Ministry of Defence Impunity: The Overseas Operations (Service Personnel and Veterans) Act 2021*

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Abstract

This article critically interrogates the policy objectives of the *Overseas Operations (Service Personnel and Veterans) Act* 2021 and its means to achieve them. While the Ministry of Defence claimed the legislation aimed to protect service personnel and veterans from the 'problem of 'lawfare''[1] following 'repeated investigations…in connection with historical operations',[2] the Act, despite amendments, continues to strengthen impunity of the British government for human rights violations, and international and domestic crimes committed in overseas military operations. It does so through three flawed *modus operandi*: introducing an unwarranted presumption *against* prosecutions, the superfluous curtailing of judicial discretion over time limitations to bring tort and human rights claims, and the securing of finality of claims despite less-than-adequate investigations. As such, the Act remains deeply problematic as it intentionally curtails the bringing of the types of claims that led to the International Criminal Court's probe into British war crimes in Iraq. It is argued that the consequences of

*The authors would like to thank Conall Mallory and Stuart Wallace for their comments. Any errors are those of the authors.

[1] MOD, 'Overseas Operations (Service Personnel and Veterans) Bill: Explanatory Notes (2020) para. 6 https://publications.parliament.uk/pa/bills/cbill/58-01/0117/en/20117en.pdf para 1 [accessed 21 April 2020]

[2] Guidance: Overseas Operations (Service Personnel and Veterans) Bill (UK Gov, 2020) *UK Government* https://www.gov.uk/government/publications/overseas-operations-service-personnel-and-veterans-Act [accessed 30 August 2021]

the Act's policy aims are symptomatic of the British state's refusal to confront the crimes, liability, and human rights violations of proximate military conflicts such as Iraq and Afghanistan and limit claims arising from abuse committed during future overseas operations. More generally, the Act is part of a wider attempt by this government to put the executive beyond legal or parliamentary reproach.

Keywords: Overseas Operations Act, Accountability, Ministry of Defence, Service Personnel, Human Rights, Impunity

1. Introduction

The Overseas Operations Bill was introduced to protect service personnel and veterans from the 'industrial levels of claims before the court',[3] and 'the vexatious hounding of veterans and…armed forces of vexatious litigation'.[4] The government was unable to pass the legislation as originally intended after it was significantly hollowed out during its divisive[5] passage through Parliament. Following a cross-party coalition of peers and MPs, with input from NGOs and civil liberties groups, senior military figures and the intervention of the Prosecutor of the International Criminal Court (ICC),[6] the House of Lords amended the law to ensure *all* Rome Statute crimes were excluded from the presumption against prosecution and the ministerial duty to consider ECHR derogation was abandoned, on which the government conceded.[7] Such

[3] HC Deb 23 September 2020, vol 680, cols 984-985
[4] Ibid cols 992-993
[5] Conall Mallory, 'Folk Heroes, Villains and the Overseas Operations Bill' (*UKHR Blog*, 12 October 2020) https://ukhumanrightsblog.com/2020/10/12/folk-heroes-villains-and-the-overseas-operations-bill-conall-mallory/ [last accessed 12 October 2020]
[6] Office of the Prosecutor of the International Criminal Court, Situation In Iraq: UK Final Report (OTP Report 9 December 2020) para 477, https://www.icc-cpi.int/itemsDocuments/201209-otp-final-report-iraq-uk-eng.pdf [accessed 15 March 2021]. See also correspondence between the Prosecutor and the Secretary of State for Defence, the Joint Committee on Human Rights and David Davis MP. ICC https://www.icc-cpi.int/iraq [accessed 13 September 2021]
[7] HL Deb 21 April 2021, vol 692, cols 1060-1073

provisions would have been at odds with the UK's obligations under international law,[8] (particularly international human rights law and international humanitarian law).[9] Despite the Act being introduced on the basis of military loyalty, it harms soldiers who have been wronged by the MOD and provides no additional benefits for them.[10] This failure to protect soldiers is reinforced by the ambiguity around what the precise problem the Act is meant to address. The claim of vexatious litigation brought by 'ambulance-chasing lawyers motivated by their own crude financial enrichment'[11] remains unsubstantiated with no evidence to suggest that a significant portion of the hundreds of claims against the MOD were vexatious.[12] Indeed, the only in-depth independent and external scrutiny of UK military conduct in Iraq from the Office of the Prosecutor (OTP) of the ICC found that there was a 'reasonable basis to believe' that war crimes were committed including wilful killing, torture, sexual violence, and rape[13] and that the aim of 'curbing the phenomena of vexatious litigation has been considerably exaggerated'.[14]

While the focus of this article is on the Act, it is important to note that we see this legislation as part of a general attempt by the current government to re-configure British constitutionalism through expanding executive power at the expense of human rights, judicial and parliamentary oversight, and other accountability mechanisms about which two Lords Committees have

