BROKEN CONTRACT

The Legal Abandonment of British Armed Forces Personnel and the Case for a Sovereign Military Operations Framework

Dr Robert Parr MBE AKC

Visiting Research Fellow, Changing Character of War Centre, Pembroke College, University of Oxford

ABSTRACT

British armed forces personnel are governed by a legal framework that no government designed, no Parliament deliberately enacted, and no operational commander can coherently apply. The progressive and unplanned conflation of International Humanitarian Law (IHL) and International Human Rights Law (IHRL) — accelerated by extraterritorial extension of the European Convention on Human Rights (ECHR) through the Strasbourg Court's post-2001 jurisprudence — has produced structural conditions of legal incoherence in which personnel may simultaneously comply with IHL and violate IHRL, without either framework providing the clarity or protection that operational command requires. Inevitably and foreseeably, this conflation has coincided with the changing nature of modern war, creating a toxic environment in which our armed forces have to navigate legal complexity whilst shouldering an inappropriate burden of legal risk. This paper argues that this incoherence is not primarily a legal problem. It is a political problem: a product of successive governments' failure to construct a coherent sovereign framework for military operations, to use available derogation mechanisms, and to honour the through-life contract between the state and those who serve it. The paper identifies that failure as a mechanism of betrayal — not merely of individual service personnel and veterans, but of national security itself. The paper advances a programme of parallel reconstruction built around two complementary instruments. The first is a sovereign Military Operations Act, providing domestic legal authority for lethal force and detention in both international and non-international armed conflict, both home and overseas, through ministerial authorisatio;, a triple-gateway prosecutorial filter; the establishment of an Expert Military Panel; and strict time limits on investigation — expressly disapplying the UK Human Rights Act (HRA) in the military operations context by a statutory primacy clause, with full ECHR withdrawal as the outer option if Strasbourg challenge follows. Essentially, the current unlimited burden of potential liability carried by our soldiers justifies this novel legal provision. The second instrument is the statutory crystallisation of the Armed Forces Covenant into a soldier/state through-life contract, transforming it from aspiration into an enforceable legal instrument. These are the instruments of a dual strategy: mutually supportive and equally essential.

INTRODUCTION: THE BROKEN CONTRACT

When a person swears the oath of attestation and enters the service of the Crown, an implicit contract is formed. It is currently not set out in a single document and carries no conventional legal enforceability. But its terms are understood by both parties: the state will deploy its service personnel in the prosecution of national policy; it will provide them with adequate legal authority, equipment, and rules of engagement to perform what it asks of them; it will support and protect them during their service and in its aftermath; and it will stand behind them when the conduct of legitimate operations is subsequently challenged. In return, service personnel accept extraordinary obligations — the obligation to place themselves in harm's way on command; to exercise lethal force under conditions of extreme stress and moral complexity; to surrender a raft of rights such as those of free association and freedom of expression; and to subordinate individual preference to institutional requirement in ways that no civilian employment relationship demands.[1]

This paper argues that the British state has reneged on that contract, and that we have now reached a breaking point after decades of damage. The state has done this not through a single act of legislative betrayal but through decades of institutional failure, political evasion, and legal incoherence. The fracturing of what this paper terms the *through-life contract* — the full continuum of obligations the state assumes from recruitment through to the lifetime welfare of the veteran where required — is not merely a welfare failure. It is a national security failure. A state that cannot credibly commit to standing behind its service personnel, that exposes its junior commanders to retrospective criminal liability for the exercise of lawful operational judgment, and that allows its veterans to face homelessness, untreated trauma, and excessive levels of criminal justice involvement as the foreseeable consequences of service, is a state that will progressively find the human contract on which its military capability depends becomes impossible to sustain.[2]

The mechanism of betrayal is primarily legal. Since 2001, the extraterritorial extension of the European Convention on Human Rights (ECHR) through the Strasbourg Court's constantly evolving jurisprudence — most decisively in *Al-Skeini v United Kingdom* (2011) — has imposed upon UK military operations a legal framework designed for peacetime

[1] The phrase *through-life contract* is used throughout this paper to denote the full continuum of obligations the state assumes when it recruits an individual into the armed forces: from the conditions of recruitment and training, through the legal framework governing operational conduct, to the support owed in the aftermath of service. It is distinguished from the Armed Forces Covenant, which is the contemporary expression of those obligations, on the grounds that the Covenant remains largely aspirational and lacks binding legal force. The argument advanced here is that the through-life contract requires legislative crystallisation to become enforceable.

[2] The Armed Forces Covenant was given statutory recognition in the Armed Forces Act 2011, which placed a duty on the Secretary of State to report annually to Parliament on the state of the Covenant. The Armed Forces Act 2021, ss 8–9, extended due regard obligations to specified public bodies. Neither measure created directly enforceable rights for service personnel or veterans. For the foundational policy, see Ministry of Defence, *The Armed Forces Covenant* (MoD 2011).

policing that was never calibrated for armed conflict. This framework operates alongside International Humanitarian Law (IHL) without a clear hierarchy of norms, without the derogation architecture from ECHR that would provide legal clarity through the UK Human Rights Act (HRA), and without the domestic legislative underpinning that would give personnel operating within it genuine legal protection. The result is what this paper describes as an osmotic blending of IHL and IHRL in the operational space:[3] a gradual conflation of two regimes that were designed for different contexts, governed by different institutions, and calibrated to fundamentally different assumptions about when the state may use lethal force.

This osmotic conflation is neither inevitable nor irreversible. It is a product of deliberate political choices — or, more precisely, of repeated political failures to make choices. The UK government consistently failed to lodge Article 15 ECHR derogations when it deploys military forces into armed conflict. It failed to enact a coherent statutory framework for overseas and domestic military operations. It failed to invest in the welfare infrastructure required by the through-life contract. And when the litigation consequences of those failures became apparent, it responded with downstream legislative sticking-plasters — the Overseas Operations Act 2021 and the ill-fated Northern Ireland legacy legislation — that addressed symptoms whilst leaving the structural disease untouched.[4]

The cost has been paid by others. The Iraq Historic Allegations Team (IHAT) investigated over 3,400 allegations and referred none for prosecution, but subjected hundreds of veterans to years of investigation. In a similar vein, the Al-Sweady Inquiry cost £31 million over five years only to establish that the most serious allegations against British forces were entirely and deliberately false. Veterans of Afghanistan and Iraq, and indeed Northern Ireland, carry rates of PTSD, alcohol dependency, relationship breakdown, homelessness, criminal justice involvement, and suicide elevated above those of the civilian population in ways that the epidemiological evidence has consistently documented and the state has consistently failed to address with adequate resources.[5] The political and media discourse has focused overwhelmingly on lawfare as the primary harm. This paper argues that framing is incomplete: the primary harm is substantive institutional failure by the state, and the threat of litigation is a stress multiplier layered upon it.

---

[3]The osmotic conflation metaphor is developed from Marko Milanović, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy* (OUP 2011) 231–238, who identifies the progressive interpenetration of IHL and IHRL frameworks as a product of litigation rather than deliberate treaty design. See also Noam Lubell, *Extraterritorial Use of Force Against Non-State Actors* (OUP 2010) ch 6.

[4]The foundational account of the historical separation of IHL and IHRL is provided by René Provost, *International Human Rights and Humanitarian Law* (CUP 2002) ch 1. The two regimes developed in institutional isolation: IHL through the Geneva Conventions process under ICRC custodianship; IHRL through the UN human rights treaty bodies. The assumption of mutual exclusivity persisted into the 1990s and was formally rejected by the International Court of Justice only in *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion [1996] ICJ Rep 226, para 25, and *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion [2004] ICJ Rep 136, paras 105–106.

