

Protecting Those Who Serve



Richard Ekins, Patrick Hennessey
and Julie Marionneau

Foreword by Rt Hon Gavin Williamson MP

Introduction by Tom Tugendhat MP



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Foreword

by Rt Hon Gavin Williamson MP
former Secretary of State for Defence

The brave men and women who make-up our Armed Forces deserve our thanks and appreciation. Serving as Defence Secretary I saw first-hand the professionalism, comradeship and loyalty that make the three Services the finest in the world. The same is true for those who served and those who'll one day put on the uniform. But as well as our gratitude, they deserve our protection – including from malicious legal claims and repeated investigations.

Everyone in the military rightly accepts that when individuals break the rules there must be consequences and personnel should face the full force of military justice. Since the turn of the century, however, the scales have tipped. Personnel and veterans who served in various theatres have been hounded in the courts. Many of those who fought in Iraq and Afghanistan have been subjected to repeated inquiries and investigations. Recent public concern, meanwhile, has been for the targeting of veterans who served in Northern Ireland and the spectacle of old men being dragged again into the judicial system.

As this report notes, the conflict in Northern Ireland took place within the UK, where British forces were rightly subject to the police and ordinary courts. Allegations that soldiers or police had unlawfully killed civilians or terrorists were investigated at the time and some resulted in trial and conviction.

But in the time since the Good Friday Agreement, and a partial amnesty for terrorists was introduced, many in the security forces – some now in retirement homes – now see old cases reopened and incidents reinvestigated.

Often forced to recall events that occurred decades ago in the heat of battle, they are made to relive repeatedly a split-second moment under sharp interrogation. When they signed up, many as teenagers, they cannot have imagined that the State they were choosing to defend would one day be used to put them on trial for actions taken in the line of duty.

It is fair to say that the Conservative Party has taken this issue seriously while in Government. The work of my predecessor Sir Michael Fallon in closing down the IHAT inquiry, commitments in the 2015 and 2017 Manifestos, and the work the Ministry of Defence undertook when I was Secretary of State, and now under my successor, all demonstrate our collective commitment to ending this injustice.

It is also why I called-out the 'witch-hunt' against our veterans and tasked the Ministry of Defence to draw-up plans to establish a time limit to potential prosecutions – an idea I'm glad to see examined in this report. I also committed the MOD to funding the legal costs of British

veterans who are now being pursued over issues relating to their service in Northern Ireland.

Yet this report vividly sets out how much more there is to do and its recommendations deserve close examination – Government must be prepared to be bold. Restoring the primacy of law designed specifically for the unique conditions of the battlefield is naturally compelling, as is guarding the rights of those who find themselves in conflict zones, civilian and military.

The legal challenge also has wider implications, as has been ably shown by my colleague Tom Tugendhat MP in his work on the ‘Fog of Law’ with Policy Exchange. The growth of ‘lawfare’ can hit recruitment, as potential recruits fear they won’t be backed up when things go wrong. As Lt Gen Sir Graeme Lamb says, “So-called ‘historical’ inquiries have a direct impact on the present. Every inquiry will affect the mind set of troops deployed on operations as they struggle to deal with split second decisions and at the same time have the added burden of considering whether their actions - for which they are extensively trained - will one day land them in court.”

It can also impact British fighting power, as commanders operate under shifting rules and our allies become uncertain as to what our forces can and cannot do. Indeed, our allies have been clear about the increasing uncertainty that hangs over combined operations. As General Petraeus warns, “The very special relationship between our two militaries... and which has been built over more than a century of serving shoulder-to-shoulder in the hardest tests of battle, could be put at risk by the present situation.”

Meanwhile, our adversaries are increasingly manipulating the rules to further their aims while avoiding a clear charge of breaking international law. We should be in no doubt that they will seek to use our legal exposure against us in the course of operations or to limit our fighting capacity more generally.

Since the Second World War, the British Armed Forces have excelled at every challenge assigned to them in theatres across the globe. It is not merely patriotism that makes me say they are the best. Operating on strict budgets, our sailors, airmen and soldiers have time and again achieved success against the odds while maintaining an unparalleled professionalism and respect for the rules of war. We must be careful we do not allow ourselves to triumph on the battlefield only to face defeat in the courtroom.

As a country, we pride ourselves on our practical approach and sense of decency. This is perhaps why there has been so much public outrage at the spectacle of those who’ve served being taken to court, rather than honoured for their sacrifice. I welcome this report and it is my earnest hope that the next Government fulfils its duty – both to those who served, and to the future effectiveness of what I know to be the finest Armed Forces in the world.

Introduction

by Tom Tugendhat MP
Chair of the Foreign Affairs Committee

We are justly proud of our Armed Forces. Their fighting capability is second to none and we maintain the highest standards of discipline and conduct. UK forces are, and long have been, subject to the rule of law, just as the UK itself is, and long has been, committed to a rules-based international order. But in recent years, the law has been weaponised against UK forces, with developments in domestic and European law subjecting our forces to an unsuitable legal regime, which undercuts British fighting power, sapping morale and hampering recruitment.

Policy Exchange first brought attention to this changing legal battlefield almost six years ago when, just weeks after leaving the British Army, I jointly authored the report *The Fog of Law*. It set out the dangers faced by commanders at all levels and the threat they face years after they have left combat. That was followed in early 2015 by our report *Clearing the Fog of Law*. Despite widespread recognition of the problem, since then, little has changed. UK forces are still exposed to lawfare being used against them and the government is unable to prevent soldiers, serving or retired, from being hounded in the courts, sometimes decades after they put their lives at risk to defend our country.

This is no minor matter. Although the inquiries are termed historic, they are very much alive in the minds of today's commanders. Young corporals and lieutenants are forced to consider not just the right thing to do in battle, but the potential of inquest decades into the future when society has changed. That is undermining the fighting capability of our troops and the prime responsibility of our government – defence.

Yet successive governments have failed to address the extension of human rights law to operations undertaken outside the UK. Unless put right, it is likely to hamper operations in the future.

It is incoherent to subject military units on operations abroad to a legal regime that is intended to govern peacetime Europe. Resisting the improper extension of human rights law isn't an attempt to get immunity or to reject the rule of law. It is instead an assertion that the proper legal regime for UK forces, which they, like other Western powers, are trained to follow, is the law of armed conflict. The application of human rights law to our forces risks future defeat.

More dangerous even than its direct operational effect may be the impact that this changing legal framework has on the morale and culture of our armed forces. The litigation that has unfolded since our operations in Iraq and Afghanistan encourages risk aversion. And the relentless,

pursuit of allegations against individual soldiers, including those who served in Northern Ireland decades ago, undermines morale. The failure of the government to protect its own, to prevent a damaging cycle of investigation and reinvestigation, weakens the trust that soldiers should have in their commanders and in the nation.

This powerful new Policy Exchange report makes clear how and why our troops have been exposed to unfair legal processes. While the European Convention on Human Rights has always applied in Northern Ireland, the European Court of Human Rights has invented new obligations and applied them retrospectively to deaths during the Troubles. The Convention has also been extended to military action in Iraq and Afghanistan, where it was initially never thought to apply. The report details the ways in which the European Court of Human Rights and our own courts have misconstrued the European Convention and the Human Rights Act, wrongly exposing our forces.

The Policy Exchange report is a devastating indictment of these changing legal developments and their consequences for our troops. The recommendations for action which it sets out are robust and realistic. They deserve close attention at the highest level. Whatever one's views about the Human Rights Act, we parliamentarians should be able to agree to restore the limited territorial and temporal scope that the Act had when it was introduced in 1998 and which some of our most senior judges long upheld. It cannot be right that without fresh evidence allegations can be pursued decades after soldiers were first investigated and assured that they would not be prosecuted.

Standing firm in defence of our troops is a moral imperative and a strategic necessity. It is required also by the demands of our international alliances. The UK should be a reliable, capable partner. Recent changes in our law, which this report makes clear have been imposed by courts rather than by responsible political choice, are starting to frustrate this capacity and must be unwound. This will take firm resolve in the face of challenge in our courts and in European courts. However, like generations of British Army Officers, who have been trained to serve the men and women we are privileged to lead, those who aspire to govern our country must show some leadership and protect those who served.

Executive summary

The next Prime Minister has a responsibility to act urgently to protect UK troops, whether serving or retired, from ongoing exposure to legal risk and to unfair legal processes. From Northern Ireland to Iraq and Afghanistan, those who served – or who serve still – in the nation’s defence have not been adequately protected. The responsibility to act does not arise solely on the grounds of basic fairness, although this would be sufficient reason for action. The process to which UK troops have been subjected bears on the morale and operational effectiveness of UK forces now, which the Government must address if it is to maintain military capacity and defend the realm.

This paper examines how this sorry state of affairs has arisen and outlines what should now be done to put it right. The paper considers investigations into allegations of historic wrongdoing in Northern Ireland, as well as investigations arising out of recent operations in Iraq and Afghanistan, and proposes reforms to UK law and practice which would more adequately protect those who served.

The conflict in Northern Ireland took place, of course, within the UK, and UK forces were therefore rightly subject to the police and ordinary courts. Allegations that soldiers or police had unlawfully killed civilians or terrorists were investigated at the time and some resulted in trial and conviction. Yet in the years since the Good Friday Agreement was concluded, and a partial amnesty for terrorists was introduced, many in the security forces have faced old incidents being reopened and reinvestigated. One main reason for this trend has been the way in which the European Court of Human Rights has misinterpreted the European Convention on Human Rights, retrospectively imposing new investigative obligations on UK authorities. Over time, our own courts have wrongly given domestic effect to these obligations by way of the Human Rights Act 1998.

The conflicts in Iraq and Afghanistan were fought outside the UK and on the premise that they were subject to the law of armed conflict but not to the European Convention on Human Rights. However, the European Court of Human Rights, which our own courts have followed all too loyally, chose subsequently to change the Convention’s scope by extending it to those conflicts and to give that extension retrospective effect. This not only has subjected those operations, and operations yet to come, to an inappropriate body of law, but also, by its retrospective imposition, has been deeply unfair on those who served. Without reform to the regime in which UK forces now operate, similar legal action will be a poisonous legacy of any future operations.

The scope and scale of this problem have been widely recognised. And

some steps have been taken to address it, most notably the (partial) closure of the Iraq Historical Investigations Team in 2017. However, the political authorities have largely treated themselves as powerless to act boldly to protect those who served. There has been a failure of political and legal imagination, with the authorities prematurely ruling out certain courses of action as politically untenable, and, especially, wrongly abandoning their responsibility in the face of court action. There is no excuse for the failure of those who constitutionally represent our nation to act so as to protect those who served.

In relation to historical investigations in Northern Ireland, Parliament should:

- **Amend the Human Rights Act 1998 to specify that it does not apply to any death that takes place before the Act came into force in October 2000;** this would restore the intended scope of the Human Rights Act, from which courts have wrongly departed, and would restore the discretion of investigating and prosecuting authorities.
- **Consider legislation that would draw a clear line under the past,** bringing to an end all ongoing investigations, inquests and prosecutions into Troubles-related deaths.
- In the alternative, **enact a robust statute of limitations, which would prevent investigation into or prosecution of allegations unless a court is satisfied that there is compelling new evidence and that investigation or prosecution would be in the interests of justice.** The more time has elapsed since any alleged incident, the greater the evidential difficulties are likely to be and the less likely any further action is to be effective and in the interests of justice. This legislation should apply to all Troubles-related deaths, whether allegedly caused by terrorists or the security forces. In practice, it would certainly provide most protection to the security forces, precisely because allegations against them are much more likely already to have been investigated.
- **Enact legislation forbidding investigation or prosecution of historic allegations in which the question is the reasonableness of the use of force in making an arrest or in preventing crime, unless and until the Attorney General for Northern Ireland certifies that in his or her view there was no honest belief in the reasonableness of the use of force in question.**
- **Enact legislation requiring, in addition, the consent of the Attorney General for England and Wales before a prosecution is brought against former or serving UK forces.**

In relation to operations outside the UK, including Iraq, Afghanistan and future operations:

- Parliament should **amend the Human Rights Act 1998 to limit**

its extra-territorial reach. The amendment should provide either that the Act only applies within the territory of the UK or that the Act only applies outside the UK in carefully limited circumstances. This would not only protect UK forces from much of the vexatious litigation which has emerged from the conflicts of the past two decades but would also prevent some of the more absurd and troubling situations that have arisen on the battlefield.