[8] There is not enough space to consider the Act's compatibility with the Articles on Responsibility of States for Internationally Wrongful Acts.
[9] The UK ratified the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in 1988 which applies to overseas operations. See Article 2. Article 14 provides for redress for victims. UNCAT has emphasised that torture can never be subject to statute of limitations and torture victims are entitled to redress regardless of when the violation occurred. See General comment No. 3 of the Committee against Torture. See also the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law'; Resolution 60/147, para. 6 (2005) which prohibits the application of statutes of limitations to 'gross violations of international human rights law and serious violations of international humanitarian law which constitute crimes under international law'.
[10] Part 2 of the Act. The HL did vote for an amendment to exclude serving or former service personnel from the limitation periods but the government rejected the amendment saying it 'allow[s] reasonable time for the bringing of claims, and it would be incompatible with the European Convention on Human Rights for different periods to apply in respect of different types of claimant.' The government also rejected amendments that would create a legal standard of duty of care towards service personnel. See the failed Dannatt amendment, HL Deb 28 April 202, vol 811, col 2351-2353.
[11] HC Deb 23 September 2020, vol 680, col 992
[12] Joint Committee on Human Rights 'Legislative Scrutiny: The Overseas Operations (Service Personnel and Veterans) Bill' (2020) HC 665 para. 41
[13] Office of the Prosecutor for the ICC, 'Iraq/UK' (2017) https://www.icc-cpi.int/itemsDocuments/2017-PE-rep/2017-otp-rep-PE-Iraq_ENG.pdf [last accessed 5 March 2019]
[14] Office of the Prosecutor (OTP) of the International Criminal Court, Situation In Iraq: UK Final Report (OTP Report 9 December 2020) para 474, https://www.icc-cpi.int/itemsDocuments/201209-otp-final-report-iraq-uk-eng.pdf [accessed 15 March 2021]

warned, 'as a matter of urgency', of the shift of power away from Parliament to the Executive.[15] The Act, although failing in its initial aims, still signals the government's refusal to confront its responsibility in committing atrocious human rights violations. This article locates the Act within the current government's claims over the 'juridification' of war, to evade judicial oversight, before outlining some key provisions of the Act and its policy aims. The main section critically examines the Act's three flawed *modus operandi* to achieve such aims: an unwarranted presumption against prosecution, and a superfluous curtailing of judicial discretion over limitations and the securing of finality of claims through less-than-adequate investigations. We conclude that the consequence of these methods is to further reify MOD impunity for human rights violations, and international and domestic crimes committed overseas which illustrates a refusal and aversion to confronting recent military interventions.

2. Government anxieties over the juridification of war

Over the past two decades, the United Kingdom's government and armed forces have become subject to increased judicial oversight[16] through new legal avenues enabling individuals to hold the government to account for failures and violations in the military domain.[17] Lengthy military engagements in Afghanistan and Iraq have resulted in extensive litigation (Northern Ireland may become subject to its own form of legal protection against historic prosecutions). These

[15] Secondary Legislation Scrutiny Committee, 'Government by Diktat: A call to return power to Parliament' (2021) HL Paper 105; Delegated Powers and Regulatory Reform Committee, 'Democracy Denied? The urgent need to rebalance power between Parliament and the Executive' (2021) HL Paper 106

[16] See G. R. Rubin, 'United Kingdom Military Law: Autonomy, Civilisation, Juridification' (2002) 65 Modern Law Review 36; Anthony Forster (2012) 'British judicial engagement and the juridification of the armed forces', International Affairs, 88:2, 283–300.

[17] Al-Skeini v United Kingdom (Application No. 55721/07); Smith & Ors v The Ministry of Defence [2013] UKSC 41; Alseran and Others v Ministry of Defence [2017] EWHC 3289 (QB). The MOD settlement costs to claimants reaches almost £22 million. There are over 600 more claims represented by Leigh Day & Co. Juridification is a consequence of the weak enforceability of IHL, which the MOD has consistently advocated as the preferred legal regime. See Stuart Wallace, *The Application of the European Convention on Human Rights to Military Operations* (CUP 2019) 2

range from accusations of war crimes and human rights violations by military personnel, to claims that soldiers had not been adequately equipped or trained for the battlefield by the MOD. In addition to the hundreds of successful Human Rights Act claims, millions of pounds of compensation have been paid to hundreds of victims[18] and both conflicts have resulted in independent criminal investigations, namely the Iraq Historic Allegations Team (IHAT) (then the Service Police Legacy Investigations (SPLI)), which investigated 3,629 allegations,[19] and the Royal Military Police's (RMP) Operation Northmoor into 675 allegations from Afghanistan. Yet, after the investigative units have closed,[20] there have not been any prosecutions arising from its work and there have been only four publicly disclosed military-initiated cases of UK soldiers facing court martial over abuses in Iraq, with five soldiers convicted.[21] These legal actions, along with the Baha Mousa Inquiry and parliamentary inquiries, have established that the MOD's own interrogation training material placed soldiers outside of international humanitarian law and international human rights law.[22] In other words, the MOD acted illegally,[23] encouraged illegal behaviour amongst its military personnel, and has now immunised itself from consequential legal actions by legislating itself out of its own failures.

