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Defence Committee

Drawing a line: Protecting veterans by a Statute of Limitations

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Summary

We and our predecessor Defence Committees have long been greatly concerned by the increasing encroachment of litigation into the sphere of military engagements, and by the cycles of investigation and re-investigation of current and former Service personnel for alleged incidents from many years ago.

In the last Parliament, our predecessor Committee and Sub-committee undertook detailed inquiries into the investigations into historic Troubles-related allegations in Northern Ireland and into the Iraq Historical Allegations Team (IHAT). In both cases, processes were identified which were deeply unsatisfactory and entirely unfit for purpose. The Committee warned that, "in adhering to the pursuit of justice and the rule of law, the Government must not lose sight of its moral responsibility and its commitment to the Armed Forces Covenant with those who have served". Fortunately, IHAT was closed down in 2017—largely as a result of the Sub-committee's inquiry.

In the case of Northern Ireland, our predecessor Committee recommended that the Government should bring forward legislative proposals to enact a Statute of Limitations, "covering all Troubles-related incidents, up to the signing of the 1998 Belfast Agreement, which involved former members of the Armed Forces", coupled with a truth-recovery mechanism aimed at providing families of the bereaved with the best possible prospect of discovering the truth.

The Government's response to this report promised to include the above recommendation in the Northern Ireland Office's legacy consultation, but that promise was broken. This prompted us to look more broadly at the question of how former Service personnel can be protected from the spectre of investigation and re-investigation for events that happened many years, and often decades, earlier. This report is focused on delivering protection for veterans and Service personnel who were previously engaged in operations, not only in Northern Ireland, but around the world.

Throughout our inquiry we have been determined to ensure that justice prevails for veterans and for current Service personnel, whilst ensuring that wrongdoing and criminality are appropriately investigated and punished. At no point has this Committee (or its predecessor Committee in the last Parliament) endorsed amnesties or blanket immunity from prosecution. Those who serve in our Armed Forces are not above the law, but we believe that there is something fundamentally wrong when veterans and current Service personnel can be investigated and exonerated, only then to become trapped in a cycle of endless re-investigation. We warn that this state of affairs risks undermining not only morale within the Armed Forces, and the potential for future recruitment, but also trust in the rule of law.

This report examines the legal frameworks that underpin the work of the Armed Forces at home and abroad, before examining current legacy investigations into Operations Banner, Telic and Herrick, as well as examples from previous campaigns. We conclude that the legal frameworks underpinning the role of the Armed Forces in civil and military operations are becoming increasingly complex and difficult to navigate, particularly in the fog and confusion of conflict.

We also looked at the levels of legal and welfare support provided to veterans and current Service personnel who have been subjected to legacy investigations. We conclude that there appears to be a good level of legal support available to those under investigation. However, we have concerns about the level of welfare support and particularly about the ability of veterans to gain access to it. We recommend that the Government should adopt a more proactive approach—fully utilising the Veterans Gateway and making contact with veterans who may be out of range of their regimental associations and ill-equipped to use online resources.

Finally, we endorse three options for reforming the current system of legacy investigations:

- **Presumption against prosecution**: we welcome the Government's preliminary announcement that it intends to derogate from parts of the European Convention on Human Rights (ECHR), prior to future conflicts, and also to adopt a presumption against prosecution for offences that are alleged to have taken place in operations overseas more than ten years ago, except where compelling new evidence emerges. However, we are concerned that this proposal will not cover soldiers who served in Northern Ireland during the Troubles and we intend to do all we can to ensure that all veterans are afforded equal protection from vexatious claims or cycles of endless re-investigation. We also recommend that, as part of its planned consultation process, the Government should bring forward its proposals in the form of a draft Bill and that this should be made available to us for pre-legislative scrutiny.

- **Reform the Human Rights Act**: this covers proposals put forward by Professor Richard Ekins to amend the Human Rights Act, alongside derogating from the ECHR ahead of conflicts. We share Professor Ekins' assessment that the European Court of Human Rights (ECtHR) has gone far beyond the original understanding of the European Convention on Human Rights, and that its rulings have stretched the temporal and territorial scope of the Human Rights Act beyond Parliament's original intentions in 1999. We conclude that the Government needs to consider whether the Human Rights Act should be amended in order to protect its plans for a presumption against prosecution. We recommend that, as part of the MoD's consultation on its proposals, Professor Ekins' proposals should be included.

- **Statute of Limitations**: we continue to believe in what we term a 'Qualified Statute of Limitations'—one that covers those veterans and current Service personnel who have been investigated and exonerated for alleged offences, from re-investigation, while allowing for the possibility of compelling new evidence emerging. We are therefore pleased that the proposals, formulated by the Defence Secretary, her predecessor and the Attorney General, for a presumption against prosecution appear to amount to a ten-year Statute of Limitations, qualified by an exception where compelling new evidence has been discovered.

We look forward to scrutinising the Government's plans in detail when they emerge, but we remind the Government that if the ECtHR seeks to overrule them, then the

option will remain of changing the UK's stance in relation to the ECHR on the lines recommended by Professor Richard Ekins. As we conclude in the report, this problem can be solved—but only by a resolute Government with the determination to do so.

1 Introduction

Context

1. In this and the last two Parliaments, we and our predecessor Defence Committees have examined the increasing encroachment of litigation into the sphere of military engagements, leading to the pursuit of veterans and Service personnel over incidents that took place, in some instances, decades before.

2010–2015 Parliament

2. In 2014, the Committee conducted a major inquiry into 'UK Armed Forces Personnel and the Legal Framework for Future Operations'. The report concluded that the Armed Forces and MoD had "faced an unprecedented number of legal cases" between 2004 and 2014, a rise driven by the number, and nature, of the conflicts that UK forces had been engaged in during that period and the "the growing use of challenges under human rights law in UK courts".

3. The report also noted the tension between International Humanitarian Law (IHL)—also known as the Law of Armed Conflict (LOAC)—the body of law that has traditionally governed armed conflicts, and human rights law (HRL). This tension has led to less certainty and clarity for Service personnel. HRL has resulted in a growing number of cases in which the European Court of Human Rights (ECtHR) has considered operations in armed conflict, thanks to the extraterritorial application of the European Convention of Human Rights (ECHR) "to allow claims in the UK courts from foreign nationals". The report argued that the "number of cases and the requirement for full and detailed investigations of every death resulting from an armed conflict is putting a significant burden on the MoD and the Armed Forces, not just in resources spent, but in the almost unlimited potential for retrospective claims against them".[1]

2015–2017 Parliament: IHAT and Northern Ireland legacy investigations

4. In the 2015–2017 Parliament, the Committee undertook inquiries into the Iraq Historical Allegations Team (IHAT) and the investigations into historic Troubles-related allegations in Northern Ireland. In the case of both IHAT and Northern Ireland, the Committee warned that "in adhering to the pursuit of justice and the rule of law, the Government must not lose sight of its moral responsibility and its commitment to the Armed Forces Covenant with those who have served".[2]

5. The Committee concluded that IHAT was "unfit for purpose" and had proven "deaf to the concerns of the Armed Forces, blind to their needs, and profligate with its own resources" and that it should be wound down.[3] In February 2017, when the Report would

1 Defence Committee, UK Armed Forces Personnel and the Legal Framework for Future Operations, Twelfth Report of Session 2013–14, HC 931, paras. 127–129

2 Defence Committee, Who guards the guardians? MoD Support for former and serving personnel, Sixth Report of Session 2016–17, HC 109, para. 128; Defence Committee, Investigations into fatalities in Northern Ireland involving British military personnel, Seventh Report of Session 2016–17, HC 1064, para, 7.

3 Defence Committee, Who guards the guardians? MoD Support for former and serving personnel, Sixth Report of Session 2016–17, HC 109, para. 122

have been under embargo if publication had not been brought forward, the then Secretary of State for Defence, Sir Michael Fallon MP, announced the closure of IHAT and the transfer of its remaining caseload to the Service police system.

6. The Committee's work on historic Troubles-related investigations in Northern Ireland similarly concluded that the investigatory process to date had been "deeply unsatisfactory" and warned that the instability of the investigatory bodies and the lingering question-marks regarding their independence had "delivered a vicious cycle of investigation and re-investigation that fails both former Service personnel and the families of those who died".[4]

7. Warning that the status quo was "not sustainable", the Committee demanded that the Government bring forward legislative proposals to remedy the situation. It also outlined a menu of potential options. Of these options, the Committee recommended "the enactment of a Statute of Limitations, covering all Troubles-related incidents, up to the signing of the 1998 Belfast Agreement, which involved former members of the Armed Forces". The Committee further recommended that this should be coupled with a "truth recovery mechanism which would provide the best possible prospect of bereaved families finding out the facts, once no-one needed to fear being prosecuted".[5] Although it was beyond the strict remit of the Committee, our predecessors also encouraged the next Government to extend this provision to include former members of the Royal Ulster Constabulary and other former security personnel.

Our inquiry

8. On 12 June 2018, following the Government's failure to include, despite a previous promise, the above recommendation in the Northern Ireland Office's legacy process consultation, we launched a new inquiry into the question "of how former Service personnel can be protected from the spectre of investigation and re-investigation for events that happened many years, and often decades, earlier".

9. Our inquiry's terms of reference invited submissions on the following:

a) What are the reasons for investigations into former Service personnel?

b) Following Iraq and Northern Ireland, which previous campaigns are likely to be the next target of investigations?

c) What are the steps that the Government should take to protect Service personnel from investigations and prosecution for historic allegations?

d) What difficulties do the UK's international legal obligations pose for any attempt at protecting Service personnel?

e) Can a Statute of Limitations, extended to all previous conflicts, be designed in such a way as to be consistent with these obligations?

f) What should be the cut-off date for the Statute of Limitations?[6]

4 Defence Committee, Investigations into fatalities in Northern Ireland involving British military personnel, Seventh Report of Session 2016–17, HC 1064, para, 24

5 Ibid., para. 52

6 Defence Committee (12 June 2018), Protecting veterans from the spectre of investigation and re-investigation

10. Over the course of our inquiry, we held three evidence sessions. On 4 September 2018, our witnesses were Colonel (Rtd) Tim Collins OBE and Colonel (Rtd) Jorge Mendonça DSO MBE, two decorated veterans who had both been subject to, and ultimately exonerated by, investigations; on 11 December 2018 we took evidence from General (Rtd) Sir Nick Parker and two legal experts, Hilary Meredith and Professor Richard Ekins. Finally, on 8 January 2019, we took evidence from Martyn Day, the Senior Partner of Leigh Day solicitors. We have also received written evidence, including from the MoD and the Ulster Unionist Party. We thank all those who gave evidence to our inquiry; a full list of those who have provided oral and written evidence can be found at the back of our report.

11. Following the launch of our inquiry, the then Secretary of State for Defence, the Rt Hon Gavin Williamson CBE MP, announced in the House of Commons on 9 July 2018 that he had established a "dedicated team within the Ministry of Defence to consider this issue [of protecting Service personnel facing historic investigations]". The Defence Secretary also stressed his desire to find a "long-term solution to help all Service personnel, from conflicts not only in Northern Ireland, but in Afghanistan and Iraq, to ensure that vexatious claims are eliminated".[7] The Committee strongly welcomed this initiative.

12. Our report begins with an examination of the legal frameworks underpinning the work of the Armed Forces at home and abroad, before moving on to an assessment of the legacy investigations that have been established into Operations Banner, Telic and Herrick. It closes by focusing on proposals for reforming the current system, including amending the Human Rights Act and establishing a Statute of Limitations.

