

Written evidence submitted by Dr Carla Ferstman and Dr Thomas Obel Hansen

Dr Carla Ferstman, University of Essex and Dr. Thomas Obel Hansen, Ulster University

Summary

1. This submission focuses on the challenges associated with enacting a proposed statute of limitations in the United Kingdom (UK) covering crimes committed in armed conflict.
2. The submission responds specifically to the following questions set out in the Terms of Reference (ToR):
 - What are the reasons for investigations into former service personnel?
 - What difficulties do the UK's international legal obligations pose for any attempt at protecting service personnel?
 - Can a Statute of Limitations, extended to all previous conflicts, be designed in such a way as to be consistent with these obligations?

I. Introduction

3. Dr. Carla Ferstman is a faculty member of the School of Law, University of Essex, who until January 2018 was the Director of the international human rights organization REDRESS. She has expertise and practical experience concerning civil liability, state responsibility and individual criminal responsibility insofar as they relate to the role of individuals, governments and international organizations in alleged violations of human rights and international humanitarian law, and she has published widely in these areas.¹
4. Dr. Thomas Obel Hansen is a faculty member of the School of Law and the Transitional Justice Institute of Ulster University. Dr. Hansen has worked and published extensively on international criminal justice and related topics. Most recently, Dr. Hansen served as the principal investigator on a British Academy funded project which examines accountability processes for alleged war crimes by British soldiers in Iraq, including an in-depth analysis of the International Criminal Court's (ICC) preliminary examination into the situation as well as the performance of legal processes in the UK – including the Iraq Historic Allegation Team (IHAT) – which may be relevant under the ICC's complementarity regime.²
5. Dr. Ferstman and Dr. Hansen are currently working jointly on a research project funded by Essex University's ESRC Impact Acceleration Account entitled "The Accountability Deficits of Major Western Powers: A Pilot Project on UK Military Accountability for International Crimes in Iraq". The purpose of the research project is to assess the various legal processes instituted in response to abuse allegations concerning UK military in Iraq, as well as to consider the progress of the ongoing preliminary examination into such issues by the ICC Prosecutor.
6. The various proceedings in the UK have proven to be complex, time-consuming and with a variety of practical, legal and procedural challenges, which we are exploring in our research.

¹ For bio, see: <https://www.essex.ac.uk/people/ferst81809/carla-ferstman>.

² For bio, see: <https://pure.ulster.ac.uk/en/persons/thomas-hansen>.

The existence of a “vicious cycle of investigation and re-investigation”,³ is one perspective and an aspect of this research, which we are seeking to analyse and explore in detail alongside research we are carrying out on the level of commitment that can be ascertained at both the policy and institutional levels to investigate and prosecute credible allegations of international crimes, committed in the context of armed conflict. We would welcome the opportunity to brief the Committee on our research findings, once the research is finalised.

7. The possible introduction of a statute of limitations for serious crimes under international law occurring during internal and international armed conflicts (including war crimes, crimes against humanity, and genocide) as well as serious violations of human rights for which there is an obligation to investigate, (such as, *inter alia*, torture and inhuman and degrading treatment or punishment, enforced disappearances, summary or extrajudicial killings) is, we would argue, an overly blunt instrument to address any challenges with the investigations. We would argue that a more detailed analysis of why investigations were judged to be so weak and ineffective and consequently resulted in judicial findings which saw the need for many to be re-opened or re-started or for more robust procedures to be put in place is an important topic for the Defence Committee to continue to explore and adequately resolve together with the relevant ministries and other stakeholders.
8. Putting in place a statute of limitations might end the “vicious cycle” but it would do little in the way of ensuring that sufficiently robust accountability processes are in place that are capable of resulting in criminal convictions (where the evidence so supports), as is required by the European Court of Human Rights in respect of Article 2 (right to life) and Article 3 (freedom from torture and ill-treatment) violations. It may inadvertently shield those individuals who perpetrate international crimes from prosecution, which would not be in the long-term interests of the military or the Government as a whole. In addition, the introduction of a statute of limitations which covers war crimes and other crimes under international law would contravene the UK’s obligations under international law, and thereby it may undermine the UK’s role on the international stage as a promoter of the rule of law.
9. At the same time, in certain circumstances, it would make it impossible for the UK to investigate or prosecute international crimes. This would make more likely the opening of a full investigation by the ICC in respect of the situation in Iraq (and potentially other situations including Afghanistan), not only because the law so permits but also because the adoption of a statute of limitations covering international crimes sends the signal that the UK Government is not committed to principles of accountability.
10. Accordingly, this submission observes that the problem in the UK is not one of ‘too much’ legal scrutiny of former and current service personnel, but rather a perception of ineffective investigations which have been problematic for defendants, but just as important – have not resulted in accountability. The proposed statute of limitations would restrict the likelihood of accountability for international crimes allegedly perpetrated by UK actors, open the door for further ICC scrutiny and potentially prosecutions of UK citizens, and would contravene Britain’s obligations under international law. It would also undermine the UK’s role as a

