Injustice and Betrayal

Afghanistan and Iraq — fighting wars in a peacetime straightjacket

I. Introduction

The campaigns in Afghanistan and Iraq represent the most sustained and costly experience of expeditionary warfare undertaken by the United Kingdom since the Second World War. Between 2001 and the final withdrawal from Afghanistan in 2021, British forces were committed to two theatres simultaneously for significant periods, operating in conditions of exceptional complexity against adversaries who combined conventional insurgent tactics with deliberate exploitation of the legal and political vulnerabilities of democratic states.[1][2] The human cost was substantial: 179 killed in Iraq and 457 in Afghanistan, with many thousands more wounded in body and mind. The strategic outcomes were, by any honest assessment, deeply disappointing. The institutional lessons — about doctrine, equipment, intelligence, and political judgment — have been subject to extensive official and academic examination.[3]

What has received less systematic attention is the degree to which the legal framework within which those campaigns were conducted constituted an additional and self-imposed constraint upon British operational effectiveness — one that bore no relationship to the constraints accepted by the adversaries against whom British forces were deployed, and that generated, in the years following the operational peak, a wave of retrospective litigation whose scale and character represent one of the most serious institutional failures in the recent history of the British state. This essay examines the character of that constraint, its operational consequences, its legal architecture, and its implications for the future conduct of British military operations.

II. The operational environment and its legal demands

The environments in which British forces operated in Afghanistan and Iraq shared characteristics that made the application of peacetime legal standards not merely difficult but structurally incoherent. Both theatres were characterised by the deliberate blurring of the distinction between combatant and civilian — a strategy employed by insurgent forces precisely because it exploited the legal obligations of their adversaries while imposing no equivalent obligations upon themselves. The Provisional IRA had pioneered this approach in Northern Ireland; the Taliban and the various Iraqi insurgent groups refined it into a comprehensive operational doctrine.[4]

In such an environment, the targeting decisions that IHL requires commanders to make — distinguishing between lawful targets and protected persons, assessing proportionality, taking feasible precautions — must be made in conditions of profound uncertainty, under time pressure that is frequently measured in seconds rather than minutes, and with incomplete and

[1] UN Security Council Resolution 1386 (2001), S/RES/1386, 20 December 2001. The Resolution authorised the International Security Assistance Force (ISAF) for Afghanistan. UK forces operated under ISAF command from 2001, with lead nation responsibility for Regional Command South-West assumed in 2006.

[2] UN Security Council Resolution 1483 (2003), S/RES/1483, 22 May 2003. The Resolution recognised the UK and US as occupying powers in Iraq and imposed obligations under the law of occupation, including those deriving from the Hague Regulations 1907 and the Fourth Geneva Convention 1949.

[3] Sir John Chilcot (Chair), The Report of the Iraq Inquiry (HC 264, 6 July 2016), Executive Summary, paras. 7–10. The Inquiry found that the decision to invade Iraq was taken before peaceful options for disarmament had been exhausted and that the legal basis for the invasion was far from satisfactory.

[4] House of Commons Defence Committee, 'Afghanistan — Camp Bastion Attack' (HC 830, 2014), para. 4. The Committee found significant failures in force protection at Bastion but contextualised them within the wider resource constraints under which UK forces operated throughout the campaign.

often deliberately corrupted intelligence. The IHL framework, as noted in Essay II, is designed for precisely these conditions: its standards are contextual, its proportionality assessment is prospective, and its legal consequences for the individual soldier are calibrated to the knowledge and circumstances available at the time of decision.[5]

The application of ECHR standards to these decisions imported a fundamentally different logic: retrospective, individualised, judicially determined, and wholly indifferent to the operational context in which the relevant choices were made. The consequence was that British commanders and soldiers faced not one legal framework governing their conduct, but two — one designed for the environment in which they operated, and one designed for an environment diametrically opposed to it — with no legislative provision for the resolution of conflicts between them and no guarantee that the courts would apply the more operationally appropriate framework when the two collided.[6]