13. **At the heart of this inquiry and our Report is a determination to ensure that justice prevails for veterans and Service personnel. This does not mean that those who serve our country are above the law: far from it. We are unequivocal in our belief that wrongdoing must be investigated and punished. However, we also believe that there is something fundamentally wrong when veterans and Service personnel who have been investigated, and exonerated, become subject to what can often seem an unending cycle of investigation and re-investigation. That is neither a just nor a sustainable state of affairs and it risks undermining morale within the Armed Forces and trust in the rule of law.**

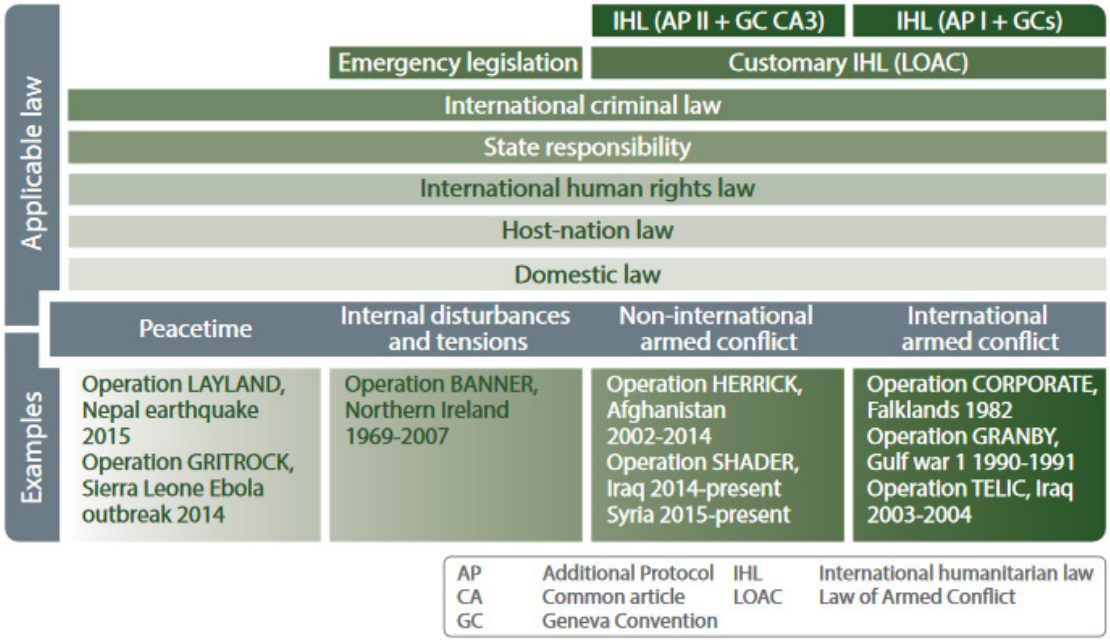
7 HC Deb 9 July 2018, col.685–686

2 The Law Governing Armed Conflict

Introduction

14. Like all citizens, Armed Forces personnel are subject to the law. However, defining what that law is has become increasingly complex. This is particularly true in joint operations, such as those in Iraq and Afghanistan, where a number of legal systems are in play. Afghanistan, for example, was underpinned by a UN Mandate and evolved from an international conflict between a US-led coalition and Afghanistan into a non-international armed conflict between NATO/Afghanistan and the Taliban (then a non-state actor).[8]

Figure 1: The different laws applying to military operations



Source: Ministry of Defence, Legal Support to Joint Operations, Joint Doctrine Publication 3–46

Service Law

15. All Service personnel must comply with Service law when on operations. This means that they must not only comply with the criminal law of England and Wales, but also with high standards of behaviour which are distinctive to the Armed Forces. For example, as the Manual of Service Law highlights, "failing to attend for duty and ill-treatment of subordinates, are subject to the same procedures and the same sort of penalties as criminal offences".[9] The Armed Forces Act 2006 replaced the separate systems that had applied for the three principal Services with a single system governing all members of the Armed Forces.

8 Ministry of Defence, Legal Support to Joint Operations, Joint Doctrine Publication 3–46, p.22
9 Ministry of Defence, Manual of Service Law (JSP 830), Vol. 1: Commanding officers guide, pp. 1.1.3 - 1.1.4

16. Offences are split into two categories: discipline offences and criminal conduct offences. Discipline offences include:

- Assisting an enemy e.g. through harbouring or protecting an enemy or providing them with supplies
- Misconduct on operations, including surrendering or abandoning a place/thing to the enemy without reasonable excuse or abandoning a post when in action or in the vicinity of the enemy
- Obstructing operations, e.g. by putting at risk, with intent or recklessness, the success of an action
- Looting
- Mutiny or failure to suppress mutiny
- Desertion

17. The military offence of criminal conduct covers anything done, anywhere in the world, that if done in England and Wales, would be against the civilian criminal law. Depending on their category, offences can either be dealt with by a Commanding Officer at a summary hearing or tried by a Court Martial.[10]

International Humanitarian Law/the Law of Armed Conflict

18. In addition to Service Law, personnel are subject to the Law of Armed Conflict (LOAC), also known as International Humanitarian Law (IHL). As our predecessor Committee explained in its 2014 report, "IHL was developed to regulate the conduct of parties to an armed conflict".[11]

19. According to the 2004 edition of the Joint Service Manual of the Law of Armed Conflict, the main purpose of LOAC "is to protect combatants and non-combatants from unnecessary suffering and to safeguard the fundamental human rights of persons who are not, or are no longer, taking part in the conflict".[12]

20. This law was traditionally built on two streams of IHL: the first, 'Hague Law', was "largely concerned with how military operations are conducted", and the second, 'Geneva Law', was "concerned with the protection of the victims of armed conflict". While, as the Joint Service Manual explains, these two streams have now merged into one corpus of law, "there is still a distinction between the law relating to armed conflicts between states, known as international armed conflicts, and armed conflicts within the territory of state, known as internal (or non-international) armed conflicts".

10 Armed Forces Act 2006

11 Defence Committee, UK Armed Forces Personnel and the Legal Framework for Future Operations, Twelfth Report of Session 2013–14, HC 931, para. 21

12 JSP 383: The Joint Service Manual of the Law of Armed Conflict, p.3

21. LOAC is binding on states, but also regulates the conduct of individuals and "the decisions in hundreds of war crimes trials conducted after the Second World War have reinforced the principle of individual criminal responsibility of members of the Armed Forces or others who violate the law of armed conflict".[13]

22. LOAC's sources can be found in customary law, that is rules developed from the practice of states and which are binding on states generally, and treaty law, that is rules expressly agreed by states in international treaties and which are only binding on states party to those treaties.[14]

23. Key pillars of LOAC include the Rome Statute on the International Criminal Court, the Hague Conventions of 1899 and 1907 and the Geneva Conventions of 1864, 1906, 1929 and 1949. In 1949, four new Geneva Conventions revised the previous Geneva Law and provided for the protection of:

a) the wounded and the sick;

b) the wounded, sick and shipwrecked at sea;

c) prisoners of war; and

d) civilians.[15]

24. In 1977, two Protocols Additional to the Geneva Conventions of 1949 were adopted. Additional Protocol I (AP1) relates to international armed conflicts, with Additional Protocol II (AP2) focusing on non-international armed conflicts:

- According to the Joint Service Manual, AP1 "codifies existing principles of customary law and introduces important new treaty provisions", setting out "detailed rules on targeting and the means and methods of warfare". It also extends the range of persons that can qualify for 'combatant status' in conflicts and includes provisions on civil defence and mercenaries. The definition of international armed conflict is, according to the Joint Service Manual, "itself expanded to include certain conflicts fought by peoples 'in exercise of their rights of self-determination'".[16]

- AP2 builds on the basic framework of rules and humanitarian protections provided by Article 3 of the 1949 Convention in relation to internal armed conflicts. AP2 was the first-ever international treaty devoted exclusively to protecting people affected by non-international armed conflicts, or civil wars. As explained by the American Red Cross, AP2 "specifically prohibits violence to the life, health and physical or mental well-being of people". It also prohibits acts of murder and cruel treatment, terrorism, hostage-taking, slavery, outrages on personal dignity, collective punishment and pillage. In addition, attacks are forbidden on civilians and on "objects indispensable to civilian survival" such as "crops, irrigation systems or drinking water sources, cultural objects, and places of worship".[17]

13 Ibid., pp.3–4
14 Ibid., p.5
15 Ibid., pp. 7–14
16 Ibid., pp.15–16
17 American Red Cross (2011), Summary of the Geneva Conventions of 1949 and their additional protocols, pp.5–6

According to the ICRC, taken together, the additional protocols "say that civilians must be spared the worst effects of conflict. They represent a milestone in the long history of efforts by the ICRC and the international community to secure greater protection [for civilians]".[18]

25. As the Joint Service Manual makes clear, all four Geneva conventions apply in any international armed conflict, regardless of whether war is declared or not or if one of the parties does not recognise the existence of a state of war, and if there is a "partial or total occupation of another state's territory, even if the occupation has met with no armed resistance".

26. These conventions are of virtually universal application, embodying customary law, and therefore apply to internal, as well as international, armed conflicts, as well as establishing an express obligation on states to bring to justice individuals who commit certain war crimes.[19]

27. Four key principles underpin LOAC:

a) **Military necessity** – "a state engaged in an armed conflict is permitted to use only that degree and kind of force, not otherwise prohibited by the law of armed conflict, that is required in order to achieve the legitimate purpose of the conflict". This principle contains four basic elements:

i) the force used can be and is being controlled;

ii) since military necessity permits the use of force only if it is 'not otherwise prohibited by the law of armed conflict', necessity cannot excuse a departure from that law;

iii) the use of force in ways which are not otherwise prohibited is legitimate if it is necessary to achieve, as quickly as possible, the complete or partial submission of the enemy;

iv) conversely, the use of force which is not necessary is unlawful, since it involves wanton killing or destruction.

b) **Humanity** - forbids the infliction of suffering, injury or destruction not actually necessary for the accomplishment of legitimate military purposes

c) **Distinction** - separates combatants from non-combatants and legitimate military targets from civilian objects

d) **Proportionality** - requires that the losses resulting from a military action should not be excessive in relation to the expected military advantage.[20]

28. The International Committee of the Red Cross (ICRC) plays a key role under LOAC as a controlling authority. It has an express mandate under the Geneva Conventions to protect victims of international and internal armed conflict and to monitor compliance with the Conventions by warring parties.

18 International Committee for the Red Cross (2009), Protocols I and II additional to the Geneva Conventions
19 Ibid., p.14
20 Ibid., pp.21–25

29. The ICRC told our predecessor Committee in 2014 that LOAC "had withstood the test of time as a realistic body of law that finds a balance between military necessity and humanity".[21]

International Human Rights Law

30. International human rights law (IHRL) now forms an important part of the law regulating the Armed Forces, a result of a number of key rulings extending the territorial applicability of the European Convention on Human Rights (ECHR). The ECHR has direct effect in the UK as a result of the Human Rights Act 1998 (the HRA) and enables individuals to sue in UK courts for a breach of Convention rights.

31. Of particular note is the judgement of the European Court of Human Rights (ECtHR) in the case of Al-Skeini v United Kingdom (2011). In this judgement, concerned with the deaths of six Iraqis, the ECtHR held that:

> in the exceptional circumstances deriving from the United Kingdom's assumption of authority for the maintenance of security in South East Iraq from 1 May 2003 to 28 June 2004, the United Kingdom had jurisdiction under Article 1 (obligation to respect human rights) of the Convention in respect of civilians killed during security operations carried out by UK soldiers in Basra.

The ECtHR further ruled that there had been a failure to conduct an independent and effective investigation into these deaths, in violation of Article 2 of ECHR.[22]

32. As a result of this ruling, Professor Richard Ekins, Dr Jonathan Morgan and Tom Tugendhat MP argued in their 2015 paper Clearing the Fog of Law that the British Armed Forces had become vulnerable to prosecution under the Human Rights Act and the ECHR.[23] They maintain that it was this judgement which "above all else" resulted in the "juridification of the Armed Forces".[24]

33. According to the Rt Hon Jack Straw, who as Home Secretary steered the HRA through Parliament, "to the very best of my recollection it was never anticipated that the Human Rights Act would operate in such a way as directly to affect the activities of UK forces in theatres abroad", and had such a prospect been in play, "there would have been a very high level of opposition to its passage, on both sides, and in both Houses".[25]

IHL versus IHRL - two systems in conflict?

