UK Ministry of Defence: Consultation on Legal Protections for Armed Forces Personnel and Veterans serving in operations outside the United Kingdom

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Question 1: Question 1: Do you agree with this view?

No

Question 2: Please tell us why you think this.

It is important for all investigations involving allegations of unlawful killing, torture and other forms of ill-treatment to be conducted in compliance with the procedural obligations which flow from Articles 2 and 3 of the European Convention on Human Rights. Part of the reason why IHAT investigations were re-opened after they were initially closed, was because courts – both UK courts adjudicating such matters[1] and the European Court of Human Rights,[2] who became involved in matters after claims were exhausted before UK courts - determined that the investigations were not effective as they were required to be, under Articles 2 and 3 of the European Convention.

In order for an investigation to be considered effective, the persons responsible for the investigation and those carrying out the inquiries must be independent of those involved in the events, which presupposes not only a lack of hierarchical or institutional connection but also a practical independence. The second condition is that the investigation be prompt, speedy and thorough. The last condition is that the investigation must be capable of leading to the identification and punishment of the persons responsible. This is not an obligation of result, but of means.

Under general legal principles, the fact of an investigation is not a basis upon which a matter can be permanently closed for reason of finality (res judicata). This would only apply after an individual was subjected to prosecution, and even then, the law specifies certain limited circumstances when a case can re-opened, on the basis of compelling new evidence.

Question 3: Do you agree with our proposals for who should be covered by this measure?

No

1 *R (Ali Zaki Mousa & Others) v Secretary of State for the Home Department* [2013] EWHC 1412 (Admin) and [2013] EWHC 2941 (Admin)

2 For example, CASE OF AL-SKEINI AND OTHERS v. THE UNITED KINGDOM (Application no. 55721/07), 7 July 2011.

Question 4: Do you agree that the measure should not cover alleged offences committed against members of the UK Armed Forces, or against UK Crown Servants?

No comments

Question 5: Please tell us why you think this.

We do not believe the Statutory Presumption against Prosecution should be enacted at all, and for these reasons we also do not believe it should cover current or former service personnel, officials or any other persons.

Even if some measure was to be enacted whereby investigation and prosecution of crimes committed in armed conflicts would somehow be restricted, it is a fundamental principle of law that the law must apply equally to all persons.[3] Putting in place a legal framework that severely restricts the application of criminal law for certain categories of people accused of having committed serious offences, including international crimes, would blatantly violate the principle of equal application of the law.

Exempting, or severely restricting, the application of criminal law to service personnel is particularly problematic since service personnel are trusted with the authority and powers to take life or cause serious harm – and can do so legally under certain circumstances in situations of armed conflict. If anything, accusations of serious crimes, often relating to having unlawfully killed or abused other combatants or civilians, must be subject to the highest level of scrutiny; those suspected should be promptly and adequately investigated by competent and independent authorities, regardless of when or where the alleged crimes were committed. The Ministry of Defence is therefore quite plainly on the wrong track when focusing on exploring measures aimed at exempting the armed forces from ordinary standards of justice with reference to an unjustified narrative of 'lawfare'.

In this regard, it must be recalled that a multitude of sources suggest that crimes in Iraq and Afghanistan were committed on a large scale – and that this happened, at least partly, due to systemic issues. For instance, in 2013, the UK High Court held in *R (Ali Zaki Mousa) v Secretary of State for Defence* (No. 2), that "there might have been systemic abuses and that such abuses may have been attributable to a lack of appropriate training".[4] In the Baha Mousa Inquiry, Sir William Gage found that there had been a "gradual loss of the doctrine" prohibiting the use of the 'five techniques' – involving hooding, white noise, food and drink deprivation, painful stress positions, and sleep deprivation – in guidelines on interrogation, in this regard pointing to a "corporate failure" in the MoD.[5] The former chief legal military adviser in Iraq has raised concerns of systemic use of unlawful interrogation methods such as hooding, in 2003, concerns which he says he passed up to ministerial level.[6] In its 2018 report, the MoD's working group on systemic issues (SIWG) said that it "considered that there was sufficient evidence to conclude