- Parliament should **enact legislation requiring derogation from the European Convention on Human Rights in relation to future operations** and protecting derogations from domestic legal challenge.
- **The political authorities should stand ready to resist judgments of the European Court of Human Rights that purport to apply the European Convention on Human Rights to military action abroad.** The UK should be at least as ready to protect those who served in defence of our nation as it has been to maintain the disenfranchisement of convicted offenders serving their sentence in prison.

I. Historical investigations in Northern Ireland

How is it that those who served in Northern Ireland, including in the late 1960s and early 1970s, are even now subject to their service being investigated and possibly resulting in charges? This section traces and critiques the practice of historical investigations in Northern Ireland.

Operation Banner in Northern Ireland ran from 1969 to 2007 and was the longest ever continuous deployment of UK forces. More than 700 soldiers were killed in terrorist attacks. In total, 3,520 people were killed during the Troubles, 301 of whom were killed by the British military. Fatalities were at first investigated by the military itself, but from September 1973 by the Royal Ulster Constabulary (RUC). Some prosecutions were brought against the security forces – including military, RUC officers and others – and some prosecutions resulted in convictions, but in many cases it was held that there was no case to answer or defendants were acquitted at trial.

The UK was a signatory to the European Convention on Human Rights (ECHR) throughout the Troubles and thus had an obligation in international law, in accordance with Article 2, to secure the right to life of all within Northern Ireland. The deployment of the British Army in Northern Ireland was part of the UK's efforts to keep the peace and thus prevent loss of life. However, in 1995 the European Court of Human Rights (ECtHR) transformed Article 2, in *McCann v United Kingdom*,¹ the “death on the Rock” case. The Court ruled by majority that the UK had violated the right to life by shooting members of an IRA bomb squad (an absurd conclusion, as the minority made clear), but more importantly it also held unanimously that the right to life entailed that the state was obliged to undertake an independent, effective official investigation into all deaths caused by state agents. The text of the ECHR says nothing of the kind;² the Court conjured this new right into existence.³ It has gone on in later cases to refine and extend the requirements of an Article 2 compliant investigation, requirements which it has then used as a ground to hold the UK in breach of the ECHR – for “failure” in the past to comply with standards that the Court has only now invented. UK courts have largely followed this ECtHR case law and in some cases have arguably gone beyond it.

The Good Friday Agreement 1998 (GFA) made provision for a partial amnesty insofar as it authorised the early release, on certain conditions, of prisoners convicted of Troubles-related offences. The GFA did not address investigation or prosecution of the security forces and did not provide any bar on future prosecutions of anyone. Decommissioning legislation

1. (1995) 21 EHRR 97 GC

2. “The judgment in *McCann* was described to me recently and felicitously as the equivalent of an additional protocol to the Convention”: John Larkin (Attorney General for Northern Ireland), “Dialogue at cross-purposes? The Northern Ireland inquest and Article 2 of the European Convention on Human Rights” in L Early, A Austin, C Over and O Chernishova (eds.), *The Right to Life under Article 2 of the European Convention on Human Rights: Twenty Years of Legal Developments since McCann v. the United Kingdom* (Wolf Legal Publishers, 2016), 161, 162.

3. Lord Hughes (a Justice of the Supreme Court from 2013-2018) speaking at Goldsmiths Law's annual criminal justice symposium at the British Academy, 27 March 2019: “Article 2 does not say anything at all about investigation, but it's a perfectly rational extension on the basis that the primary right won't be effective unless you also have a secondary right to investigation. But it is pure judicial legislation of the kind which – if it happened in relation to an English statute by an English court – would attract, rightly, some would say, a great deal of criticism”.

provides that weapons surrendered in this context cannot be used for evidence, which limits prosecutions of terrorists;⁴ obviously no such provision holds in relation to weapons used by soldiers. The GFA makes no provision for the so-called “on the runs” (OTRs), persons suspected of but not charged with offences relating to the Troubles, or persons charged who thereafter escaped, or persons charged and convicted who thereafter escaped. Sinn Fein argued that it was anomalous that they were not covered by the GFA and the British Government, at first in private but then in public, agreed. The Government proposed a kind of amnesty by way of the Northern Ireland (Offences) Bill 2005, which was rejected by Parliament. The Government went on to introduce an administrative scheme, which resulted in hundreds of so-called “comfort letters” being sent to OTRs, advising them that they were not wanted by the Police Service of Northern Ireland or any other police force in the UK. The scheme came to light in 2014 when the High Court relied on one of the letters to hold that it was an abuse of process to try John Downey for the 1982 Hyde Park bombings (a letter had been sent to him in error).⁵ The subsequent Hallett Report concluded that the administrative scheme was not an amnesty and that the comfort letters did not bar future prosecutions.⁶ These conclusions have not been tested in court and are dubious.⁷ It is undeniable that special provision has been made to provide assurances to terrorists and has resulted in the collapse of one murder trial to date. No equivalent assurances have been provided to security forces who served in Northern Ireland.

While it would not be quite right to say that the facts on the ground amount to an asymmetric amnesty, protecting terrorists but not military or police, it is certainly true that the status quo provides some protection to the terrorists and certainly encourages disproportionate attention to deaths involving the military or police. This is relevant in thinking about whether reforms to the status quo, which might provide assurances to former personnel in relation to allegations arising out of Troubles-related deaths, would introduce a novel amnesty. Arguably, such reforms would instead end the unfair treatment which those who served have endured since the end of the Troubles.

Three years after the GFA, in May 2001, the ECtHR gave judgment in a set of joined cases against the UK in relation to deaths caused by the security forces in Northern Ireland. In *McKerr v United Kingdom*,⁸ the Court held that the UK had breached the Article 2 right to life by failing to provide an adequate – effective, independent and transparent – investigation into the circumstances in which the killing of McKerr took place. McKerr had been shot by armed police officers in 1982. The officers in question had then been charged with a range of offences but the charges against them were dismissed by the court. A subsequent police investigation and an inquest had also taken place. But the ECtHR held that in all these investigations there were shortcomings, including in relation to the independence of the investigators, the information provided to the family of the deceased, the scope of the relevant investigations (that is, how far they delved into wider security policy and its connection to the killing), and the speed with

4. Northern Ireland Arms Decommissioning Act 1997, section 5 “Evidence”; note that the Act also creates an amnesty in relation to offences otherwise committed in respect of anything done in accordance with a decommissioning scheme, per section 4 “Amnesty” and the Schedule to the Act.

5. *R. v Downey (John Anthony)* [2014] EW Misc 7 (Central Crim Ct)

6. The Rt Hon Dame Heather Hallett, *The Report of the Hallett Review* (HC Paper No.380, 2014–2015)

7. R Ekins, “Amnesty and Abuse of Process” (2015) 131 *Law Quarterly Review* 196

8. (2002) 34 EHRR 20

which they were completed. The Court ordered the UK to pay damages and the UK undertook to overhaul inquests in Northern Ireland but did not undertake to reopen investigations into McKerr's death.

The family of McKerr applied to the domestic courts, by way of the Human Rights Act 1998 (HRA), for an order that an Article 2 compliant investigation be reopened. It was alleged that the failure to hold such an investigation was an ongoing breach of Article 2, and unlawful by virtue of the HRA's incorporation of the ECHR. The application was eventually dismissed by the House of Lords, *In re McKerr*,⁹ which ruled authoritatively that the HRA does not have retrospective effect and so cannot apply to deaths that pre-date the Act's commencement in 2000.

Lord Brown, amongst others, also cast doubt on whether in any case the failure to reopen an investigation constituted an ongoing breach of Article 2 in international law. Nonetheless, in 2006, the Historical Enquiries Team (HET) was set up within the Police Service of Northern Ireland (PSNI). The UK Government had presented a package of measures to the Committee of Ministers of the Council of Europe in response to the McKerr cases,¹⁰ which was designed to address the ECtHR's findings and to prevent such failings happening again. The primary objectives of HET were: (1) to bring a measure of resolution to families of those killed during the Troubles and (2) to re-examine all deaths attributable to the Troubles and ensure that all investigative and evidential opportunities are subject to thorough and exhaustive examination. In 2008, the Secretariat to the Committee of Ministers of the Council of Europe acknowledged that HET would not be carrying out Article 2 compliant investigations (they could obviously not be prompt) but that HET's work would help bring resolution (a consideration not obviously relevant to the Committee's responsibility) and that it could help satisfy the state's continuing obligation to conduct effective Article 2 investigations.¹¹ It is not obvious how these views stand together or why the Secretariat assumed a continuing obligation.

The ECtHR has held that a new Article 2 obligation can arise in relation to historic death. In *Brecknell v United Kingdom*,¹² the ECtHR rejected the idea that any assertion or allegation could trigger a fresh obligation but ruled that the state must be open to information that "has the potential either to undermine the conclusions of an earlier investigation or to allow an earlier inconclusive investigation to be pursued further."¹³ The ECtHR was reluctant to set any kind of clear test, partly because of the variety of fact patterns that might arise, but also because of the resource considerations that would bear on policing priorities. It concluded that plausible or credible new allegations or evidence relevant to identification and prosecution of the killer would generate an obligation to take further investigative steps, steps which might reasonably, however, be restricted in their reach, partly by reason of the difficulties imposed by the passage of time.

The ECtHR's developing Article 2 case law, including *Brecknell*, did not at first have domestic effect in UK law by reason of *In re McKerr*, which, to repeat, held authoritatively that the HRA did not apply (and thus convention rights did not arise in UK law) in relation to events, including

9. [2004] UKHL 12

10. The Committee of Ministers is the Council of Europe's decision-making body and consists of the Foreign Affairs Ministers of all member states or their permanent diplomatic representatives. In accordance with Article 46 of the ECHR, as amended by Protocol No. 11, the Committee of Ministers supervises execution of the judgments of the ECtHR.

11. Cases concerning the action of security forces in Northern Ireland – Progress achieved in implementing the Court's judgments since Interim Resolution CM/ResDH(2007)73 and outstanding issues – Memorandum prepared by the Department for the Execution of Judgments of the European Court of Human Rights (DG-HL), 19 November 2008 at [47] and [49]

12. (2007) 46 EHRR 957

13. (2007) 46 EHRR 957at [70]

deaths, that predated the Act's commencement in October 2000. This sensible ruling of the House of Lords has since been abandoned by the Supreme Court. In *Re McCaughey*,¹⁴ a majority of our Supreme Court held that it should depart from *In re McKerr* because of the ECtHR's judgment in *Šilih v Slovenia*,¹⁵ in which the ECtHR asserted that an Article 2 obligation existed in relation to deaths that predated a member state's entry into the ECHR itself. The Supreme Court majority held that this ECtHR judgment effectively prised apart the procedural and substantive limbs of Article 2, which meant that a procedural obligation might be actionable under the HRA even if the death predated the Act. The majority did not say that every pre-HRA death had to be investigated to an Art 2 standard, although one can argue that this is its logic; the extent of the procedural obligation was unclear in the ECtHR judgment and remains unclear. In a powerful dissent, Lord Rodger reasoned that the majority's judgment effectively made the HRA retrospective, introducing major uncertainty into our law in a way contrary to Parliament's intention.¹⁶ What was clear, however, was that, notwithstanding *Brecknell*, if the state did choose to investigate a death that predated the HRA, the courts would stand ready to require that the investigation be Article 2 compliant.¹⁷ Thus, the judgment exposed the authorities to litigation by way of the HRA, arguably for failing to reopen or continue investigations into deaths that predated the Act but also in relation to the conduct of investigations that they chose to initiate.