34. Our predecessor Committee in 2014 found that the "tension and overlap" between IHL and IHRL had "resulted in a lack of certainty and clarity" and recommended that the Government "should work to ensure that IHL is the body of law regulating conduct of armed conflicts with primacy over human rights law".[26]

21 Defence Committee, UK Armed Forces Personnel and the Legal Framework for Future Operations, Twelfth Report of Session 2013–14, HC 931, para. 21
22 European Court of Human Rights Press Unit (May 2018), Factsheet – Armed Conflicts, p.13
23 R. Ekins, J. Morgan and T. Tugendhat. (2015), Clearing the Fog of Law, Policy Exchange, p.11
24 Ibid., p.13
25 Ibid.
26 Defence Committee, UK Armed Forces Personnel and the Legal Framework for Future Operations, Twelfth Report of Session 2013–14, HC 931, para 128–129

35. Similar conclusions were reached by Professor Ekins, Dr Jonathan Morgan and Tom Tugendhat MP in the paper mentioned in para 28. They warned that the "ever expanding reach of the ECHR is now supplanting far more practical laws of war [namely IHL/LOAC]" and drew a contrast between the practical laws of war embodied in IHL and the nature of IHRL, particularly ECHR, which was "designed for conditions of peace in post-war Europe" and is a "wholly impracticable code for regulating the conduct of the British military in violent combat scenarios".[27]

36. They explain the differences between the two legal regimes in a table:

Table 1: IHL vs. IHRL

International Humanitarian Law (e.g. LOAC)	International Human Rights Law (ECHR/ HRA)
Treats various types of armed conflict differently (states vs state; high intensity civil war; low-intensity civil war).	Treats all types of conflict in the same way. Does not differentiate between riots handled by police and full-scale pitched battles, unless states formally seek to derogate.
Different regimes combining a few general principles (distinction, military necessity, humanity, proportionality) with an array of specific rules.	Single regime comprising rights-based rules pitched at a high level of abstraction and involving considerable judicial discretion in application.
Main addressees of obligations are parties to the armed conflict (including non-state armed groups).	Addressee of obligations is the Government/state.
No international judicial system of enforcement. With the exception of war crimes, supervision and enforcement is instead centred on states and on the International Committee of the Red Cross.	Includes several international bodies entrusted with enforcement and monitoring, including political bodies (such as the UN Human Rights Council) and judicial or quasi–judicial bodies (e.g. the European Court of Human Rights and the Human Rights Committee and often also domestic courts). Consistently with the rights-based nature of the system, enforcement at the initiative of individuals is central.
Only applies in times of armed conflict.	Applies all the time.
Its provisions are generally non-derogable (except Article 5 Geneva Convention IV).	Most human rights provisions are derogable.
Conceived for the conduct of hostilities and protection of persons in the power of the enemy.	Conceived to protect persons from abuse by the power of the state. Does not rest on the idea of conduct of hostilities, but on law enforcement during peacetime.

27 R. Ekins, J. Morgan and T. Tugendhat (2015). Clearing the Fog of Law, Policy Exchange, p.8

International Humanitarian Law (e.g. LOAC)	International Human Rights Law (ECHR/ HRA)
Is premised on different status (civilians, combatants, civilians directly participating in hostilities, prisoners of war, etc), each entitled to distinct privileges and immunities.	Is premised on the principle of equality and the idea of equal rights.
Focuses on 'parties to conflict' (states or non-state parties).	Focuses on the individual.
Detention, subject to various guarantees, allowed on security grounds.	Detention justified on a number of exhaustive grounds which, under the ECHR, do not include security.
Notion of control of territory pertains to law of occupation and triggers absolute obligations.	Notion of 'effective control' has a broader meaning: IHRL obligations are more flexible and vary with the degrees of control. IHRL can apply in certain situations that do not conform to the common definition of occupation.
Accepts the use of lethal force against combatants and civilians directly participating in hostilities, tolerates incidental killing of civilians in some circumstances (subject to proportionality). Planning military operations aimed at killing enemy combatants is permitted.	Lethal force can only be used in cases of imminent danger. Extremely narrow acceptance of lethal force. Planning an operation with the purpose of killing is never lawful.
Misapplication of force can constitute war crime.	Misapplication of force is treated as a crime.

Source: Ekins, Morgan and Tugendhat (2015), Clearing the Fog of Law

37. The *Clearing the Fog of Law* paper argued that to restore the primacy of IHL the UK Government should derogate from the ECHR before future armed conflicts.[28]

38. In October 2016, the Prime Minister and the then Defence Secretary, the Rt Hon Sir Michael Fallon MP, announced that the Government would "put an end to the industry of vexatious claims that has pursued those who served in previous conflicts" by introducing a "presumption to derogate" from the ECHR during future armed conflicts. According to the Government, "our legal system has been abused to level false charges against our troops on an industrial scale".[29]

39. In its 2017 manifesto, the Conservative Party made the following commitments:

> We will protect our brave Armed Forces personnel from persistent legal claims, which distress those who risk their lives for us, cost the taxpayer millions and undermine the Armed Forces in the Service they give. Under a Conservative government, British troops will in future be subject to the Law of Armed Conflict, which includes the Geneva Convention and UK

28 Ibid., p.46

29 P. Walker and O. Bowcott (The Guardian, 4 October 2016). Plan for UK military to opt out of European convention on human rights

> Service Law, not the European Court of Human Rights. We will strengthen legal Services regulation and restrict legal aid for unscrupulous law firms that issue vexatious legal claims against the Armed Forces.[30]

We consider the question of derogation from the ECHR as one of the options for reform of the current system underpinning legacy investigations in Chapter Four of this report.

A conflict apart? Northern Ireland, Operation Banner and the legal framework

40. Armed Forces were deployed to Northern Ireland in a supporting role for the local police forces. Therefore, IHL did not apply. Instead, Service personnel were subject to Service Law and Civilian Law, as well as the specific Rules of Engagement (RoE) provided.

41. In Northern Ireland, the RoE were contained in what was commonly known as 'the Yellow Card'. The Yellow Card was subject to continuous review and scrutiny and was amended on several occasions. Initially containing 21 distinct rules, the Yellow Card was considered to be too detailed and complex to be readily intelligible and was subsequently revised. The 1980 version only contained 6 rules.[31]

42. According to the House of Commons Library, the British Army suggested in its 2006 assessment of Operation Banner that "it was intended that so long as soldiers adhered to the contents of the Yellow Card then they would be acting within the law". However, "it was widely acknowledged that the Yellow Card had no legal force" and, in the opinion of the Standing Advisory Commission on Human Rights:

> The operational rules for the use of lethal force by soldiers and policemen are considerably more detailed and more restrictive than the test laid down in the Criminal Law Acts. But they have no formal legal force and cannot therefore be taken to override or even to assist in the interpretation of the statutory test […] It is clear that in case of any conflict between the two sets of rules the legal standard must prevail in any civil or criminal proceedings arising out of a disputed incident.[32]

43. IHRL has applied in Northern Ireland, with the ECtHR's case law and interpretation of Article 2 and 3 of ECHR playing a key role in underpinning the investigatory process of Troubles-related deaths.[33]

The practical experience of operating under the legal framework

44. On 4 September 2018, we took evidence from Colonels (Rtd) Tim Collins and Jorge Mendonça, who were asked for their perspectives on the legal underpinnings of British military operations and on the training, in legal matters, that Service personnel received

30 The Conservative and Unionist Party (2017). Forward, Together: Our Plan for a Stronger Britain and a Prosperous Future, p.41

31 C. Mills and D. Torrance (26 June 2018), Investigation of Former Armed Forces Personnel who served in Northern Ireland, House of Commons Library Briefing Paper: CBP 8352, pp.9–11

32 Ibid., pp.11–12

33 Defence Committee, Investigations into fatalities in Northern Ireland involving British military personnel, Seventh Report of Session 2016–17, HC1064, paras. 26–38

during recent conflicts. We also took evidence, on 11 December 2018 from General (Rtd) Sir Nick Parker, who held senior Commanding Officer positions in Northern Ireland, Afghanistan and Iraq.

Impact of law on Armed Forces personnel

45. Colonel Mendonça argued that it would not have been possible to wage either the First or Second World Wars successfully under the sort of legal regime that exists today. He suggested that this was particularly because of the feeling that soldiers, going into battle today, "have to question everything they were told to do, because it could hang over them for years thereafter and ruin their lives".[34]

46. According to Colonel Mendonça, this process of constantly looking over one's shoulder, as exemplified by Colonel Collins' claim that he tells his son (a serving soldier) that if he is given an order that he must check it is legal and, if possible, given in writing, "has got to slow things up", thus cutting against the key point of an Army: "to win […], to act more decisively and to get the job done".[35]

47. General Parker told us how the chain of command responded to the legal issues during conflict. He explained that there was a habit of "separating the operational chain of command […] from, if you like the technical chain of command, where the legal stuff was going on. If you sat in a divisional chain of command, this was not your business, because it was being sucked out into the adjutant general's area, into this very complex legal environment".[36] He suggested that the military has been "running scared of the law" and recalled conversations he had had while a commanding officer when "we were clinging on to the idea of courts martial, because there were these attacks coming in on the way we executed the military aspects of law". Overall, his characterisation of officers' responses to legal issues was "it was too complicated and you did not really understand it, so you left it to the experts to do it".[37]

The legal status of the conflicts in Iraq and Afghanistan

48. An important section of our session with Colonels Collins and Mendonça focused on the status of the conflicts in Iraq and Afghanistan. Colonel Collins rejected the view that Afghanistan was a war and argued that Western forces and the Afghan government were instead combating criminal bodies. As a result, military personnel were engaged in supporting the rule of law, rather than participating in the kind of state-versus-state conflict for which military law exists.[38]

49. There is a significant difference between this argument and the experience of Service personnel on the ground who, especially if they are fired upon, see themselves in a combat situation.[39] However, as Colonel Collins said, "the reason we are sitting here today is that that there is an important difference [between conventional state-versus-state conflict

34 Q5
35 Qq16–18
36 Q124
37 Q125
38 Q6
39 Q14

and non-international state conflicts/counter-insurgency operations], and that's where the clever lawyers are jumping in and saying, "My client was harmed", when of course his client was an active combatant, albeit a criminal".[40]

Legal Training and Education

50. Colonels Collins and Mendonça were asked about the level of training they and their regiments received before their deployments to Iraq.

51. According to Colonel Mendonça, his unit, "like many", was the subject of delays in learning when they would be deployed, for "political reasons […] [which meant] that we did not get the resources of the training team coming to us to help us to prepare". However, "when eventually someone kindly signed the order to warn us formally of deployment, in June 2003, some resources then came our way to help us with such training".[41]

52. He told us that for rules of engagement training, "the brigade lawyer provided us with a draft [of the rules]" so that he and other officers could train their soldiers. He also told us that the legal framework for their deployment and operations featured in their training to soldiers in the form of an hour-long lesson "that was repeated several times and it would then have been tested with scenarios". These lessons continued to be repeated and tested after the regiment arrived in theatre.[42] Asked if there was anything comparable to the yellow card, Colonel Mendonça believed that there had been, but could not remember carrying such a card in his pocket. Colonel Collins, however, queried whether such a card would have existed, due to the change in the nature of the war by the time Colonel Mendonça's regiment was deployed.[43]

53. At the outset of the war, the UK was part of a multi-national coalition fighting the Ba'ath controlled Iraqi state. The war was thus fought under LOAC. By the time, Colonel Mendonça's regiment was deployed, the collapse and defeat of Saddam's regime had seen the nature of the conflict evolve away from LOAC and towards counter-insurgency.[44] As a result, the rules changed "so that if someone had a weapon […] it was not lawful to open fire. They had to be engaging you at the time". Colonel Mendonça said that he remembered the legal advice as "being clear" and that it did not cover the ECHR.[45]

54. On the training and advice provided for Service personnel during the Troubles, Colonel Collins told us that Service personnel had received "extensive advice" which included "reinforcement training" where personnel would:

> Go through an intensive period of training and you would carry a number not just of cards for opening fire, cards for opening fire with baton rounds, cards for if you strayed into the Irish Republic. It was a whole aide memoire, and so the training was comprehensive.[46]

40 Q12
41 Q21
42 Qq21, 25
43 Qq26–27
44 Qq32–33
45 Qq29–30
46 Q31

Colonel Collins also said that the yellow card was something that "was reflected on in training", but "not something you read in bed at night; it was something you were aware of".[47]

55. When told that the yellow card had been judged by the Standing Advisory Committee on Human Rights not to provide full protection, Colonel Mendonça expressed disappointment, particularly as many Service personnel would have thought that it provided "pretty clear guidance on how to behave".[48]

56. General Parker suggested that legal education and training:

> Gets better as a campaign goes on. As you adapt more to the circumstances that you face, so your advice and your understanding of all aspects, including the legal aspects, gets better. When you get bunged into somewhere, first off it is extremely difficult to understand exactly what the legal circumstances will be, and you have to trust.