[3] By way of example, ICCPR Article 14(1) provides that "All persons shall be equal before the courts and tribunals".
[4] EWHC 1412 (Admin) (24 May 2013), para. 176.
[5] See further Thomas Obel Hansen, Accountability for British War Crimes in Iraq? Examining the Nexus between International and National Justice Responses", in Morten Bergsmo and Carsten Stahn, *Quality Control in Preliminary Examination: Reviewing Impact, Policies and Practices*, TOAEP, 2018, pp. 399-450, at 418.
[6] See further Carla Ferstman, Dr Thomas Obel Hansen and Dr Noora Arajärvi, THE UK MILITARY IN IRAQ: EFFORTS AND PROSPECT FOR ACCOUNTABILITY FOR INTERNATIONAL CRIMES ALLEGATIONS?, Essex and Ulster Universities, 1 October 2018, pp 43-44.

that assaults in detention had occurred, and may have been systemic".[7] Similarly, lawyers and human rights groups who have investigated the Iraq claims and made submissions to the ICC Prosecutor note that "what at first appears to be a series of random acts begins to form a clear pattern of systematic abuse", which "may attach all the way up the chain of command to the Chief of Defence Staff".[8]

This raises a broader issue: if crimes by UK forces in military campaigns tend to be, at least partly, caused by systemic issues, the most obvious solution would be to rectify these system shortcomings, not further eroding accountability. If anything, putting in place measures that further limit the prospects of criminal accountability will only escalate systemic problems.

Question 6: Do you agree with our proposals for the circumstances in which the measure should apply?

No

Question 7: Please tell us why you think this, and in particular whether you have any alternative suggestions for the circumstances in which the measure should apply?

We do not believe the Statutory Presumption against Prosecution should be enacted at all, and for these reasons we can also not agree with the proposed circumstances in which the measure would apply.

If the measure was to be enacted, there are significant problems with the proposed circumstances in which the measure would apply. The measure currently proposed is framed extremely broadly and vaguely and uses terms unknown to the law of armed conflict. Notably, the proposed application to situations where UK forces are exercising "operational duties" in "any military operation outside the UK in the course of which members of the UK Armed Forces came under attack, or faced the threat of attack or violent resistance" raises more questions than it provides answers concerning when the measure would apply. For example, does this mean that the measure applies to any situation where members of the UK armed forces are exercising some form of "operational duties" abroad, including situations of international and non-international armed conflict, occupation and other situations such as the provision of military training and technical assistance to other countries? Does it cover situations where UK armed forces are suspected of having committed serious crimes such as torture against detainees within its custody, although such conduct surely would fall outside any ordinary understanding of what amounts to 'operational duties'? One cannot help but speculate the answer is 'yes', since the majority of the ongoing or closed criminal investigations that appear to form the rationale for enacting the Statutory Presumption against Prosecution concern exactly such serious crimes against detainees.

Question 8: Do you agree that ten years is an appropriate qualifying time?

No

Question 9: Do you agree that the measure should apply regardless of how long ago the relevant events occurred?

No

Question 10: Please provide further explanatory comments, as necessary

[7] MoD SIWG, 'Systemic Issues Identified from Service Police and Other Investigations into Military Operations Overseas: August 2018', para. 7.1.7.

[8] ECCHR and PIL submission to the ICC Prosecutor, January 2014 communication, pp 37, 169.

We do not believe the measure should apply at all, neither to crimes committed up to ten years ago or any other time.

While it remains unclear why the Ministry of Defence proposes a 10 year time limit and not some other period if the measure is to be time-limited, the practical consequence would be that the measure could be applied to many of the crimes allegedly committed by UK service personnel in Afghanistan and Iraq, as well as Northern Ireland. This is hugely problematic because these are conflicts which have been associated with a high number of alleged crimes, which have so far not been adequately investigated.

Notwithstanding the large number of inquiries opened by the Iraq Historic Allegation Team (IHAT) relating to allegations of criminal conduct in the Iraq war, only a very limited number of criminal prosecutions have occurred. Our research demonstrates that the Iraq investigations have often been poorly structured and conducted, suffering from multiple problems ranging the use of investigators with no or limited experience investigating war crimes to inadequate attention to systemic and systematic issues.[9] Accordingly, 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 both for victims and defendants and which have not resulted in any meaningful accountability for the serious crimes reportedly committed on a large scale in situations such as Iraq.