³ Rt Hon Dr Julian Lewis MP, reiterating the Defence Committee’s unanimous view. See <https://www.parliament.uk/business/committees/committees-a-z/commons-select/defence-committee/news-parliament-2017/statute-limitations-inquiry-launched-17-19/>.

champion of the international rule of law, and hence its ability to advance its agenda internationally, including its ability to influence other States and international organizations.

II. The reasons for, and importance of, investigating crimes allegedly committed by former and current service personnel

11. We submit that there are three main reasons why it is important to investigate allegations of crimes by former and current service personnel, namely:
 - i) To ensure that the rule of law applies equally to all and that no soldier is above the law. Accountability is important in and of itself for any country which wishes and seeks to be bound by the rule of law, such as the UK. There are no exemptions for categories of personnel, particularly for serious crimes under international law. As set out below in this submission, both international and UK domestic law require that former and current service personnel accused of crimes under international law are subject to investigations, and where the evidence supports it, prosecutions, irrespectively of when such crimes were committed. Adopting a statute of limitations which covers international crimes would seriously undermine these objectives, also taking into account that certain witness or documentary evidence may only become available after a significant passage of time.
 - ii) To ensure that serious misconduct constituting crimes under international law does not become the accepted behaviour in the military. When crimes go unpunished, there is a risk that this will be interpreted as tacit acceptance of the behaviour by those in charge, or that those in charge do not perceive the behaviour to be significant or problematic. This promotes lawlessness within the military and erodes military discipline and morale, which in turn undermines respect for the UK's armed forces internationally and domestically and would have serious consequences for the effectiveness of the UK military. The requirement to investigate and prosecute therefore serves an important educative purpose, one which is not diminished by the passage of time, in particular with respect to international crimes.
 - iii) To guarantee non-recurrence of international crimes. Investigations and prosecutions make clear that certain behaviour will not be tolerated. This is particularly important with respect to international crimes, which are characterised by their serious impact on victims, universal condemnation and potential threat to international peace and security. It would help avoid the situation of the resurrection of the "five techniques" banned following their use in Northern Ireland, in other battlefields such as Iraq.

III. The non-applicability of statutes of limitation to the prosecution of crimes under international law

12. Should the UK adopt a statute of limitations which bars the prosecution in the UK of war crimes and potentially other Rome Statute crimes committed in past conflicts, this would undermine the perception of the UK as a strong supporter for principles and values of international justice and open the door for the ICC to exercise jurisdiction over such cases on grounds that the UK is 'unable' to prosecute them under the admissibility regime set out in Article 17 of the Rome Statute.