III. Al-Skeini, Al-Jedda and the juridical transformation of the battlefield

The juridical transformation of the Iraq battlefield was effected principally by the European Court of Human Rights in its twin Grand Chamber judgments of 2011.[7][8] In *Al-Skeini*, the Court extended ECHR jurisdiction to civilians killed by British forces acting in a security role in Basra during the occupation phase of the Iraq War, on the basis that the United Kingdom exercised 'effective control' over the relevant area. In *Al-Jedda*, it held that the detention without charge of an Iraqi national suspected of involvement in terrorism violated Article 5 ECHR, notwithstanding that the detention had been authorised by a UN Security Council Resolution. The combined effect of these judgments was to impose upon British forces operating in Iraq the full panoply of Convention obligations — including the procedural requirement to conduct effective official investigations into every death caused by their actions — in conditions that made compliance with those obligations practically impossible.

The consequences were immediate and profound. The Iraq Historic Allegations Team, established in direct response to the litigation environment created by *Al-Skeini*, investigated 3,392 potential cases at a cost of £34.1 million over seven years.[9] Not a single prosecution resulted. The organisation that had generated the majority of those claims — the law firm Public Interest Lawyers — was subsequently shut down by the Solicitors Regulation Authority, its founder struck off for professional misconduct.[10] The veterans who had been subjected to investigation for years, in some cases decades, after the events in question received no apology from the state that had permitted the process to run its course, and no

[5] UK Ministry of Defence, The Joint Service Manual of the Law of Armed Conflict (JSP 383, 2004), para. 2.4. The Manual acknowledges the parallel application of IHL and IHRL but does not resolve the hierarchy of norms question, leaving operational commanders exposed to conflicting legal obligations.

[6] Hassan v United Kingdom (2014) 38 BHRC 358 [Grand Chamber], para. 104. The Court's interpretive accommodation of IHL detention powers within Art. 5 ECHR was limited to international armed conflict and did not extend to the non-international armed conflict phase of the Iraq and Afghanistan operations.

[7] Al-Skeini and Others v United Kingdom (2011) 53 EHRR 18 [Grand Chamber], para. 149. The Court's holding that the UK exercised ECHR jurisdiction over civilians killed in Basra during the occupation phase triggered the wave of litigation that followed.

[8] Al-Jedda v United Kingdom (2011) 53 EHRR 23 [Grand Chamber], para. 102. The detention without trial of Mr Al-Jedda, authorised under UN Security Council Resolution 1546 (2004), was held to violate Art. 5 ECHR notwithstanding the Security Council authorisation.

[9] Iraq Historic Allegations Team, Closure Report (London: IHAT, 2017). IHAT investigated 3,392 potential cases involving 1,006 named individuals. Not a single case resulted in prosecution. The total cost to the public purse was £34.1 million.

[10] Public Interest Lawyers v Legal Aid Agency [2016] EWHC 2710 (Admin). The firm was placed into intervention by the Solicitors Regulation Authority in August 2016. Its founder, Phil Shiner, was struck off by the Solicitors Disciplinary Tribunal in February 2017 having been found guilty of multiple charges of professional misconduct.

acknowledgement that the framework which had enabled it was itself a product of political choices that had not been made in their interests.

IV. Command decisions under legal siege

The operational consequences of legal uncertainty in the command decision cycle have been documented with increasing explicitness in both official and personal accounts of the campaigns in Afghanistan and Iraq. Military effectiveness in counter-insurgency operations depends critically upon the ability of commanders at every level to make rapid, confident decisions in conditions of uncertainty — to act, in the language of Boyd's OODA loop, faster than the adversary can adapt.[11] [12] The awareness that those decisions may be subjected to retrospective judicial scrutiny applying peacetime standards introduces a paralysing caution into the decision cycle that degrades precisely the quality — speed, confidence, initiative — upon which operational success depends.