The domestic legal risk is confirmed by a decision of the Supreme Court in May this year: *In the matter of an application by Geraldine Finucane for Judicial Review (Northern Ireland)*.¹⁸ The Court declared that there had not been an Article 2 compliant investigation into the death in 1989 of Patrick Finucane (a solicitor brutally murdered in front of his wife and children). The Court reasoned that there was a continuing, unmet Article 2 obligation. Strictly, the Court left it to the state to decide what form an investigation should now take, if indeed any investigation was thought to be feasible – but any decision not to investigate must be at risk of further challenge. It is arguable that the Supreme Court in this case went beyond the requirements imposed by the ECtHR. Note that the Court was willing to conclude that the state remained in breach of its Article 2 obligation in 2019 notwithstanding the conclusion of the Committee of Ministers to the contrary in 2008.

In 2013, Her Majesty's Inspectorate of Constabulary reviewed and heavily criticised HET's work, especially its treatment of cases involving former soldiers, interviews with who were often not under caution, an omission that would make their evidence inadmissible in any subsequent court proceedings.¹⁹ The PSNI then announced that it would review all military cases between 1968 and 1998 in order "to ensure the quality of the review reached the required standard".²⁰ As a result of budgetary pressure, the HET was disbanded in 2014 and a much smaller Legacy Investigations Branch (LIB) was formed.²¹ The PSNI has said that it does not prioritise cases involving the military but this does account for 30% of its workload, despite concerning only 10% of deaths.²²

In 2013, the Attorney General for Northern Ireland, John Larkin

14. [2011] UKSC 20

15. (2009) 49 EHRR 996

16. [2011] UKSC 20 at [155-161]. Lord Rodger remarked, *inter alia*, at [161] that "the simple fact is that [on the majority's approach] this court would be overruling *McKerr* by inventing its own transitional provision which is designed to insert into the Act a backwards time-limit that Parliament did not enact" and, at [162], "If, having deciphered *Šilih*, Parliament feels moved to amend the HRA so as to impose an obligation on public authorities to investigate deaths which occurred before the HRA came into force, it has every opportunity to do so. It has not done so over the last two years. Somehow, I would be surprised if it did so in future."

17. *In the Matter of an application by Brigid Hughes* [2018] NIQB 30 at [24], per Sir Paul Girvan: "The majority in the Supreme Court [in *Re McCaughey*] concluded that if the UK authorities decided to hold an inquest into a death which had occurred before 2 October 2000 (that it is to say before the Human Rights Act 1998 took effect) the Convention imposed an international obligation to ensure that it complied with the procedural obligations arising under Article 2, at least so far as that was possible under domestic law. The provisions of the 1998 Act applied to any obligation which currently arose under Article 2." See also *In the matter of an application by Margaret McQuillan for Judicial Review* [2019] NICA 13 [128-138]. On the questions of whether Article 2 ever requires an inquest and whether an inquest alone could ever satisfy Article 2, and thus whether it makes sense to speak of an Article 2 compliant inquest, see John Larkin, "Dialogue at cross-purposes? The Northern Ireland inquest and Article 2 of the European Convention on Human Rights" in L Early, A Austin, C Over and O Chernishova (eds.), *The Right to Life under Article 2 of the European Convention on Human Rights: Twenty Years of Legal Developments since McCann v. the United Kingdom* (Wolf Legal Publishers, 2016), 161.

18. [2019] UKSC 7

19. Her Majesty's Inspectorate of Constabulary, *Inspection of the Police Service of Northern Ireland Historical Enquiries Team* (2013)

20. C Mills and D Torrance, *Investigation of Former Armed Forces Personnel who served in Northern Ireland*, House of Commons Library Briefing Paper, CBP 8352, 10 June 2019, 5.

21. *Ibid.*

22. *Ibid.*

QC, proposed drawing a line under the past and bringing to an end all investigations, inquests and prosecutions into Troubles-related deaths.²³ This proposal was not well received, with the UK Government asserting that it was utterly opposed to an amnesty for terrorists and Amnesty International condemning the proposal as an “utter betrayal of victims’ fundamental right to access justice”.²⁴

In November 2014, Nils Muiznieks, the Council of Europe’s Commissioner for Human Rights, baldly asserted that the UK was breaching the ECHR by not investigating effectively the circumstances in which state agents caused deaths during the Troubles and punishing those responsible.²⁵ He asserted further that there had been virtual impunity for state agents, that the Article 2 responsibility was absolute, and that budgetary cuts were no excuse for the UK not meeting its Article 2 obligations. In fact, UK forces and police have never had impunity. That the UK did not comply during the Troubles with standards asserted by the ECtHR in 1995 and developed over subsequent years is something that falls far short of a de facto grant of impunity. Further, while Article 2 plausibly establishes an absolute obligation not to intentionally kill (self-defence aside), the investigative obligation cannot be thought to be absolute, for it is subject to what is reasonably doable in the circumstances, which must include budgetary and manpower considerations. Just as what can be done in the midst of a “public emergency threatening the life of the nation” is very different to what can be done in ordinary circumstances,²⁶ so too what should be done long after the emergency’s conclusion is to be considered relative to current circumstances including the needs of public safety and present police resources.²⁷ It is unreasonable to assert that Article 2 now requires Northern Ireland to give unconditional priority to legacy cases over other urgent budgetary considerations. Further, even if the ECtHR’s recent jurisprudence means that it will hold that the UK breached the Article 2 investigative duty in, say, the early 1970s, it does not follow that this requires further investigations now.²⁸ The duty has, by hypothesis, already been breached. It is not now possible, for example, to have a prompt Article 2 compliant investigation.²⁹

The Stormont House Agreement in December 2014 made provision for a new, independent Historical Investigations Unit (HIU), which would continue to investigate Troubles-related deaths. The Agreement has not yet been implemented. Since 2011, decisions to prosecute have been made in 26 cases, five of which involve soldiers, six of whom have been prosecuted.³⁰ In February 2018, the Court of Appeal in Northern Ireland quashed a decision not to prosecute a former soldier.³¹

Consider the case of Dennis Hutchings, a 78-year-old former member of the Life Guards, who has been living in retirement in Cornwall for many years.³² In 1974 Hutchings was assigned to a patrol in a dangerous area of the border, regularly crossed by gunmen with impunity. The threat level in this area was particularly high, with a member of the Life Guards shot and killed in one of many attacks in the area in the first fortnight of June. Two days before the incident in question a patrol commanded by

23. “We need to bring to an end the prospect of inquests with respect to Troubles-related deaths... What I am saying is take the lawyers out of it. I think lawyers are very good at solving practical problems in the here and now, but lawyers aren’t good at historical research... The people who should be getting history right are historians, so in terms of recent history, the people who are making the greatest contribution are often journalists.” See Liam Clarke, “Attorney General John Larkin: It’s time to call halt to all Troubles cases”, *The Belfast Telegraph*, 20 November 2013.

24. Vincent Kearney, “NI attorney general John Larkin calls for end to Troubles prosecutions”, BBC News, 20 November 2013.

25. Mr Muiznieks was in Belfast to speak at a conference organised by the Transitional Justice Unit, University of Ulster. He gave an interview to the BBC, which was broadcast on BBC Newsline on 6 November 2014 and widely reported. See further: Vincent Kearney, “UK must pay for Troubles killings investigations says European official”, BBC News website, 6 November 2014. The remarks have also been quoted by the High Court: see *In the Matter of an application by Brigid Hughes* [2018] NIQB 30 at [15].

26. The ECtHR accepted in 1978 that the situation in Northern Ireland was clearly a “public emergency threatening the life of the nation”, to quote the operative terms of Article 15 of the ECHR: *Ireland v United Kingdom* (1978) 2 EHRR 25. The Government is quoted at [15] as describing the situation as “the longest and most violent terrorist campaign witnessed in either part of the island of Ireland”.

27. But note that budgetary decisions in relation to legacy cases have been challenged, with some initial success, in the courts: *In the Matter of an application by Brigid Hughes* [2018] NIQB 30.

28. *In re McKerr* [2004] UKHL 12 at [94-97], per Lord Brown

29. [2004] UKHL 12 at [95], per Lord Brown

30. Police Prosecution Service Press Release dated 15 April 2019: “We have identified 26 cases involving a large number of suspects which can be described as “legacy” in which the PPS has taken prosecutorial decisions since 2011. Half of all such cases relate to alleged offences involving republican paramilitaries and there have been prosecutions in eight of these. Proceedings are still active in three of these cases. Of the five concluded cases, there were two convictions and two in which proceedings were discontinued, one following the death of the defendant. There was also one acquittal. Eight of the 26 cases related to alleged loyalist paramilitary activity. There were decisions to prosecute in four of these cases. Convictions have been secured in two cases while two others are currently active. A further five cases involved a number of former soldiers. This has resulted in a decision to prosecute six individuals for a range of serious offences. The final two cases involved police officers and both resulted in a decision not to prosecute.”

31. *In the matter of an application by Margaret Brady for Judicial Review* [2018] NICA 20

32. *In the matter of an application by Dennis Hutchings for Judicial Review (Northern Ireland)* [2019] UKSC 26

Hutchings had engaged in a firefight with a group of men, with firearms and explosives found in their vehicle. On the morning of 15 June, the patrol encountered a man, John Paul Cunningham, who appeared to be hiding by the road. He ran away and ignored several commands to stop. Members of the patrol fired and he was killed. He proved not to have been a terrorist and indeed had limited intellectual capacity and may well have been easily confused and inherently fearful of uniforms and vehicles. An investigation at the time led the Director of Public Prosecutions to conclude that no criminal charges should be laid. A generation later, HET investigated and also recommended that no further action be taken, noting that the death was an absolute tragedy which should not have happened. But the LIB conducted another investigation, which led to Mr Hutchings being arrested, taken to a police station in Northern Ireland, and subsequently charged. In April 2016, the Director of Public Prosecutions directed that his trial should be before a judge alone, a direction made known to Hutchings in May 2017 and challenged by way of judicial review. The challenge failed before the Supreme Court, which opens the door to trial at last beginning, in September 2019, some 45 years after the incident in question.

It bears noting that civil litigation is also afoot, not only against the Ministry of Defence, but also against General Sir Frank Kitson, now in his nineties. The litigation alleges negligence and misfeasance in a public office in relation to a killing that took place while Kitson was not serving in Northern Ireland, largely it seems on the basis of Kitson's development (see his book *Low Intensity Operations: Subversion, Insurgency, Peace-keeping* (Faber, 1971)) of the Army's lawful and well-regarded operating procedures against terrorism and guerrilla warfare.

There is widespread concern that there is a disproportionate focus on cases involving the security forces.³³ While this concern should not be overstated, it does seem to be borne out to an extent.³⁴ Fatalities involving the armed forces were investigated soon after they occurred and largely concerned whether the soldier in question had the right to fire in view of the circumstances in which he found himself. Further, it is obvious, and acknowledged by all sides, that many of the deaths caused by the armed forces were justified uses of force in self-defence or defence of others. Thus, while UK forces may have been responsible for a tenth of deaths during the Troubles, they must be responsible for a much smaller proportion of murders or unlawful killings. The contemporaneous investigations into these did sometimes result in charges. The failure to secure a conviction in the early 1970s does not entail that an injustice was done, still less that one should try again for convictions now. To the extent that there is now and recently a disproportionate focus on the security forces, this results, to a considerable extent, from the relative availability of evidence in relation to the activities of state agents in contrast to terrorists.³⁵ Recall the limitations on using decommissioned weapons as evidence for prosecution – an entirely sensible limitation, for otherwise the decommissioning process would fail, but one that encourages a skewed focus on state agents. Likewise, the enemies of those state agents, the OTRs, have – or at least had – some legal

33. C Mills and D Torrance, *Investigation of Former Armed Forces Personnel who served in Northern Ireland*, House of Commons Library Briefing Paper, CBP 8352, 10 June 2019, 6: "Concerns have been expressed over the credibility and reliability of evidence and witness statements that may be over 40 years old and the re-opening of investigations that had already concluded. Most notable has been the widespread perception that investigations have disproportionately focused on the actions of the armed forces and former police officers, which account for 30% of the LIB's workload but only form 10% of the overall deaths during the Troubles."

