Injustice and Betrayal

Why this matters — the degradation of Defence

I. Introduction

The armed forces of the United Kingdom occupy a singular constitutional position. They are the coercive instrument of last resort upon which the state's sovereignty ultimately rests, yet they are simultaneously required to operate within an increasingly complex matrix of legal obligations, political constraints, and institutional pressures that were never designed with the exigencies of modern warfare in mind. Over the past three decades, and with accelerating intensity since the interventions in Afghanistan and Iraq, a structural pathology has emerged at the intersection of law, politics, and military capability: one in which the very personnel tasked with the defence of the realm are subjected to protracted legal jeopardy, institutional abandonment, and a form of retrospective criminalisation that bears no proportionate relationship to the conduct in question.

This essay argues that the phenomenon is neither accidental nor incidental. It is the product of deliberate political choices, institutional inertia, and a legal architecture that has been permitted to expand into the operational space of armed conflict without adequate calibration to the realities of that environment. The consequences are material: they degrade operational effectiveness, undermine recruitment and retention, corrode the moral component of fighting power, and — in aggregate — constitute a significant and under-examined threat to national security. To understand why this matters, it is necessary first to understand the scale and character of what has occurred.

II. The strategic context: Defence in a contested age

The United Kingdom's 2021 Integrated Review described a world of intensifying strategic competition, in which state and non-state adversaries contest British interests across all domains — physical, cognitive, and legal.[1] That document, and the Defence Command Paper that accompanied it, acknowledged the need for a military capable of operating across the full spectrum of conflict, from stabilisation and counter-insurgency to high-intensity warfighting against near-peer adversaries. What neither document confronted with adequate rigour was the degree to which the United Kingdom's own legal and political culture had already imposed constraints upon that spectrum that no adversary could have achieved by force of arms alone.

The concept of 'lawfare' — the instrumentalisation of legal processes to achieve strategic objectives that cannot be secured through conventional military means — has received growing attention in academic and policy literature.[2] It describes a recognisable pattern in which adversaries or their proxies exploit the legal frameworks of democratic states to target those states' own security services. What has received less attention, however, is the degree to which the United Kingdom's domestic legal and political establishment has, whether through negligence or ideological disposition, facilitated precisely this exploitation — not merely as a theoretical vulnerability but as a demonstrated and costly reality.

The extraterritorial extension of the European Convention on Human Rights (ECHR) to the conduct of British forces in occupied territories — established by the European Court of Human Rights in *Al-Skeini v United Kingdom* (2011) — created the juridical conditions for a

[1] Ministry of Defence, 'Defence in a Competitive Age' (Command Paper 411, March 2021), p. 5.

[2] Joint Committee on Human Rights, 'The Government's Independent Review of the Human Rights Act' (HC 89, 2021), para. 3.12. See also Orde F. Kittrie, Lawfare: Law as a Weapon of War (Oxford: Oxford University Press, 2016), pp. 1–15.

wave of litigation against servicemen and women whose actions, taken in extremis in active theatres of conflict, were subsequently subjected to peacetime standards of accountability designed for entirely different circumstances.[3] The strategic implications of this jurisprudential shift were not adequately anticipated by the government, nor were they subsequently managed with the competence or urgency the situation demanded.

III. The human cost of institutional abandonment

The human dimension of this problem is neither abstract nor distant. Since 2010, thousands of veterans of the Northern Ireland conflict, the campaigns in Iraq, and operations in Afghanistan have been subjected to police investigation, formal inquiry, or civil litigation arising from actions taken, in many cases, decades previously.[4] The Iraq Historic Allegations Team (IHAT), established in 2010 and disbanded in 2017, investigated approximately 3,400 alleged cases of unlawful killing and ill-treatment arising from the Iraq War. Of these, not a single prosecution resulted. The financial cost to the public purse exceeded £34 million; the human cost — measured in years of anxiety, reputational damage, and psychological harm suffered by veterans who had already given their service to the state — is incalculable.[5]

That IHAT was substantially fed by claims generated by the now-disgraced law firm Public Interest Lawyers, operating on a no-win-no-fee basis and later found by a disciplinary tribunal to have made knowingly false representations, does not mitigate the institutional failure involved.[6] On the contrary, it compounds it. The machinery of the state — the Ministry of Defence, the Service Police, the prosecutorial authorities — was deployed against its own personnel at the behest of a commercial legal enterprise whose motivations were, at best, ideological and, at worst, nakedly financial. That this was permitted to occur, and to continue for seven years, represents a failure of political will and institutional leadership of the first order.