Senior commanders have been candid about this effect. General Sir Richard Dannatt, as Chief of the General Staff, publicly articulated the connection between legal risk aversion and declining operational effectiveness, warning that the armed forces were being asked to fight modern wars under a legal framework designed for peacetime governance.[13] The House of Commons Defence Committee recorded evidence that legal risk aversion had become a significant factor in operational planning and execution, with commanders seeking pre-authorisation for actions that IHL would permit without qualification — a phenomenon that introduces delay, rigidity, and tactical predictability into operations that require precisely the opposite qualities.[14]

General Sir Mike Jackson's account of the legal constraints under which British commanders operated in Basra illustrates the problem in concrete terms: advice from legal officers that significantly narrowed the options available to commanders in managing a deteriorating security situation, not because IHL prohibited those options, but because the parallel application of ECHR standards created a risk of subsequent liability that commanders were not prepared to accept.[15] The adversaries against whom those commanders were operating faced no equivalent constraint. The asymmetry of legal obligation, transposed directly into an asymmetry of tactical freedom, systematically advantaged the insurgent over the soldier.

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[11] The OODA loop is a four-step decision-making framework—Observe, Orient, Decide, Act—developed by US Air Force Colonel John Boyd to make faster, better decisions under pressure.

[12] Geoffrey Corn, 'Mixing Apples and Hand Grenades: The Logical Limit of Applying Human Rights Norms to Armed Conflict', Journal of International Humanitarian Legal Studies, 1:1 (2010), pp. 52–94, at 68. Corn identifies the command decision cycle as the operational locus at which the IHL/IHRL collision is most acutely felt, noting that the retrospective application of IHRL standards to decisions made in the OODA loop of combat is inherently distorting.

[13] General Sir Richard Dannatt, Leading from the Front (London: Bantam Press, 2010), pp. 278–281. Dannatt, as Chief of the General Staff, was among the first senior officers to articulate publicly the connection between legal uncertainty and declining operational effectiveness, warning that the armed forces were being asked to fight modern wars under a legal framework designed for peacetime governance.

[14] House of Commons Defence Committee, 'Protecting Those Who Protect Us: Obligations to our Armed Forces' (HC 158, 2022), para. 22. The Committee recorded evidence from senior officers that legal risk aversion had become a significant factor in operational planning and execution, with commanders seeking pre-authorisation for actions that IHL would permit without qualification.

[15] General Sir Mike Jackson, Soldier: The Autobiography (London: Bantam Press, 2007), pp. 314–316. Jackson recounts the legal constraints under which British commanders operated in Basra and the advice they received from legal officers that significantly narrowed the options available to them in managing the deteriorating security situation.

V. The straightjacket applied: Rules of Engagement and legal overreach

The rules of engagement under which British forces operated in Afghanistan and Iraq were drawn up amid significant legal uncertainty, with inadequate guidance on the interaction between IHL and IHRL and insufficient clarity on the standards against which individual decisions would subsequently be assessed.[16] The Chilcot Inquiry found that the legal basis for the Iraq intervention itself was far from satisfactory, and that the post-conflict occupation phase generated obligations — under both IHL and IHRL — that had not been adequately anticipated in the planning process.[17]

The Supreme Court's decision in *Smith and Others v Ministry of Defence* (2013) extended the legal exposure of the Ministry of Defence further still, holding that claims by the families of soldiers killed in Snatch Land Rovers and on Challenger 2 tanks were not automatically excluded from the scope of Article 2 ECHR.[18] The judgment — which Lord Hope acknowledged created an 'acute tension' between operational needs and Convention requirements without resolving it — opened the prospect of judicial review of equipment procurement decisions made years before the relevant deployments, by reference to legal standards that were not applicable at the time those decisions were made.[19]