34. Defence Committee, *Investigations into fatalities in Northern Ireland involving British military personnel* HC1064, 26 April 2017, para. 15.

35. For obvious reasons, there is much greater documentary evidence in relation to the activities of security forces than terrorists, including of course the records of past investigations into deaths involving state agents. In one recent case, discovery in the National Archive at Kew of Military Logs, including records of radio traffic on the army's communication net, have given rise to fresh investigations; see further *In the matter of an application by Margaret McQuillan for Judicial Review* [2019] NICA 13.

assurance against prosecution,³⁶ however odd the process by which it has arisen, which those who served lack. And the strictures of Article 2, given the force of domestic law by *Re McCaughey*, equip claimants to challenge the authorities by alleging failures to investigate or to investigate to an Article 2 standard. This must and does incentivise political opponents of British rule to continue their political struggle by demands and complaints that keep an undue focus on state agents.

At this length of time, with many cases often concerning events close on half a century ago, it will be difficult to prosecute charges fairly or to secure convictions.³⁷ It is unfair to those who served, who were investigated at the time and assured that they would not face charges (or who faced charges and were acquitted and now face some different but related charge), to have allegations reopened, to be investigated again on suspicion of murder (or other very serious offences), and to face prosecution. The unfairness remains even if most cases will not result in prosecutions and most prosecutions will fail to result in convictions.

It is possible that the courts may in the end dismiss some prosecutions on the grounds that they constitute an abuse of process (recall that murder charges against John Downey were dismissed on this ground, by reference to the “comfort letter” he was erroneously sent). As a general matter, the courts may stay proceedings on the grounds either that it is not possible for the accused to receive a fair trial or that the accused should not be standing trial at all. In the latter case, the stay of proceedings is intended to protect the integrity of the criminal justice system. In exceptional cases, delay in bringing a prosecution may itself amount to an abuse of process, especially if evidence has been lost, which makes it difficult for the accused to defend the charges against him.³⁸ It will sometimes be an abuse of process to bring proceedings in breach of a promise not to prosecute, especially if the accused relied on the promise to his detriment.³⁹ More generally, prosecuting authorities recognise that a suspect who is informed that a decision has been made not to prosecute him is entitled to rely on that decision, which should not ordinarily be revoked.⁴⁰ The decision may be revoked if new evidence comes to light, of course, but also if a review of the decision concludes that the original decision was wrong and that in order to maintain confidence in the criminal justice system a prosecution should now be brought. If such a prosecution were subsequently to be stayed for abuse of process, which may be a risk, this would obviously not maintain confidence.

In many cases, prosecutions of former service personnel are being brought notwithstanding an earlier decision not to prosecute, a decision on which they were entitled to rely. Even if a prosecutor now might be minded to prosecute, it does not follow that the original decision was wrong. And even if it was wrong, it is not obvious that prosecuting now will help maintain confidence in the criminal justice system. It is true that serious offences should usually be tried if there is a reasonable chance of securing a conviction. But the extreme delay in deciding now to prosecute clearly overturns expectations, not only of the accused in question but of

36. The Government responded to the Hallett Report by stating that no OTR should rely on a letter received and that the Crown reserves the right to prosecute regardless of such a letter: Rt. Hon. Theresa Villiers, Secretary of State for Northern Ireland, Statement to the House of Commons, September 9, 2014. However, a risk remains the letters will be used successfully to resist prosecutions in other cases. See further n7 above.

37. In the context of historical allegations arising out of the Kenyan Emergency, the courts have noted the difficulty of fairly trying a case many decades after the events in question, where the passage of time and consequent loss of key witnesses and documents makes it impossible for the defendant to meet the claim on its merits: see *Kimathi & Ors v the Foreign and Commonwealth Office* [2018] EWHC 3144 (QB) at [315-318].

38. *R v S (SP)* [2006] 2 Cr App R 23

39. *R v Abu Hamza* [2007] QB 659; see also *R v AJ* [2019] EWCA Crim 647

40. In England and Wales, see section 10 of the Code for Crown Prosecutors; in Northern Ireland, see sections 4.59-4.65 of the Code for Prosecutors.

UK forces more generally. In the absence of compelling new evidence, overturning a decision not to prosecute must risk undermining the confidence that UK forces, and the UK public, have in the criminal justice system. This is a reason for prosecutors not to revoke earlier decisions not to prosecute. And it suggests that some prosecutions may be stayed for abuse of process, the risk of which should encourage further caution on the part of the authorities. However, the abuse of process jurisdiction is a thin reed on which to assure those who served that they are not exposed to unfair proceedings. Courts are rightly reluctant to stay proceedings, the abuse of process jurisdiction is discretionary, and a stay will not avoid the indignity and distress which investigation and prosecution involve. That is, while some prosecutions of former service personnel may constitute abuses of process, and some may be dismissed on this ground, this is no full answer to the unfairness to which they are exposed.

The likelihood that very few convictions will result makes the entire exercise dubious. Putting aside the risks of Article 2 litigation, prosecuting authorities would have robust discretion to decide which cases it was in the public interest to investigate and prosecute and might be likely to conclude that these cases did not fit the bill. But the political pressure to investigate, and the legal/judicial pressure to investigate state agents in particular, makes it difficult for prosecuting authorities to reverse course, notwithstanding the general position about undoing decisions not to prosecute. It is unfair to keep in play a distressing process of investigation and reinvestigation. Those who served were not granted, and do not ask for, impunity from the law. But having been investigated at the time, they should not continue, long after the events in question, to be subject to legal risk. We owe it to them to bring this process to an end, to assure them that it is now settled.

II. Other conflicts: Iraq, Afghanistan and future operations

The soldiers who fought in Iraq and Afghanistan understood those operations to be subject to service law, criminal law, and the law of armed conflict. While troops were still in the field, some key operational decisions, including in relation to detention of enemy combatants or their transfer to allied forces, were challenged in the English courts. This was only the beginning. The aftermath of both conflicts, especially Iraq to date, has been hundreds, if not thousands, of allegations of civil wrongs or human rights violations. Some wrongs were committed and some soldiers have been prosecuted for unlawful uses of force.⁴¹ However, many allegations were entirely fabricated, as the *Al-Sweady* inquiry concluded in late 2014.⁴² The allegations led to the creation of the Iraq Historical Allegations Team (IHAT). The opportunities for domestic litigation were at first limited by the judgment of the House of Lords in *Al-Skeini v Secretary of State for Defence*,⁴³ which held that the HRA only applied outside the UK in highly limited, exceptional cases. The House of Lords noted the difficulties of applying the ECHR outside the UK (or the territory of the Council of Europe), including difficulties in relation to evidence-gathering in dangerous, unfamiliar conditions.

This authoritative ruling about the scope of the HRA had relied on an earlier ECtHR judgment, *Bankovic v Belgium*,⁴⁴ which understood the reach of the ECHR to be limited largely to the territory of the member state. (The ECHR requires states to secure the convention rights of those within its “jurisdiction” and this term was understood in *Bankovic* to be largely territorial.) This judgment was in effect reversed and overruled by the ECtHR’s ruling in *Al-Skeini v United Kingdom*,⁴⁵ which nevertheless was followed more or less unquestioningly by our Supreme Court in *Smith v Ministry of Defence*,⁴⁶ which arguably even extended the reach of the novel and highly destabilising *Al-Skeini* doctrine. The ECtHR introduced a novel understanding of “jurisdiction”, which extended its reach, as subsequent cases confirmed, to any context in which the state exercised power, including by using force, in relation to another.

The main significance, for present purposes, of the Court’s ruling was retrospectively to extend Article 2 to the use of force by UK forces in Iraq and Afghanistan. This meant that the substantive standard for the lawful use of force was established by European human rights law (which requires

41. Arabella Lang, *Iraq Historic Allegations Team*, House of Commons Library Briefing Paper, CBP 7478, 22 January 2016.

42. This should not be a surprise. There is nothing new about insurgent groups fabricating allegations of abuse against security forces as a tactic. This was a tactic employed by the Mau Mau, for example: *Kimathi & Ors v the Foreign and Commonwealth Office* [2018] EWHC 2066 (QB) at [314], quoting Frank Kitson, *Gangs and Counter-gangs* (Barrie & Rockcliff, 1960), 46. See also Penny Mordaunt, Secretary of State for Defence, *Legal Protections and Support for Armed Forces Personnel and Veterans*: Written statement – HCWS 1575, 21 May 2019: “IHAT was established with the best of intentions but was hijacked by unscrupulous lawyers who argued for an expansion of our investigative obligations. It spiralled from a two-year investigation into around 100 allegations to more than 3,500 allegations.”

43. [2007] UKHL 26

44. [2001] ECHR 890

45. [2011] ECHR 1093

46. [2013] UKSC 41

only such force as is minimally necessary) rather than the law of armed conflict (which makes combatants liable to lethal force). Perhaps even more importantly, it extended to the UK the Article 2 procedural obligation to investigate cases in which state agents may be responsible for a death and to punish unlawful killing. Thus, the ECtHR held the UK to be in breach for having failed in Iraq to have undertaken independent investigations into all the circumstances in which deaths took place, including deaths of enemy combatants and others who may have been killed by UK forces. The British military did not frame its operations abroad around an Article 2 investigative obligation, partly because that duty was understood not to extend outside the UK and partly also because it may have been judged often to have been impracticable.

The rationale for initiating and maintaining IHAT was partly concern that the International Criminal Court might otherwise assume jurisdiction over the allegations in question.⁴⁷ But the scope of IHAT was greatly expanded over time, partly by way of threat of domestic litigation. And the way in which IHAT operated was revised over time, again partly by way of domestic litigation. This resulted in some former service personnel being investigated and reinvestigated multiple times, which was understandably distressing. IHAT did not result in any criminal prosecutions. It was closed down in June 2017 but part of its work continues by way of Service Police Legacy Investigations,⁴⁸ which on 31 March 2019 had a caseload consisting of 18 full investigations and 13 directed lines of enquiry, having closed, or in the process of closing, 1133 allegations since 1 July 2017.⁴⁹ In addition, there are around 1,400 judicial review claims and 1,000 compensation claims underway against the Ministry of Defence in relation to operations in Iraq.⁵⁰ In relation to Afghanistan, the number is significantly lower, with 10 judicial review and around 90 compensation claims; however, more claims may well be lodged against the Ministry of Defence once the national security situation in Afghanistan improves.

While the Ministry of Defence is the defendant, these claims inevitably turn on the conduct of service personnel and expose them to judicial scrutiny of their service, with consequences for reputation and career and the possibility of subsequent prosecution. The same is true, in a different context, for claims made by the families of deceased soldiers, which allege that deaths on the battlefield result from negligence.⁵¹ These actions do not directly expose service personnel to liability, but they make military action subject to the ordinary courts, risking “the judicialisation of war”, as some senior judges have noted with concern.⁵² They also in effect expose the actions of personnel to second-guessing in a court of law, which is not the right forum for such review.

The problem has also arisen in relation to much older deployments, such as operations in Kenya, Malaya and Cyprus. Not all litigation arising from these conflicts has advanced far – the Kenyan Emergency Group Litigation has been dismissed because the judge found he could not extend time, per section 33 of the Limitation Act 1980, in view of the prejudice suffered by the defendant in meeting such stale claims.⁵³ But the risk that military

47. Defence Committee, *Who guards the guardians? MoD support for former and serving personnel*, HC 109, 10 February 2017, para. 117. “In oral evidence, the Secretary of State for Defence [Rt Hon Sir Michael Fallon MP] argued that the ICC’s monitoring of IHAT required the continuation of the IHAT investigations: ‘If we were unable to demonstrate that these [criminal allegations] were being properly investigated, we could have ended up [...] opening the way to the International Criminal Court. That would have got us into a far more difficult situation.’ He added that the UK was ‘being watched very closely by the International Criminal Court’, and he had to have ‘regard to that.’”