57. On that point, Sir Nick spoke of his belief in trusting the chain of command to do the right thing: "if you do the right thing, you usually end up being able to justify what you have done in any circumstance":

> I have a recollection of training for Northern Ireland where we were being briefed on the yellow card. The briefers showed us a video with somebody coming out with a nail bomb from behind a wall. They freeze-framed the video at various stages and asked whether you could shoot at this point. The commanding officer of the day stood up and said, "Stop—this is ridiculous. You can't freeze-frame life. You can't make judgments like that.[49]

58. According to Sir Nick, "you have to make judgments on the basis of a flow and context; yet that was the way we were being taught. You cannot take it to those sorts of extremes. You have to trust the chain of command to do the right thing".[50] When it was later pointed out to Sir Nick, that the commanding officer, in the scenario outlined above, had done the wrong thing in stopping the video, when a similar technique was used to convict Lee Clegg, Sir Nick reiterated his insistence that he had done the right thing and that the freeze frames used in court in the Clegg case were "wholly inappropriate. That is not what life's like".[51]

Conclusions

59. **The legal frameworks underpinning the role of the Armed Forces in civilian and military operations are becoming increasingly complex and difficult to navigate, particularly in the fog and confusion of operations and conflicts. We share the judgement of our predecessor Committee in its 2014 report that the tensions and overlap between International Humanitarian Law (the Law of Armed Conflict) and International Human Rights Law have led to a lack of certainty and clarity. The expansionary judgements of the European Court of Human Rights have served to add**

47 Q35
48 Q36
49 Q132
50 Q132
51 Qq142, 144

even further uncertainty to this picture, particularly when their judgements have, in some important instances, had the effect of applying the Convention and its obligations retrospectively.

60. **This complexity and uncertainty has meant that it is all the more challenging and all the more urgent that commanding officers and Service personnel fully understand the laws governing the conflicts in which they are engaged. The importance of clear and accessible law has become well established in the civilian sphere, not least through the work of the Law Commission, and this principle should be just as, if not more, important when it comes to our Armed Forces.**

61. ***In light of the increasing complexity of the legal frameworks underpinning military operations, the MoD should ensure that sufficient resources are made available for educating the Armed Forces, on a more regular basis, about their legal obligations.***

3 Legacy Investigations - Past and Present

Current legacy investigations

62. According to the MoD, the operational legacy investigations and inquests currently live are:

a) Northern Ireland (Operation Banner)

i) Coroners Inquests

ii) Criminal investigations and review being conducted by PSNI and other appointed Home Office Police Forces

b) Iraq (Operation Telic)

i) Service Police Legacy Investigations (SPLI) SPLI took over the remaining caseload after the closure of IHAT. SPLI is led by a senior Royal Navy Police officer.

ii) Iraq Fatality Investigations (IFI) – in 2013 the High Court ruled that the investigations by IHAT were insufficient to comply with the UK's investigative obligations under ECHR and ordered the Secretary of State to establish a further process of inquisitorial inquiries. As a result, the Secretary of State "has required that on completion of investigations by IHAT/SPLI and of any resulting prosecutions, relevant cases would be referred to the Iraq Fatality Investigations for consideration". These investigations are a form of inquest: "they are intended to ascertain how an individual died and whether there are lessons that can and should be learned. They are not concerned with blame and, at the start of each case, an undertaking is given that witnesses will not be prosecuted on the basis of any self-incriminating evidence they may make".

c) Afghanistan (Operation Herrick)

i) Operation NORTHMOOR was established in 2014 as an independent Royal Military Policy led investigation into allegations relating to UK detention operations in Afghanistan during the period 2005 to 2013.[52]

In addition, in August 2018, the *Daily Express* reported that a number of veterans had been contacted by the Government Legal Department informing them of a litigation claim making "wide-ranging […] allegations of wrongdoing by the British Government during the Cyprus Emergency between 1955 and 1960". These veterans were asked to confirm if they served in Cyprus during this period and to provide assistance "in relation to any recollections of events and matters during that period which are relevant to this litigation".[53]

52 HM Government, Guidance: Operational legacy investigations and inquests – help for veterans

53 (Daily Express, 11 August 2018), It beggars belief! Now witch-hunt targets men who served their country 60 years ago

Previous investigations into allegations made against Service personnel

Allegations made against Colonel Tim Collins

63. In May 2003 an investigation was launched following claims made by an American soldier attached to the 1st Battalion, the Royal Irish Regiment, that the battalion's Commanding Officer Colonel Tim Collins had mistreated Iraqi prisoners of war. The central allegation was that Colonel Collins had threatened to pistol-whip and then shoot Ayoub Yousif Naser, a former regime loyalist.

64. The claims were investigated the Special Investigation Branch (SIB) of the Royal Military Police, which cleared Colonel Collins of any wrongdoing and concluded that no proceedings should be taken against him.[54] Colonel Collins had resigned from the Army in January 2004. According to an interview with his wife, "a major factor in her husband's decision to resign was what he saw as the Army's failure to support him when he was wrongly accused of war crimes".[55]

65. In 2003, Colonel Collins sued the *Sunday Express* and *Sunday Mirror* for libel after both newspapers printed further allegations accusing him of war crimes, including the murder of an Iraqi prisoner. In court in April 2004, both newspapers accepted that the allegations were untrue and that they should not have been published.[56]

66. We asked Colonel Collins about his experience of the investigatory process. He said that "the one thing I was not able to do at any stage was find out what I was actually being investigated for".[57] Colonel Collins said that he had to resort to contacting journalists as "no-one in the military was prepared to tell me what it [the thing he was being investigated for] was". He was unable to secure legal representation from, or financed by, the MoD (in contrast to Colonel Mendonça—see below) and he had to rely on legal support, provided pro bono, from a solicitor who had served alongside him in Northern Ireland.[58] Colonel Collins still maintains that he does not know fully what the outcome of the investigation was—other than that he was not being charged with anything:

> I understand it was an investigation; there was a finding. I have asked people what the findings were. No one has ever had the courage to tell me, and if you can find out I would love to know […] no one has ever had the courage to tell me what the outcome from that was.[59]

67. Colonel Collins told us that he had found out that he would not be charged in a phone call from his brigade commander. He told us that the conversation went: "'There's nothing there'. I said, 'Is that it?' and he said, 'Well, that is more or less it.' I said, 'more or less it?' and he said, 'Well that's it'".[60]

54 BBC News (1 September 2003), Officer cleared of Iraqi war crimes; M. Evans (The Times, 31 October 2003), 'War crimes' colonel has last laugh on accusers
55 BBC News (11 January 2004), Iraq War colonel quits Army
56 BBC News (2 April 2004), Colonel wins libel damages
57 Q55
58 Qq55–57
59 Q57
60 Q57

68. **We find the idea that a Serviceman could be told that he was under investigation, but not told what for, a disturbing one; equally disturbing is the idea that, on the conclusion of the investigations, he was not told what the findings were. *The MoD should examine Colonel Collins' testimony and undertake the necessary investigations of its procedures to establish what happened in this case and to ensure that such a scenario can never happen again.***

Baha Mousa Court Martial 2007

69. In September 2003, the 1st Battalion Queen's Lancashire Regiment (1 QLR) undertook Operation Salerno, a three-hour targeted search of hotels in Basra for a number of individuals suspected of being, or supporting, former Ba'athist regime loyalists. Ten men were arrested, including Baha Mousa, and taken in for questioning. During internment, Baha Mousa died and a Special Investigation Branch (SIB) investigation and post-mortem took place. During the post-mortem, the pathologist found 93 separate surface injuries on his body. An examination of other detainees took place, which also yielded signs of injuries, albeit not of the quantity or severity of those found on Baha Mousa.

70. Court Martial proceedings were initiated against seven members of 1 QLR, including the Commanding Officer Colonel Jorge Mendonça (charged with negligently performing a duty). At the Court Martial, the Judge-Advocate ruled that Colonel Mendonça and two other colleagues had no case to answer and the charges against them were dismissed. One of those charged, Corporal Donald Payne, pleaded guilty to the charge of inhumane treatment of persons and was sentenced to twelve months imprisonment and dismissed from the Army.

71. Despite being cleared of the charges, Colonel Mendonça left the Army in 2007, saying that he had been "hung out to dry" by the MoD and that he could face further investigations.[61]

72. We asked Colonel Mendonça about his experience of the investigatory process. He told us that he had been taken to trial only because of the fallout from another, similar, case where soldiers had been tried for abusing Iraqi prisoners and there had been "an outcry about why no officers were on trial". Colonel Mendonça suggested that because of this incident, the then Attorney General (Lord Goldsmith) "wrote to the Ministry of Defence saying that he did not want to see that happen again".[62]

73. Colonel Mendonça claimed in his evidence to the Committee that what he found most difficult about the case, to begin with, was the sense "that the investigation was done with a view to seeing me go to trial, as opposed to investigating the full facts of the case and actually looking at what else I might be doing while commanding 620 soldiers in a very difficult circumstance".[63]

74. According to Colonel Mendonça, after being interviewed and then charged in early 2005, he went to trial in September 2006 before being acquitted in February 2007. While

61 M. Oliver (The Guardian, 1 June 2007), Cleared Mendonca quits Army; J. Johnston (Daily Mail, 29 September 2007), I was hung out to dry, says British commander dragged through 'political' court martial

62 Q37

63 Q43

Colonel Mendonça was able to remain in post in charge of UK middle east operations at PJHQ Northwood, he claimed that the Army's initial response "was to remove and place me in some sort of limbo".[64]

75. Following this experience, Colonel Mendonça then read in the newspapers, and had it confirmed subsequently, that he was to be reinvestigated "because there is some procedure that requires them to look over the evidence that came out in the six months of the trial to see if there is anything else that they might wish to pick you up on". At the stage, he decided to leave the military.[65]

76. Colonel Mendonça told us that "the whole process hung me out to dry". He questioned the way in which the investigatory process operates and the way in which senior military figures react to it.[66] For example, while accepting that such allegations "must be investigated properly", Colonel Mendonça criticised the failure of senior officers to stand up "to people like the Attorney General who will seek to take away commanding officers' powers". He suggested that had the investigation been conducted by his commanding officer, then the brigade commander "could have looked at that and said 'Yeah, it's terrible. I know Jorge did his job properly, so I am not holding him to account on the basis of the evidence investigated'".[67]

77. Asked about support from the MoD, Colonel Mendonça said that he was defended by an "excellent legal team, which was selected by me and paid for by the Ministry of Defence" and noted that he would not have been able to afford such a defence from his own pocket.[68]

Baha Mousa inquiry

78. Following the conclusion of the Court Martial proceedings, Baha Mousa's father instigated judicial review proceedings for a public inquiry. As a result of an agreement reached between Baha Mousa's father and the MoD, a public inquiry was established in 2008, chaired by the Rt Hon Sir William Gage. The inquiry started its proceedings in 2009 and concluded in 2011, at a cost of £13m.