13. Article 29 of the Rome Statute concerning “[n]on-applicability of statute of limitations” states in clear terms that “[t]he crimes within the jurisdiction of the Court shall not be subject to any statute of limitations.”
14. During the negotiations and drafting of the Rome Statute, the topic of statutes of limitation was subject to considerable debate. The 1998 Report of the Preparatory Committee on the Establishment of an International Criminal Court, which formed the basis for the negotiations during the Rome Conference, discussed five different proposals as to how to deal with statutory limitations.⁴ During the Rome Conference, the Working Group on General Principles of Criminal Law proposed a provision providing for the non-applicability of statutory limitations to all crimes within the jurisdiction of the Court.⁵ The drafters of the Statute eventually adopted the proposal of the Working Group, which is now contained in Article 29 of the Statute. The only publicly expressed disagreement concerning the provision was made by China and France in a footnote of the Working Group’s Report, which noted that they disagreed on the application of this rule with respect to war crimes and further emphasised their concern with regard to the effect of the passage of time in terms of securing a fair trial.⁶ Unlike China and France, the UK did not express any reservations with respect to the formulation of Article 29. The Working Group’s proposal was adopted by the Conference without changes.
15. As Professor William Schabas points out, “[b]ecause there is no statutory limitation provided within the Statute itself, it seems that Article 29 is directed more at national legislation”.⁷ In other words, the rationale of including Article 29 is to guide States Parties to, where necessary, amend their existing legislation – and to avoid adopting new legislation – which allows for statutes of limitation covering Rome Statute crimes.
16. Accordingly, the ‘problem’ is one of complementarity in that a State Party which has a statute of limitations which bars the prosecution of a Rome Statute crimes makes itself liable to the ICC’s jurisdiction under the principle due to its inability to prosecute relevant crimes covered by its statute of limitations. Whereas this issue has not yet arisen before ICC Chambers, the general view is that the ICC would likely declare that such a State is “unable” to prosecute the relevant case under Articles 17(1)(b) and 17(3) of the Statute and hence decide in favour of admissibility at the ICC. The consequence would be that the ICC is entitled to exercise its jurisdiction over UK citizens covered by the proposed statute of limitation.⁸
17. For this reason, most States Parties that still had domestic provisions on statutes of limitation covering crimes within the jurisdiction of the ICC have abolished or amended them – or appear to be at least considering to do so.⁹
18. In some countries, statutes of limitations apply to a limited category of international crimes, seen as ‘less serious’, but even then this could result in the ICC exercising jurisdiction. In

⁴ Draft Statute of an International Criminal Court, 14 April 1998, UN Doc. A/Conf.183/2/Add.2, pp. 53-54, Article 27: ‘Statute of limitation’.

⁵ Working Group 2 on General Principles of Criminal Law’, UN Doc A/Conf.183/C.1/WGGP/L.4, p. 4.

⁶ UN Doc.A/Conf.183/C.1/WGGP/L.4, p.4, footnote 7.

⁷ William Schabas, *An Introduction to the International Criminal Court*, CUP, 4th ed 2011, p 247.

⁸ See <https://www.casematrixnetwork.org/cmkn-knowledge-hub/icc-commentary-clicc/commentary-rome-statute/commentary-rome-statute-part-3/>.

⁹ See <https://www.casematrixnetwork.org/cmkn-knowledge-hub/icc-commentary-clicc/commentary-rome-statute/commentary-rome-statute-part-3/>.

the German legal system, Article 5 of the German 2002 Code of Crimes against International Law, which entered into force on 30 June 2002, confines its regime of statutory limitations to war crimes subject to less than one-year imprisonment. Such war crimes remain subject to the ordinary provisions on statutory limitations provided for in Article 78 of the German Penal Code. The German legislature reportedly exempted these crimes from imprescriptibility because it considered them of a significantly less serious nature than some ordinary crimes that remain subject to ordinary provisions on statutory limitations provided for in the Penal Code. Yet, commentaries suggest that, theoretically, the ICC could exercise jurisdiction with respect to these minor war crimes in light of the complementarity principle.¹⁰