[5]The Iraq Historic Allegations Team (IHAT) was established in 2010 following the European Court of Human Rights judgment in *Al-Skeini v United Kingdom* (2011) 53 EHRR 18. It investigated over 3,400 allegations and referred none for prosecution before being wound up in 2017. The Al-Sweady Public Inquiry, chaired by Sir Thayne Forbes, ran from 2009 to 2014, cost approximately £31 million, and found the most serious allegations — of unlawful killing and mutilation of Iraqi detainees — to be entirely and deliberately false: Sir Thayne Forbes, *The Al-Sweady Inquiry Report* (HC 1047, 2014) vol 1, ch 5.

The paper proceeds in six sections. Section I traces the architecture of the legal framework governing UK military operations and identifies its structural incoherence. Section II examines the extraterritorial extension of ECHR obligations and the failure to use available derogation mechanisms. Section III analyses the application of IHRL to armed forces personnel themselves — the state's obligations running inward — and its relationship to the through-life contract. Section IV interrogates the dominant lawfare narrative and advances the case for understanding substantive institutional failure as the primary harm, with lawfare acting as a significant and morally inappropriate multiplier. Section V examines IHL's International Armed Conflict (IAC)/Non-International Armed Conflict (NIAC) distinction and the legal exposure this creates for UK personnel. Finally, Section VI advances a reform programme: the Military Operations Act and its specific mechanisms, the constitutional case for targeted HRA disapplication, and — as the structural keystone of the entire programme — a reimagining and statutory crystallisation of the through-life contract.[6]

I. THE ARCHITECTURE OF ABANDONMENT: IHL, IHRL, AND THE UNDESIGNED FRAMEWORK

The legal framework governing UK military operations overseas is not, in any meaningful sense, a framework. It is an accretion: a sedimentary deposit of treaty obligations assumed at different times for different purposes; domestic legislation enacted reactively in response to litigation rather than prospectively in response to strategic need; and judicial decisions that have progressively expanded the reach of human rights obligations into operational military contexts without — and this is the critical point — any corresponding legislative architecture to give those obligations operational coherence.

The origins of the structural problem lie in the post-war construction of two separate international legal regimes that were deliberately designed not to interact, and that cannot adequately account for the changing character of war in the modern era. International Humanitarian Law — the law of armed conflict, codified primarily through the Geneva Conventions of 1949 and their Additional Protocols of 1977 — was constructed under the institutional custodianship of the International Committee of the Red Cross (ICRC) to regulate the conduct of hostilities between and within states. International Human Rights Law — codified through the UN Charter, the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and regional instruments, including the ECHR — was developed by the UN human rights treaty bodies to govern the peacetime relationship between states and their citizens.[7]

[6]The 2021 Integrated Review described the UK as a *"global Britain"* committed to the international rules-based order: HM Government, *Global Britain in a Competitive Age: The Integrated Review of Security, Defence, Development and Foreign Policy* (Cm 403, 2021). The 2023 Integrated Review Refresh and the 2025 Strategic Defence Review both maintained this framing while acknowledging increased threat from state adversaries, without resolving the legal architecture question this paper addresses.

[7]The Geneva Conventions 1949 were drafted on the assumption that the primary form of armed conflict would be inter-state war. Common Article 3, applicable to non-international armed conflict, was a late addition inserted over significant state resistance: see Frédéric Mégret, *"War? Legal Semantics and the Move to Violence"* (2002) 13 EJIL 361. The

These regimes operated in institutional isolation for over four decades. The assumption of mutual exclusivity — that IHL governed armed conflict and IHRL governed everything else — was formally rejected by the International Court of Justice (ICJ) in 1996, when the Court held in the *Nuclear Weapons* advisory opinion that IHRL obligations continued to apply in armed conflict, with IHL operating as *lex specialis* to determine the content of the right to life in that context.[8] The ICJ's position initiated a process of convergence that has accelerated through subsequent litigation and that has never been accompanied by a coherent political or legislative response in any state that has had to apply it in the field.

The *lex specialis* formulation — that IHL, as the more specific framework, displaces IHRL in armed conflict — has failed to provide the clarity that operational commanders require for a fundamental reason: the European Court of Human Rights (ECtHR) has declined to accept it. The ECtHR has instead adopted a model of harmonious interpretation or accommodation, seeking to read Convention obligations in light of IHL rather than treating IHL as superseding them.[9] The result is that the two frameworks operate simultaneously, without a clear hierarchy, and with a body of jurisprudence that is neither consistent nor predictable in its application to the specific factual contexts — detention without trial, targeted killing, collateral civilian casualties — that overseas military operations generate.

The domestic legislative response has been reactive, inadequate, and structurally misconceived. The Human Rights Act 1998 incorporated the substantive rights of the ECHR into domestic law, with no provision addressing their application to overseas military operations. The Overseas Operations (Service Personnel and Veterans) Act 2021 created a presumption against prosecution for historical allegations more than five years old — a downstream filter on prosecutorial decision-making — without addressing the underlying Convention obligations or the investigative duty that generates the process harm the Act was designed to mitigate.[10] The Northern Ireland Troubles (Legacy and Reconciliation) Act 2023 attempted a different approach for the Northern Ireland legacy and was found by the Supreme

assumption that IHL and IHRL governed separate domains — armed conflict and peacetime respectively — was doctrinally embedded in the International Court of Justice's early advisory opinions before being progressively eroded.

[8]The leading judicial authority for the concurrent applicability of IHL and IHRL is the ICJ's advisory opinion in *Nuclear Weapons* [1996] ICJ Rep 226, para 25: *"the protection of the International Covenant on Civil and Political Rights does not cease in times of war, except by operation of Article 4 of the Covenant whereby certain provisions may be derogated from in a time of national emergency."* This position was confirmed and extended in *Wall* [2004] ICJ Rep 136 and *Armed Activities on the Territory of the Congo (DRC v Uganda)* [2005] ICJ Rep 168.

[9]The *lex specialis* principle — that a more specific rule displaces a more general one in the same field — was invoked by the ICJ in *Nuclear Weapons* as the mechanism by which IHL governs the right to life in armed conflict rather than Article 6 ICCPR. Its application to the ECHR is contested: the ECtHR has declined to accept IHL as displacing Convention obligations in the way the ICJ's formulation might suggest, preferring instead a model of *harmonious interpretation* or *accommodation*. See Milanović (n 3) ch 8; Cordula Droege, *"The Interplay Between International Humanitarian Law and International Human Rights Law in Situations of Armed Conflict"* (2007) 40 Israel LR 310.

[10]The Overseas Operations (Service Personnel and Veterans) Act 2021 created a statutory presumption against prosecution for offences alleged to have been committed more than five years before the date of prosecution, subject to limited exceptions. The presumption is rebuttable and does not extinguish the investigative obligation under Article 2 ECHR. For critical analysis see Justin McCracken, *"The Overseas Operations Act 2021: A Flawed Solution to a Real Problem"* [2022] Public Law 45. The Northern Ireland Troubles (Legacy and Reconciliation) Act 2023, which attempted a different approach for the Northern Ireland legacy, was subsequently found by the Supreme Court to be incompatible with the ECHR in several material respects: *Dillon and others v Secretary of State for Northern Ireland* [2024] UKSC 19, though a 2026 judgement stepped back from this to some degree.

Court to be incompatible with the ECHR in several material respects — in part precisely because it attempted to limit investigative obligations whilst remaining within the very HRA framework it sought to constrain.

What has never been produced is what the operational reality has always demanded: a coherent statutory framework governing UK military operations home and overseas — providing domestic legal authority for the use of lethal force in both international and non-international armed conflict; a legal basis for detention that does not depend on contested IHL interpretation; a status determination framework for targeting decisions; and rules of engagement (ROE) grounded in a statutory framework so that personnel acting within them have a clear and defensible legal basis for their actions.