Accordingly, the proposed measure must be viewed in light of other measures, action and inaction characterizing the Government's approach to accountability norms in the context of military campaigns, including ineffective mechanisms to investigate crimes committed in conflict zones; a general failure to address the systemic issues that permit frequent abuses in military campaigns; opposition to International Criminal Court (ICC) scrutiny; and attacks on the legal profession and human rights advocates.[10]

Question 11: Do you agree with our proposal that the presumption should apply to all offences?

No

Question 12: Are there any offences which you think should be excluded from the measure?

Yes. At the very least, the measure should not include international crimes and other serious violations of international law for which the UK is under an obligation under international law to investigate and prosecute. These include, as a minimum, the Rome Statute crimes of war crimes, crimes against humanity, and genocide as well as serious violations of international human rights law 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.

Question 13: Please tell us why you think this.

[9] Carla Ferstman, Dr Thomas Obel Hansen and Dr Noora Arajärvi, THE UK MILITARY IN IRAQ: EFFORTS AND PROSPECT FOR ACCOUNTABILITY FOR INTERNATIONAL CRIMES ALLEGATIONS?, Essex and Ulster Universities, 1 October 2018, https://www.ulster.ac.uk/__data/assets/pdf_file/0018/317502/THE-UK-MILITARY-IN-IRAQ-1Oct2018.pdf.

[10] British authorities have referred to an "industry of vexatious claims" and "spurious" allegations, "false claims" or "claims that are totally without foundation" brought by "ambulance-chasing lawyers" from "parasitic law firms". See further See Carla Ferstman, Dr Thomas Obel Hansen and Dr Noora Arajärvi, THE UK MILITARY IN IRAQ: EFFORTS AND PROSPECT FOR ACCOUNTABILITY FOR INTERNATIONAL CRIMES ALLEGATIONS?, Essex and Ulster Universities, 1 October 2018, p 28.

The UK is under an international law obligation to investigate and prosecute the type of crimes mentioned above in 12. Failing to do so would bring the UK into breach of these obligations, with resulting potential litigation against the UK and UK citizens internationally, including possibly criminal trials before the ICC.

International law imposes certain obligations on the UK, including an obligation not to put in place a legal framework that makes it impossible, or severely restricts the possibility, to investigate and prosecute serious crimes under international law committed in armed conflict, irrespective of when these crimes were committed.

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. Similarly, the Rome Statute – which the UK worked rigorously to see adopted and widely ratified – creates obligations for State Parties to put in place needed measures that permit and facilitate the prosecution of Rome Statute crimes domestically. Indeed, 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." While the proposed measure is not referred to as a statute of limitations, its effect would, depending on its exact formulation, in many ways be the same. Because the ICC is based on the so-called principle of complementarity, putting in place measures that make impossible or limit the possibilities of domestic prosecution of Rome Statute crimes could easily open the door for the ICC to exercise jurisdiction over UK citizens on grounds that the UK is, in the words of the Statute, 'unable' or 'unwilling' to prosecute them under the admissibility regime set out in Article 17 of the Rome Statute.

Accordingly, any measure that seriously restricts the UK's ability to investigate and prosecute Rome Statute crimes, 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 measures that restrict the UK's ability to investigate and prosecute Rome Statute crimes itself sends the signal that the UK Government is not committed to principles of accountability.

Even if the UK was to withdraw from the international instruments which lay down the mentioned obligations to investigate and prosecute, this would not exclude the ICC from exercising jurisdiction over crimes committed at a time where the UK was still a State Party. Any bar on domestic prosecution of Rome Statute crimes committed in past conflicts while the UK was a State Party to the ICC would not affect the ICC's competence to prosecute these crimes; on the contrary it makes ICC intervention more likely. Additionally, the obligation to investigate and prosecute serious international crimes may also follow from customary international law, meaning that the UK would still be under international law obligations to do so regardless of any possible steps to pull the UK out of international treaties.