19. The principle of the non-applicability of statutes of limitation covering core international crimes is recognised in various international treaties, including the 1968 UN Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity¹¹ and the 1974 European Convention on the Non-Applicability of Statutory Limitations to Crimes against Humanity and War Crimes.¹² Furthermore, the Rome Statute as already referred to, provides for no limitation period.
20. While the UK, as most Western European States, has not ratified the 1968 UN Convention nor the 1974 European Convention, it is bound by the rule on the non-applicability of limitation periods for international crimes under the Rome Statute as well as under customary international law.
21. According to the International Committee of the Red Cross (ICRC), State practice establishes as a rule of customary international law that "[s]tatutes of limitation may not apply to war crimes", which is seen to apply in relation to war crimes committed in both international and non-international armed conflicts.¹³ To support this proposition, the ICRC notes that "the principle that statutes of limitation do not apply to war crimes is set forth in many military manuals and in the legislation of many States, including those of States not party to the UN or European Conventions on the Non-Applicability of Statutory Limitations to War Crimes or Crimes against humanity."¹⁴
22. The ICRC further observes that case-law of States not party to the UN or European Conventions has often ruled that statutes of limitation do not apply to war crimes; that official statements by States, such as the US which are not parties to these treaties, have pointed to the non-applicability of statutory limitations to war crimes or crimes against humanity; and that several States that had previously objected to a prohibition of statutory limitations, or whose legislation was not clear on this point now recognise the principle that statutes of limitation do not apply to war crimes.¹⁵

¹⁰ See <https://www.casematrixnetwork.org/cm-n-knowledge-hub/icc-commentary-clicc/commentary-rome-statute/commentary-rome-statute-part-3/>.

¹¹ See the UN Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, adopted and opened for signature, ratification and accession by General Assembly resolution 2391 (XXIII) of 26 November 1968 and entered into force on 11 November 1970.

¹² See European Convention on the Non-Applicability of Statutory Limitation to Crimes against Humanity and War Crimes, European Treaty Series - No. 82, Strasbourg, 25.I.1974

¹³ ICRC, *Customary IHL*, "Rule 160", https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule160.

¹⁴ ICRC, *Customary IHL*, "Rule 160", https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule160.

¹⁵ ICRC, *Customary IHL*, "Rule 160", https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule160.

23. Numerous other legal authorities similarly suggest that customary international law requires the non-applicability of statutory limitations to certain international crimes. For example, the American Bar Association notes that: “International law proscribes statutes of limitations for the most serious crimes of international concern, namely genocide, crimes against humanity, and serious war crimes. Not only do treaties and conventions embody this principle, but national legislation, judicial decisions, and policies provide evidence of widespread state practice and a belief that exempting these crimes from the relevant statutes of limitations is obligatory.”¹⁶
24. A statute of limitation – which extends to “all previous conflicts”, as suggested by the Defence Committee – will arguably serve as a de facto amnesty for certain historic crimes allegedly perpetrated by the military and thus would contravene both the law binding upon the UK and the spirit of such law, which underscores the importance of credible and effective investigations as a means to ensure accountability. For such a statute of limitation to be designed in such a way as to be consistent with Britain’s international obligations, it would need to be restricted to instances in which there is an international or non-international armed conflict and would need to exempt from its application – at the very least – certain crimes under international law, namely genocide, crimes against humanity and war crimes. It would also need to exempt from its application those human rights violations for which there is a recognised obligation to carry out effective investigations.