The Act curtails domestic tort and criminal proceedings against military personnel *and* the MOD, by pushing back against judicial scrutiny of executive action in response to the so-called

[18] Ministry of Defence FOI, 9 November 2015 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/476727/20151109-FOI2015-06481-RESPONSE-O.pdf [accessed 20 January 2020] MOD common law compensation claims statistics 2020/21, 4 November 2021 https://www.gov.uk/government/statistics/mod-common-law-compensation-claims-statistics-202021/mod-common-law-compensation-claims-statistics-202021 [accessed 1 December 2021]

[19] Report on Preliminary Examination Activities (2018) (5 December 2018) https://www.icc-cpi.int/itemsDocuments/181205-rep-otp-PE-ENG.pdf at [200] [accessed 4 March 2020]

[20] SPLI completed the final investigations, inherited from IHAT, in November 2020, which was not reported until October 2021: SPLI quarterly update: 30 September to 16 November 2020, 19 October 2021 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1026583/20210730_Final_Qtrly_Report-30SEP20_16NOV20.pdf [accessed 1 December 2021].

[21] European Centre for Constitutional and Human Rights, 'War Crimes in Iraq (Submission)', 31 July 2019 https://www.ecchr.eu/fileadmin/Juristische_Dokumente/ECCHR_Follow_Up_Communication_to_OTP_War_crimes_by_UK_forces_in_Iraq_July_2019.pdf pp 6-7 [accessed 2 August 2020]

[22] William Gage, 'Baha Mousa Public Inquiry Report' (2011) HC 1452–I; House of Commons Defence Committee, Who Guards the Guardians? MoD support for former and serving personnel, (HC 109, 2017) para 86

[23] Intelligence and Security Committee, Detainee Mistreatment and Rendition 2001-2010, (HC1113, 2018) pp 26-28

'judicialisation of war'.[24] In 2016, following a significant period of open ministerial denigration of the Human Rights Act (HRA) and human rights lawyers,[25] and influential reports from Policy Exchange,[26] the then Secretary of State for Defence announced that the government would introduce measures to limit the length of time during which claims could be brought against the government.[27] These measures came in different guises: firstly as combat immunity legislation,[28] then as a statute of limitations[29] and, in the current form, a statutory presumption against prosecution. It is to the Act that we now turn.

3. Overview of the Overseas Operations (Service Personnel and Veterans) Act 2021

What is left of the Act given that it does not make it more difficult for soldiers committing war crimes to be prosecuted; nor does it contain a Ministerial duty to consider derogating from the ECHR? Is it still a problematic piece of legislation?

The Act applies to 'overseas armed forces actions' brought against the MOD, the Secretary of State for Defence, or any member of Her Majesty's forces in relation to overseas operations. This is broadly defined by section 1(6) as 'any operations outside the British Islands, including peacekeeping operations and operations for dealing with terrorism, civil unrest or serious

[24] MOD, 'Overseas Operations (Service Personnel and Veterans) Bill: Explanatory Notes (2020) https://publications.parliament.uk/pa/bills/cbill/58-01/0117/en/20117en.pdf para 1 [accessed 21 April 2020]; Defence Committee, UK Armed Forces Personnel and the Legal Framework for Future Operations, (HC 931, 2013) para 96

[25] See Tim Ross 'Defence Secretary Michael Fallon: Suspend the Human Rights Act to Protect Our Troops' *The Telegraph* (London, 26 December 2015)

[26] Thomas Tugendhat and Laura Croft, 'The Fog of War' Policy Exchange (2013) https://policyexchange.org.uk/publication/the-fog-of-law-an-introduction-to-the-legal-erosion-of-british-fighting-power/ [accessed 6 May 2020]; Richard Ekins, Jonathan Morgan and Tom Tugendhat, 'Clearing the Fog, Policy Exchange (2015) https://policyexchange.org.uk/publication/clearing-the-fog-of-law-saving-our-armed-forces-from-defeat-by-judicial-diktat [accessed 6 May 2020]; Richard Ekins, Patrick Hennessey and Julie Marionneau, 'Protecting those who serve' Policy Exchange (2019) https://policyexchange.org.uk/publication/protecting-those-who-serve/ [accessed 6 May 2020].

[27] Michael Fallon, 'Government to protect Armed Forces from persistent legal claims in future overseas operations' *UK government* (4 October 2016) https://www.gov.uk/government/news/government-to-protect-armed-forces-from-persistent-legal-claims-in-future-overseas-operations [accessed 27 April 2019]

[28] Michael Fallon, 'Combat Compensation Consultation' *Ministry of Defence* https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/573565/20161128-Consultation_document_death_and_injury_compensation_scheme.pdf [accessed 5 July 2021]

[29] HC Deb 25 January 2018, vol 635, cols 203-226 ; HC Deb 25 June 2018, vol 643, cols 727-734

public disorder, in the course of which members of Her Majesty's forces come under attack or face the threat of attack or violent resistance'. The Act protects British forces from being prosecuted for crimes committed more than five years earlier if legal actions in relation to those acts are brought after the law came into force but does not apply to actions already brought.