Further, putting in place the proposed measure and thereby potentially breaching the said obligations could seriously harm the UK's reputation as a country that respects and promotes the international rule of law. As one commentator notes, it would put the UK in the same league as "former dictatorships in Argentina and Chile and […] Robert Mugabe's government in Zimbabwe", and "for the UK to join such a list would be quite extraordinary."[11] In plain terms, any measure that significantly limits the possibility to prosecute international crimes, whether referred to as statute of limitations or a Statutory Presumption against Prosecution, risks undermining the UK's role as a champion of the international rule

[11] Kieran McEvoy, 'Investigations into the Troubles are vital – and that includes ex-soldiers', 11 May 2018, https://www.theguardian.com/commentisfree/2018/may/11/investigations-troubles-ex-soldiers-northern-ireland.

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

The Government states it will only consider measures which it believes can be enacted "in a manner which is consistent with our obligations under domestic and international law"; if so, it should abandon the idea of enacting a Statutory Presumption against Prosecution.

Question 14: Do you support the option of only allowing the presumption to be overridden where a prosecutor considers that there are 'exceptional circumstances' in a particular case (Option 1), or the option of allowing a prosecutor to bring a prosecution notwithstanding the presumption wherever they consider it in the public interest to do so, having regard to all the circumstances of the case including (but not limited to) certain factors specified in legislation (Option 2)?

Neither

Question 15: Please tell us why you think this.

We do not believe a statutory presumption against prosecution should be in place in any circumstance. Given the position of authority and trust that members of the Armed Forces enjoy, their access to weapons and equipment, and their service on behalf of Her Majesty's Government, it is important that prosecutions occur when the evidential standards for the initiation of a prosecution have been met, and such a prosecution is deemed to be in the public interest. The greater the seriousness of the alleged offence, the greater the public interest, assuming the requisite evidence is present.

The Code for Crown Prosecutors already has ample criteria to provide guidance on whether a prosecution should take place. This includes an evidential stage; followed by a public interest stage. The evidential stage concerns an independent prosecutor's assessment whether there is a realistic prospect of conviction. The public interest stage guidance involves considerations such as: the seriousness of the alleged offence; the level of culpability of the offender; the circumstances of and the harm caused to the victim; the suspect's age and maturity at the time of the offence; the impact of the offending on the community; Is prosecution a proportionate response; Do sources of information require protecting.

It should be noted that, the Crown Prosecution Service's "Note on the investigation and prosecution of crimes of universal jurisdiction" adopts similar criteria in relation to universal jurisdiction prosecutions in the UK, with some added complexity owing to the fact that the individuals not only committed the alleged crimes abroad but invariably were not British subjects and were not acting in service of the British Government. It would be inappropriate for a presumption against prosecution to operate for British subjects, but not for foreign citizens.

Question 16: If we proceed with the second option set out above, are there any other specific factors to which you think a prosecutor should be required to have regard in determining whether to override the presumption and bring a prosecution, beyond those listed above?

As indicated, we believe the Code for Crown Prosecutors provides ample criteria to assist in determining whether a prosecution should be brought. We do not believe a presumption against prosecution should be factored in to how those criteria are considered or applied.

Question 17: Please provide further explanatory comments, as necessary.

As answered above.

Question 18: Please give us your views on this.

We believe that the same standards should apply to all armed forces personnel – throughout the UK, including Scotland. However, as indicated throughout these submissions we do not believe that a presumption against prosecution is warranted or should apply – to any armed forces personnel.

Question 19: Do you support enacting this measure?

No

Question 20: Please tell us why you think this.

We would remind the UK of its obligations under the International Criminal Court Statute, Article 31 (1) (c) and (d) reproduced below:

Article 31 Grounds for excluding criminal responsibility

1. **In addition to other grounds for excluding criminal responsibility provided for in this Statute, a person shall not be criminally responsible if, at the time of that person's conduct:**

   (c) The person acts reasonably to defend himself or herself or another person or, in the case of war crimes, property which is essential for the survival of the person or another person or property which is essential for accomplishing a military mission, against an imminent and unlawful use of force in a manner proportionate to the degree of danger to the person or the other person or property protected. The fact that the person was involved in a defensive operation conducted by forces shall not in itself constitute a ground for excluding criminal responsibility under this subparagraph;

   (d) The conduct which is alleged to constitute a crime within the jurisdiction of the Court has been caused by duress resulting from a threat of imminent death or of continuing or imminent serious bodily harm against that person or another person, and the person acts necessarily and reasonably to avoid this threat, provided that the person does not intend to cause a greater harm than the one sought to be avoided. Such a threat may either be: (i) Made by other persons; or (ii) Constituted by other circumstances beyond that person's control.