48. The Secretary State for Defence announced the closure of IHAT on 5 April 2017.

49. Service Police Legacy Investigations – Quarterly Update – 1 Jan 2019 to 31 Mar 2019.

50. Interview, Ministry of Defence, 31 January 2019.

51. R Ekins, J Morgan and T Tugendhat, *Clearing the Fog of Law* (Policy Exchange, 2015)

52. *Smith v Ministry of Defence* [2013] UKSC 41, per Lord Mance at [150].

53. *Kimathi v Foreign and Commonwealth Office* [2018] EWHC 3144 (QB); see further: J Duke-Evans, R Ekins, J Marionneau and T Tugendhat, *The Collapse of the Kenyan Emergency Group Litigation: Causes and Consequences* (Policy Exchange, 2018).

action undertaken now will give rise to legal liability, for Government and for individual soldiers, years in the future is a very real one. The risk is especially pronounced in view of the fact that litigation is sometimes initiated by enemy combatants – the abuse of English legal processes is a known tactic of some insurgent groups⁵⁴ – and, as this paper has shown, often involves the retrospective application of new legal standards to past action, effectively displacing the law of armed conflict and rules of engagement on which soldiers will have relied when serving. This drift in the law is not consistent with the rule of law. As General Sir Nick Carter KCB DSO ADC chief of the Defence Staff said “we need to watch carefully that the effects of lawfare – i.e. the often vexatious exploitation of our legal system by others to de-legitimise the use of military force, to distract us and to sow discord and doubt in the public mind about the validity of the cause – do not undermine the confidence of our junior leadership”.⁵⁵

There must be real concerns about the impact of this litigation on morale,⁵⁶ recruitment and operational effectiveness.⁵⁷ The spectacle of former service personnel being reinvestigated in relation to events from half a century ago, or investigated and reinvestigated in relation to battlefield operations in Iraq more than a decade ago, will not reassure serving personnel, or prospective recruits, that the nation values their service. Future operations may also be more directly prejudiced insofar as fighting subject to European human rights law will risk litigation challenging operational decisions and imposing an unsound legal standard, which departs from the law of armed conflict.⁵⁸ There is a further risk that even when certain actions and operations would be found to be entirely legal, a culture of risk aversion – a culture antithetical to combat effectiveness – will take hold regardless.⁵⁹ That law protects the right to life of enemy combatants and civilians within limits that recognise the realities of war (protecting captured combatants from abuse; preventing civilians from ever being the targets of force). Extending a broad and stringent duty to investigate the circumstances in which deaths occur will simply not be tenable in many operational contexts. UK forces should be trained and structured to observe the law in the course of operations, including to hold to account soldiers who violate the law, but this does not require allowing European human rights law to displace the law of armed conflict.

For the time being, the UK is not engaged in large-scale military operations. This makes it all too easy to overlook or discount the legal problems that are likely to arise in future; it should instead provide an opportunity to make effective provision now for a sensible legal framework.

54. See n42 above. Litigation in Northern Ireland also often has a political dimension.

55. General Sir Nick Carter KCB CBE DSO ADC at the annual chief of staff lecture, 11 December 2018, RUSI Whitehall.

56. Defence Committee, *Who guards the guardians? MoD support for former and serving personnel*, HC 109, 10 February 2017, para. 29. For a more personal reflection, see: Brian Wood, *Double Crossed: A Code of Honour, A Complete Betrayal* (Virgin Books, 2019).

57. Lucy Fisher, “David Petraeus: Call to cease ‘lawfare’ on war veterans”, *The Times*, 19 October 2018. “David Petraeus has raised concerns about the spread in Britain of ‘lawfare’, the legal pursuit of soldiers over alleged actions on the battlefield. ‘The growing ‘judicialisation’ of conflict should concern the UK – just as it concerns me’, he said. ‘The current ‘fog of law’ may undermine the operational effectiveness of British troops engaged in multinational coalitions.’”

58. See also Colonel Kirby Abbott, “A brief overview of legal interoperability challenges for NATO arising from the interrelationship between IHL and IHRL in light of the European Convention on Human Rights” (2014) 96 (893) *International Review of the Red Cross* 107, 110: “While the NATO ROE and targeting doctrines display a very traditional IHL, ‘lex specialis’ approach, NATO does not have a doctrine per se that allows its Member States to collectively define the relationship between IHL and IHRL/ ECHR. There is a potential, therefore, for national legal approaches to diverge, including those expressly or implicitly related to IHL and IHRL/ECHR interaction.”

59. General Sir Nick Carter KCB CBE DSO ADC Gen, Chief of the Defence Staff, UK Ministry of Defence at RUSI, Annual Chief of the Defence Staff Lecture, 11 December 2018. “Taking all of this together, and recognising the extraordinary complexity of the operating environment, we need to watch carefully that the effects of lawfare – i.e. the often vexatious exploitation of our legal system by others to de-legitimise the use of military force, to distract us, and to sow discord and doubt in the public mind about the validity of the cause - do not undermine the confidence of our junior leadership. There is a risk that the cumulative impact over the past decade, of a number of judgments and legal developments, could have the potential to constrain our ability to defend our nation, our values and our interests. It matters profoundly to our Armed Forces that the next time they are employed on complex military operations, they are provided with the necessary legal and ethical framework to enable them to take the sorts of risks that are necessary to prevail against cunning and ruthless opponents.”

III. Judicial power and political responsibility

Those who served in Northern Ireland, Iraq and Afghanistan are being treated unfairly in large part because of the retrospective application of European human rights law. This is the consequence of the misuse of judicial power, which the political authorities have largely failed to answer.

In *McCann v United Kingdom*, the ECtHR transformed Article 2's content by asserting that it included a new procedural, investigative obligation. The Court's finding in *McKerr v United Kingdom* that past investigations in Northern Ireland did not comply with this obligation has overshadowed all that has followed – in Iraq and Afghanistan as well as in Northern Ireland. Whatever the merits of the investigative standards the ECtHR requires, the Court's rulings, and their domestic reception, have exposed veterans to a cycle of investigations and threat of prosecution. As Lord Brown noted in *In Re McKerr*, it is not necessarily the case that past breaches of the Article 2 procedural obligation remain continuing breaches unless and until a new investigation is commenced.⁶⁰ However, this understanding has framed events, as has the fear that the UK will be held liable before the Strasbourg Court for failing to investigate or prosecute. There are reasons to think that the ECtHR may hold that failures to prosecute constitute a breach of Article 2. In some cases, the Court has upheld “amnesty” legislation, provided a balance is maintained between the legitimate interests of the state and the interests of individuals. However, the Court has also taken the view that amnesties are generally prohibited by international law and it may yet rule that amnesties are inconsistent with the ECHR and, relatedly, that all serious allegations must be prosecuted.⁶¹

In *Al-Skeini v United Kingdom*, the ECtHR extended the reach of the ECHR by revolutionising the meaning of “jurisdiction” in Article 1 of the Convention. The Court thus departed from its much more sensible, and otherwise authoritative, ruling in *Bankovic*, greatly expanding the types of state action that are now taken to be subject to European human rights law.

Our own courts have permitted these changes to transform the HRA, departing from Parliament's lawmaking intention in 1998. The HRA was intended to apply only to events arising after it came into force, yet in *Re McCaughey* our courts have followed the Strasbourg Court and imposed duties in domestic law in relation to Troubles-related deaths. The scope of these duties is uncertain, as noted, but the transformation of the HRA's temporal scope is wrong.

Likewise, the HRA was intended to apply either only within the

60. [2004] UKHL 12 at [94-97], per Lord Brown; Lord Hoffmann and Lord Rodger agreeing at [68] and [82] respectively (the point was not strictly necessary for resolution of the case).

61. M Jackson, “Amnesties in Strasbourg” (2018) 38 *Oxford Journal of Legal Studies* 451: “So far, the European Court of Human Rights (the Court, ECtHR) has not heard a similar direct challenge to an amnesty law. But when that case comes, as it likely will, there is a good chance that the Court will make a serious error. That error will be to hold that the Convention requires *in all circumstances* the prosecution of perpetrators of gross human rights abuses. It will be to hold that amnesties for the most serious abuses are always impermissible under the Convention. Such a decision would be legally, politically and institutionally indefensible.”

territory of the UK, or at least only within the “jurisdiction” of the UK, in a primarily territorial sense. Lord Bingham in *Al-Skeini v Secretary of State for Defence* dissented from the majority’s view that the HRA had the limited extra-territorial effect necessary to track the meaning of “jurisdiction” in the ECHR itself: he reasoned that the Act only applied in the UK. The majority followed *Bankovic* and rejected the idea that the ECHR might simply apply wherever UK forces were present. Yet this is how the HRA is now understood, thanks to the Supreme Court’s willingness, confirmed in *Smith v Ministry of Defence*,⁶² to take the HRA to extend anywhere and everywhere necessary to satisfy the ECtHR.⁶³ The Supreme Court should instead have held fast to either the majority or minority positions in *Al-Skeini v Secretary of State for Defence*, on the grounds that Parliament in 1998 did not intend the HRA to have the sweeping extra-territorial effect that the ECtHR in 2011 imposed upon the ECHR itself.

The HRA in practice is now radically different in scope to what Parliament enacted. This is confirmed by Jack Straw’s evidence to the Defence Committee in 2014, where he advised that it was certainly not anticipated, when the HRA was enacted, that it could apply to military operations abroad.

Successive governments have not responded robustly or imaginatively to these legal changes. On the contrary, they have taken themselves to be sharply limited in their room for manoeuvre by the threat of litigation, either in domestic courts or before the ECtHR. Clearly, the Government must comply with judgments of UK courts. But it retains the option of proposing that Parliament enact legislation that would require different judgments. This option it has not pursued,⁶⁴ seemingly on the grounds that it would in due course result in an adverse ruling before the ECtHR, with which the UK would be legally required to conform.⁶⁵ Hence, the Government has failed to consider amending the HRA to restore its limited temporal and territorial scope. It has attempted to avoid the risk of liability by keeping investigations ongoing, by reinvestigating allegations when this is thought prudent to minimise liability, and widening the scope of investigations on a similar calculus.

This reasoning is clearly evident in the sorry litany recounted in the previous sections of this paper. It is also apparent in the Ministry of Defence’s recent written evidence to the Defence Committee. Responding to the written evidence of Richard Ekins,⁶⁶ the Ministry of Defence fails to see any point in amending the HRA to restore the discretion to discontinue investigations or decide not to prosecute, on the grounds that the exercise of such discretion would risk the UK being held liable before the ECtHR.⁶⁷ The Ministry of Defence takes it to be axiomatic that the UK simply must comply with judgments of that Court, even judgments that openly depart from the ECHR’s terms.⁶⁸ It also asserts that “it is difficult to see how” amending the HRA “could have an effect on ongoing proceedings without offending against the principles of non-retrospectivity and legal certainty.”⁶⁹ This analysis fails to recognise that the legal problem we face consists in the ECtHR having changed the meaning of the ECHR with

62. [2013] UKSC 41

63. See also *Al-Saadoon & Ors v Secretary of State for Defence* [2015] EWHC 715 and *Serdar Mohammed & Others v Secretary of State for Defence* [2015] EWCA Civ 843. In *Al-Saadoon*, Leggatt J recognised that it was certainly an “unattractive” prospect that, “if the UK becomes involved in a war or peacekeeping operation overseas, every enemy soldier or civilian who is killed or wounded by British forces is entitled to an investigation into whether the killing or wounding was lawful and, if it was unlawful, to claim compensation from the UK”.

64. See further The Ministry of Defence’s response to Professor Ekins’ written evidence to the Defence Committee, 18 April 2019, published by the Defence Committee on 25 April 2019: “The Human Rights Act gives further effect to the ECHR in our domestic law, and we are not considering amending or repealing it.”