The presumption against prosecution for 'relevant offences' was meant to protect against the 'cycle' of claims and re-investigations primarily through a 'triple lock' system (also described as the 'new factors') of protection against prosecutions for alleged historical offences which will provide 'greater certainty for Service personnel and veterans in relation to vexatious claims and prosecution of historical events, that occurred in the uniquely complex environment of armed conflict overseas'.[30] Essentially, the Act provides that once five years have elapsed since the incident giving rise to proceedings, then three 'conditions' must be met in order for the prosecution, including a private prosecution, to proceed. These conditions are:

1. Exceptionality: That it will be 'exceptional' for a relevant prosecutor to decide that proceedings should be brought against a member of the British service personnel or a veteran or that the proceedings against the person for the offence should be continued (section 2);

2. Dilution of culpability: This is a requirement for a prosecutor to 'give particular weight' to certain matters that can be understood as reducing 'the person's culpability or otherwise tend against prosecution' such as the 'adverse effect' of the prevailing conditions at the time and the impact those conditions will have 'on the ability of that service person or veteran to make sound judgements or exercise self-control or on their mental health.' Further, if there has been a previous investigation and no compelling

[30] MOD, 'Overseas Operations (Service Personnel and Veterans) Bill: Explanatory Notes (2020) https://publications.parliament.uk/pa/bills/cbill/58-01/0117/en/20117en.pdf para 1 [last accessed 21 April 2020]

new evidence has emerged, the public interest is for finality to be achieved (section 3); and,

3. Permission to prosecute: Notwithstanding these considerations, a prosecution can only proceed if the Attorney General, or, in the case of Northern Ireland, the Advocate General, gives consent to prosecute (section 5).

Part 2 of Schedule 1 excludes from the Act's 'protection against prosecution' a series of important offences including all sexual offences, genocide, crimes against humanity and war crimes and conduct ancillary to these particular crimes under the International Criminal Court Act 2001. This means that the 'relevant offences' for the purpose of the Act do not include the type of offences complained of by Iraqi and Afghani civilians but includes a host of other criminal offences such as murder, manslaughter or grievous bodily harm. Section 6 refers to offences under section 42 of the Armed Forces Act 2006 and an offence punishable with a criminal penalty. Section 6(2) excludes offences committed against other service personnel, a Crown servant, or a defence contractor meaning that the presumption against prosecution does not apply in these circumstances but the limitation periods, discussed below, do.

In addition, the Act reduces judicial discretion for lengthening time limitations to bring civil actions. For tort claims, the Limitation Act 1980 confers qualified judicial discretion to extend the normal time limit of three years, outlining a series of considerations in foregoing that limit under section 33. This includes whether the claimant or defendant would be prejudiced by judicial exercise of discretion, the length and reasons for the delay and the extent to which the plaintiff acted promptly and reasonably once it was known there are grounds for an action for damages. Section 8 of the Act amends section 33 by reducing discretion in respect of death or personal injury claims which relate to overseas military operations, by fixing an absolute end limit of six years in which the claim must be brought. Further, in addition to the six factors set

out in section 33(3) of the Limitation Act 1980 when considering whether it is equitable to extend the primary limitation period, the Act specifies additional factors the court must have regard to when exercising this discretion such as 'the likely impact of the operational context on the ability of members of Her Majesty's forces to remember relevant events or actions fully or accurately'; and the 'likely impact of the action on the mental health of any witness or potential witnesses' who are members of the Armed forces (as per Schedule 2, Part 1). In addition, the Act also amends the Foreign Limitation Periods Act 1984 so that claims brought under foreign law are subject to the same time limits. Claims brought by military personnel against the MOD are also subject to these provisions as well as already being subject to combat immunity. In combination, these measures amount to the 'personal injury longstop'.[31]

Section 11 makes a similar change in bringing claims under the HRA. Typically, section 7(5)(b) HRA confers a discretion to extend the one-year limit on Convention rights claims as far as it is equitable considering all the circumstances. The Act, however, introduces amendments to section 7 that require judges to have particular regard to 'the effect of the delay in bringing proceedings on the cogency of evidence adduced or likely to be adduced by the parties' (taking into account the impact of the operational context on the ability to recall events) and the mental health effects of recalling such events on witnesses and military personnel. Further, the Act also introduces an absolute six-year limitation on bringing proceedings, or within 12-months since the 'date of knowledge' which is the date the claimant became aware of the act complained of and the role of the MOD or the Secretary of State for Defence, whichever is the later. This is the 'human rights longstop'.[32]