79. The inquiry concluded that Mr Mousa had died after suffering an "appalling episode of serious gratuitous violence" in a "very serious breach of discipline" and found a "corporate failure" at the MoD for the use in Iraq of interrogation methods which had been banned in 1972.

80. The inquiry listed a substantial number of recommendations, these included:

- Standard orders to be issued ahead of each military operation clarifying that the use of five specific interrogations techniques was banned
- Medical personnel to be more involved in providing advice that captured persons were not fit for detention or questioning

64 Q37
65 Q37
66 Q50
67 Qq44, 50
68 Q51

- Greater clarity in training in relation to "restraint positions". More must be done to give "practical guidance" to help personnel distinguish between unlawful stress positions and "legitimate use of force to effect a search, or an arrest or prevent assault or escape"
- Training to include a warning that conduct that can be expected of a non-Geneva Conventions compliant enemy does not reflect the standards required of British and NATO forces[69]

The Al-Sweady Inquiry

81. In 2009 a public inquiry was launched into the Battle of Danny Boy in Iraq in 2004, a three-hour gun battle between soldiers from the Argyll and Sutherland Highlanders and Princess of Wales Royal Regiment and 100 Iraqi insurgents who had ambushed the soldiers. Following the battle, British soldiers faced allegations of mistreatment of prisoners, torture and murder.

82. The Al-Sweady inquiry finally reported in 2014 at an estimated cost of £31m. Chaired by Sir Thayne Forbes, the report concluded that while the "conduct of various individual soldiers and some of the procedures being followed by the British military in 2004 fell below the high standards normally expected of the British Army", and while "certain aspects of the way in which the nine Iraqi detainees […] were treated by the British military […] amounted to actual or possible ill-treatment", the "vast majority" of the allegations made against the British military, including "without exception, all the most serious allegations", were "wholly and entirely without merit of justification".[70]

83. According to the Al-Sweady report, "very many of those baseless allegations were the product of deliberate and calculated lies on the part of those who made them and who then gave evidence to this Inquiry in order to support and perpetuate them". Other false allegations were "the result of inappropriate and reckless speculation on the part of witnesses".[71]

84. Indeed, the report came to the "firm conclusion" that the approach of the detainees and a number of other Iraqi witnesses to the giving of evidence was "both unprincipled in the extreme and wholly without regard for the truth" to the extent that some witnesses told "deliberate and calculated lies to this Inquiry".[72]

85. In contrast, Sir Thayne was "for the most part […] generally impressed by the way in which the military witnesses approached the giving of their evidence to this Inquiry" and, overall, he found the military witnesses to "be both truthful and reliable".[73]

86. The Inquiry concluded that "all the most serious allegations, made against the British soldiers involved in the Battle of Danny Boy and its aftermath and which have been hanging over those soldiers for the last 10 years, have been found to be wholly without

69 BBC News (8 September 2011), Baha Mousa inquiry: 'Serious discipline breach' by Army
70 Sir Thayne Forbes (December 2014), The Report of the Al-Sweady inquiry, HC 818-I, paras 5.196 and 5.198
71 Ibid., para. 5.198
72 Ibid., para. 5.199
73 Ibid., para. 5.200

foundation and entirely the product of deliberate lies, reckless speculation and ingrained hostility" and that British soldiers responded to the ambush that commenced the Battle of Danny Boy "with exemplary courage, resolution and professionalism".[74]

Support for veterans and Service personnel facing investigation

87. Support for Army personnel and veterans facing these investigatory processes is led by the Operational Legacy Support Team (OLST) within the Army Personnel Services Group. The MoD describe the OLST as a "small, dedicated team which provides the Army's lead for support and advice to veterans and serving personnel on matters relating to legacy operations".[75]

Legal support

88. The MoD has stated that "legal support is provided to all serving personnel and veterans being investigated or prosecuted for allegations relating to legacy operations in Northern Ireland, Iraq and Afghanistan". However, "due to the different legal processes, the way this support is provided differs between cases relating to Northern Ireland and those from Iraq and Afghanistan":

- Northern Ireland: Legal advice and support for individuals affected by the Northern Ireland legacy cases is provided by the MOD. In relation to the inquests, while there is no provision for individual representation for those summoned to appear as witnesses, advice is offered to individuals at no cost by the MOD's legal team. For those under investigation or being prosecuted as part of a Troubles criminal case, full legal costs will be met by the MOD.
- Iraq / Afghanistan: Legal funding is provided through the Armed Forces Criminal Legal Aid Authority (AFCLAA) for Service personnel and veterans interviewed and investigated or prosecuted under the Service Justice System for allegations arising from operations in Iraq and Afghanistan under the IHAT / SPLI or Op NORTHMOOR investigations. Legal support is also available to those individuals undergoing the IFI process as witnesses who were involved in an incident.

Welfare support

89. The MoD says that it "recognises the need for welfare support for serving and retired personnel affected by any of these legal processes". For serving personnel, the provision of primary welfare support within the unit is the responsibility of the commanding officer.

90. Duty of care for veterans being investigated as potential suspects or referred to trial in either of the SPLI or the Op NORTHMOOR Service Justice System inquiries is "coordinated through the appointment of a bespoke commanding officer who will ensure that veterans under their care are offered the full range of support at their disposal".[76]

74 Ibid., paras. 5.201–5.202
75 HM Government, Guidance: Operational legacy investigations and inquests – help for veterans
76 HM Government, Guidance: Operational legacy investigations and inquests – help for veterans

91. Veterans involved in operational legacy matters arising from Northern Ireland, Iraq and Afghanistan are "encouraged to engage with their respective regimental associations at the earliest opportunity to identify what support and advice is available for them throughout the operational legacy inquest or investigation process".

92. In addition, the MoD has noted that SSAFA has "agreed to provide specific welfare support and assistance for those serving personnel and veterans involved in operational legacy investigations from Iraq and Afghanistan who may wish to seek support from outside of Defence".[77]

Concerns about the level of support being provided by MoD

93. During his appearance before the Committee, Sir Nick Parker outlined a number of concerns about the support being provided to veterans by the MoD. One was the notion that the MoD may face a conflict of interest "because it presumably has some sort of responsibility for what was going on at the time":

> I am talking about the early '70s in Northern Ireland. How can a veteran be given the best possible advice, and defence if he needs it, if the Government Legal Department is conflicted? My experience has been that the lawyers who have then started to help in the cases where people have come to me have found the Ministry of Defence less than helpful in certain areas, and that there has been a need to encourage their support. I am sure they would deny this. My sense is that you need to have independence for each of the people being put in a vulnerable position.

94. Sir Nick also pointed to the advice given to people to contact their regimental headquarters. According to Sir Nick:

> That is not the right place to go. Regimental headquarters are wonderful places, but they have had people stripped out of them. The people who are there are not the highest-grade people. It is not the place that will know the best thing to do and give you the best advice.

He also warned that this could inculcate a 'team view' on episodes that might not always be the best thing for individuals facing investigation.[78]

95. From a lawyer's perspective, Hilary Meredith also spoke about the levels of support provided by the MoD to individuals facing legacy investigations. According to Ms Meredith, "one of the biggest issues that we had in the IHAT was the lack of support from MoD":

> Having spoken to the MOD myself about it, I eventually asked, "For a veteran who has been out of the forces for 20 years, what telephone number does he phone for help?" First of all, they suggested the Veterans Agency. I said, "So, he's been arrested, he's is in prison and it is midnight. If he phones the Veterans Agency, who comes down to help him?" "Ah, all right, okay. Maybe his commanding officer." I said, "His commanding officer is retired, and he does not have the phone number anymore. Who does he phone?"

77 HM Government, Guidance: Operational legacy investigations and inquests – help for veterans
78 Q131

According to Ms Meredith, "there is no connection with veterans" in the MoD, resulting in a "dramatic link missing for help for veterans".[79]

96. In written evidence to the Committee, the MoD insisted that it was "committed to providing high quality welfare and pastoral support to all those veterans affected by historic investigations". According to the MoD, veterans can access support through the Veterans Welfare Service (VWS). The VWS, the MoD suggests, can "help facilitate any necessary assistance" and "has experience of supporting individuals through court cases, public inquiries and coroner's inquests". The MoD argued that Regimental Associations can also play an important role in providing support to veterans facing investigatory processes, and stated that it was working with the Associations most affected by legacy cases "to ensure that veterans receive the welfare support they need and deserve".[80]

97. **Overall, there appears to be a good level of legal support available to those under investigation, as Colonel Mendonça attested to during his evidence. We are aware of the concerns expressed by Sir Nick Parker that there could be potential conflicts of interest for the Government as a funder of legal support. We therefore call upon MoD to do all it can to ensure that this risk is minimised. There is also a danger that the current approach to legal provision risks the Service community missing out on the accumulation of collective knowledge and expertise.** ***We recommend that the MoD must engage with law firms with long experience of, and proven expertise in, providing counsel to those under investigation, in order to learn the lessons of these experiences and to ensure a more coherent approach to supporting veterans and Service personnel.***

98. **While we are broadly reassured about the provision of legal support to those under investigation, our inquiry has raised concerns about the level of welfare support—particularly about the ability for veterans to access welfare support. There is a real risk that veterans who do not live near regimental associations could slip through the net.**

99. ***We recommend that the Government should adopt a more proactive approach to assessing, and providing, the welfare support that veterans and Service personnel facing legacy investigations may require. The Veterans Gateway needs to be fully utilised as a means of directing veterans towards available help and the MoD should undertake a campaign to make contact with those veterans who may not be in close range of regimental headquarters or well equipped to use online resources.***

79 Q133
80 SOL0011

4 Reforming the system

A presumption against prosecution?

100. In March 2019, *The Sunday Times* reported that the then Defence Secretary, the Rt Hon Gavin Williamson MP, was seeking to bring forward legislation in the next Queen's Speech to protect veterans from prosecution for alleged historic abuses. According to the report, the proposed legislation would create a "statutory presumption against prosecution […] if the alleged offence took place more than 10 years ago". The legislation would require Attorney-General consent for any prosecution to proceed and would produce new advice from the Law Officers on "the level of evidence required to bring forward a prosecution, as well as set[ting] a test for whether bring[ing] forward the case is in the public interest".[81]

101. On 15 May the new Defence Secretary, the Rt Hon Penny Mordaunt MP, announced that the Government would bring forward, for further consultation, proposals aimed at providing stronger legal protections for Service personnel and veterans against prosecution. In addition to the 'presumption against prosecution' proposal that was revealed by the media in March 2019, the new announcement included the suggestion that Service personnel and veterans would be protected from investigations into actions on overseas battlefields after 10 years, except "in exceptional circumstances" such as the emergence of compelling new evidence.

102. The proposals would not apply to Northern Ireland-related fatalities. However, the Defence Secretary, addressing the RUSI Seapower Conference, indicated that the MoD would have a role contributing to the Northern Ireland Office's development of its legacy proposals. She also expressed her view that the lessons learnt from investigating allegations in Iraq and Afghanistan should also be applied to Northern Ireland.[82]

103. On 21 May 2019, the Secretary of State for Defence laid a Written Ministerial Statement, providing further details about her Department's proposals. In the Statement, she expressed the Government's opposition to veterans and Service personnel "being subject to repeated investigations in connection with historical operations many years after the events in question". To "address the basic unfairness of repeated investigations", the Defence Secretary confirmed that a "short public consultation" would be undertaken on measures that she believed should "be taken forward in legislation". One of these measures was the widely trailed presumption against prosecution for alleged offences that took place more than a decade earlier and which were "the subject of previous investigation", save in "exceptional circumstances".[83]

104. The Defence Secretary confirmed that the proposals would not apply to Troubles-related offences. However, she stated that the Government's "obligations to those who served in Northern Ireland remain the same as those who served in other theatres" and explained that it had been agreed with the Northern Ireland Secretary that the MoD would

81 C. Wheeler and R. Kerbaj (The Sunday Times, 3 March 2019), Minister seeks 10-year limit on prosecutions of soldiers

82 Ministry of Defence (15 May 2019), Defence Secretary keynote speech at the Sea Power Conference 2019, GOV.UK

83 HCWS1575

"provide formal input to any process taken forward by the Northern Ireland Office". The Defence Secretary also confirmed the Government's intention to derogate from the ECHR ahead of future conflicts.