65. *Ibid.* “Under Professor Ekins’ proposals, it would no longer be possible to bring a claim before the domestic courts for a human rights violation that occurred overseas or before 2000. It would nevertheless still be possible to bring such claims in Strasbourg.”

66. Richard Ekins, “Amending the Human Rights Act 1998”, written evidence on behalf of Policy Exchange’s Judicial Power Project submitted to the Defence Committee’s Statute of Limitations – veterans protection inquiry, 25 February 2019, expanding on oral evidence to the Committee on 11 December 2018.

67. The Ministry of Defence’s response to Professor Ekins’ written evidence to the Defence Committee, 18 April 2019, published by the Defence Committee on 25 April 2019

68. *Ibid.* The Ministry’s evidence does not note that the ECtHR invented the investigative obligation, which is not to be found in the text of the ECHR. See further nn2-3 above.

69. *Ibid.*

retrospective effect, the domestic legal effect of which turns on domestic judicial misinterpretation of the HRA. Legislating to restore the legal position as understood by our senior courts in *Al-Skeini* and *In re McKerr* would vindicate the rule of law, not violate it as the Ministry of Defence wrongly asserts. The legalistic caution seemingly at work in the Ministry's thinking inhibits the Government from protecting those who served. The Government should be willing to restore the HRA's intended scope, to introduce measures that protect those who served, and to stand by those measures even in the face of opposition from the ECtHR.

True, the Government has said it will derogate from the ECHR in relation to future operations. However, the Ministry of Defence's recent evidence glosses this commitment, reducing it to an undertaking to "consider derogating from certain Articles of the ECHR in respect of significant future military operations if appropriate in the particular circumstances",⁷⁰ whereas in fact the Government should derogate in relation to *all* future operations.⁷¹ Further, while derogation is an important action, it does nothing to address the plight in which UK troops now find themselves. Also, derogation is vulnerable to legal action, domestic and European, and on past form the Government will fail to stand its ground in the face of such action. What assurance do soldiers who are serving now have that they will not be subject to similar abusive practices in future? In any case, this is not just about what personnel will be forced to endure but about how operations will be fought and about the capacities of third-parties, including enemy combatants, to frustrate military action, including ongoing operations, in our own courts. The *status quo* has already given rise to concerning and confusing scenarios such as the uncertainty as to whether and for how long British forces could detain enemy forces in Afghanistan. An ISAF rule requiring the release or transfer of detainees to Afghan authorities after 96 hours was put in place in order to avoid confusion over different legal regimes and national approaches toward the detention of insurgents in Afghanistan. The 96 hour authority to detain has since been the subject of litigation in the United Kingdom in the *Serdar Mohammed* case,⁷² which highlighted a divide between nations such as the United States and Canada that have relied on a customary IHL basis for such detention and European ones requiring an ECHR justification. The UK court rejected an IHL basis and relied instead on a United Nations Security Council Resolution authority.⁷³ The Government should derogate from the ECHR in all future operations; it should invite Parliament to legislate to protect derogation from challenge in the domestic courts; and it should resist future ECtHR judgments that attempt to quash such derogation.

In relation to Northern Ireland, the problems caused by judicial action are compounded by the Government's misapprehensions about what is politically tenable. The focus of the GFA and related measures has been on terrorists, which has left the security forces relatively disadvantaged. Measures to bring investigations or prosecutions to an end should not be thought to treat those who served as if they were equivalent to terrorists. Rather it would be to protect the position of those who need protection.

70. *Ibid.*

71. See Richard Ekins, supplementary written evidence to the Defence Committee, 9 May 2019.

72. [2017] UKSC 2

73. K Watkin, "Accountability Fatigue: A Human Rights Law Problem for Armed Forces?" Just Security Blog, 1 November 2018.

This would be an amnesty only in the sense that it offered relief from persecution, not in the sense that it acknowledged or forgave wrongdoing. The dismissal of the Attorney General for Northern Ireland’s proposal to draw a line under the past was overly hasty. Likewise, the Government has wrongly followed the DUP’s lead in assuming that historic investigations should continue. The DUP’s hope that the focus of these investigations will somehow be on terrorists rather than soldiers (and police and others in the security forces) is unrealistic.

As has been widely reported, the Prime Minister rejected proposals for a statute of limitations on the grounds that any such statute would have to be of universal application, otherwise the ECtHR would rule against it, and that any such universal statute would be rejected by the DUP as an amnesty.⁷⁴ Both reasons are wrong. The UK should not hold back from enacting a specific statute of limitations on the grounds that it risks ECtHR challenge. There may be reasons not to enact such a statute in any case, because of concerns about its political reception in Northern Ireland and the peace process, and the political salience of the ECtHR’s ruling is relevant to this end. But the Government should decide for itself whether a specific statute of limitations is a just solution to the predicament facing veterans, rather than outsourcing that judgment to the courts. This set of strictures – surrender to the courts even before litigation is joined and surrender to the DUP’s antipathy towards a general resolution and enthusiasm for historical investigations – hamstring the Government’s response to the plight of those who served. The strictures must be lifted.

The Government has proposed one narrow solution and is reportedly contemplating other modest responses.⁷⁵ The proposed solution is to legislate to establish a presumption against prosecution after ten years, which would mean that prosecutions would only be brought in exceptional circumstances. This legislation is proposed for cases outside the UK, and thus would extend to conflicts in Iraq and Afghanistan but not to historical investigations from Northern Ireland.⁷⁶ The solution is along the right lines but is focused on prosecutions only, rather than on investigations, which are equally important. The proposal, if enacted, would also be vulnerable to litigation, deploying section 3 of the Human Rights Act 1998 (HRA) to interpret “exceptional” to mean whenever was necessary to avoid an Article 2 breach.⁷⁷ The courts have interpreted analogous sentencing provisions in similarly strained ways.⁷⁸ And even if the courts were to hold back from undermining the statute in this way, there would be a risk they would denounce it by way of section 4 of the HRA.⁷⁹ Would the Government and Parliament resist this pressure?

Other changes that are reportedly being considered include requiring the Attorney General’s consent before a prosecution may be brought.⁸⁰ This would be a useful protection for former UK forces and others in the security forces (if the relevant legislation extends to them). There might be a risk that if the discretion remains in the hands of Northern Ireland law officers, the protection may prove illusory, subject to the dispositions of the incumbent at the relevant point in time and the pressures to which he

74. Anna Mikhailova, “Veterans of the Troubles ‘were thrown to the wolves’” *Daily Telegraph*, 23 May 2019

75. Penny Mordaunt, Secretary of State for Defence, *Legal Protections and Support for Armed Forces Personnel and Veterans*: Written statement – HCWS 1575, 21 May 2019: “To address the basic unfairness of repeated investigations many years after the event, I intend to undertake a short public consultation on measures which I believe should be taken forward in legislation. One of the measures this consultation will include is a statutory presumption against prosecution of current or former personnel for alleged offences committed outside the UK in the course of duty more than 10 years previously, and which have been the subject of a previous investigation. This is not the same as a statute of limitations or amnesty, but it will mean that prosecutions in such circumstances should not be considered to be in the public interest, except in “exceptional circumstances”.

76. *Ibid.* “Our obligations to veterans who have served in Northern Ireland remain the same as those who served in other theatres. I have agreed with the Northern Ireland Secretary that my Department will provide formal input to any process taken forward by the Northern Ireland Office resulting from the Stormont House Agreement. I understand the importance of making sure this process is fair and has the trust of all sides, supporting the commitments of the UK and Irish governments to the Belfast Agreement and to peace in Northern Ireland. In this spirit, we intend to share our considerable experience of the practical difficulties of investigating historical allegations from Iraq and Afghanistan and the unintended consequences that resulted from it, and the impact this has had on Armed Forces personnel. Veterans’ voices need to continue to be heard and the lessons of IHAT need to be learned.” In March 2019, it was reported that the Defence Secretary at that time, Gavin Williamson, was expected in the Queen’s Speech to bring forward legislative proposals for a statutory presumption against prosecution if the alleged offence took place more than 10 years ago, proposals which were to extend also to Northern Ireland: Caroline Wheeler and Richard Kerbaj, “Minister seeks 10-year limit on prosecutions of soldiers; Gavin Williamson is proposing protection for veterans as paratroopers await a charging decision over Bloody Sunday”, *Sunday Times*, 3 March 2019, pp.1-2.

77. Section 3 requires that, so far as it is possible to do so, legislation must be read and given effect in a way that is compatible with convention rights.

78. *R v Offen* [2000] EWCA Crim 96

79. Section 4 authorises the courts to declare that primary legislation is incompatible with convention rights; the declaration does not have any effect on the legal validity of the primary legislation in question.

80. Wheeler and Kerbaj, n76 above.

or she is subject. (But note however that the Attorney General for Northern Ireland enjoys statutory independence.⁸¹) More importantly, there would be a risk that decisions not to permit prosecution would be challenged in the courts, either on traditional judicial review grounds or by way of the HRA. Finally, the Government remains, for the time being at least, committed to implementing the Stormont Agreement. It is almost five years since agreement was reached. The process envisaged in that agreement would involve working through remaining cases, which would extend the uncertain position of veterans. The Ministry of Defence has undertaken to support veterans who are facing investigation and prosecution, but this is no substitute for assurances that they are secure.

The Supreme Court judgment in *Smith* exposed the Ministry of Defence to liability in relation to the death of soldiers on the battlefield, liability in the law of negligence and for breach of Article 2. The Government had proposed legislation to restore the Crown's immunity to negligence liability in these circumstances,⁸² legislation that fell away by virtue of the 2017 general election. In its recent response to Richard Ekins's written evidence, the Ministry of Defence resists the idea of amending the HRA to exclude its application outside the UK on the grounds that such an amendment would prevent the families of fallen soldiers from suing the Ministry for breach of Article 2.⁸³ The Ministry was right in 2013 to oppose extension of the HRA in this context and it is no good winding back negligence liability (if the Government ever were to revive the legislative proposal in question or simply to use its existing statutory powers,⁸⁴ as Policy Exchange recommended in 2015)⁸⁵ while retaining equivalent liability under the HRA. This exposure risks "the judicialisation of war", to adopt the term used by Lord Mance, dissenting in relation to negligence liability, in *Smith* itself.⁸⁶ The Government should act to bring its exposure to litigation in these circumstances to an end. This is compatible with paying full and fair compensation on a no-fault basis. The point of the change would be to prevent distortion of military action by holding over all concerned the prospect of being second-guessed in the ordinary courts and exposed to career-ending judicial criticism – a prospect from which soldiers should be protected.

81. Section 22(5) of the Justice (Northern Ireland) Act 2002

82. See *Better combat compensation: consultation document*, 1 December 2016

83. Limiting the HRA's extra-territorial effect, the Ministry of Defence says, "would additionally prevent members of the Armed Forces or their relatives from bringing claims in the domestic courts for human rights violations that occurred outside the UK. This could lead to an effect which appears punitive to members of the Armed Forces and their relatives": see the Ministry of Defence's response to Professor Ekins' written evidence to the Defence Committee, 18 April 2019, published by the Defence Committee on 25 April 2019.

84. Per section 10 of the Crown Proceedings (Armed Forces) Act 1987

85. R Ekins, J Morgan and T Tugendhat, *Clearing the Fog of Law* (Policy Exchange, 2015)

86. *Smith v Ministry of Defence* [2013] UKSC 41, per Lord Mance at [150]

IV. How to protect those who served

The position is different in relation to Northern Ireland and other conflicts. The main problem in Northern Ireland concerns the distance in time between the events in question and investigations now undertaken. In relation to other conflicts, the events are often more recent but took place outside the UK in the difficult context of military action in unstable and unsafe countries. In both contexts, the retrospective application of an Article 2 investigative obligation causes unfairness. The obligation may also cause difficulty in relation to future operations, in which it may be impractical to require an independent, wide-ranging investigation of all uses of lethal force. Often the military justice system, per service law, will pursue investigations, but the appropriateness of this will turn on the credibility of allegations and the extent to which they relate to the battlefield itself.