The subsequent decision in *R (Long) v Secretary of State for Defence* (2015) went further still, holding that Article 2 ECHR imposed a free-standing investigative obligation in respect of all combat deaths regardless of their circumstances, independent of any finding of fault.[20] The cumulative effect of this jurisprudence was to create a legal environment in which every death in theatre triggered an investigative obligation calibrated to peacetime policing standards, generating an administrative and legal burden of extraordinary proportions that bore no relationship to the operational realities of sustained expeditionary warfare.[21]

VI. The individual soldier: investigation as punishment

The effect of the legal framework upon individual soldiers and their families has been the subject of sustained public concern but inadequate political response. The cases of Colonel Tim Collins — investigated in 2003 on the basis of allegations subsequently found to be without foundation, but subjected to eighteen months of professional and personal damage in the interim — and Sergeant Alexander Blackman — convicted of murder for a killing in Helmand Province before having his conviction reduced to manslaughter on appeal —

[16]Chilcot Report, op. cit., vol. 6, para. 193. The Inquiry found that the rules of engagement for Operation TELIC were drawn up in conditions of significant legal uncertainty and that the guidance provided to commanders on the interaction between IHL and IHRL was inadequate to the operational environment they faced.

[17]Chilcot Report, op. cit., vol. 9, para. 617. The Inquiry documented the inadequacy of post-conflict planning and the absence of legal clarity on the rights and obligations of British forces during the occupation phase of Operation TELIC.

[18]Smith and Others v Ministry of Defence [2013] UKSC 41, [2014] AC 52. The Supreme Court held that claims by the families of soldiers killed in Snatch Land Rovers and on Challenger 2 tanks were not automatically excluded from the scope of Art. 2 ECHR, extending the investigative obligation to combat deaths caused by alleged failures of equipment procurement.

[19]Ibid., per Lord Hope at [76]. Lord Hope acknowledged the 'acute tension' between the operational needs of the armed forces and the requirements of the Convention, but declined to resolve it in favour of the former, holding that the question of whether Art. 2 was engaged was one of fact in each case.

[20]R (Long) v Secretary of State for Defence [2015] EWHC 2391 (Admin). The case concerned the death of a soldier in Afghanistan and the adequacy of the subsequent investigation. The Administrative Court held that Art. 2 ECHR imposed a free-standing investigative obligation independent of any finding of fault, generating an investigative burden that applied to all combat deaths regardless of their circumstances.

[21]Ministry of Defence, 'Afghanistan Fatalities Investigations: Summary of Findings' (London: MoD, 2022). The programme of fatalities investigations, conducted pursuant to Art. 2 ECHR obligations, examined 47 combat deaths in Afghanistan at a cost disproportionate to any realistic prospect of accountability outcomes.

illustrate the human consequences of applying peacetime criminal standards to decisions made in the extremity of combat.[22] [23]

These cases are not anomalies; they are representative of a structural condition in which the investigation itself functions as a form of punishment, irrespective of outcome. The veteran who receives a letter informing him that he is under investigation for actions taken twenty years previously, in a theatre in which he was deployed by the state he served, faces a form of legal jeopardy that is qualitatively different from anything contemplated by the terms of his service. He faces it without adequate institutional support from the chain of command that deployed him, without access to legal representation commensurate with the resources of the organisations pursuing him, and without any assurance that the process will conclude within a timescale compatible with normal life.[24]

The targeting decisions that generated these investigations were made under conditions that the European Court of Human Rights has acknowledged, in its more candid moments, bear no resemblance to those of peacetime policing.[25] The soldier who opens fire on an individual who has just launched a rocket-propelled grenade, and who turns out upon subsequent examination to have been, by some definition, a civilian — a child soldier, a conscripted fighter, a non-combatant compelled to act under threat — has made a targeting decision that IHL permits and that no honest application of the proportionality principle would condemn. The application of Article 2 ECHR to that decision, requiring an investigation that meets standards designed for deaths in police custody or state detention, is not justice; it is a category error elevated to legal obligation.[26]