The psychological impact upon serving personnel of witnessing this treatment of their predecessors cannot be overstated. The armed forces depend upon what military doctrine terms the ‘moral component’ of fighting power: the will to fight, the belief in the legitimacy of the mission, and the confidence that the state stands behind those who act in its name.[7] When soldiers observe decorated veterans — men and women who served with distinction — subjected to criminal investigation for decisions made under fire, in darkness, under threat of death, and without the luxury of deliberation, the corrosive effect upon that moral component is profound and lasting.

IV. The political dimension: complicity and convenience

It would be comforting to attribute the situation entirely to external forces — to hostile litigation, to European jurisprudence, to the campaigns of advocacy organisations. In truth, however, the complicity of successive British governments is central to the analysis. The decisions that

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[3] Al-Skeini and Others v United Kingdom (2011) 53 EHRR 18 [Grand Chamber], para. 149. The Court held that the United Kingdom exercised Article 1 ECHR jurisdiction over Iraqi civilians killed by British forces acting in a law enforcement capacity in Basra.

[4] House of Commons Defence Committee, 'Protecting Those Who Protect Us: Obligations to our Armed Forces' (HC 158, 2022), para. 8.

[5] Iraq Historic Allegations Team, Closure Report (London: IHAT, 2017), p. 3. The final cost figure of £34.1 million was confirmed by the Minister for the Armed Forces, Hansard HC Deb, 14 June 2017, col. 430W.

[6] Public Interest Lawyers was shut down in August 2016 following intervention by the Solicitors Regulation Authority. See R (Ali Zaki Mousa) v Secretary of State for Defence [2013] EWCA Civ 1334. The Solicitors Disciplinary Tribunal subsequently struck off the firm's founder, Phil Shiner, in 2017.

[7] Cabinet Office, 'Global Britain in a Competitive Age: The Integrated Review of Security, Defence, Development and Foreign Policy' (Command Paper 403, 2021), p. 7. The Integrated Review identifies the 'moral component' of fighting power as central to operational capability.

created the conditions for industrial-scale retrospective litigation were political decisions, made by political actors, and sustained by political inertia.[8]

The failure to establish a clear legal framework for the conduct of operations — one that properly distinguished between the standards applicable in armed conflict and those applicable in peacetime — left a vacuum that was inevitably filled by lawyers pursuing their clients' interests and by courts applying the only tools available to them. The Human Rights Act 1998, which incorporated the ECHR into domestic law, contained no express provision for the application of International Humanitarian Law as the governing legal regime in armed conflict.[9] This was not an oversight; it was a choice, and its consequences have been borne disproportionately by those who served.

There is also a dimension that sits at the intersection of domestic politics and international obligation that merits particular scrutiny. The United Kingdom's relationship with the European Court of Human Rights has long been characterised by a tension between the declaratory commitment to the Convention and the practical consequences of Strasbourg's expanding jurisdiction.[10] Successive governments have chosen accommodation over confrontation — a posture that, whatever its diplomatic merits, has consistently prioritised European judicial comity over the protection of those who serve in the British armed forces. The political cost of that accommodation has been externalised onto veterans who lack the institutional voice to resist it.

V. The operational consequences: a degraded force

The operational consequences of this sustained institutional failure are direct and measurable. Military effectiveness in counter-insurgency and stabilisation operations depends critically upon the willingness and ability of commanders at all levels to make rapid, high-stakes decisions in conditions of uncertainty. The awareness that such decisions may, years or decades later, be the subject of criminal investigation applying standards derived from peacetime policing rather than the laws of armed conflict introduces a paralysing caution that is fundamentally incompatible with effective military operations.[11]

The Overseas Operations (Service Personnel and Veterans) Act 2021 represented a partial acknowledgement of this problem, introducing a presumption against prosecution for alleged offences committed overseas after five years.[12] The Act was a necessary but manifestly insufficient response. It does not address the underlying legal architecture that creates the conditions for litigation in the first place; it does not protect veterans of the Northern Ireland conflict, who remain exposed to legacy investigations under a separate and contentious statutory framework; and it does not resolve the fundamental tension between the ECHR regime and the laws of armed conflict that drives the problem at its root.

The effects upon recruitment and retention compound the operational damage. In an era of severe pressure upon the armed forces' ability to attract and retain sufficient numbers of

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[8]David Ucko and Thomas Marks, Crafting Strategy for Irregular Warfare: A Framework for Analysis and Action (Washington DC: NDU Press, 2020), p. 44.