The UK should certainly investigate serious allegations and police its own forces. But there are limits to how long investigations should be kept underway and how far they should be subject to judicial control. Article 2 requires the courts to order investigations and to supervise their progress, in response to litigation to this end. The need, in other words, is to restore the discretion of investigating and prosecuting authorities to decide what the public interest requires. In relation to Northern Ireland, the need is also to make a clear-eyed decision about whether all investigations and prosecutions should now be brought to an end. That is, Parliament should take responsibility for determining whether, and if so when, further investigations and prosecutions are justified.

Northern Ireland

Parliament should amend the HRA to limit its temporal reach, making clear that it does not apply to deaths that predate the Act's commencement in October 2000. This would mean that one could not rely on Article 2 in domestic litigation in relation to Troubles-related deaths. This amendment would restore the intended scope of the Act, restoring the law as understood by the House of Lords upheld in *In Re McKerr*. Limiting the Act's temporal scope would prevent litigation in the domestic courts for alleged breach of Article 2 in relation to deaths during the Troubles, which would restore the discretion of investigating and prosecuting authorities not to investigate historic cases and not to bring charges. However, those who served might still need protection against politically motivated, or overly zealous, prosecuting authorities. This protection might take the form of

an absolute bar on investigations and prosecutions or it might take other forms, which we detail below.

There is a strong case for the proposal made by the Attorney General for Northern Ireland, John Larkin QC, in 2013, to draw a clear line under the past, bringing to an end all inquests, inquiries, investigations and prosecutions into Troubles-related deaths. It is now more than twenty years since the Good Friday Agreement and the number of prosecutions in the last eight years has been low. While there may yet be more prosecutions, of former security forces and terrorists, the likelihood of convictions is low and the costs of historical investigations are significant. Drawing a line under the past would give assurances to all involved that they will not be investigated further, that they do not risk trial or prosecution. Some commentators would support a bar on prosecutions but not on further investigations.⁸⁷ It is arguable that Article 2 does not necessarily require prosecutions but that it does require investigation (but note that there is a strong risk that the ECtHR may hold, in some future case, that prosecutions are required and that any legislative restriction on prosecution, especially a general amnesty or protections for state agents in particular, breaches Article 2). However, it is also arguable that there is no continuing duty to investigate, decades after the death in question and decades after, on the Court's logic, an effective independent investigation should have been provided. There is a risk of litigation, in the domestic courts and in the ECtHR, if one fails to reinvestigate Troubles-related deaths and, especially, if one investigates such a death other than by way of an Article 2 compliant process. That is, reopening investigations carries with it liability to judicial supervision intended to secure compliance with Article 2. Likewise, there is a risk of challenge if one fails to reopen an investigation if new evidence comes to light.

The main obstacle to drawing a line under the past may not be the risk of legal challenge but the political opposition to anything that is perceived, rightly or wrongly, to be an amnesty. There is an important difference in principle between a limitation period, which recognises the significance of the passage of time for the fairness of judicial proceedings, and an amnesty. Prohibiting further investigations and prosecutions would not be a decision that acts that were criminal in the past should now be treated as if they were not criminal. Rather, it would be a decision that further investigations and prosecutions were not in the public interest, in view of the unfairness to those who had already been investigated, the limited prospects for conviction, and the resource implications. It is possible that there would be widespread political opposition to a categorical rule, on the grounds that it would foreclose any prospect of justice in relation to some historic murders. Some might also object that it is unjust to those who served to subject them to the same rule as terrorists. The answer to this point is that the problem may very well be that they are now treated worse than terrorists.

The alternative to a general prohibition on further investigations and prosecutions is a statute of limitations that would provide assurance that

87. Consider written evidence submitted by Professor Kieran McEvoy to the Defence Committee's inquiry into Investigations into fatalities in Northern Ireland involving British military personnel, 7 March 2017, concluding that a statute of limitations which sought to bar criminal prosecutions would be lawful only if, inter alia, it did not negate "the rights of victims under Article 2 or 3 of the European Convention on Human Rights to an effective investigation into what happened and to possible reparations."

prosecutions would be exceptional and investigations would be targeted. A statute of limitations of general application would be similar to a general prohibition, but would enable some cases to proceed if new evidence were discovered.⁸⁸ A statute that applied only to soldiers or the security forces would be harder to justify and would risk challenge in the European and domestic courts. More promising would be a statute of limitations that applied to cases that had been investigated in the past, where a decision to prosecute or not to prosecute had been made. In such cases, one could rule out further investigations or prosecutions unless compelling new evidence had come to light, evidence which could not be sought simply by reopening old investigations to see what they now suggest or what could now be found.

Legislation to this effect might proceed by analogy to Part 10 of the Criminal Justice Act 2003, which permits retrial of serious offences for which a person has been acquitted. For a retrial to be permissible, prosecutors must apply to the Court of Appeal for an order quashing the acquittal and ordering a retrial.⁸⁹ The Court of Appeal may only make such an order if there is new and compelling evidence and if a retrial is in the interests of justice.⁹⁰ Evidence is not new if it was raised during the first trial.⁹¹ Evidence is compelling if it is reliable, substantial and highly probative.⁹² In thinking about the interests of justice, the Court is to have particular regard:⁹³ to whether circumstances now make a fair trial unlikely, to the length of time since the alleged offence (which may be relevant in particular to the prospect of a fair trial), to whether new evidence would have been brought to bear in the first trial but for a failure by an officer or prosecutor to act with due diligence or expedition, and to whether since the trial an officer or prosecutor has failed to act with due diligence or expedition. The point is that the further one travels from the alleged offending and from the first trial the stronger the case against reopening proceedings, even if there is new and compelling evidence. The same holds when the reason for delay is due to the failures of officers or prosecutors, which should not ordinarily be a reason to reopen proceedings. The legislation also limits the state's freedom to investigate offences in relation to which a person has been acquitted, requiring the consent of the Director of Public Prosecutions (DPP) before a person is arrested or his property is seized or his fingerprints taken and so forth.⁹⁴ This consent is only to be given if the DPP is satisfied that there is, or is likely as a result of the investigation to be, sufficient new evidence to warrant the investigation and if it is in the public interest for the investigation to proceed.⁹⁵

This legislation applies in Northern Ireland and so will protect any person acquitted of an offence. However, the legislation may provide a useful model for wider reform. In the context of historic investigations in Northern Ireland, there is a strong case for an analogous rule that where a person has been investigated and where a decision not to prosecute has been made, or where a case has been dismissed, there can be no further investigations or charges unless and until the investigating or prosecuting authorities persuade a court (a) that there is new and compelling evidence

88. Compare the Armed Forces (Statute of Limitations) Bill 2017-2019, introduced by Richard Benyon MP, with first reading on 1 November 2017. The Bill provides that proceedings cannot be brought in a civilian court more than ten years after the alleged offence if the occurrences which might give rise to proceedings have been the subject of an investigation.

89. Criminal Justice Act 2003, section 76

90. Criminal Justice Act 2003, sections 77-79

91. Criminal Justice Act 2003, section 78(2)

92. Criminal Justice Act 2003, section 78(3)

93. Criminal Justice Act 2003, section 79(2)

94. Criminal Justice Act 2003, section 85(2) and (3), subject to section 86 "Urgent investigative steps"

95. Criminal Justice Act 2003, section 85(6)

and (b) that it is in the interests of justice for charges to be brought. In view of the distance of time since the alleged offending, often close on fifty years, fresh investigations and new charges will very seldom be justified. This is ever more the case if the original decision not to bring charges is attributed to failings by the investigating authorities at the time, for it is unfair to the accused to reopen the matter for this reason. Likewise, there would be a strong case to rule out reopening investigations where there is little prospect of new and compelling evidence coming to light and where the interests of justice would not support a subsequent prosecution in any event. Legislation to this effect could be of general application and thus extend not only to former soldiers, but to police officers and alleged terrorists. It might be of most use to those who served in the security forces, precisely because they were investigated at the time. Some prosecutions of alleged historic offences might be dismissed as abuses of process; however, this is by no means assured and in any case would not prevent harassment or distress arising by way of investigations and charges, even if they are dismissed near the end of the criminal justice process. The legislation this paper proposes, modelled on Part 10 of the Criminal Justice Act 2003, would introduce a general protection rather than relying on the abuse of process jurisdiction. This would provide assurances to those who served that if they have been investigated in the past they have nothing to fear. It would leave open the door to prosecutions in truly exceptional cases, when compelling new evidence came to light, but would limit the opportunity simply to take another look at old cases.

The proposed statute of limitations would apply to allegations that have been investigated. In most cases it will be clear whether this condition has been met, but there is a risk that courts might interpret “investigation” in strained ways and the legislation should be carefully drafted to minimise this risk. Relatedly, it would be important to prevent any such legislation from being distorted or denounced by way of HRA litigation. Amending the HRA to restore its limited temporal scope would prevent the Act from being used (per section 3) to misinterpret the statute of limitations or (per section 4) to declare it to be inconsistent with convention rights.

The Government should propose amendments to the HRA and a general statute of limitations of the kind noted above. This would replace the commitment in the Stormont Agreement in relation to historic cases, a commitment which has been overtaken by the failure to form a government and the passage of time, which steadily reduces the prospects of successful investigations and prosecutions.

In addition to these legislative changes, Parliament should enact legislation specifying that no prosecution may be brought against a (former) British soldier in relation to historic allegations without the consent of the Attorney General for England and Wales, the country’s leading law officer who is responsible to the Parliament of the United Kingdom. This would involve a partial departure from the devolutionary settlement, which would otherwise leave decisions about law enforcement in Northern Ireland to the devolved authorities, but one that is justified

in principle by reference to (a) the nation's collective obligation to ensure that those who serve are treated fairly and (b) the importance of preventing military morale from being undermined.

Parliament should also consider introducing a further protection for those who served. Many historic allegations turn on whether the use of force by a member of the security forces was reasonable. Section 3 of the Criminal Law Act (Northern Ireland) 1967 provides that "A person may use such force as is reasonable in the circumstances in the prevention of crime, or in effecting or assisting in the lawful arrest of offenders or suspected offenders or of persons unlawfully at large." There is a strong risk of unfairness in second-guessing judgments made decades ago about the reasonableness of the use of force, which was honestly if perhaps mistakenly exercised in order to perform an arrest or to prevent crime (including crime likely to result in loss of life). Parliament should consider forbidding prosecution or further investigation of allegations in which section 3 will be the ground of defence unless and until the Attorney General for Northern Ireland certifies that in his or her view there was no honest belief in the reasonableness of the use of force. This would sharply limit prosecutions that involve second-guessing judgments made in the heat of the moment, but would not rule out prosecutions in relation to allegations of planned killing.

If litigation is brought before the ECtHR challenging these changes, it should be robustly resisted. The UK should argue that any breaches of Article 2 are no longer ongoing, that legislation to prevent unfair trials and to protect persons already investigated lies within the margin of appreciation, especially in the context of addressing the legacy of a long-running conflict. If the ECtHR were foolish enough to denounce this legislation as a breach of the ECHR, then the UK should stand ready to defy the Court in order to protect those who served from injustice. That is, the Government should not propose and Parliament should not accept proposals to amend relevant legislation. The retrospective application of the HRA is unjust and should not be tolerated. Neither should our authorities surrender to the ECtHR responsibility for determining whether continuing investigations and risk of prosecution is fair in view of the passage of time and so forth. We set out below a more general case for principled defiance of the Court, which should frame government policy.