105. **We welcome the announcement by the Defence Secretary that she will bring forward proposals on protecting Service personnel and veterans from prosecution. We hope that these proposals will indeed include a bar on new investigations for events that took place more than a decade ago unless there is compelling new evidence. A presumption against prosecution and protection from a fresh cycle of investigations, in cases which have previously been investigated and where there is no compelling new evidence, would be a sensible package of reforms. It would also be in keeping with the recommendation our predecessor Committee made, in relation to Northern Ireland legacy investigations, in 2017.**

106. **However, we are extremely concerned that these proposals will not cover soldiers who served in Northern Ireland during The Troubles. We appreciate that legacy investigations in Northern Ireland are the subject of a cross-party process and form an important strand of the talks aimed at restoring devolution. Nonetheless, the treatment of UK Armed Forces should not be inferior in Northern Ireland to that which applies to legacy issues from conflicts overseas. Indeed, the protection of Service personnel and veterans everywhere should be a subject of the utmost importance to the UK Parliament and Her Majesty's Government.**

107. **The lives of those who served in defence of the United Kingdom deserve an equal protection from 'lawfare' and vexatious claims, regardless of where they served or where they now live, as the Defence Secretary herself acknowledged in her Written Statement on 21 May. We intend to do all we can to secure this self-evident outcome.**

108. **We remind the Government that, in the context of Northern Ireland, our predecessor Committee expressly recommended not only a Qualified Statute of Limitations for Service personnel and veterans, but one which was coupled with a truth recovery mechanism aimed at providing the families of victims that best possible hope of uncovering the truth. We continue to believe that this offers the best route forward.**

109. ***We understand that the Government's proposals will be put out to consultation and we recommend that this process should include the publication of any bill in draft form. Such a draft bill should be made available for pre-legislative scrutiny by this Committee and, after it secures its Second Reading when introduced formally before the House, it should be remitted to an ad-hoc Select Committee for its Committee Stage, as is customary for Armed Forces Bills.***

Corporate Responsibility

110. In both her written and oral evidence, Hilary Meredith proposed that that MoD take corporate responsibility for criminal behaviour as a means of protecting Service personnel. This, she suggested, could be done by transferring the doctrine of combat immunity into criminal law.[84] Under an arrangement of this sort, wrongdoing would be investigated and punished internally by the military under Courts Martial.[85]

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111. Professor Richard Ekins, appearing alongside Ms Meredith, queried the practicality of this arrangement and suggested that under such a model, where the civilian courts would have to examine the liability of the MoD, there would still be a need to investigate in depth the actions of the Servicemen involved. According to Professor Ekins:

> It might not be that they are exposed to criminal liability or civilian liability personally, but often simply having to be investigated and give evidence, and having this as a mark on your career, especially if you are serving, is going to be highly problematic.[86]

Overall, Professor Ekins' assessment was that he did not think that such a scheme, which allowed action against the MoD for years and decades to come, "would protect the individuals in question".[87]

112. **We share the scepticism about Hilary Meredith's scheme for MoD corporate responsibility for alleged military crimes, and are concerned about the message that it would send. Service personnel who are promptly and properly investigated, and found guilty of criminal offences, should face the consequences themselves rather than being shielded by the MoD taking corporate responsibility.**

Reform and derogate?

113. Another proposal for providing better protection for Service personnel and veterans, put forward by Professor Ekins, was that the UK should derogate from the ECHR, in advance of future conflicts, and amend the Human Rights Act.[88] He explained that legacy investigations have materialised as a result of "a combination of European human rights law and the obligations that have been foisted upon the Convention by the European Court of Human Rights"[as explored in Chapter 2 of this report]. The result, he claimed, is an "overhang whereby a Government is at risk of human rights challenge if it does not maintain investigations".[89]

114. Professor Ekins argued that the ECtHR's caselaw has extended the Convention back in time and across the world; in particular, he highlighted how, in 2011, an ECtHR ruling overturned the position taken by the House of Lords in 2004 that the HRA did not apply to deaths prior to October 2000 (when the HRA came into force), and how, in 2007, the Al Skeini decision saw the territorial extent of the UK's obligations extended to territory for which it held responsibility in Iraq between the fall of the Ba'ath regime and the accession of the interim Iraqi government.[90]

115. Professor Ekins argued that, because of those two developments, Parliament should amend the HRA "to restore the understanding that our House of Lords [as the then Supreme Court] had in relation to the temporal application of the Act" and to similarly do so in relation to its territorial extent. He stressed that such a move "should not be viewed as

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88 Qq155–159
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a revolutionary act" nor of being of "the same level of political controversy" as would arise if repealing the HRA were proposed.[91] In his opinion, unless the HRA were amended it would be "very difficult" to address the problem of continued legacy investigations.[92]

116. In addition, Professor Ekins believed that the Government should seek to derogate from the ECHR in advance of future conflicts. He argued that the only reason that this had not been done in the cases of Iraq and Afghanistan was "because no one thought it [the ECHR] would apply". Had the UK derogated then it "would have helped" although he recognised that it would not have resolved the problem entirely as there are some articles of the ECHR from which states cannot derogate.[93]

117. He further suggested that derogation and reforming the HRA should be seen as complementary steps. Derogation alone risks the intervention by the ECtHR or a domestic court. However, he believed that "we can protect the derogation against our own courts if we legislate to remove their power to second-guess a derogation". [94]

118. Professor Ekins acknowledged that this could be a difficult issue for the ECtHR and that amending the HRA would not be a risk-free option.[95] The ECtHR could, he conceded, "hold the United Kingdom to be in breach of its obligations. That is a serious possibility".[96] Despite suggesting that "plenty of countries […] have failed to confirm and been held to be in breach on more than one occasion", he also recognised that the United Kingdom was a "very law-abiding nation […] and for good reason". Nonetheless, this would be "an instance of principled defiance" where the UK would "be holding the line on the position that is clearly set out in the European Convention, and was undone by the Strasbourg Court's misinterpretation, especially in the Al-Skeini case".[97] Ultimately, he suggested, it was a "political question whether the United Kingdom is willing to establish and hold a firm line in relation to not needlessly reopening investigations".[98]

119. Professor Ekins's written evidence outlines two possible alternative amendments to the HRA to alter its temporal and territorial scope. The first proposed amendment would see two new subsections inserted into s.22 of HRA:

> (8) Nothing in this Act applies in relation to–
>
> (a) an act taking place before 2 October 2000; or
>
> (b) an act taking place outside the United Kingdom; or
>
> (c) any failure, on or after 2 October 2000 or within the United Kingdom, to respond to an act that falls within (a) or (b).
>
> (9) In section 22(8), responding to an act includes investigating or otherwise having regard to evidence that it might have occurred and to providing a remedy for it.

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94 Qq155–156
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96 Q119
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According to Professor Ekins, the proposed s.22(8) "rules out extra-territorial application of the HRA" and would reinstate the territorial understanding of the HRA and ECHR that the Government unsuccessfully argued in the Al-Skeini case. This would, he suggests, "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".[99]

120. The second proposal put forward by Professor Ekins would, he argued, "more closely track the UK's obligations under the Convention" and would amend the HRA to "incorporate the Bankovic understanding of 'jurisdiction', rejecting the Al-Skeini v UK expansion":

> (8) Nothing in this Act applies in relation to–
>
> (a) An act taking place before 2 October 2000, or
>
> (b) An act taking place outside the United Kingdom otherwise than at a time when that place was within the reach of United Kingdom law, or
>
> (c) Any failure, on or after 2 October 2000 or at a place within the United Kingdom or within the reach of United Kingdom law, to respond to an act that falls within (a) or (b).
>
> (9) In section 22(8), responding to an act includes investigating or otherwise having regard to evidence that it might have occurred and to providing a remedy for it.
>
> (10) In section 22(8), a place outside the United Kingdom is within the reach of United Kingdom law if it is–
>
> (a) An embassy or consulate of the United Kingdom, or
>
> (b) A military base or vessel or aircraft under the control of United Kingdom military forces, or
>
> (c) A British ship or aircraft, or
>
> (d) A territory in which the United Kingdom has effective control of the territory and its inhabitants as a result of military occupation or through the consent, invitation or acquiescence of the Government of that territory and in which the United Kingdom exercises all or some of the public powers normally to be exercised by that Government in accordance with the law of the United Kingdom (other than this Act) or a part of the United Kingdom.

Professor Ekins suggests that this amendment would "make provision [as explained above] for some limited extra-territorial application", although there is a risk (due to s.22(10)(d)) "that the courts might interpret it in ways that effectively reinstate the Al-Skeini expansion". To counter this, he further suggests that the extra-territorial reach of

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the Act could be limited to sub-sections (a) to (c) of his proposed s.22(10). He claims that this would "largely, but not entirely, reflect the Bankovic ruling and would minimise the risk of subsequent judicial sabotage".[100]

121. According to Professor Ekins, amending the HRA in these ways "would free the Government to discontinue investigations into veterans without the risk of challenge in domestic courts for breach of human rights law". He explained that the amending legislation "should specify that it is not subject to sections 3 and 4 of the HRA", as otherwise claimants could "invite domestic courts to undermine the amendments by way of 'rights-consistent' interpretation or to denounce the amendments and put pressure on Parliament and Government to repeal them".

122. Professor Ekins acknowledged the political and legal risks of amending the HRA, including a ruling against the UK Government by the ECtHR. Nonetheless, he emphasized that, in his opinion, "where the Strasbourg Court has fundamentally misconstrued the law then there are good reasons for the UK to consider not complying with its rulings".[101]

The MoD's response to Professor Ekins's proposals

123. While suggesting that the above proposals deserved careful attention, the MoD, in supplementary written evidence to our inquiry, cautioned that there appeared to be some significant challenges to implementing them and warned that they did not provide "a complete solution". In particular, the MoD warned that the proposals "would not remove the obligations under domestic criminal law and under international law to investigate serious allegations".[102]

124. According to the MoD, by removing the ability to bring before domestic courts claims for ECHR violations that occurred overseas or before 2000, legal risks could increase "as the domestic courts currently provide some insulation against further expansion of the ECHR" and the loss of the ability to use the closed material procedure in domestic courts would likely see the Government unable to defend in the Strasbourg court claims that involve issues of national security.[103]

125. Although reiterating the Government's pledge to consider derogating from aspects of the ECHR in advance of future conflicts, the MoD's written evidence emphasises the Government's continuing commitment to membership of the ECHR. According to the MoD, "the Human Rights Act gives further effect to the ECHR in our domestic law, and we are not considering amending or repealing it".[104]

126. In response, Professor Ekins expressed his disappointment at the approach taken by the MoD towards his proposals. He considered that his proposals conformed to the position taken by UK courts prior to 2011, that the HRA and the ECHR "did not apply to deaths that took place before 2000 or outside the UK (with very limited exceptions)". He went on to suggest that "the MOD's response effectively concedes, but also understates,

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the domestic legal risk to which the Government is now exposed if it fails to reinvestigate historic incidents. This legal risk is a contributing factor to the difficulty of protecting veterans".[105]

127. Calling on the Government to adopt the stance taken on prisoner voting,[106] Professor Ekins argued that "the Government's reluctance to consider amending the HRA is disappointing […] [and] sharply limits the prospect that the Government will introduce changes that are capable of addressing the problem". He, therefore, urged the Government to "be bolder in its thinking, to avoid taking the jurisprudence of the Strasbourg Court to be a strait-jacket, and to introduce proposals to Parliament that respond directly to the problem we confront".[107]

128. **We agree with Professor Ekins that the ECtHR has gone beyond the original understanding of the Convention and that its rulings have stretched the temporal and territorial scope of the HRA beyond Parliament's original intentions in 1999.**

129. **We understand the Government's concern about the potential consequences of reforming the HRA and the implications for the UK's continued membership of the ECHR. However, it is also clear that the ECtHR's expansionism is one of the main drivers of the relentless cycle of legacy investigations. If the Government's proposals for implementing a presumption against prosecution are to succeed in stopping the injustice of repeated, and vexatious, investigations, then it needs seriously to consider whether the Human Rights Act also needs to be amended to counter the expansionist rulings of the European Court of Human Rights.**

130. ***Despite the concerns expressed by the MoD in its written evidence to our inquiry, we are strongly attracted to Professor Ekins's proposals as a basis for further work. Of his two proposals, the second option appears to pose the lesser legal risk and, due to the importance of the jurisprudence of the European Court of Human Rights in sustaining legacy investigations, this option should be properly and carefully considered and should, therefore, be included in the Government's consultation alongside its preferred proposal.***

Statute of Limitations

131. The question of whether a Statute of Limitations should be established to protect Service personnel from re-investigation long after alleged events took place has been an important feature of our work in conducting this inquiry and that of our predecessor Committee in its 2017 report on legacy investigations in Northern Ireland.