The proposed partial defence falls outside these and other grounds for excluding criminal responsibility in that it involves providing a defence in circumstances in which a person exceeds what is strictly necessary. By its nature, this would fall outwith the UK's obligations under the ICC Statute. Thus, this approach if adopted would subject UK Armed Forces in such situations to the possibility of investigations and prosecutions by the ICC, given that by virtue of the partial defence, the UK would be showing itself not to be able or willing to proceed genuinely with an investigation or prosecution.

Question 21: Please give us your views on whether the measure should apply across the UK.

We do not believe this measure should apply anywhere in the UK.

Question 22: Are there any other legal protections measures for Armed Forces personnel and veterans, in this context, which you think the Ministry of Defence should be considering?

Yes

Question 23: If yes, please provide details

The Ministry of Defence and the Government more broadly should ensure that adequate legal safeguards for service personnel and veterans are in place, including access to legal counsel and other internationally recognized due process and fair trial standards.

However, rather than restricting the possibility for criminal investigations for crimes committed in armed conflicts through the proposed Statutory Presumption against Prosecution, the legal protection of current and former service personnel is best served by putting in place a framework that facilitates prompt and adequate investigation in the first place, which would clear anyone wrongly suspected of having committed a crime without risk of undue re-investigation and at the same time ensure accountability for those guilty of committing crimes.

So far, the various proceedings in the UK covering alleged crimes by current and former service personnel have proven to be complex, time-consuming and with a variety of practical, legal and procedural challenges. What is needed, therefore, is not legislation to restrict criminal investigations and prosecutions but a detailed analysis of why investigations have been 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.

Question 24: Whether it would be appropriate to impose an absolute limit (or "longstop") for bringing claims for personal injury and/or death seeking damages in respect of historical events which took place outside the UK? This would prevent claims being brought beyond that point, while still leaving the Courts with discretion to allow claims that are brought outside the normal time limit but before the absolute limit.

It would not be appropriate to impose an absolute limit ("longstop") for bringing claims for personal injury and/or death seeking damages in respect of historical events which took place outside the UK. To do so would breach the rights of victims to reparations, to which they are entitled in accordance with statutes ratified by the UK.

Violations of human rights gives rise to an obligation on the part of the State to make reparation.[12] The right to a remedy has been recognized as non-derogable.[13] 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,[14] and the remedy must be suitable to grant appropriate relief for the legal right that is alleged to have been infringed.

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:[15]

> ***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]**

The *UN Basic Principles and Guidelines on the Right to a Remedy and Reparation*[16], 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.***
>
> ***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.***

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

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[12] 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.

[13] 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.

[14] 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.

[15] WGEID Report 1997 (E/CN.4/1998/43).

16 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.

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. UK courts have taken this 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.[17] A similar approach was taken by a Dutch district court in respect to colonial-era crimes in Indonesia.[18]

In the exercise of the Court's discretion, factors such as the degree of access victims had to the courts, any issues relating to the age of the victims, the impact of trauma on their ability to lodge proceedings, their knowledge of the claim, have all been appropriately taken into account by the Courts in determining whether a particular claim should be allowed to proceed. Accordingly, no separate statute of limitations pertaining to civil claims arising from actions of the military during armed conflict is warranted, given that the current law appears to be operating appropriately. The reduction of the Court's discretion – when there is no indication that the discretion has been fettered or applied inappropriately, simply to reduce the liability of the Government is a self-serving exercise which would ultimately breach victims' right to a remedy.

Question 25: Whether the "longstop" should be set at ten years, or some shorter or longer period?

There should not be a "longstop".

Question 26: Whether there should be any exceptions to a "longstop"?

As above, there should be no longstop.

[17] Ndiki Mutua, Paulo Nzili, Wambugu Wa Nyingi, Jane Muthoni Mara and Susan Ngondi v. The Foreign and Commonwealth Office [2012] EWHC 2678 (QB).
[18] 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.