The absence of such a framework is not an oversight. It is a sustained political failure to accept that the use of military force requires legislative underpinning, and to recognise that the costs of failing to provide it are borne by the individuals who are deployed without such protection.

This failure is, as this paper's title suggests, a form of abandonment. The state has repeatedly asked armed forces personnel to conduct operations — in the Falklands, Northern Ireland, Bosnia, Kosovo, Sierra Leone, Afghanistan, Iraq, Libya, Syria — without providing them with the legal architecture that would give those operations a secure domestic legal foundation. When litigation has followed, the state has defended its interests in court while leaving individual personnel to navigate the consequences of the process across years, and in some cases decades, of adversarial investigation and inquiry. When the political costs of that litigation have become visible, the state has responded with legislation that adjusts those consequences at the margins without reconstructing the framework that generates them. The through-life contract has been dishonoured not once but systematically, across every dimension of its content.

II. JURISDICTION WITHOUT DEROGATION: THE ECHR'S EXTRATERRITORIAL REACH

The extraterritorial extension of ECHR jurisdiction through the Strasbourg Court's post-2001 jurisprudence represents the most acute legal development affecting UK military operations in the Convention's history. Its consequences were neither inevitable nor unforeseeable — but the UK government failed at every stage to use the legal mechanisms available to manage them.

The ECHR's jurisdictional reach under Article 1 — the obligation of member states to secure Convention rights to "everyone within their jurisdiction" — was originally conceived in territorial terms. The foundational doctrine was one of spatial control: a state's Convention obligations extended to territory under its effective overall control, as established in *Loizidou v Turkey* in 1995 in respect of Turkish military operations in northern Cyprus. For the UK, the critical question post-2001 extending from deployments into the Middle East was

whether British forces conducting combat and security operations in Afghanistan and Iraq engaged Convention obligations toward the individuals with whom they interacted.

The Grand Chamber's judgment in *Al-Skeini v United Kingdom* in 2011 resolved that question in a way that extended far beyond territorial control.[11] The Court held that the Convention followed UK forces wherever they exercised *state-agent authority and control* — meaning it applied wherever British personnel exercised physical power and control over individuals. The practical consequence was that any arrest, detention, checkpoint interaction, or use of force involving UK personnel brought those individuals within UK jurisdiction for Convention purposes, regardless of the operational context or the applicable IHL framework.

Decided the same day, *Al-Jedda v United Kingdom* compounded the position by addressing the interaction between ECHR obligations and UN Security Council (UNSC) authorisations.[12] The Court held that UNSC resolutions should be presumed not to authorise rights violations unless they contain clear and explicit language to that effect — meaning that coalition detention operations authorised by resolution were simultaneously held to be governed by Convention standards that the resolution did not clearly authorise the breach of.

Against this jurisprudential backdrop, the partially accommodating judgment in *Hassan v United Kingdom* in 2014 offered limited relief.[13] The Grand Chamber held that Article 5 ECHR should be interpreted in light of IHL detention provisions in international (state-on-state) armed conflict — representing a degree of accommodation between the two frameworks. But the accommodation was narrowly confined to IAC detention and leaves NIAC operations — the predominant form of contemporary armed conflict — outside its scope.

The mechanism designed to manage this situation — Article 15 ECHR derogation — was available throughout the post-2001 campaigns but was not used.[14] A properly constructed derogation, lodged at the commencement of operations in Afghanistan and Iraq, maintained throughout and robustly defended thereafter, could have suspended the procedural and substantive obligations that gave rise to the investigative and litigation exposure that

[11] Al-Skeini v United Kingdom (2011) 53 EHRR 18. The Grand Chamber held, by sixteen votes to one, that the UK exercised jurisdiction under Article 1 ECHR over six Iraqi civilians killed by British forces in Basra during security operations. The Court identified the doctrine of *state agent authority and control* as an autonomous basis for extraterritorial jurisdiction, distinct from the spatial model of effective overall control of territory established in *Loizidou v Turkey* (1995) 20 EHRR 99.

[12] Al-Jedda v United Kingdom (2011) 53 EHRR 23. The Grand Chamber held that the UK could not rely on UN Security Council Resolution 1546 (2004) to authorise internment in Iraq in a manner incompatible with Article 5 ECHR. The practical effect was to foreclose the international law route that might otherwise have provided a legal basis for detention operations inconsistent with Article 5 requirements.

[13] Hassan v United Kingdom (2014) 38 BHRC 358 (Grand Chamber). The Court held that Article 5 ECHR should be *interpreted and applied* in light of the provisions of IHL relating to detention in international armed conflict. The accommodation was narrowly confined: it applied only to IAC detention and its extension to NIAC has not been confirmed.

[14] Article 15 ECHR permits derogation *"[i]n time of war or other public emergency threatening the life of the nation"* from most Convention obligations *"to the extent strictly required by the exigencies of the situation."* The UK has invoked Article 15 on four occasions: in respect of detention without trial in Northern Ireland (*Brannigan and McBride v United Kingdom* (1993) 17 EHRR 539); in respect of the same measures under the Anti-terrorism, Crime and Security Act 2001 (*A v Secretary of State for the Home Department* [2004] UKHL 56); and twice in the early period of the COVID-19 pandemic. No derogation was lodged in respect of operations in Afghanistan or Iraq.

followed. The failure to use it was not a legal incapacity. It was political judgment — specifically, the judgment that lodging a formal derogation would constitute an admission of emergency conditions and attract unwanted political scrutiny.[15] The result was that operations were conducted in a legal grey zone of the government's own creation: Convention obligations extending extraterritorially without derogation, and without a domestic statutory framework to fill the gap. It would not be unfair to suggest that this was an egregious act of national self-harm.[16]

The question of how far human rights law extends to armed forces personnel in the field is not primarily a legal one. It is a question about the kind of state the UK wishes to be — about the relationship between sovereignty and international legal obligation, and about whether democratic accountability for decisions to go to war should rest with Parliament or be displaced to an international court whose decisions Parliament cannot reverse. To speak plainly, having judicial decisions made in Strasbourg breaks the democratic chain of control over the UK's deductive legal process. That is a constitutional problem of the first order, but it has been treated by successive governments as a technical legal inconvenience rather than a political question to be answered in Parliament.

III. THE STATE'S OBLIGATIONS TO ITS OWN: IHRL APPLIED INWARD AND THE THROUGH-LIFE CONTRACT

The academic and policy literature on IHRL and the armed forces has overwhelmingly focused on the obligations that human rights law imposes on military personnel in their treatment of others — adversaries, detainees, civilians. A less-examined but equally important dimension is the application of IHRL to the state's treatment of its own armed forces personnel. This *inward* application — what the state owes those who serve it — is where the through-life contract most directly intersects with the legal framework, and where the evidence of its systematic breach is most clearly documented.

Article 2 and the positive obligation to protect personnel

Smith and Others v Ministry of Defence confirmed in 2013 that Article 2 ECHR applied to the deaths of British soldiers in Iraq, and that the operational duty was not automatically excluded in the combat context.[17] The case concerned the adequacy of Snatch Land Rovers

[15]The failure to lodge an Article 15 derogation for Afghanistan and Iraq operations has been described by academic commentators as a *"strategic blunder"* of the highest order: Lawrence Hill-Cawthorne, *Detention in Non-International Armed Conflict* (OUP 2016) 187. The government's apparent reasoning — that derogation would constitute an admission that operations involved conditions of emergency and therefore attract unwanted scrutiny — inverted the logic of the derogation mechanism.