[31] MOD, 'Overseas Operations (Service Personnel and Veterans) Bill: ECHR Memorandum' (2020) para 21-24 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/920358/ECHR_Memo_-_OO_SPV__Bill_-_FINAL.pdf [accessed 2 September 2021]

[32] MOD, 'Overseas Operations (Service Personnel and Veterans) Bill: ECHR Memorandum' (2020) para 26-28 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/920358/ECHR_Memo_-_OO_SPV__Bill_-_FINAL.pdf [accessed 2 September 2021]

To answer the questions posed at the beginning of this section, the Act remains deeply problematic on many levels. Firstly, as has been seen from the IHAT/SPLI investigations into allegations against British service personnel in Iraq, although the ICC found that the allegations amounted to war crimes, domestic investigators down-graded various allegations by classifying[33] 'lower-level allegations of ill-treatment' as actual bodily harm, assault and other 'less serious' offences even though examination of those particular cases showed that they actually amounted to torture, inhuman treatment, cruel, humiliating and degrading treatment and outrages upon personal dignity, including sexually degrading treatment, and critically, rape, which were dismissed without further investigation.[34] Although all war crimes are excluded from the presumption against prosecution, other crimes are not, meaning that classifying crimes as a domestic crime would enable the presumption to apply even though the conduct might actually amount to a war crime. Crucially, this is found in the SPLI final report, which accounts its closed investigations, describing numerous cases as domestic crimes like 'grievous bodily harm' and 'sexual assault'.[35] Furthermore, although the ICC was considering numerous allegations of sexual violence contrary to article 8(2)(b)(xxii) or article 8(2)(e)(vi) of the Rome Statute, all such cases were classified by IHAT/SPLI as 'sexual assault' with a medium or low severity level.[36] Research on how the investigative classification of crimes and prosecutorial discretion is affected by the Act will be valuable.

Another problem is the fact the Act's longstops target the very claims that were issued by Iraqi victims who suffered abuse amounting to numerous war crimes. Many of these tort and human

[33] Elizabeth Stubbins Bates, 'Distorted Terminology: The UK's Closure of Investigations into alleged Torture and Inhuman Treatment in Iraq' (2020) 68(3) *ICLQ* 719-739

[34] European Centre for Constitutional and Human Rights, 'War Crimes in Iraq (Submission)', 31 July 2019 https://www.ecchr.eu/fileadmin/Juristische_Dokumente/ECCHR_Follow_Up_Communication_to_OTP_War_crimes_by_UK_forces_in_Iraq_July_2019.pdf p 27 [accessed 2 August 2020]. Confidential annexes to this communication detailing these cases are on file with one of the authors.

[35] SPLI work completed (table) https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1026579/20210929-SPLI_Work_Completed_Table.pdf [accessed 1 December 2021].

[36] Systemic Issues Working Group, "Systemic Issues Identified from Service Police and Other Investigations into Military Operations Overseas: August 2018' (Ministry of Defence August 2018), para 6.2.2.

rights claims were brought after six years, meaning that such claims would face additional barriers (see section 4.2 below). The disclosure gained from the issuing of these claims enabled the victims, the public, and the ICC to know what happened. Indeed, it is these civil and human rights claims which directly led to the domestic criminal investigations which would not otherwise have been initiated if it were not for the litigation. Even though the Act contains no limitations to criminal investigations, the longstops may curb the possibility of criminal investigations being established by preventing such claims in the first place.

Finally, the Act does not meet its primary policy objective as soldiers can still be prosecuted (notwithstanding the first point made above about the classification of crimes) and also that the longstops apply to claims brought by soldiers and veterans against the MOD. All in all, the Act protects the MOD much more than service personnel and veterans.

4. Problematizing the means for the policy objectives

One of the *purported* policy objectives of the Act is to protect military personnel from vexatious litigation for which we identified three flawed *modus operandi* - introducing a new presumption against prosecution, curtailing judicial discretion on limitations and prosecutorial discretion, and securing finality of claims despite less-than-adequate investigations. These will now be critically interrogated before the following section concludes that they actually serve to reify British state impunity in relation to human rights violations and international and domestic crimes committed overseas.

4.1 Introducing a new presumption against prosecution

4.1.1 The presumption against prosecutions as unwarranted

The European Court of Human Rights (ECtHR) Articles 2 and 3 ECHR jurisprudence confirms that compliant investigations must be initiated reasonably promptly and be capable of identifying culpable individuals and securing accountability, including through the criminal justice process with criminal proceedings being a potential remedy.[37] The State's Article 2 ECHR positive obligation also requires an 'effective independent judicial system to be set up so as to secure legal means capable of establishing the facts, holding accountable those at fault and providing appropriate redress to the victim.'[38] Seemingly, based on the wording of the Act, the curtailment of prosecutions will be encouraged even if there is strong evidence to suggest a prosecution may be successful because the prosecutor 'must' give particular weight to previously irrelevant considerations when making a determination as to whether to proceed with a prosecution. Under the Full Code Test, the Service Prosecuting Authority (SPA) can already decide not to proceed with a prosecution if it views that a prosecution would not be in the public interest or if it deems that there is a low success of prosecution, even when an investigating authority has recommended that an individual be charged.[39] As such, it is unclear why the Act's focus is upon prosecutions.