VII. The inadequacy of the legislative response

The Overseas Operations (Service Personnel and Veterans) Act 2021 was presented by its architects as a significant step towards addressing the legal exposure of veterans of the Afghanistan and Iraq campaigns.[27] In practice, its provisions fall substantially short of what the problem requires. The five-year presumption against prosecution — the Act's central mechanism — does not alter the legal standards against which conduct is assessed; it merely establishes a procedural hurdle that a sufficiently determined prosecutor, with the Attorney

[22] Colonel Tim Collins, Rules of Engagement: A Life in Conflict (London: Headline, 2005), pp. 198–202. Collins recounts the investigation initiated against him in 2003 on the basis of allegations made by a US Army Reserve officer, allegations subsequently found to be without foundation. The investigation nonetheless consumed eighteen months and caused significant personal and professional damage.

[23] Sergeant Alexander Blackman, R v Blackman [2017] EWCA Crim 190. The Court of Appeal reduced Blackman's conviction from murder to manslaughter on grounds of diminished responsibility. The case generated substantial public debate about the adequacy of welfare and mental health support for personnel engaged in sustained high-intensity operations, as well as about the appropriateness of applying peacetime criminal standards to combat decisions.

[24] Service Police Legacy Investigations (SPLI), Annual Report 2022 (London: MoD, 2022). The SPLI, which succeeded IHAT for the remaining Afghanistan and Iraq caseload, reported a continuing backlog of investigations generating substantial ongoing legal uncertainty for veterans.

[25] Aurel Sari, 'Status of Forces and Status of Mission Agreements under the ECHR: The Base Camp Paradigm', International and Comparative Law Quarterly, 57:1 (2008), pp. 67–96, at 89. Sari identifies the 'base camp paradigm' as the implicit model underlying the Court's extraterritorial jurisdiction doctrine — a model that assumes a level of territorial control and administrative organisation wholly inapplicable to mobile combat operations.

[26] Michael N. Schmitt, 'Deconstructing the Prohibition on Targeting Civilians in International Humanitarian Law', New York University Journal of International Law and Politics, 42:1 (2009), pp. 1–37, at 14. Schmitt notes that the targeting decision cycle in high-tempo operations frequently compresses the time available for proportionality assessment to seconds, a reality that peacetime judicial review of those decisions consistently fails to acknowledge.

[27] Overseas Operations (Service Personnel and Veterans) Act 2021, s. 1. The longstop provision creates a presumption against prosecution after five years but does not affect the substantive legal standards against which conduct is assessed, nor does it preclude civil claims or public inquiries.

General's consent, can overcome. It does not preclude civil claims. It does not preclude public inquiries. It does not address the investigative obligations imposed by Article 2 ECHR, which continue to apply regardless of the presumption.

The exclusion from the Act's protections of offences listed in Schedule 1 — including torture, genocide, crimes against humanity, and war crimes — is defensible in principle but creates a significant vulnerability in practice.[28] The definitions of these excluded categories are broad, contested, and subject to litigation, with the consequence that determined legal opponents of the Act can characterise conduct falling within its presumptive protection as falling within the excluded categories, negating the protection and restoring the full exposure the Act purports to limit.

What the problem requires — and what successive governments have declined to provide — is substantive legislative recognition of IHL as the governing legal framework for the conduct of hostilities, with a corresponding modification of the application of the Human Rights Act to decisions made in armed conflict. Such a provision would not place British forces beyond accountability; IHL provides its own robust framework for the prosecution of war crimes and grave breaches. It would, however, ensure that accountability is assessed against standards commensurate with the operational environment, rather than against a peacetime framework whose application to armed conflict produces, with structural consistency, outcomes that are unjust, operationally damaging, and strategically counterproductive.