132. In 2017, our predecessors argued for the creation of a Statute of Limitations "covering all Troubles-related incidents, up to the signing of the 1998 Belfast Agreement, which involved former members of the Armed Forces". They also recommended that this be

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106 In Hirst v. UK No.2 and Greens and MT v. UK, the ECtHR ruled that the UK's blanket ban on prisoner voting was in breach of Protocol 1 Article 3 of the ECHR. The ban is still in place, although the UK Government was ordered to pay €23,000 in costs and expenses to Hirst in October 2005. In 2012, following a warning from the ECtHR about the continuing breach of the ECHR, the UK Government introduced the draft Voting Eligibility (Prisoners) Bill. The draft Bill received pre-legislative scrutiny from a specially appointed Joint Committee. A formal Bill was never introduced before Parliament. See: I. White and A. Horne (11 February 2015). Prisoners' voting rights (2005 to May 2015), House of Commons Library Standard Note: SN/PC/01764

107 SOL0013

paired with a "truth recovery mechanism" as a means both of satisfying legal requirements for investigations to occur—though without the prospect of prosecutions—and therefore of helping bereaved families finally to discover the facts.[108]

133. In undertaking this inquiry, we have sought to examine whether this proposal could be established to cover all previous conflicts and whether this could be done in a manner consistent with the UK's legal obligations. Unsurprisingly, evidence to our inquiry has shown a marked difference of opinion among witnesses about a Statute of Limitations.

Opponents of a Statute of Limitations

134. Opposition to the idea primarily rests on two objections: 1) that it could have deleterious consequences in Northern Ireland; and 2) that it would be contrary to the UK's international legal obligations and could invite challenge from international courts.

135. On the first point, KRW LLP warned that a Statute of Limitations would be contrary to the "delicate compromise" reached by Northern Ireland's political parties in the Stormont House Agreement (SHA) and would "destabilise" this arrangement.[109] Doug Beattie MLA, in his evidence on behalf of the UUP, also advised against a Statute of Limitations, arguing that such a system would "not achieve the purpose for which it is intended—namely protecting troops" as it would end up being extended to cover terrorist and paramilitary groups.

136. Mr Beattie also warned that it would cause "reputational damage" to the UK and instead argued that the Royal Prerogative of Mercy "must be viewed as the fall-back position for any soldier found guilty of a crime that is not premeditated", suggesting that such a mechanism could enable those charged "to make a clear statement of fact knowing that they will not be facing jail" and that this could be conducted in closed court with no media coverage. Finally, Mr Beattie argued that the Government should stop legal aid for historical actions against the military, suggesting that this "should apply to those abusing the legal aid system and who are trying to rewrite history".[110]

137. On the broader point about the potential impact on the UK's international standing and obligations, Dr Carla Ferstman and Dr Thomas Hansen, from the University of Essex, warned that a Statute of Limitations could be seen as the UK disregarding its obligations and "would not only undermine the UK's role as a champion of the rule of law internationally, but could also make UK citizens liable to prosecutions before the ICC and undermine respect for UK Armed Forces".[111]

Support for a Statute of Limitations

138. General (Rtd) Sir Nick Parker in both his written and oral evidence strongly supported a Statute of Limitations,[112] although he expressed scepticism as to whether such a system would be established and how long this would take. He, therefore, also emphasized the

108 Defence Committee, Investigations into fatalities in Northern Ireland involving British military personnel, Seventh Report of Session 2016–17, HC 1064, para.52
109 SOL0006
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need for the MoD to "provide the appropriate level of support to any veterans who become involved in any impending inquests" and made the case for all such veterans to receive their own lawyers independent from, but funded by, the MoD.[113]

139. Colonel (Rtd) Jorge Mendonça also expressed his support for the idea of Statute of Limitations, "providing that there is no startling new evidence that stands up".[114] Colonel (Rtd) Tim Collins, however, was more sceptical of the idea and stated that he believed in the rule of law and holding the Armed Forces "to the highest standards".[115] However, he indicated that he could "absolutely" consider supporting such a scheme if it could be compliant with the UK's Article 2 obligations, and the rule of law.[116]

140. Professor Ekins also told us that he believed that a Statute of Limitations was a "very good idea" and emphasized the need to "close down, by legislation, the risk of criminal trials 40 or 50 years later [after the alleged events took place]".[117] While he expressed doubt as to whether prosecutions of veterans for alleged offences that took place so long ago would often succeed, he reiterated that a "legislative bar is a very good idea", saying that the current "unfairness is too great".[118]

The MoD's stance on a Statute of Limitations

141. In its written evidence to the Committee, the MoD explained that the work undertaken by its internal team, established in July 2018 to examine the issue of legacy investigations, "has led us to the conclusion that a Statute of Limitations covering all military operations would be very challenging". According to the MoD, there would be a two-fold risk:

> In relation to offences alleged to have been committed during military operations overseas, there is a substantial risk that the absence of a domestic system of prosecution would probably lead to the International Criminal Court (ICC) asserting its jurisdiction.
>
> Meanwhile, in the Northern Ireland context, the Committee heard evidence in 2017 which suggested that a Statute of Limitations specific to deaths which occurred during the Troubles could be lawful, but only if applied to both non-state actors (paramilitaries) and state actors (Armed Forces and the Police). The Committee heard that an amnesty that applied only to Service Personnel would not be compliant with the UK's ECHR obligations.[119]

142. In coming to these conclusions, the MoD also examined cases where amnesties had been enacted in other ECHR member states, including an amnesty enacted by the French Government in one of its overseas territories (New Caledonia) and an amnesty enacted by the Croatian Government after its war of independence. However, the team had not spent "significant amounts of time studying amnesties enacted in countries which are not parties to the Convention".

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143. The MoD found that where amnesties have been enacted in countries which are parties to the ECHR, they have been "enacted with the purpose of promoting peace and reconciliation following periods of conflict or civil unrest and have applied to all participants in the conflict or civil unrest". The MoD also argued that there were "no examples of which the team is aware where a signatory to the ECHR has enacted a Statute of Limitations which prevents prosecutions only of Service personnel, or only of persons acting on behalf of the State more generally, from being brought in connection with a conflict or civil unrest after a prescribed number of years".[120]

144. The MoD's team also considered examples of where statutes of limitations of general application exist in other ECHR countries, e.g. Germany. Based on the team's assessment, the MoD highlighted two points:

> First, where statutes of limitations do exist they apply in respect of crimes committed by all persons, not a particular class of persons (e.g. Service personnel). Secondly, the team are unaware of any examples of such a Statute of Limitations having operated to prevent the prosecution of an individual acting on behalf of a State for causing a death—something which would appear inconsistent with the State's obligations under Article 2 ECHR.

General conclusions

145. **We are disappointed, but not surprised, that critics of our predecessor Committee's proposal for a Statute of Limitations have failed to acknowledge that the Committee has made clear that it is not proposing, and does not endorse, a blanket Statute of Limitations nor one that does not provide scope for re-investigation where compelling new evidence emerges.**

146. **We are firm in our belief that the proposals represent a Qualified Statute of Limitations that recognises both the importance of investigation of serious offences and the possibility of compelling new evidence emerging. Such a Statute of Limitations would in no way constitute an 'amnesty', rather it would require Service personnel and/or veterans to have already been investigated and exonerated of the offences in question.**

147. **We are therefore pleased that it appears that the proposals, outlined by the Defence Secretary, amount to a ten-year Statute of Limitations, qualified by an exception where compelling new evidence has been discovered.**

148. **We look forward to scrutinising the Government's proposals in detail when they emerge, but we remind the Government that if the ECtHR seeks to overrule these plans, the option will remain of changing the UK's stance in relation to the ECHR on the lines recommended by Professor Richard Ekins. This problem can be solved—but only by a resolute Government with the determination to do so.**

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Conclusions and recommendations

Our inquiry

1. At the heart of this inquiry and our Report is a determination to ensure that justice prevails for veterans and Service personnel. This does not mean that those who serve our country are above the law: far from it. We are unequivocal in our belief that wrongdoing must be investigated and punished. However, we also believe that there is something fundamentally wrong when veterans and Service personnel who have been investigated, and exonerated, become subject to what can often seem an unending cycle of investigation and re-investigation. That is neither a just nor a sustainable state of affairs and it risks undermining morale within the Armed Forces and trust in the rule of law. (Paragraph 13)

The Law Governing Armed Conflict

2. The legal frameworks underpinning the role of the Armed Forces in civilian and military operations are becoming increasingly complex and difficult to navigate, particularly in the fog and confusion of operations and conflicts. We share the judgement of our predecessor Committee in its 2014 report that the tensions and overlap between International Humanitarian Law (the Law of Armed Conflict) and International Human Rights Law have led to a lack of certainty and clarity. The expansionary judgements of the European Court of Human Rights have served to add even further uncertainty to this picture, particularly when their judgements have, in some important instances, had the effect of applying the Convention and its obligations retrospectively. (Paragraph 59)

3. This complexity and uncertainty has meant that it is all the more challenging and all the more urgent that commanding officers and Service personnel fully understand the laws governing the conflicts in which they are engaged. The importance of clear and accessible law has become well established in the civilian sphere, not least through the work of the Law Commission, and this principle should be just as, if not more, important when it comes to our Armed Forces. (Paragraph 60)

4. *In light of the increasing complexity of the legal frameworks underpinning military operations, the MoD should ensure that sufficient resources are made available for educating the Armed Forces, on a more regular basis, about their legal obligations.* (Paragraph 61)

Legacy Investigations - Past and Present

5. We find the idea that a Serviceman could be told that he was under investigation, but not told what for, a disturbing one; equally disturbing is the idea that, on the conclusion of the investigations, he was not told what the findings were. *The MoD should examine Colonel Collins' testimony and undertake the necessary investigations of its procedures to establish what happened in this case and to ensure that such a scenario can never happen again.* (Paragraph 68)

6. Overall, there appears to be a good level of legal support available to those under investigation, as Colonel Mendonça attested to during his evidence. We are aware of the concerns expressed by Sir Nick Parker that there could be potential conflicts of interest for the Government as a funder of legal support. We therefore call upon MoD to do all it can to ensure that this risk is minimised. There is also a danger that the current approach to legal provision risks the Service community missing out on the accumulation of collective knowledge and expertise. *We recommend that the MoD must engage with law firms with long experience of, and proven expertise in, providing counsel to those under investigation, in order to learn the lessons of these experiences and to ensure a more coherent approach to supporting veterans and Service personnel.* (Paragraph 97)