Another peculiarity lies with the purposes typically informing the legal technique of presumptions against prosecutions which are entirely misaligned in this Act. Such provisions are usually introduced into legislation to encourage victims to report what authorities consider to be greater criminal activity which they have unwillingly participated in, and to thus not fear recrimination. For example, in instances where those who break immigration laws are victims

[37] Stuart Wallace, *The Application of the European Convention on Human Rights to Military Operations* (CUP 2019) pp.111-112
[38] Ciechonzska v Poland 19766/04, 14 June 2011 [66]; *McCann v. UK* (1995) 21 EHRR 97 [161]
[39] For example, IHAT referred one case of unlawful killing and one case of ill-treatment to the Director of Service Prosecutions for prosecution who in both cases decided not to proceed. See IHAT, 'The Iraq Historical Allegations Team Quarterly Update- October to December 2016' (2016) pp. 2-3 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/617305/20170116-Quarterly_Update_website_Dec16.pdf [accessed 4 June 2020]; European Centre for Constitutional and Human Rights, 'War Crimes in Iraq (Submission)', 31 July 2019 https://www.ecchr.eu/fileadmin/Juristische_Dokumente/ECCHR_Follow_Up_Communication_to_OTP_War_crimes_by_UK_forces_in_Iraq_July_2019.pdf pp 6-7 [accessed 2 August 2020].

of trafficking, such a law will instruct a prosecutor not to prosecute.[40] There is no comparable situation where military personnel are under such victimisation that a presumption would be needed to encourage them to come forward about the nature of said victimisation. Furthermore, the dilution of culpability section of the Act speaks more to factors that might mitigate a sentence once a verdict of guilty has been reached, perhaps even indications of whether the accused had the sufficient mental capacity to commit the crime, not factors to be taken into account to determine guilt in itself.[41]

4.1.2 Prosecutorial discretion to determine the 'exceptional'

The triple lock feature of the Act raises the threshold for when a prosecution might be brought, partly on the basis that it will assume that there will not be a prosecution apart from when it is deemed exceptional. In addition to requiring Attorney General consent[42] and requiring the judge to give weight to particular matters, including the demands and adverse effects that deployment might have on military personnel- including their mental health- and public interest in finality[43] (what has elsewhere been described as amounting to a *de facto* statute of limitations[44]) there is also prosecutorial discretion on determining the exceptionality of prosecutions exceeding five years.

What is deemed exceptional is disconcertingly vague and the notion has been castigated as 'not helpful as a new test when prosecutions have been truly exceptional' particularly given the lack of guidance which simply says that 'such prosecutions, as part of a triple lock, should be exceptional'.[45]

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[40] E.g s.45, Modern Slavery Act 2005
[41] A case in point on the diminished responsibility of service personnel is R v Alexander Wayne Blackman [2017] EWCA Crim 190
[42] See R. (on the application of Evans) v Attorney General [2015] UKSC 21; We don't expand on this element of the triple lock given AG consent features in several pieces of legislation e.g. International Criminal Court Act 2001
[43] MOD, 'Overseas Operations (Service Personnel and Veterans) Bill: Explanatory Notes (2020) https://publications.parliament.uk/pa/bills/cbill/58-01/0117/en/20117en.pdf para 1 [accessed 21 April 2020]
[44] JCHR, 'Oral evidence: The Overseas Operations (Service Personnel and Veterans) Bill' (2020) HC 665, 5
[45] HC Deb 9 March 2021, vol 810, col 1529-1530

Further, the Bill's Impact Assessment stated that the triple lock might 'over time have an indirect impact on repeat criminal investigations, as police investigations may not be continued if, in consultation with prosecutors, it is assessed that cases will not meet the 'exceptional' threshold.'[46] It is also envisaged that, 'over time, as prosecutors become familiar with the measure, they should be able to advise investigators earlier in the process as to whether this new statutory requirement would be met in a particular case.'[47] Such a practice would preclude the need for an investigation if the prosecutor at the outset can already determine whether the case would be granted permission to proceed, even before the investigation is complete.