IV. The Non-Applicability of statutes of limitation to civil proceedings concerning crimes under international law

25. Civil claims which relate to harm or injuries caused by crimes under international law or other serious human rights violations have in general followed a different approach as compared to criminal law but with similar end results with respect to the non-application of statutes of limitation to bar claims.
26. Proceedings which concern both criminal and civil liability at the same time (for instance, in civil law countries where reparation claims are dealt with as part of the criminal trial, or international criminal courts and tribunals which include a reparations element) invariably do not adopt separate rules on prescription for the civil parts of the case. For example, before the ICC, the award of reparations will follow a criminal conviction for crimes under its statute. In these circumstances there are no provisions setting out limitation periods for the reparations phase, implying that Article 29 (which bars limitations) would apply to the entirety of the case, including reparations; indeed reparations simply follow convictions. A further example of this is the internal rules of the Extraordinary Chambers of the Courts of Cambodia (“ECCC”), set up to try Khmer Rouge crimes, which allows victims to apply to be civil parties and seek reparations before the Court. The facts relate to 1975-79 and thus are 35+ years old. The legal framework of the ECCC does not provide for statutory limitations for victims’ claims.¹⁷ General international law does not contain rules on statutory limitations for civil claims of victims of violations of international law. As prescription can only be invoked pursuant to an explicit rule, to the extent international

¹⁶ See American Bar Association, “Report to the House of Delegates”, Doc 107A, https://www.americanbar.org/content/dam/aba/uncategorized/international_law/2013_hod_annual_meeting_107A.authcheckdam.pdf, pp 1-2.

¹⁷ ECCC, Internal Rules (Rev.9) as revised on 16 January 2015, https://www.eccc.gov.kh/sites/default/files/legal-documents/Internal_Rules_Rev_9_Eng.pdf

courts apply international law, it would seem that victims' claims before the ICC and the ECCC cannot be rejected because of time limitations.

27. In other cases of claims involving serious crimes under international law – for instance, civil proceedings for damages arising out of gross violations of human rights by the State, or claims before human rights bodies and courts, the approach to limitation periods stems from the obligation to afford victims of such crimes with access to a remedy. Violations of human rights gives rise to an obligation on the part of the State to make reparation.¹⁸ The right to a remedy has been recognized as non-derogable.¹⁹ The Inter-American Court of Human Rights, the European Court of Human Rights and the UN Human Rights Committee have repeatedly emphasised that the right to a remedy must be effective and not merely illusory or theoretical,²⁰ and the remedy must be suitable to grant appropriate relief for the legal right that is alleged to have been infringed.
28. The concept of 'effective' remedy has led both national and international courts and related mechanisms and principles to outlaw statutes of limitation altogether, or in some cases, to outlaw limitation periods that are overly abridged. For instance, the UN Working Group on Enforced or Involuntary Disappearance has issued the following General Comment on the disappearances Declaration:²¹

73. Compensation shall be 'adequate' i.e. proportionate to the gravity of the human rights violation (e.g. the period of disappearance, the conditions of detention, etc.) and to the suffering of the victim and the family. Monetary compensation shall be granted for any damage resulting from an enforced disappearance such as physical or mental harm, lost opportunities, material damages and loss of earnings, harm to reputation and costs required for legal or expert assistance. Civil claims for compensation shall not be limited by amnesty laws, made subject to statutes of limitation or made dependent on penal sanctions imposed on the perpetrators [emphasis added]

29. The *UN Basic Principles and Guidelines on the Right to a Remedy and Reparation*²², provide in respect of statutes of limitations that:

6. Where so provided for in an applicable treaty or contained in other international legal obligations, statutes of limitation shall not apply to gross violations of international human rights law and serious violations of international humanitarian law which constitute crimes under international law.

¹⁸ See e.g. Principles 3(d) and 12 of the UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, Adopted and proclaimed by General Assembly resolution 60/147 of 16 December 2005.

¹⁹ See, for example, General Comment 29 on States of Emergency (Art. 4) of the UN Human Rights Committee, CCPR/C/21/Rev.1/Add.11, 31 August 2001, at para. 14.

²⁰ Judicial Guarantees in States of Emergency, Inter-Am. Ct. H.R., (Arts. 27(2), 25 and 8 of the American Convention on Human Rights), Advisory Opinion OC-9/87, October 6, 1987, Inter-Am. Ct. H.R. (Ser. A) No. 9 (1987), at para. 24. See also, *Cordova v. Italy (No. 1)*, Eur. Ct. H.R., App. No. 40877/98, (30 Jan. 2003) at para. 58; *Aksoy v. Turkey*, Eur. Ct. H.R., App. No. 21987/93 (18 Dec. 1996) at para. 95; and *Deon McTaggart v Jamaica*, HRC, U.N. Doc. No. CCPR/C/62/D/749/1997 (3 Jun. 1998) at paras. 10-11.