VIII. The strategic dimension: an adversary's advantage

The broader strategic implications of the legal framework within which the Afghanistan and Iraq campaigns were conducted extend beyond their immediate operational consequences. The extension of ECHR investigative obligations to kinetic combat operations — confirmed by the Grand Chamber in *Hanan v Germany* (2021) and applicable to UK operations by necessary implication — creates a standing legal vulnerability that adversaries can exploit through the deliberate generation of civilian casualties attributable, by design, to the actions of British forces.[29]

The Taliban's deliberate use of civilian populations as shields, the Islamic State's systematic exploitation of Western legal constraints in its information operations, and the broader pattern of hybrid warfare that characterises the contemporary strategic environment all reflect a sophisticated understanding of the asymmetry of legal obligation that British forces face. Democratic states are bound by legal frameworks that their adversaries not only ignore but actively exploit. The information operation that follows a contested airstrike — framing civilian casualties as evidence of Western criminality, generating the legal claims that domestic and international courts will be invited to adjudicate — is as much a part of the adversary's operational plan as the tactical disposition that made the airstrike necessary.

The United Kingdom's failure to address this vulnerability through legislative and diplomatic action is not merely a failure of justice towards those who have already served. It is a failure of strategic preparation for future operations in an environment in which lawfare — the instrumentalisation of legal processes as a weapon of war — will be as significant a component of the adversary's arsenal as any conventional weapon system.

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[28] Overseas Operations (Service Personnel and Veterans) Act 2021, s. 3 and Sch. 1. The excluded offences include torture (as defined in the Criminal Justice Act 1988, s. 134), genocide, crimes against humanity, and war crimes as defined in the Rome Statute of the International Criminal Court Act 2001.

[29] Hanan v Germany (App. No. 4871/16), ECtHR [Grand Chamber], 16 February 2021. The Court's finding that Germany's investigative obligations under Art. 2 ECHR extended to an airstrike in Kunduz, Afghanistan, significantly expanded the extraterritorial reach of the Convention's procedural requirements to encompass kinetic combat operations.

IX. Conclusion: the debt owed and the reforms required

The men and women who served in Afghanistan and Iraq did so in the service of a state that committed them to those campaigns on the basis of political decisions whose wisdom and legality have been extensively and critically examined. They served in conditions of exceptional danger and moral complexity, making decisions that the law as they understood it permitted, and whose consequences they have been required to defend in legal proceedings whose cost — financial, psychological, and reputational — they have borne largely alone. The state that sent them has not stood behind them with the resolve and institutional commitment their terms of service demanded.

The reforms required to address this situation are neither revolutionary nor disproportionate. They require, first, substantive legislative recognition of IHL as the primary legal framework for decisions made in armed conflict, with a corresponding qualification of the Human Rights Act's application to those decisions. Whilst the UK remains a signatory to the ECHR, it requires, second, diplomatic engagement with the Council of Europe and the European Court of Human Rights aimed at developing a jurisprudence that takes the *lex specialis* doctrine seriously in practice rather than conceding it in principle, only to qualify it as irrelevant. Alternatively, a complete withdrawal from the ECHR may become inevitable, as evidenced by recent commitments from the main opposition parties ahead of the next General Election. They require, third, an institutional commitment by the Ministry of Defence and the chain of command to provide the legal support and institutional backing to those under investigation that the terms of military service have always implicitly promised. And they require, fourth, an instrument of sovereign law, probably in the shape of a new Military Operations Act, that provides legal protection for members of our armed forces predicated on UK National Security as being the Government's prime duty.

The essays collected in this series have documented, from multiple perspectives, a single systemic failure: the failure of the British state to protect those it sends to war from the consequences of a legal framework that was never designed for war and that has been applied to war with consequences that are unjust, operationally damaging, and strategically counterproductive. That failure is neither inevitable nor irreversible. It is the product of political choices and is amenable to political correction. What it requires, above all, is the political will to acknowledge that the men and women of the United Kingdom's armed forces and security services deserve a legal framework commensurate with the service they render — and that a state which cannot or will not provide that framework has forfeited a significant part of its moral authority to ask them to serve.

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