[16]The interaction between *Al-Skeini's* expanded jurisdictional doctrine and the absence of derogation is the central structural failure of UK legal policy on overseas operations. As Milanović observes, the state cannot simultaneously assert that the Convention applies to its operations abroad and decline to invoke the mechanism specifically designed to modify Convention obligations in conditions of armed conflict: Milanović (n 3) 241.

[17]Smith and Others v Ministry of Defence [2013] UKSC 41, [2014] AC 52. The Supreme Court held by a majority that the Article 2 ECHR right to life was capable of applying to the deaths of British soldiers in Iraq in two distinct ways: the *systemic duty*, requiring adequate legal and regulatory frameworks for the protection of life, applied without restriction; the

as protection against IEDs — a procurement decision that led to the deaths of soldiers whose government had failed to equip adequately for the threat environment within which they were deployed. The *Smith* duty represents IHRL operating precisely in the direction that the through-life contract requires: constraining the executive's treatment of its own forces and imposing legal obligations in respect of procurement, training, and planning decisions that expose personnel to foreseeable lethal risk. The difficulty is that it operates through litigation — through deaths and subsequent judicial examination — rather than through the prospective statutory framework that genuine accountability demands.

Courts-Martial, Article 6, and disciplinary legitimacy

Findlay v United Kingdom in 1997 found the UK courts-martial system violated Article 6 due to the convening officer's structural dominance over the process.[18] The case precipitated the comprehensive restructuring under the Armed Forces Act 2006, which created the Court Martial and the independent Summary Appeal Court. The structural tension that *Findlay* identified — that military discipline requires hierarchy and command authority while Article 6 requires independence from that same authority — has not been fully resolved by the subsequent reforms. The through-life contract requires that service personnel be subject to a disciplinary system that is genuinely fair, and the evidence from the post-2001 period — in which junior personnel faced years of investigation for the implementation of command decisions — suggests the system has fallen short of this standard at the level that matters most to those within it.

The Armed Forces Covenant: aspiration and its limits

The Armed Forces Covenant is the contemporary expression of the through-life contract.[19] Its legal status is wrong: aspirational rather than enforceable, subject to the political will of whatever administration happens to be in power, and largely left to local authorities and public service providers to deliver without legislative teeth. The inadequacy of this purely aspirational model is demonstrated by comparison with statutory frameworks in comparable democracies.[20] The conceptual foundation for a legally enforceable through-life contract is not without precedent in UK law. The implied duty of mutual trust and confidence in employment law — the obligation that neither party will, without reasonable cause, act in a

operational duty, requiring reasonable precautions in specific operations, was not automatically excluded by combat immunity.

[18]Findlay v United Kingdom (1997) 24 EHRR 221. The European Court held that the UK courts-martial system violated Article 6(1) ECHR because the convening officer — who was responsible for prosecuting the charge — also appointed the members of the court martial. This precipitated the Armed Forces Act 1996 reforms and ultimately the comprehensive restructuring under the Armed Forces Act 2006.

[19]The Armed Forces Covenant was first published in 2000 and substantially revised in 2011. Independent assessments have repeatedly identified mental health provision, housing support, and transition services as areas of systematic underperformance: see Office for Veterans' Affairs, *The UK Veterans Strategy Action Plan 2022–2024* (Cabinet Office 2022).

[20]The comparative models are instructive. The United States' Servicemembers Civil Relief Act 2003 and the Veterans Access to Care Act 2014 create specific, justiciable entitlements. Canada's New Veterans Charter 2006 and the Pension for Life programme establish statutory entitlements to rehabilitation, education, and income replacement. Australia's Veterans' Entitlements Act 1986 and the Military Rehabilitation and Compensation Act 2004 provide a comprehensive statutory framework.

manner likely to destroy or seriously damage the relationship of trust and confidence between them — represents a judicial articulation of ongoing relational obligation that operates beyond the express terms of the contract.[21] The through-life contract between the state and its armed forces personnel is precisely this kind of relational obligation: it cannot be reduced to the express terms of attestation, because the full extent of what the state asks of those who serve it is realised over a lifetime rather than specified at enlistment.

The statutory crystallisation of the through-life contract — transforming the Covenant's aspirational commitments into justiciable entitlements — is therefore not merely a welfare reform. It is a constitutional commitment: the state's formal acknowledgement, in enforceable legal form, of the obligations it assumes when it asks individuals to place themselves in harm's way on its behalf. It is the legal foundation without which every other element of the reform programme advanced in this paper is incomplete.

IV. THE PRIMARY HARM RECONSIDERED: SUBSTANCE, LITIGATION, AND THE INTERACTION EFFECT

The political and media framing of harm to veterans from post-2001 operations has been overwhelmingly dominated by the lawfare narrative: the claim that the primary harm is vexatious litigation, ambulance-chasing law firms, and the use of human rights law as a weapon against personnel who served honourably. This narrative is not without foundation, but it is seriously incomplete. The primary harm to British armed forces personnel is not a successfully prosecuted litigation. It is the systematic failure of the state to honour the through-life contract — in the field, in the aftermath of service, and in the legal framework within which both are experienced. Litigation *and the extended investigations and enquiries this spawns* are stress multipliers layered upon that primary failure, not the sole failure itself.

The epidemiological evidence

The evidence on veteran welfare outcomes tells a clear and consistent story that the lawfare narrative consistently displaces. Studies by the King's Centre for Military Health Research — the foundational epidemiological work on UK veteran welfare — demonstrate that the primary harms affecting veterans of post-2001 operations are mental health conditions, transition failure, homelessness, criminal justice involvement, and suicide at rates elevated above the general population.[22]

The suicide data is particularly stark. Younger veterans — those under 24 — show elevated suicide rates compared to age-matched civilian controls, a finding that has been persistent

[21] The concept of a *through-life contract* has partial antecedents in employment law theory. The implied duty of mutual trust and confidence recognised in *Malik v BCCI SA* [1998] AC 20 (HL) represents a judicial articulation of an ongoing relational obligation that operates beyond the four corners of the written contract.

[22] The foundational epidemiological studies are: Nicola Fear and others, *"What are the Consequences of Deployment to Iraq and Afghanistan on the Mental Health of the UK Armed Forces? A Cohort Study"* (2010) 375 *The Lancet* 1783; Amy Iversen and others, *"What Happens to Veterans When They Leave the Armed Forces? Cohort Study of UK Veterans and Controls"* (2005) 331 BMJ 569.

across multiple studies and that is not explained by pre-enlistment vulnerability.[23] These are not people destroyed solely by the threat of litigation. They are people destroyed by combat exposure, inadequate mental health provision, failed transition, and the loss of institutional identity and purpose that service provides and that civilian life, without adequate support, cannot replicate. The number of veterans actually prosecuted arising from historical operational allegations is small relative to the scale of this welfare crisis. IHAT investigated over 3,400 allegations and referred none for prosecution. As we have seen here, the *process of investigation is the punishment,* acting as a multiplier to the existing substantive harm.

Institutional failure is the primary cause

The substantive harm to veterans is the product of institutional failure by the state that deployed them, operating across every stage of the through-life contract. Before deployment: inadequate psychological preparation, unrealistic operational tempo, insufficient dwell time between tours. In theatre: equipment deficiencies of the kind that *Smith v MoD* subsequently litigated; insufficient rules of engagement clarity; inadequate legal support to personnel making split-second decisions with long-tail legal consequences. After service: the collapse of the military Covenant in practice — inadequate mental health provision, poor transition support, an NHS structurally ill-equipped to treat complex military trauma, and a veterans' affairs infrastructure chronically under-resourced relative to the scale of operational commitments from 2001 onwards.

