hard, as a result of these limitations, for cases raising HRA issues to progress. Nevertheless, the Act has been essential in securing recognition that British servicepeople were dangerously poorly equipped for the tasks they were asked to complete while on duty;[25] and that the deaths of individuals while in British military custody had not been adequately investigated.[26]

36. There is no evidence that the HRA's applicability to areas under the UK's effective control impedes the UK's military capabilities in any way. Rather, removing that applicability would only serve to render ordinary people more vulnerable to abuses and protect the Executive from accountability for its failures.

Should the remedial order process, as set out in section 10 of and Schedule 2 to the HRA, be modified, for example by enhancing the role of Parliament?

37. As discussed in our answer to question c) above, the use of secondary legislation to amend primary legislation may be a concern in principle and it is important that there is sufficient and appropriate scrutiny of this process. However, the remedial order process under the HRA is very different to the normal process for the making of delegated legislation (whether by negative or affirmative procedure). In practice there is no evidence of remedial orders under the HRA being used problematically. The parliamentary Joint Committee on Human Rights, who have the primary parliamentary responsibility for overseeing such orders, confirm that they are used sparingly and appropriately and we hope and expect that this will continue.[27] We consider that the JCHR is sufficiently watchful that abuses of this process would be highlighted, were they to arise. We also understand from the JCHR that there is little parliamentary appetite for further involvement in this process, given the constraints on parliamentary time.

38. As such we do not consider that there is a case for any new constraint on the remedial order process.

[24] Smith v Ministry of Defence [2013] UKSC 41
[25] https://www.bbc.co.uk/news/uk-40958686
[26] Al Skeini and Ors v SSHD [2007] UKHL 26
[27] https://committees.parliament.uk/publications/4934/documents/49399/default/

Conclusion

39. The Human Rights Act has served its function remarkably well in the twenty years since it came into force, despite being faced with vociferous opposition from government and media critics for much of that period. From a constitutional perspective it is a remarkably simple yet intricate construction, providing a significant level of legalised rights protection while maintaining the principle of parliamentary sovereignty. In practical terms, the Act has been responsible for protecting the rights of minority and otherwise marginalised groups unrepresented in the mainstream political process, as well as significant societal advances in respect for and promotion of rights.

40. In light of this, Amnesty International does not consider that the HRA is in need of amendment and should be retained. Indeed, we hold serious concerns about the commissioning of this Review, both in terms of it serving as the latest manifestation of attempts by the Executive to delegitimise legal limits on its conduct and in its contribution to undermining both the UK's devolution settlement and, most seriously, the peace settlement in Northern Ireland. In 2017, the Chief Constable of the PSNI made it clear that the then-threatened removal of the HRA would be 'hugely detrimental to both confidence in policing and the confidence of the police to make difficult decisions'.[28] The HRA has also been crucial to ensuring a number of confidence-building investigations and inquests into contested killings from the Northern Ireland conflict.[29]

41. As the Panel will know, previous attempts to radically alter or simply repeal the HRA foundered in large part because of the extent to which the HRA has been interwoven into those agreements and the ongoing commitment of those communities to the principles of the HRA. To avoid the kind of difficulties that previous attempts at 'reform' ran into, it will not be enough to leave an Act entitled the HRA on the statute book while radically altering its workings through the kinds of substantial amendments considered in the Review's terms of reference. Although there are no devolution-specific questions in the Review's terms of reference, we would urge the panel to seek and heed the

[28] 'The Impact of the Human Rights Act in Northern Ireland: Conference Report', available: http://www.humanrightsconsortium.org/wp-content/uploads/2017/04/The-Impact-of-the-HRA-in-Northern-Ireland-Conference-Report-1.pdf

[29] *In the matter of an application by Geraldine Finucane for Judicial Review* [2019] UKSC 7; *In the matter of an application by Hugh Jordan for Judicial Review* [2019] UKSC 9.

advice of expert commentators from both Scotland and Northern Ireland as to the complications and the dangers posed by the current proposals.

42. Finally, we would reiterate our movement's concern that what happens with regards to human rights in the UK has consequences internationally. As is widely reported, there is a growing threat to rights protections and the rule of law in many countries around the world, with independent judiciaries and lawful restraints on government action being presented as in some way illegitimate affronts to the will of the people. It is imperative that the UK not be seen to be condoning or participating in these developments.