4.1.3 ECHR implications of the presumption

Although a presumption against prosecution is different from a statute of limitations, the difference is one of degree rather than one of kind. The combined effect of the triple lock system make it very difficult for a prosecution to proceed. Indeed, the 'longstops' mean victims' rights to justice and effective reparation are severely limited. While there is no right to obtain a prosecution following an investigation,[48] the ECtHR jurisprudence is clear that a contracting party has undermined its procedural obligations arising under Articles 2 and 3 if an investigation is terminated through statutory limitation of criminal liability resulting from the authorities inactivity.[49] Furthermore, when a death occurs following ill-treatment by state agents, the Court has considered the interference of the state in punishing perpetrators as being akin to an impermissible partial amnesty and thus virtual impunity.[50] Where a State agent has been charged with crimes involving torture or ill-treatment, the Court has stressed that it is of the utmost importance for the purposes of an 'effective remedy' that criminal proceedings

[46] MOD, 'Impact Assessment: Overseas Operations (Service Personnel and Veterans) Bill' (2020) para 4 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/918954/Impact-assessment-OO_SPV__Bill-
[47] Ibid para 29
[48] *Giuliani and Gaggio v. Italy* (Application No. 23458/02) para 306
[49] *Association "21 December 1989" and Others v. Romania* (App no 33810/07) para 144
[50] Al-Skeini v United Kingdom (Application No. 55721/07)

and sentencing are not time-barred and that the granting of an amnesty or pardon should not be permissible.[51]

Although the presumption against prosecution is not an amnesty or pardon, and excludes war crimes, its effects, in the context of the Act's other measures and with the Act's aims in mind, is similarly a form of state manufactured impunity. In discussing the procedural obligations under Article 2, the case of *Öneryıldız v. Turkey* stated that 'the national courts should not under any circumstances be prepared to allow life-endangering offences to go unpunished'.[52] While this provision does not prohibit such prosecutions, it substantially curtails them. In addition, Articles 2 and 3 provide for positive state obligations to put in place effective deterrence to criminal wrongdoings. This must be accompanied by effective law enforcement for the prevention, suppression and punishment of breaches of those laws. [53] The Act falls foul of the procedural obligations under Article 2, and Article 3 ECHR - which is non-derogable.

4.1.4 Inadvertently inviting the jurisdiction of the International Criminal Court

The Rome Statute cannot be derogated from. One part of the Rome Statute's admissibility criteria which must be met before a full investigation into an accused State can be opened, is whether or not the State in question is willing or able to genuinely investigate the allegations of war crimes itself and prosecute those responsible.[54] Many of the illegal interrogation methods used on detainees during the Iraq occupation were MOD trained techniques, meaning that the matter goes beyond the conduct of individual soldiers and points to the culpability of senior military officials when sanctioning training or failing to stop such conduct.[55] Even though all crimes under the Rome Statute are excluded from the Act, there are two possibilities

[51] Abdülsamet Yaman v. Turkey, (Application No. 32446/96) para [55]
[52] (Application No. 48939/99)
[53] *Keenan v UK* (Application no. 27229/95)
[54] Article 17 Rome Statute
[55] William Gage, 'Baha Mousa Public Inquiry Report' (2011) HC 1452–I; House of Commons Defence Committee, Who Guards the Guardians? MoD support for former and serving personnel, (HC 109, 2017) para 86

as to how the Act will be applied by investigators and prosecutors: both could focus on excluded war crimes, rather than domestic crimes, to avoid the presumption against prosecution, or they could classify crimes as domestic crimes, as IHAT did, so that the presumption applies. As the 'longstops' hamper the very claims that led to the ICC's preliminary examination of the UK's conduct in Iraq from being brought in the future, the Act still has implications for the ICC's ability to oversee UK domestic investigations into alleged war crimes, simply by limiting such allegations being dealt with domestically in the first place.

Concluding, this first flawed *modus operandi* has several problems. The first is that a presumption may discourage prosecutions when there is strong evidence to the contrary. The second is that the Act fundamentally misunderstands, or exploits, why presumptions against prosecution provisions are typically used. Thirdly, the presumption against prosecution, in its quasi-statute of limitations incarnation, is potentially in breach of several procedural obligations under the ECHR. Finally, such provisions could invite more opprobrium by the ICC.[56]

4.2 Curtailing judicial discretion on limitations and prosecutorial discretion

The Act sits within a wider tapestry of laws that renders such proceedings for more recent conflicts challenging given the difficulties for claimants to bring actions against foreign military interventions.

4.2.1 Limitation clauses as superfluous

[56] Office of the Prosecutor of the International Criminal Court, Situation In Iraq: UK Final Report (OTP Report 9 December 2020) para 479, https://www.icc-cpi.int/itemsDocuments/201209-otp-final-report-iraq-uk-eng.pdf [accessed 15 March 2021]

Attempts to time-bar victims of torture from bringing civil and human rights claims and placing temporal barriers to prosecuting perpetrators is not consistent with international law.[57] Human rights claims are not intended to solely focus upon individual soldiers but seek to identify and purge the systematic issues, albeit within limits,[58] and those higher up the chain of command, especially in relation to arrest liability and detention operations. In negligence claims, the action seeks to establish MOD liability for conduct in the preparation and lead up to operations (in the conduct of hostilities, combat immunity doctrine prevents negligence claims[59]). It is only through human rights law (which in *Smith* was the channel through which a negligence claim could be brought in relation to the preparation for combat operations) that these failures and harms have been addressed – no other available mechanism has been able to achieve this. Establishing a time limit by which such prosecutions can be brought to the courts will have the effect of furthering and entrenching a level of impunity for military personnel, senior commanders, and ministers. Delays in credible but late claims will only serve the Executive.