The lawfare narrative and its hidden political function

The lawfare narrative — while not factually baseless — serves political functions that explain its dominance in parliamentary and media discourse.[24] It externalises blame: attributing harm to law firms, human rights lawyers, and the Strasbourg court rather than to the Ministry of Defence, the command chain, or successive governments' decisions on operational tempo, equipment funding, veteran support, and legislative reform. It is legislatively tractable: restricting litigation is something Parliament can do relatively quickly and at relatively modest political cost, hence the Overseas Operations Act. Fixing veteran mental health provision, reforming transition, holding command-level institutional accountability, and constructing a coherent legal framework for operations require sustained resource commitment and political will of a fundamentally different order.

[23] Suicide rates among younger veterans (under 24) have been consistently elevated relative to age-matched civilian controls: Office for National Statistics, *Suicide by Occupation, England: 2011 to 2015* (ONS 2017); Academic Centre for Defence Mental Health, *Suicide and Open Verdict Deaths in the UK Regular Armed Forces* (King's College London 2020).

[24] Phil Shiner of Public Interest Lawyers was struck off by a Solicitors Disciplinary Tribunal in 2017 following findings of multiple breaches of professional conduct arising from the fabrication and procurement of false allegations against UK forces in Iraq: *Solicitors Regulation Authority v Shiner* (SDT, 2 February 2017). PIL had received approximately £9.5 million in legal aid funding.

The interaction effect

The relationship between substantive harm and litigation harm is not binary. They compound each other in ways that the either/or framing of the political debate consistently misses.[25] Veterans already carrying combat trauma, already navigating inadequate mental health provision, already struggling with transition failure, are then subjected to investigative processes — IHAT interviews, public inquiry appearances, media scrutiny — that can persist for years. The psychological cost of investigation falls on psychological ground already compromised by the prior substantive harm. *There would be value in conducting empirical research to ascertain the degree to which unending inquiries, the threat of litigation or criminal prosecution, and lawfare compound the primary causes of harm.*

This inverse relationship is important. The political energy expended on Overseas Operations Act-type legislative responses has demonstrably displaced sustained attention and resource commitment to the substantive harm. Weak 'protections' – themselves little more than courtesies – likely to be incorporated into the upcoming Northern Ireland Troubles Act are another example of distraction from the core issue.[26] Laws, then, have been adjusted; but meanwhile, the Covenant has not been funded. This displacement reflects the political economy of a situation in which the actors who control the legislative response are also the actors whose systemic failures the substantive harm narrative most directly implicates. The lawfare narrative is, in this sense, not merely incomplete. It is institutionally convenient.

V. IAC, NIAC, AND THE STRUCTURAL CONDITION OF LEGAL EXPOSURE

The distinction between international armed conflict (IAC) and non-international armed conflict (NIAC) is one of the most consequential — and most operationally problematic — in the entire structure of international law. For UK armed forces personnel operating in the conflicts of the post-Cold War period, it is not an academic question of classification. It is the structural condition of their legal exposure.

The foundational architecture and its asymmetry

The IAC/NIAC distinction originates in the structure of the Geneva Conventions of 1949. International armed conflict attracts the full apparatus of IHL, including — crucially — the

[25]The concept of *institutional betrayal trauma* — developed by Jennifer Freyd and others — describes the additional harm caused when an institution fails to respond adequately to wrongdoing suffered by those in its care: see Jennifer Freyd, *"Violations of Power, Adaptive Blindness, and Betrayal Trauma Theory"* (1997) 7 Feminism & Psychology 22.

[26]The political economy of the lawfare narrative is partly explicable by *externalisation incentives*: the political cost of acknowledging systemic failures of procurement, command accountability, and veteran welfare falls on the same institutions — the MoD, the Treasury, the Cabinet Office — that would bear the cost of remediation.

combatant's privilege.[27] NIAC was originally governed only by Common Article 3. The combatant's privilege — the immunity from domestic prosecution for acts of lawful belligerency that would otherwise constitute murder — is one of the most significant consequences of this distinction.[28] In IAC, a soldier who kills an enemy combatant or a civilian in compliance with IHL commits no offence under domestic or international law. In NIAC, there is no equivalent privilege. For UK personnel, this created acute exposure in Afghanistan (NIAC) that did not exist in the same form in the Gulf War (IAC).

The detention crisis: Serdar Mohammed

Serdar Mohammed v Ministry of Defence revealed with devastating clarity the consequences of the absence of a coherent legal framework for NIAC detention.[29] The Supreme Court held that IHL does not provide a free-standing detention authority in NIAC — meaning that UK detention of Taliban fighters in Afghanistan lacked an IHL legal basis throughout the campaign. Personnel conducting detention operations authorised by their chain of command and carried out in accordance with their rules of engagement were, on the Supreme Court's analysis, operating without an adequate legal basis. The accountability for that failure lies not with the individuals who conducted the detentions but with the governments and command structures that deployed them without the legal architecture required to make their actions lawful.

The classification problem and contemporary conflict

The IAC/NIAC binary assumes that conflicts can be cleanly classified and that the classification is stable throughout the conflict's duration. Contemporary conflicts consistently refuse to honour either assumption. The direct participation in hostilities concept — developed through the ICRC's 2009 Interpretive Guidance as the functional targeting criterion in NIAC — provides an operational framework of contested scope and operationally demanding application.[30] The Reyaad Khan drone strike in Syria in 2015 illustrated the

[27]The foundational IHL architecture for armed conflict classification is established by common Article 2 (IAC) and common Article 3 (NIAC) of the Geneva Conventions 1949. The assumption that IHL and IHRL governed separate domains persisted until the ICJ's *Nuclear Weapons* advisory opinion. See Jean Pictet (ed), *Commentary on the Geneva Conventions of 12 August 1949* (ICRC 1952) vol III, 35–37.

[28]The combatant's privilege — the immunity from domestic prosecution for acts of lawful belligerency — derives from Article 43 AP I and reflects pre-existing customary IHL. Its absence in NIAC is a deliberate policy choice: states were and remain unwilling to legitimate non-state armed groups by granting their members the privilege. See Michael Schmitt (ed), *Tallinn Manual 2.0* (CUP 2017) Rule 82.

[29]Serdar Mohammed v Ministry of Defence [2017] UKSC 1, [2017] AC 649. The Supreme Court held, reversing the Court of Appeal on the IHL question, that IHL does not provide a free-standing detention authority in NIAC. The practical consequence was that UK detention of Taliban fighters in Afghanistan throughout the campaign lacked an adequate legal basis.

[30]The ICRC's 2009 Interpretive Guidance on the Notion of Direct Participation in Hostilities under IHL (Nils Melzer, ICRC 2009) adopts a three-part cumulative test. The Guidance is not legally binding and is contested by several states: see Michael Schmitt, *"The Interpretive Guidance on the Notion of Direct Participation in Hostilities: A Critical Analysis"* (2010) 1 Harvard National Security Journal 5.

pressure that transnational non-state threats place on both the IAC/NIAC framework and the ECHR's jurisdictional architecture.[31]

The IHRL interaction compounds these difficulties in an operationally perverse way. In IAC, *Hassan* provides some accommodation between Article 5 ECHR and the Geneva Conventions' detention provisions. In NIAC, no equivalent accommodation exists — meaning that IHRL obligations operate with full force in precisely the conflict type that provides less IHL regulation and presents a more demanding operational environment. The soldier operating in NIAC has less legal protection, less clarity on targeting and detention authority, and faces fuller IHRL exposure than the soldier in IAC. This is the inverse of what operational logic would require, and it is the product of treaty architecture built for a world of inter-state conflict that no longer predominates.

The IAC/NIAC distinction will not be eliminated by treaty reform, though there is ample research suggesting it should be. States will not voluntarily grant non-state armed groups the legitimising framework of full IHL coverage. The distinction therefore persists not because it is legally coherent or operationally functional, but because the alternative is perceived as more politically costly than maintaining the asymmetry. For UK personnel operating in that asymmetry, it is the daily structural condition of their legal exposure, unaddressed by the governments that created it and unmitigated by the legislative responses that have followed.