7. While we are broadly reassured about the provision of legal support to those under investigation, our inquiry has raised concerns about the level of welfare support—particularly about the ability for veterans to access welfare support. There is a real risk that veterans who do not live near regimental associations could slip through the net. (Paragraph 98)

8. *We recommend that the Government should adopt a more proactive approach to assessing, and providing, the welfare support that veterans and Service personnel facing legacy investigations may require. The Veterans Gateway needs to be fully utilised as a means of directing veterans towards available help and the MoD should undertake a campaign to make contact with those veterans who may not be in close range of regimental headquarters or well equipped to use online resources.* (Paragraph 99)

Reforming the system

9. We welcome the announcement by the Defence Secretary that she will bring forward proposals on protecting Service personnel and veterans from prosecution. We hope that these proposals will indeed include a bar on new investigations for events that took place more than a decade ago unless there is compelling new evidence. A presumption against prosecution and protection from a fresh cycle of investigations, in cases which have previously been investigated and where there is no compelling new evidence, would be a sensible package of reforms. It would also be in keeping with the recommendation our predecessor Committee made, in relation to Northern Ireland legacy investigations, in 2017. (Paragraph 105)

10. However, we are extremely concerned that these proposals will not cover soldiers who served in Northern Ireland during The Troubles. We appreciate that legacy investigations in Northern Ireland are the subject of a cross-party process and form an important strand of the talks aimed at restoring devolution. Nonetheless, the treatment of UK Armed Forces should not be inferior in Northern Ireland to that which applies to legacy issues from conflicts overseas. Indeed, the protection of Service personnel and veterans everywhere should be a subject of the utmost importance to the UK Parliament and Her Majesty's Government. (Paragraph 106)

11. The lives of those who served in defence of the United Kingdom deserve an equal protection from 'lawfare' and vexatious claims, regardless of where they served or

where they now live, as the Defence Secretary herself acknowledged in her Written Statement on 21 May. We intend to do all we can to secure this self-evident outcome. (Paragraph 107)

12. We remind the Government that, in the context of Northern Ireland, our predecessor Committee expressly recommended not only a Qualified Statute of Limitations for Service personnel and veterans, but one which was coupled with a truth recovery mechanism aimed at providing the families of victims that best possible hope of uncovering the truth. We continue to believe that this offers the best route forward. (Paragraph 108)

13. *We understand that the Government's proposals will be put out to consultation and we recommend that this process should include the publication of any bill in draft form. Such a draft bill should be made available for pre-legislative scrutiny by this Committee and, after it secures its Second Reading when introduced formally before the House, it should be remitted to an ad-hoc Select Committee for its Committee Stage, as is customary for Armed Forces Bills.* (Paragraph 109)

14. We share the scepticism about Hilary Meredith's scheme for MoD corporate responsibility for alleged military crimes, and are concerned about the message that it would send. Service personnel who are promptly and properly investigated, and found guilty of criminal offences, should face the consequences themselves rather than being shielded by the MoD taking corporate responsibility. (Paragraph 112)

15. We agree with Professor Ekins that the ECtHR has gone beyond the original understanding of the Convention and that its rulings have stretched the temporal and territorial scope of the HRA beyond Parliament's original intentions in 1999. (Paragraph 128)

16. We understand the Government's concern about the potential consequences of reforming the HRA and the implications for the UK's continued membership of the ECHR. However, it is also clear that the ECtHR's expansionism is one of the main drivers of the relentless cycle of legacy investigations. If the Government's proposals for implementing a presumption against prosecution are to succeed in stopping the injustice of repeated, and vexatious, investigations, then it needs seriously to consider whether the Human Rights Act also needs to be amended to counter the expansionist rulings of the European Court of Human Rights. (Paragraph 129)

17. *Despite the concerns expressed by the MoD in its written evidence to our inquiry, we are strongly attracted to Professor Ekins's proposals as a basis for further work. Of his two proposals, the second option appears to pose the lesser legal risk and, due to the importance of the jurisprudence of the European Court of Human Rights in sustaining legacy investigations, this option should be properly and carefully considered and should, therefore, be included in the Government's consultation alongside its preferred proposal.* (Paragraph 130)

18. We are disappointed, but not surprised, that critics of our predecessor Committee's proposal for a Statute of Limitations have failed to acknowledge that the Committee has made clear that it is not proposing, and does not endorse, a blanket Statute of Limitations nor one that does not provide scope for re-investigation where compelling new evidence emerges (Paragraph 145)

19. We are firm in our belief that the proposals represent a Qualified Statute of Limitations that recognises both the importance of investigation of serious offences and the possibility of compelling new evidence emerging. Such a Statute of Limitations would in no way constitute an 'amnesty', rather it would require Service personnel and/or veterans to have already been investigated and exonerated of the offences in question. (Paragraph 146)

20. We are therefore pleased that it appears that the proposals, outlined by the Defence Secretary, amount to a ten-year Statute of Limitations, qualified by an exception where compelling new evidence has been discovered. (Paragraph 147)

21. We look forward to scrutinising the Government's proposals in detail when they emerge, but we remind the Government that if the ECtHR seeks to overrule these plans, the option will remain of changing the UK's stance in relation to the ECHR on the lines recommended by Professor Richard Ekins. This problem can be solved—but only by a resolute Government with the determination to do so. (Paragraph 148)

Formal minutes

Tuesday 16 July 2019

Members present:

Rt Hon Dr Julian Lewis, in the Chair

Rt Hon Mr Mark Francois	Gavin Robinson
Graham P Jones	Rt Hon John Spellar
Mrs Madeleine Moon	Phil Wilson

Draft Report (*Drawing a line: Protecting veterans by a Statute of Limitations*), proposed by the Chair, brought up and read.

Ordered, That the draft Report be read a second time, paragraph by paragraph.

Paragraphs 1 to 148 read and agreed to.

Summary agreed to.

Resolved, That the Report be the Seventeenth Report of the Committee to the House.

Ordered, That the Chair make the Report to the House.

Ordered, That embargoed copies of the Report be made available, in accordance with the provisions of Standing Order No. 134.

[Adjourned till Tuesday 23 July at 10.45 am.

Witnesses

The following witnesses gave evidence. Transcripts can be viewed on the inquiry publications page of the Committee's website.

Tuesday 4 September 2018

Colonel Tim Collins OBE, Colonel Jorge Mendonça DSO MBE — Q1–84

Tuesday 11 December 2018

General (Rtd) Sir Nick Parker, **Hilary Meredith**, Chairman, Hilary Meredith Solicitors, **Professor Richard Ekins**, Policy Exchange Judicial Power Project and University of Oxford — Q85–172

Tuesday 8 January 2019

Martyn Day, Senior Partner, Leigh Day — Q173–370

Published written evidence

The following written evidence was received and can be viewed on the inquiry publications page of the Committee's website.

SOL numbers are generated by the evidence processing system and so may not be complete.

1 Ekins, Professor Richard (SOL0010)
2 Ekins, Professor Richard (SOL0013)
3 Ferstman, Carla (SOL0005)
4 Fisher-Paine, Lynne (SOL0001)
5 Hilary Meredith Solicitors Ltd (SOL0002)
6 KRW LAW LLP (SOL0006)
7 Ministry of Defence (SOL0008)
8 Ministry of Defence (SOL0011)
9 Ministry of Defence (SOL0012)
10 Parker, Sir Nick (SOL0003)
11 Rowlands, Mr Michael (SOL0004)
12 Ulster Unionist Party (SOL0007)

List of Reports from the Committee during the current Parliament

All publications from the Committee are available on the publications page of the Committee's website. The reference number of the Government's response to each Report is printed in brackets after the HC printing number.

Session 2017–19

First Report	Gambling on 'Efficiency': Defence Acquisition and Procurement	HC 431 (HC 846)
Second Report	Unclear for take-off? F-35 Procurement	HC 326 (HC 845)
Third Report	Sunset for the Royal Marines? The Royal Marines and UK amphibious capability	HC 622 (HC 1044)
Fourth Report	Rash or Rational? North Korea and the threat it poses	HC 327 (HC 1155)
Fifth Report	Lost in Translation? Afghan Interpreters and Other Locally Employed Civilians	HC 572 (HC 1568)
Sixth Report	The Government's proposals for a future security partnership with the European Union	HC 594 (HC 1570)
Seventh Report	Beyond 2 per cent: A preliminary report on the Modernising Defence Programme	HC 818 (HC 1994)
Eighth Report	Indispensable allies: US, NATO and UK Defence relations	HC 387 (HC 1569)
Ninth Report	Armed Forces Covenant Annual Report 2017	HC 707 (HC 1571)
Tenth Report	UK arms exports during 2016	HC 666 (HC 1789)
Eleventh Report	Armed Forces and veterans mental health	HC 813 (HC 1635)
Twelfth Report	On Thin Ice: UK Defence in the Arctic	HC 388 (HC 1659)
Thirteenth Report	Future Anti-Ship Missile Systems: Joint inquiry with the Assemblée nationale's Standing Committee on National Defence and the Armed Forces	HC 1071 (HC 2033)
Fourteenth Report	Mental Health and the Armed Forces, Part Two: The Provision of Care	HC 1481 (HC 2213)
Fifthteenth Report	Missile Misdemeanours: Russia and the INF Treaty	HC 1734 (HC 2464)
Sixteenth Report	Fairness without Fear: The work of the Service Complaints Ombudsman	HC 1889
First Special Report	SDSR 2015 and the Army	HC 311
Second Special Report	Armed Forces Covenant Annual Report 2016	HC 310

Third Special Report	Investigations into fatalities in Northern Ireland involving British military personnel: Government Response to the Committee's Seventh Report of Session 2016–17	HC 549
Fourth Special Report	Gambling on 'Efficiency': Defence Acquisition and Procurement: Government Response to the Committee's First Report	HC 846
Fifth Special Report	Unclear for take-off? F-35 Procurement: Responses to the Committee's Second Report	HC 845
Sixth Special Report	Sunset for the Royal Marines? The Royal Marines and UK amphibious capability: Government Response to the Committee's Third Report	HC 1044
Seventh Special Report	Rash or Rational? North Korea and the threat it poses: Government Response to the Committee's Fourth Report	HC 1155
Eighth Special Report	Lost in Translation? Afghan Interpreters and Other Locally Employed Civilians: Government Response to the Committee's Fifth Report	HC 1568
Ninth Special Report	Indispensable allies: US, NATO and UK Defence relations: Government Response to the Committee's Eighth Report	HC 1569
Tenth Special Report	The Government's proposals for a future security partnership with the European Union: Government Response to the Committee's Sixth Report	HC 1570
Eleventh Special Report	Armed Forces Covenant Annual Report 2017: Government Response to the Committee's Ninth Report	HC 1571
Twelfth Special Report	Mental health and the Armed Forces, Part One: The Scale of mental health issues: Government Response to the Committee's Eleventh Report	HC 1635
Thirteenth Special Report	On Thin Ice: Defence in the Arctic: Government Response to the Committee's Twelfth Report	HC 1659
Fourteenth Special Report	UK arms exports during 2016: Government Response to the Committees' First Joint Report	HC 1789
Fifteenth Special Report	Beyond 2 per cent: A preliminary report on the Modernising Defence Programme: Government Response to the Committee's Seventh Report	HC 1994
Sixteenth Special Report	Future Anti-Ship Missile Systems: Joint inquiry with the Assemblée nationale's Standing Committee on National Defence and the Armed Forces: Government Response to the Committee's Thirteenth Report	HC 2033
Seventeenth Special Report	Armed Forces Covenant: NAO Review of LIBOR Funding	HC 2201
Eighteenth Special Report	Mental Health and the Armed Forces, Part Two: The Provision of Care: Government Response to the Committee's Fourteenth Report of Session 2017–19	HC 2213

Nineteenth Special Report	Missile Misdemeanours: Russia and the INF Treaty: Government response to the Committee's Fifteenth Report of Session 2017–19	HC 2464
Twentieth Special Report	Shifting the Goalposts? Defence Expenditure and the 2% Pledge: An Update	HC 2527