²¹ WGEID Report 1997 (E/CN.4/1998/43).

²² Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, Adopted and proclaimed by General Assembly resolution 60/147 of 16 December 2005.

7. Domestic statutes of limitations for other types of violations that do not constitute crimes under international law, including those time limitations applicable to civil claims and other procedures, should not be unduly restrictive.

30. Regardless of whether there is an applicable limitation period under domestic law, in numerous cases involving personal injury and assets and property looted during the perpetration of crimes under international law, courts have regularly used their discretion to extend limitation periods to allow claimants to have their cases adjudicated, in the interests of justice.
31. For example, in 1999, the Cour d'Appel de Paris in the Gentili decision, considered the French Decree of 21 April 1945, which set a time-limit for recovery claims of six months after the legal date of the end of hostilities, under certain conditions. The trial court lifted the limitation on the grounds that the heirs, because of the threats they faced from the Nazis, had had to move away. This was upheld on appeal.²³
32. UK courts took a similar approach in the historic claim concerning torture, including castration and related abuses alleged to have been perpetrated by UK colonial forces in Kenya, as part of efforts to quash an uprising by members of the Mau Mau group. The High Court had to assess the defendant's claim that the claim should be barred from proceeding as the facts to be investigated at any trial would go back to 1952. In allowing the case to proceed, the High Court determined that the Limitation Act 1980 confers on the court the widest possible discretion, within bounds, to enable claims for personal injury to proceed outside the general limitation period where the justice of the case so requires.²⁴ A similar approach was taken by a Dutch district court in respect to colonial-era crimes in Indonesia.²⁵
33. Accordingly, no separate statute of limitations pertaining to civil claims arising from actions of the military during armed conflict is warranted.

V. Recommendations for the Defence Committee

34. We urge the Defence Committee to carefully consider the policy and legal ramifications of adopting a statute of limitations in the UK, extended to crimes committed in "all previous conflicts".
35. In particular, as demonstrated in this submission, it is important to keep in mind that international law impose certain obligations on the UK, including an obligation not to put in place a legal framework that makes impossible prosecuting and pursuing civil claims with respect to serious crimes under international law committed in armed conflict, irrespective of when these crimes were committed. Similarly, the European Convention on Human Rights requires effective investigations capable of leading to prosecutions for alleged violations of Article 2 and 3 of the Convention; these requirements do not extinguish with the passage of time.

²³ Cour d'Appel de Paris, 1ere Chambre A (Paris Court of Appeal,), Decision of 2 June 1999, summarised in V. Parisot, 'The Gentili di Giuseppe Case in France', International Journal of Cultural Property (2001), 10: 264-275. The final appeal is summarised at 268.

²⁴ Ndiki Mutua, Paulo Nzili, Wambugu Wa Nyingi, Jane Muthoni Mara and Susan Ngondi v. The Foreign and Commonwealth Office [2012] EWHC 2678 (QB).

²⁵ Wisah Binti Silan et al. v. The State of The Netherlands (Ministry of Foreign Affairs), District Court of The Hague, The Netherlands, 354119 / HA ZA 09-4171, 14 September 2011.

36. Disregarding these obligations would not only undermine the UK's role as a champion of the rule of law internationally, but could also make UK citizens liable to prosecutions before the ICC and undermine respect for UK armed forces.
37. If any statute of limitation was to be adopted in the UK covering conduct by former and current service personnel in international or non-international armed conflict, it is important that it explicitly exempts from its application genocide, crimes against humanity and war crimes, as well as human rights violations for which there is an obligation to investigate.

18 July 2018