VI. THE REFORM PROGRAMME: A MILITARY OPERATIONS ACT AND THE STATUTORY THROUGH-LIFE CONTRACT

The reform programme this paper advances is not a single legislative measure. It is a parallel construction: two complementary instruments that together reconstitute the legal framework governing UK military operations on a coherent, sovereign, and constitutionally defensible basis. The first is a novel Military Operations Act — the legal protection of service personnel during and after operational deployment. The second is the statutory crystallisation of the through-life contract — the legal protection of those who serve across the full continuum of their service and its aftermath. These are not alternative approaches. They are the two halves of the same broken contract, and the reform programme must hold both simultaneously.

The Constitutional approach: targeted disapplication before withdrawal

The question of whether the UK should withdraw from the ECHR, or repeal the Human Rights Act in its entirety, is analytically more tractable than the political debate typically allows — provided it is understood as a question of sequencing rather than destination.[32]

[31] The Reyaad Khan strike in Syria on 21 August 2015 — the first acknowledged use of lethal force by UK forces outside a recognised armed conflict since the Falklands War — was justified on Article 51 UN Charter self-defence grounds rather than IHL targeting authority: Cabinet Office, *Memorandum on the Legal Basis for UK Military Action in Syria* (September 2015).

[32] The case for HRA repeal as an intermediate measure — short of full ECHR withdrawal — is analytically distinct from the case for Convention withdrawal. Repeal removes the domestic enforcement mechanism (the Section 3 interpretive

The most immediately achievable and constitutionally defensible first step is targeted statutory disapplication: a Military Operations Act that expressly disapplies the Human Rights Act in the military operations context through a primacy clause, making clear that the courts have no power to make a declaration of incompatibility with the HRA in respect of the Act's provisions, and that the HRA's interpretive obligations do not apply to the Act's construction. This is the constitutional approach most closely analogous to the Canadian Charter's Section 33 notwithstanding clause, adapted for a specific operational context rather than as a general override.[33] It is a significantly smaller political commitment than whole-Act repeal, and it resolves the most acute problem — the domestic judicial pathway through which extraterritorial Convention rights are enforced against military operations — without requiring the full international consequence of ECHR withdrawal.

The Wolfson Report concluded that full withdrawal from the ECHR would ultimately be necessary to insulate domestic military operations legislation from challenge at Strasbourg. That conclusion is probably correct as a matter of international law: if the UK remains a Convention signatory, families of those killed in operations may still bring Strasbourg applications, and the ECtHR may still find violations. Full withdrawal resolves this definitively. But withdrawal is the outer option — the measure that becomes necessary if targeted disapplication proves insufficient — not the first step. The sequencing matters: Parliament can enact a Military Operations Act with HRA disapplication within the current constitutional framework; ECHR withdrawal requires a more extensive political and diplomatic programme. Attempting withdrawal before the domestic legislative programme is in place is the wrong order.

The Military Operations Act: mechanisms and Constitutional architecture

A new Military Operations Act will provide the sovereign legal framework for UK military operations, both domestic and overseas and in both IAC and NIAC, for the first time. Its six essential components address the structural failures this paper has identified at every stage, thereby providing a stable legal framework for the conduct of military operations in all conflict environments.

Ministerial authorisation of the use of force: The Act's foundational mechanism is a power for a Minister — acting personally — to authorise the use of force in military operations. Force used under that authorisation and in compliance with IHL is treated as lawful for all purposes under domestic law. This is the domestic expression of the *lex specialis* principle

obligation, Section 4 declaration of incompatibility, and HRA-grounded judicial review) while leaving the international obligation intact. The Wolfson Report (Lord Wolfson of Tredegar, *Advice to the Leader of the Conservative Party Re ECHR*, 2025) concluded that full ECHR withdrawal would be necessary to insulate domestic military operations legislation from challenge at Strasbourg. The argument of this paper is that targeted disapplication within a new Military Operations Act — explicitly disapplying the HRA in the military operations context by a statutory primacy clause — is the operative first step, with full withdrawal as the outer option if a Strasbourg challenge follows.

[33]The targeted disapplication approach has constitutional precedent in the Canadian Charter of Rights and Freedoms 1982, s 33 (the "notwithstanding clause"), which permits Parliament or a provincial legislature to declare that an Act operates notwithstanding specified Charter rights. The British Bill of Rights Commission (2012) considered but did not recommend this approach for the UK: Commission on a Bill of Rights, *A UK Bill of Rights? The Choice Before Us* (December 2012) vol 1, ch 10. A military operations-specific disapplication is constitutionally less far-reaching than a general notwithstanding clause and is more readily defensible.

that the ECtHR declined to accept at the international level: it asserts by statute what international adjudication has refused to concede.[34] Authorisations are laid before Parliament, subject to a Commons resolution that the Minister must respond to, maintaining democratic accountability while insulating operational decisions from judicial review. The authorisation is non-justiciable: the courts have no power to question its validity.

Retrospective certification: The Act provides for the Minister to issue a certificate deeming that past uses of force — including operations in Iraq, Afghanistan, and Northern Ireland — are to be treated as authorised under the Act. This power directly addresses the *Serdar Mohammed* detention-authority problem, the extraterritorial consequences of the Al-Skeini case for historical operations, and the systemic failure of the Northern Ireland legacy legislation. It is constitutionally bold and raises legitimate rule-of-law concerns about retrospective legislation, requiring honest parliamentary engagement.[35] The counter-argument — that the certification power does not create new criminal liability but removes a legal uncertainty that should never have existed, and applies only where IHL compliance is confirmed — is analogous to retrospective validation of procedurally defective administrative acts and is constitutionally supportable.

The triple gateway filter: No criminal investigation or prosecution of military personnel for conduct on active service may commence without the concurrent consent of the Attorney General, the Chief of Defence Staff (CDS), and the Director of Public Prosecutions (DPP). This is a significant constitutional innovation: it places two non-judicial actors — the Attorney General and the CDS — as co-equal gatekeepers alongside the prosecutorial authority, ensuring that legal, military, and public-interest perspectives are applied before the threshold for investigation is crossed.[36] This transforms the prosecutorial decision from a unilateral legal judgment into a tripartite constitutional gateway, reflecting the *sui generis* nature of accountability in military operations.

[34]The ministerial authorisation mechanism represents a significant constitutional innovation: it relocates the question of lawfulness from the courts to the executive, making the Minister's authorisation non-justiciable (subject only to IHL compliance). This is the domestic expression of the *lex specialis* principle that the ECtHR declined to accept at the international level: it asserts by domestic statute what international adjudication has refused to concede. The constitutional argument for non-justiciability in this context draws on the established doctrine that decisions of high policy and national security are not amenable to judicial review: see *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 (HL).

[35]The retrospective certification power raises established constitutional concerns about the rule of law and the prohibition on retrospective legislation. The principle that legislation should not operate retrospectively to alter the legal consequences of past acts is deeply embedded in common law: see *R v Secretary of State for the Home Department, ex parte Pierson* [1998] AC 539 (HL). The counter-argument — that the certification power does not create new criminal liability but removes a legal uncertainty that should never have existed, and that it applies only where IHL compliance is confirmed — is analogous to legislation retrospectively validating administrative acts held procedurally defective: *War Damage Act 1965* being the canonical example. The constitutional balance is defensible but requires explicit parliamentary engagement.