Other conflicts

In relation to conflicts outside the UK, including in Iraq and Afghanistan or conflicts yet to be fought, the way to protect veterans is to amend the territorial scope of the HRA, which would mean that Article 2 did not apply to events outside the UK (subject to limited exceptions for which legislation might provide) as a matter of domestic law. This would prevent claimants, including sometimes enemy combatants, using our courts to require and to supervise investigations into our troops. It would be for responsible authorities to exercise their discretion as to which allegations to investigate and how best to do so in view of the circumstances in which

they found themselves. In relation to future operations the UK should also exercise its Article 15 right to derogate from the ECHR, which would limit the scope of the ECHR's application to operations to some extent. This derogation would be vulnerable to challenge in domestic courts as well as in the ECtHR – it is possible the courts would rule that derogation was only possible in the context of a war that threatened the life of the nation rather than in time of war simpliciter.⁹⁶ Still, for so long as the UK remains party to the ECHR, we should avail ourselves of the right to derogate. This would supplement, but would not replace the need for, amendment of the HRA to restore the Act's intended territorial scope, which is either solely within the UK, if one follows Lord Bingham, or outside the UK only in the limited sense contemplated in *Bankovic*, if one follows the other judges in *Al Skeini* in the House of Lords. Either way, amending the Act's territorial scope, with retrospective effect, would prevent its problematic application to all or most military action in Iraq and Afghanistan. This would free our authorities to bring the cycle of reinvestigation to an end.

Amending the HRA's territorial scope and terminating Article 2 litigation in our courts in relation to military action abroad would likely invite litigation before the ECtHR. The UK should maintain that the ECtHR has subverted the ECHR, extending it beyond the scope agreed by the member states in 1950. The UK should refuse to comply with the ECtHR's departure from *Bankovic* as with other cases in which the ECtHR brazenly remakes or abandons the ECHR's terms. Note that in relation to prisoner voting the UK did not conform to the ECtHR's ill-considered judgments. The UK should be at least as willing to protect those who served in the armed forces as it is to maintain the disenfranchisement of those serving time in prison.

The case for principled defiance of European courts acting in excess of their jurisdiction has been made, more or less expressly, by leading UK judges and it articulates principles that should govern the relationship between international tribunals of limited competence and sovereign states.⁹⁷ In relation to prisoner voting, the UK rightly refused to comply with the Strasbourg Court's misinterpretation of the Convention.⁹⁸ The impasse has been brought to an end by way of an apparent compromise, but in effect (and by design) the UK has not changed the laws that the Strasbourg Court ruled were in breach of the Convention right to vote.⁹⁹ On the contrary, the Committee of Ministers has accepted as sufficient the UK's proposal to leave the legislation entirely unamended and in force, and merely to warn convicted offenders that one consequence of imprisonment is incapacity to vote and to permit some offenders on temporary license to vote. If Parliament and Government are serious about protecting veterans from legal abuse, and about bringing to an end the improper extension of European human rights law to military action abroad and to events far in the past, then they must be willing to defy Strasbourg on this matter. The alternative would be to commit to withdrawal from the Convention itself.

It is sometimes suggested that ministers and civil servants are constitutionally obliged, whether by the principle of the rule of law or otherwise, not to promote legislation, or otherwise to act, in ways that

96. See *R (Al-Jedda) v Secretary of State for Defence* [2007] UKHL 58 at [38] per Lord Bingham; *Smith v Ministry of Defence* [2013] UKSC 41 at [60] per Lord Hope and *Serdar Mohammed v Secretary of State for Defence* [2017] UKSC 2 at [45] per Lord Sumption.

97. In *R (on the application of HS2 Action Alliance Limited v Secretary of State for Transport* [2014] and *Pham v Home Secretary* [2015] UKSC 19, Lord Mance outlined grounds on which the Court might refuse to give effect to judgments of the Court of Justice of the EU that either (a) compromised fundamentals of the UK constitution or (b) flouted the Treaties of the EU, such that the Court of Justice was outside its jurisdiction.

98. *Hirst v United Kingdom* (No. 2) (2005) (74025/01), 6 October 2005; for criticism of *Hirst* and its progeny, see Lord Sumption, "The Limits of Law" and "A Response" in NW Barber, R Ekins, and P Yowell (eds.), *Lord Sumption and the Limits of the Law* (Hart Publishing, 2016), 22-23, 221-222 and J Finnis, "Prisoners' Voting and Judges' Powers", chapter 12 in G Sigalek, G Webber and R Dixon (eds.), *Constitutional Dialogue: Rights, Democracy, Institutions* (Cambridge University Press, 2019), 337.

99. Council of Europe, Committee of Ministers 1302nd meeting, 5-7 December 2017

risk placing the UK in breach of its treaty obligations.¹⁰⁰ There is no such constitutional principle and the limitation this would place on the UK's political authorities is inconsistent with parliamentary sovereignty and responsible government. It will often be right for ministers and civil servants to take pains to avoid action that would breach the UK's obligations in international law. But when and whether this is the case is a question of fine political judgment, for which ministers are responsible to Parliament (and which does not free civil servants to do other than give loyal service while they remain in their employment).

¹⁰⁰See *Meeting Report: the Ministerial Code and International Rule of Law*, the All-Party Parliamentary Group on the Rule of Law, 9 November 2015. Dominic Grieve MP QC chaired the meeting in question. His remarks at the meeting are summarised on p6 (emphasis added): "*The duty of Ministers is to try to reconcile international law with the law of the land. It may be that because of parliamentary sovereignty, the two are irreconcilable, but at least attempting to bring domestic law into conformity with international law is better than not attempting to so do, or actively undermining compliance with international law. Where there is compatibility, Ministers should not be thinking about ways to bring in incompatibility. Moreover, if a civil servant was asked to do something incompatible with international law, they may refuse to do it.*"

Appendix: Amending the Human Rights Act 1998

Section 22 of the HRA addresses the Act's commencement, application and extent, as well as its territorial application.

In order to limit the temporal scope of the Act, Parliament should introduce a new section 22(8):

- (8) *Nothing in this Act applies in relation to anything (including any death) occurring before 2 October 2000, or to any act or omission on or after that date in respect of such an occurrence.*

This amendment would reinstate the House of Lords's *In re McKerr* judgment. This restoration of the Act's limited temporal scope would entail that no Article 2 investigative obligation would arise in domestic law even when an investigation was initiated, or continued, or recommenced after 2 October 2000. However, the amendment could specify this even more expressly if necessary.

In order to limit the territorial scope of the Act, Parliament might introduce a new section 22(9):

- (9) *Nothing in this Act applies in relation to acts that take place outside the United Kingdom.*

This would reinstate Lord Bingham's understanding of the Act, for which the Government argued in the *Al-Skeini* litigation. This would make the Act's application somewhat more limited than the scope of the UK's "jurisdiction" in the *Bankovic* sense, for while the Strasbourg Court held that jurisdiction is primarily territorial, it did allow for some limited extra-territorial applications.

An alternative to the proposed section 22(9), which would more closely track the UK's obligations under the Convention, would be for Parliament to amend the Act effectively to incorporate the *Bankovic* understanding of "jurisdiction", rejecting the *Al-Skeini v United Kingdom* expansion. Thus, Parliament might enact two new subsections 22(9) and (10):

- (9) *This Act applies in relation to acts that take place within:*
 - (a) *the United Kingdom or,*
 - (b) *other territories over which the United Kingdom has jurisdiction or,*

- (c) United Kingdom military bases, embassies or consulates or on board craft and vessels registered in, or flying the flag of, the United Kingdom.
- (10) The United Kingdom has jurisdiction over a territory, for the purposes of section 22(9), if it has effective control of the relevant territory and its inhabitants as a result of military occupation or through the consent, invitation or acquiescence of the Government of that territory and if it exercises all or some of the public powers normally to be exercised by that Government

The risk of this formulation is that courts might interpret the proposed section 22(10) in ways that effectively reinstate the *Al-Skeini* expansion. One might then limit the scope of the Act to the places outlined in subsections (a) and (c) of our proposed section 22(9). This would largely reflect the *Bankovic* ruling and would minimise the risk of subsequent judicial sabotage.

“I share the authors’ deep concern about the continuing failure to protect our troops, both on active service abroad and in Northern Ireland, from repeated investigation and threat of prosecution long after the events in question. This paper is a hugely valuable basis for further consideration of this most difficult area of law and policy and may well point the way towards the best available solution.”

Lord Brown of Eaton-under-Heywood, Former Justice of the Supreme Court of the United Kingdom

“Professor Ekins and his co-authors have made an indispensable contribution to the continuing debate on the litigation legacy of the Northern Ireland ‘Troubles’. This has been a debate hitherto remarkable more for slogans than scholarship or sound judgement; the quality of that debate has been pushed firmly upwards by this paper.”

John Larkin QC, Attorney General for Northern Ireland

“We have an absolute moral obligation to adequately protect our veterans as well as the men and women in uniform who risk their lives to defend the realm. This is a remarkable in-depth study laying bare the failure to protect our troops from spurious legal claims and repeated investigations on operations from Northern Ireland to Iraq and Afghanistan. This report is a powerful statement of the importance of protecting our troops and restoring the operational effectiveness of our forces and the morale of those who serve. Policy Exchange has presented clear recommendation for policy action. For the next Government failure of political and legal imagination is now no longer an option.”

Admiral Lord West, Former First Sea Lord

“So-called ‘historical’ inquiries have a direct impact on the present. Every inquiry will affect the mind set of troops deployed on operations as they struggle to deal with split second decisions and at the same time have the added burden of considering whether their actions - for which they are extensively trained - will one day land them in court. This thoughtful and clear Policy Exchange report is, I believe, the route map the next Government should follow to protect our troops from defeat in the courtroom or an unnecessary delay in carrying out orders - resulting in injury or death, whether their own, those they are there to protect or those under their command.”

Lt Gen Sir Graeme Lamb, Former Commander of the Field Army and Former Director Special Forces

“The potency of NATO lies in the ability of the Allies to fight as one. As this excellent Policy Exchange report sets out, the creeping changes to the law governing British forces threatens to undermine the contribution we can make to joint operations. To maintain the future capacity of our Armed Forces – and to end the persecution of veterans – the next Government must study this report and act.”

Lord Robertson, Former Secretary General of NATO

'I have long argued the way some service personnel and veterans have been persecuted in our judicial system turns the stomach. We must work harder to honour our commitment to those who've served our country. We also risk the credibility of our Armed Forces in the eyes of our allies – rendering ourselves vulnerable by permitting the growth of 'lawfare'. Policy Exchange has helped to put this issue on the map – I welcome this report and will carefully consider its recommendations.'

Rt Hon Boris Johnson MP

"I grew up in a naval family and know personally how much we owe to our service men and women. On this Armed Forces Day we're reminded of the bravery and sacrifice of those who serve our country in uniform. This Policy Exchange report is a serious and welcome contribution to an important debate. We owe it to our forces and veterans to resolve these issues with all possible speed."

Rt Hon Jeremy Hunt MP

"There is justified concern right across British society about the unfair treatment of our troops who have served in conflicts and who are being reinvestigated, sometimes decades after the events. This appalling treatment of our soldiers is detrimental to the UK's ability to fight, negatively affecting public perceptions of the role of law in military affairs. This powerful and timely Policy Exchange report explains why this situation has taken place and what should be done to draw it to a close. The study's recommendations, including its proposal to restore the intended scope of the Human Rights Act, are a guide for policy action that should be considered seriously across the political divide."

Rt Hon John Spellar MP

"Policy Exchange has been relentless in its support for UK forces facing the growing risk of the judicialisation of conflict, and I have strongly supported that position. Policy Exchange's new report explains how British soldiers have been subjected to what clearly are unfair legal processes. This has not only created enormous stress and anxiety on those who have served, it has also put at risk the trust between the British society and its armed forces, and also between commanders and those on the frontlines. The extension of European human rights law to UK operations is in considerable contrast with the US focus on strict compliance with the Law of Armed Conflict. The very special relationship between our two militaries, which I experienced personally during decades of the Cold War in Europe, and also during contingency and combat operations in the Balkans, Iraq, Afghanistan, and the greater Middle East, and which has been built over more than a century of serving shoulder-to-shoulder in the hardest tests of battle, could be put at risk by the present situation. Putting all this right has to be a priority if the UK is to remain a country of military consequence on the world stage, something which I fervently hope to see. In view of that, I hope that policy makers in the UK will give Policy Exchange's latest report close and serious consideration."

General David Petraeus, Former Commander, United States Central Command