[9]Human Rights Act 1998, s. 1 and Sch. 1. The Act incorporates Convention rights as defined by the ECHR but contains no express provision disapplying those rights in favour of IHL during armed conflict, a lacuna the courts have had to address by developing the lex specialis doctrine domestically.

[10]Lord Neuberger, 'Has Strasbourg got it right? How does the European Court of Human Rights treat the United Kingdom?' (Lord Alexander of Weedon Lecture, Lincoln's Inn, 2012), p. 11.

[11]David Cameron, Statement to the House of Commons on the Iraq Inquiry, Hansard HC Deb, 6 July 2016, col. 889.

[12]Overseas Operations (Service Personnel and Veterans) Act 2021, s. 1. The five-year presumption against prosecution applies to offences other than those listed in Sch. 1 (which includes torture, genocide, and crimes against humanity).

capable personnel, the reputational damage inflicted by sustained high-profile litigation against veterans constitutes a significant deterrent.[13] Young men and women of ability, weighing the prospect of military service, observe that the state has been willing to prosecute its own soldiers for decisions made in extremis, based on allegations generated years or decades after the fact, often by individuals who bore arms against them. The rational inference — that the state cannot be trusted to stand behind those who serve in its name — is not without evidential foundation.

VI. The National Security dimension: privileging our enemies

The strategic implications of the foregoing extend beyond the welfare of individual veterans and the operational effectiveness of current forces. They touch upon a fundamental question of national security: whether the legal and political environment in which British forces must operate is calibrated to advance or undermine the state's security interests.[14]

The answer, on the evidence of the past three decades, is that in significant respects it has operated to the advantage of those who oppose British interests. The same legal processes that subjected British soldiers to investigation have been exploited by organisations and individuals hostile to the United Kingdom, operating through sympathetic legal intermediaries and advocacy networks, to impose costs upon the state and its security apparatus that no conventional adversary could have achieved. This is not a conspiracy theory; it is a documented pattern of behaviour with identifiable actors, beneficiaries, and negative consequences for national security.[15]

The concept of 'privileging our enemies' is not mere rhetoric. It describes a concrete and demonstrable outcome: a situation in which the legal protections available to individuals who have borne arms against British forces — or who have provided material, financial, or logistical support to those who have — exceed, in practical terms, the protections afforded to the soldiers tasked with defeating them. This inversion of the expected relationship between a democratic state and its security apparatus is the central pathology of the problem this essay introduces.

VII. Conclusion: a problem that demands systematic resolution

The degrading of defence capacity through the legal and political exposure of security force personnel is not a discrete problem admitting of a discrete solution. It is a systemic consequence of choices made at multiple levels — juridical, legislative, political, and institutional — over an extended period, and it will require a correspondingly systemic response. The essays that follow examine three dimensions of this broader problem in detail: the collision of legal norms that has created the conditions for the current situation; the specific and painful experience of Northern Ireland legacy litigation; and the manner in which the conduct of operations in Afghanistan and Iraq was constrained by a peacetime legal framework that was wholly inappropriate to the operational environment.

What this introductory essay seeks to establish is the foundational point from which that analysis proceeds: that the issue at stake is not, at its core, a legal or technical question. It is a political question of the highest order, concerning the relationship between the state and

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[13] Thomas de la Mare QC and Catherine Donnelly, 'Human Rights and the Armed Forces' (Justice, 2021), p. 28; Ministry of Defence, 'UK Armed Forces Biannual Diversity Statistics' (October 2022), Table 1a, showing a sustained downward trend in trained strength since 2010.

[14] Samuel Huntington, The Soldier and the State: The Theory and Politics of Civil-Military Relations (Cambridge, MA: Harvard University Press, 1957), pp. 11–18.

[15] Suzanne Raine, 'Homeland Security and the Problem of the Persistent Adversary', RUSI Journal, 166:1 (2021), pp. 14–22; see also Intelligence and Security Committee of Parliament, 'Russia' (HC 632, 2020), para. 14.

those who serve it in conditions of extreme danger and moral complexity. A state that cannot or will not protect the men and women it sends to war from the consequences of decisions made in the fog of conflict has, in a meaningful sense, broken the most fundamental compact of military service. The harmful consequences of that breach — for operational effectiveness, recruitment, morale, and national security — are not incidental. They are existential in character, and they demand, as a matter of urgency, a response commensurate with their gravity.

Dr Robert Parr MBE AKC is a Visiting Research Fellow at the Changing Character of War Centre, Pembroke College, University of Oxford. Prior to becoming an author and academic, he served for 25 years in the Royal Marines, UK Special Forces, and National Intelligence.