[36]The triple gateway — requiring concurrent consent of the Attorney General, the Chief of Defence Staff, and the Director of Public Prosecutions before any investigation or prosecution of military personnel on active service may proceed — is constitutionally significant as a constraint on prosecutorial independence. The DPP's independence is a constitutional convention of considerable weight: see *R (Corner House Research) v Director of the Serious Fraud Office* [2008] UKHL 60. The triple gateway limits rather than removes that independence, and the involvement of two non-judicial actors (Attorney General, CDS) as co-equal gatekeepers is the more novel element. The analogy to the Attorney General's historic role as guardian of the public interest in criminal proceedings provides partial constitutional cover.

The Expert Military Panel: A standing Expert Military Panel — comprising a serving Major General and two Lieutenant Colonels or lesser rank holding relevant operational experience, appointed by Royal Warrant — is required to be consulted in all criminal, civil, and inquest proceedings relating to military operations, with courts and coroners required to give the Panel's representations significant weight.[37] This is the Bill's most institutionally innovative element and the most important answer to the ECHR Article 2 investigative-standards problem. Rather than attempting to reform Article 2 from outside — through derogation or withdrawal — the Panel injects the operational expertise that peacetime investigative and adjudicative processes structurally lack, from within the proceedings themselves. A court that is required to consult serving senior officers with direct operational experience relevant to the matters before it is a materially different institution from the peacetime tribunal that *Al-Sweady* demonstrated.

Time limits on investigation: Investigations must commence within 12 months of the end of the relevant operation and conclude within two years of the triple gateway consent, with extensions possible only under a triple gateway agreement and only then where new and compelling evidence exists.[38] The five-year and 15-year investigations that characterised the IHAT and Al-Sweady processes are structurally precluded. The "new and compelling evidence" threshold — defined with precision in the Act — closes the re-opening loop that has allowed allegations to be resurrected without a fresh evidential foundation.

Legal aid and compensation: All serving and former military personnel facing criminal or civil proceedings arising from active service are entitled to full legal aid without means testing, and a compensation scheme is in place for those whose service is materially disrupted by prolonged or unfounded proceedings. These provisions give legislative expression to the state's duty of care to those it deploys — an element of the through-life contract that has previously depended entirely upon executive discretion.

The Northern Ireland dimension

The Military Operations Act framework has particular significance for the Northern Ireland legacy. The Legacy Act 2023's conditional immunity mechanism was found incompatible with the ECHR, in part because it sought to limit investigative obligations while remaining

[37] The Expert Military Panel represents the most institutionally innovative element of the proposed framework. By requiring courts, coroners, and inquiries to consult a standing body of serving senior officers — and to give their representations significant weight — the Bill injects operational expertise into the adjudicative process in a form more systematic and authoritative than expert witness evidence. The Panel's Royal Warrant appointment and its composition (a serving Major General plus two Lieutenant Colonels or a lesser rank of relevant experience) give it institutional standing that ad hoc expert witnesses lack. The closest analogy in existing law is the specialist assessors system in admiralty proceedings: Supreme Court Act 1981, s 70.

[38] The 12-month investigation commencement limit and the two-year investigation duration limit, subject to triple gateway extension, represent a significant departure from the current framework under which investigations have routinely extended over periods of five to fifteen years. The Al-Sweady Inquiry (2009–2014) and IHAT (2010–2017) both operated without effective time limits. The proposed limits are calibrated to balance investigative adequacy against the psychological harm and operational disruption of prolonged legal jeopardy. The analogy to the right to trial within a reasonable time under Article 6 ECHR — which the domestic courts have given increasing weight in abuse of process applications — provides supporting authority: see *Attorney General's Reference (No 2 of 2001)* [2003] UKHL 68.

within the HRA framework it sought to constrain.[39] A Military Operations Act with an explicit HRA disapplication primacy clause — not subject to the Section 3 interpretive obligation or the Section 4 declaration of incompatibility — is constitutionally more robust in this respect: the domestic courts are without power to disapply the Act's protections on HRA grounds. The retrospective certification power, applied to Northern Ireland operations, would achieve what the Legacy Act attempted and what the Supreme Court disallowed, only to be partly reinstated. Whether the ECtHR would find a Strasbourg violation in respect of the Northern Ireland legacy cases is the question that full Convention withdrawal definitively resolves, which remains the outer option if required.

ICC complementarity and international accountability

A concern sometimes raised against legislation of this kind is that by limiting domestic accountability, it triggers the International Criminal Court's (ICC) complementarity jurisdiction — the principle that the Court may exercise jurisdiction where a state is 'unwilling or unable genuinely to carry out the investigation or prosecution'. The Military Operations Act addresses this concern directly.[40] The Act preserves criminal liability for genuine IHL violations: war crimes, genocide, crimes against humanity, and other offences under the Geneva Conventions Act 1957 and the ICC Act 2001 remain prosecutable. What the Act removes is the application of peacetime procedural and substantive standards to IHL-compliant conduct. The complementarity argument is that the UK is not disapplying accountability — it is calibrating its sovereign Military Operations Act to IHL standards, *which is precisely what the ICC's foundational framework assumes states will do.*

The statutory through-life contract: the keystone

The statutory crystallisation of the through-life contract is the keystone of the reform programme — the instrument without which every other element is structurally incomplete. A new Military Operations Act, as proposed, protects service personnel during and after operational deployment. It provides legal authority for the use of force, protection from retrospective prosecution for IHL-compliant conduct, and the legal aid and compensation that recognise the state's duty of care. But it addresses only the operational and accountability stages of the through-life contract.

---

[39]The Northern Ireland legacy dimension of the Military Operations Act framework is of particular constitutional significance. The Legacy Act 2023's conditional immunity mechanism was found incompatible with the ECHR in *Dillon* [2024] UKSC 19 partly because it operated within the HRA framework it sought to limit. A Military Operations Act with an explicit HRA disapplication primacy clause — not subject to s 3 or s 4 of the HRA — is constitutionally more robust: the domestic courts cannot make a declaration of incompatibility in respect of a provision that expressly removes their power to do so. Whether the ECtHR could still find a violation at the international level is a separate question that full Convention withdrawal would resolve.

[40]The ICC's complementarity principle — by which the Court's jurisdiction is activated only where national courts are *"unwilling or unable genuinely to carry out the investigation or prosecution"* — means that the adequacy of domestic accountability mechanisms directly determines ICC exposure: Rome Statute 1998, Art 17. The Bill's preservation of criminal liability for genuine IHL violations (war crimes, genocide, crimes against humanity) means that the complementarity argument is maintainable: the UK is not disapplying accountability, it is calibrating it to IHL standards. The OTP's preliminary examination of Iraq/UK (closed December 2020) noted concerns about investigation adequacy but found the gravity threshold unmet: OTP, *Report on Preliminary Examination Activities 2020* (ICC OTP, December 2020) paras 167–190.

The welfare stage — transition, mental health provision, housing, and lifetime support — is addressed by converting the Armed Forces Covenant from an aspirational document into an enforceable legal instrument: creating justiciable entitlements to welfare obligations, backed by dedicated funding, an independent oversight body with genuine accountability powers, and a right of action for individuals whose entitlements are not met.[41] The Military Operations Act and the statutory Covenant are complementary rather than alternative instruments.[42] The Military Operations Act addresses conditions of service and the legal aftermath of operational deployment. The Covenant addresses the human aftermath of a life spent in service.

The fiscal demands of a fully funded statutory Covenant are considerable. They are also, on any serious analysis, considerably less than the long-term costs of not meeting them: the NHS costs of veteran mental health conditions, the criminal justice costs of veteran offending driven by untreated trauma, the housing costs of veteran homelessness, and the recruitment and retention costs of an all-volunteer military that cannot credibly demonstrate to those considering service that the state will stand behind them. The through-life contract is not a welfare expenditure. It is an investment in the human infrastructure on which national security depends.

CONCLUSION: FROM ASPIRATION TO COMMITMENT

The argument this paper has advanced is, at its core, straightforward. The legal framework governing UK military operations is not a framework. It is an accretion of treaty obligations, domestic legislation, and judicial decisions that has developed in response to litigation rather than through deliberate architectural choice. The result exposes British armed forces personnel — at every stage of their service and its aftermath — to conditions of legal uncertainty that are both constitutionally unjust and operationally dangerous. The primary cause is not the Strasbourg Court, not human rights lawyers, and not the structure of international law. It is the sustained failure of successive governments to construct the legal architecture that the deployment of armed force requires; to use the derogation mechanisms that the ECHR provides; and to honour the through-life contract that military service demands.

[41] The statutory crystallisation of the through-life contract — transforming the Armed Forces Covenant from aspiration to enforceable legal instrument — has no direct precedent in UK law but draws on several analogous frameworks. The Armed Forces (Pensions) Act 2004 and the War Pensions scheme under the Naval, Military and Air Forces Etc (Disablement and Death) Service Pensions Order 2006 create statutory entitlements in respect of specific welfare obligations. The through-life contract extends this model across the full continuum: recruitment conditions, operational legal framework, transition support, and lifetime welfare.

[42] The through-life contract and the Military Operations Act are complementary rather than alternative instruments. The Act addresses the operational legal stage of the through-life contract — the conditions under which force may be used, the legal protection of those who use it, and the accountability framework for alleged violations. The statutory Covenant addresses the welfare stage — transition, mental health provision, housing, and lifetime support. Neither is sufficient without the other: a legally protected soldier who returns to an inadequate welfare system has had one half of the contract honoured and one half broken. The reform programme must hold both halves simultaneously.

The reform programme advanced here — a Military Operations Act as the first legislative step, with targeted HRA disapplication as its constitutional mechanism and ECHR withdrawal as the outer option if Strasbourg challenge follows; an Expert Military Panel as the institutional answer to Article 2 investigative standards; a triple gateway as the prosecutorial filter; retrospective certification as the remedy for historical legal vacuums; and, as the structural keystone, the statutory crystallisation of the through-life contract — is not radical. It is what competent governance of military force has always required and what no government has yet provided. It treats the problem for what it is: a political failure requiring political resolution.

The through-life contract is not a metaphor. It is the constitutional relationship between the state and those it asks to fight on its behalf, from the moment of attestation to the end of life, where required. That relationship has been systematically dishonoured. The Military Operations Act addresses one half of the breach: the legal conditions under which force is used and the accountability of those who use it. The statutory Covenant addresses the other half: the welfare of those whose lives are shaped — sometimes destroyed — by the service the state asked of them. Both are necessary. Both are achievable. Both are, on any honest accounting, long overdue.

The reform programme this paper outlines is not, ultimately, about law. *It is about what kind of country the United Kingdom chooses to be toward those who serve it.* The law is the instrument. The commitment — or its absence — is the choice.

SELECT BIBLIOGRAPHY

Primary Sources

Al-Jedda v United Kingdom (2011) 53 EHRR 23 (Grand Chamber)

Al-Skeini v United Kingdom (2011) 53 EHRR 18 (Grand Chamber)

Armed Activities on the Territory of the Congo (DRC v Uganda) [2005] ICJ Rep 168

Attorney General's Reference (No 2 of 2001) [2003] UKHL 68

Brannigan and McBride v United Kingdom (1993) 17 EHRR 539

Council of Civil Service Unions v Minister for the Civil Service [1985] AC 374 (HL)

Dillon and others v Secretary of State for Northern Ireland [2024] UKSC 19

Findlay v United Kingdom (1997) 24 EHRR 221

Hassan v United Kingdom (2014) 38 BHRC 358 (Grand Chamber)

Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion [2004] ICJ Rep 136

Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion [1996] ICJ Rep 226

Loizidou v Turkey (1995) 20 EHRR 99

Malik v BCCI SA [1998] AC 20 (HL)

McCann v United Kingdom (1995) 21 EHRR 97

R (Corner House Research) v Director of the Serious Fraud Office [2008] UKHL 60

R v Secretary of State for the Home Department, ex parte Pierson [1998] AC 539 (HL)

Serdar Mohammed v Ministry of Defence [2017] UKSC 1, [2017] AC 649

Smith and Others v Ministry of Defence [2013] UKSC 41, [2014] AC 52

Solicitors Regulation Authority v Shiner (Solicitors Disciplinary Tribunal, 2 February 2017)

A v Secretary of State for the Home Department [2004] UKHL 56

Legislation and International Instruments

Armed Forces Act 2006

Armed Forces Act 2011

Armed Forces Act 2021

European Convention on Human Rights 1950

Geneva Conventions 1949 and Additional Protocols 1977

Human Rights Act 1998

Northern Ireland Troubles (Legacy and Reconciliation) Act 2023

Overseas Operations (Service Personnel and Veterans) Act 2021

Rome Statute of the International Criminal Court 1998

Official Reports and Government Documents

Cabinet Office, *Memorandum on the Legal Basis for UK Military Action in Syria* (September 2015)

Commission on a Bill of Rights, *A UK Bill of Rights? The Choice Before Us* (December 2012)

HM Government, *Global Britain in a Competitive Age: The Integrated Review of Security, Defence, Development and Foreign Policy* (Cm 403, 2021)

ICC Office of the Prosecutor, *Report on Preliminary Examination Activities 2020* (December 2020)

Joint Committee on Human Rights, *The Government's Policy on the Use of Lethal Force Abroad* (HL Paper 144, HC 847, 2015–16)

Lord Wolfson of Tredegar, *Advice to the Leader of the Conservative Party Re ECHR* (2025)

Ministry of Defence, *The Armed Forces Covenant* (MoD 2011)

Office for Veterans' Affairs, *The UK Veterans Strategy Action Plan 2022–2024* (Cabinet Office 2022)

Sir Thayne Forbes, *The Al-Sweady Inquiry Report* (HC 1047, 2014)

Secondary Sources

Droege C, "The Interplay Between International Humanitarian Law and International Human Rights Law in Situations of Armed Conflict" (2007) 40 Israel LR 310

Fear N and others, "What are the Consequences of Deployment to Iraq and Afghanistan on the Mental Health of the UK Armed Forces? A Cohort Study" (2010) 375 *The Lancet* 1783

Freyd J, "Violations of Power, Adaptive Blindness, and Betrayal Trauma Theory" (1997) 7 Feminism & Psychology 22

Hill-Cawthorne L, *Detention in Non-International Armed Conflict* (OUP 2016)

Iversen A and others, "What Happens to Veterans When They Leave the Armed Forces?" (2005) 331 BMJ 569

Kavanagh A, *Constitutional Review under the UK Human Rights Act* (CUP 2009)

Lubell N, *Extraterritorial Use of Force Against Non-State Actors* (OUP 2010)

McCracken J, "The Overseas Operations Act 2021: A Flawed Solution to a Real Problem" [2022] Public Law 45

Mégret F, "War? Legal Semantics and the Move to Violence" (2002) 13 EJIL 361

Melzer N, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under IHL* (ICRC 2009)

Milanović M, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy* (OUP 2011)

Pictet J (ed), *Commentary on the Geneva Conventions of 12 August 1949* (ICRC 1952)

Provost R, *International Human Rights and Humanitarian Law* (CUP 2002)

Schmitt M, "The Interpretive Guidance on the Notion of Direct Participation in Hostilities: A Critical Analysis" (2010) 1 Harvard National Security Journal 5

Schmitt M (ed), *Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations* (CUP 2017)

Sumption J, *Trials of the State: Law and the Decline of Politics* (Profile Books 2019)