Litigation brought for the same conduct often crosses over criminal, tort and ECHR claims. The limitations that the Act introduces are on prosecuting alleged crimes that exceed five years, and human rights violations and actions in tort beyond six years. The case law on limitations across tort and human rights proceedings are varied but they illustrate a common reticence toward litigation of distant events.[60] However, for good reasons, more recent conflict-related claims might not manifest some time *ex post factum*. Indeed, foreign victims of killings or abuse by British state actors on the victims' own territory are likely to be delayed in bringing their claims before the British courts. Members of the armed forces are often immune from the

[57] Principles 24 of the Joinet Principles, 1968 UN Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity and General Assembly, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law; Resolution 60/147, para. 7 (2005).
[58] Susan Marks, 'Human rights and root causes' *Modern Law Review* 2011, 74(1), 57-78
[59] Richard Mulcahy v Ministry of Defence [1996] P.I.Q.R. P276; Multiple Claimants v Ministry of Defence [2003] EWHC 1134 (QB); Mohamet Bici, Skender Bici v Ministry of Defence [2004] EWHC 786 (QB); Smith and Others v the Ministry of Defence [2013] UKSC 41.
[60] Colin Murray, 'Back to the Future: Tort's Capacity to Remedy Historic Human Rights Abuses' (2019) 30, 2 Kings Law Journal

legal processes of foreign territories and victims often do not know how to bring such claims before the courts of the invading or occupying country and thus face numerous and significant barriers to justice.[61]

4.2.2 The Temporal scope of the ECHR

Article 53(3) ECHR provides that the acts complained of must have occurred after the date of entry into force of the Convention in the respondent State in question ('the critical date'). An application can be declared admissible, however, if the State is responsible for continuing a situation i.e. one which began *prior* to ratification and *persisted* after the critical date.[62] The question of whether ECHR-compliant investigations must be carried out regarding allegations of violations *before* the ECHR was ratified by the UK have received judicial attention given recent legal actions seeking to remedy colonial-era crimes. Once a duty of investigation under Article 2 or 3 ECHR is triggered[63] that duty only lasts for as long as state authorities 'can reasonably be expected to take measures with an aim to elucidate the circumstances of the death and establish responsibility for it' [64] (this also applies to Article 3 ECHR claims). If new evidence comes to light, then a fresh duty *may* arise.[65]

A strict set of criteria must be met which restrict the temporal scope of the procedural obligation in historic cases. Once the period during which it can be reasonably expected that a state can or should take measures to establish truth and responsibility for the breach has passed there are additional conditions to be met. Set out in *Janowiec & Others v Russia*,[66] these include, save in certain exceptional cases, that the period of time between the death and the 'critical date'

[61] Al-Saadoon & Others v Secretary of State for Defence [2016] EWHC 773 (Admin) [166]; Alseran & Others v Ministry of Defence [2017] EWHC 3289 (QB) [751]-[777], [785]-[786]; Stuart Wallace, *The Application of the European Convention on Human Rights to Military Operations* (CUP 2019) 130-132
[62] Varnava v Turkey (Application No 16064/90)
[63] Ilhan v Turkey (Application no. 22277/93)
[64] Šilih v Slovenia (Application no. 71463/01) para 157; In Re McCaughey [2012] 1 AC 725, [47]
[65] Brecknell v UK (2008) 46 EHRR 42; Hackett v United Kingdom (Application No 4698/04); Gasyak v Turkey (Application No 27872/03) Emin v Cyprus (Application No 59623/08); Nasirkhayeva v Russia (Application No 1721/07)
[66] (Applications nos. 55508/07 and 29520/09)

must have been 'reasonably short' and generally no more than 10 years. *Šilih v Slovenia*[67] established that a duty to investigate a death prior to the ECHR's entry into force will arise but a major part of the investigation must have been carried out, or ought to have been carried out, after the entry into force of the Convention.[68]

Domestically, following *Keyu v Secretary of State for Foreign and Commonwealth Affairs*[69] the Act does not further prohibit delayed claims flowing from colonial-era crimes because the Supreme Court ruled in *Keyu* that the claim, alleging a breach of the Article 2 ECHR investigative duty relating to the killing of 24 unarmed plantation workers by British soldiers during the 1948 Malaya emergency, was time barred. The killings had occurred too long before the 'critical date' (taken as 1966 when the UK established the individual right of petition) exceeding the 10-year limit set by Strasbourg rendering any possibility of investigating this British colonial crime null. Alluding to this temporal proximity of adjudicating colonial wrongs, Lord Kerr noted the 'deficiency in our system of law' for addressing historical wrongs that the case exposed.[70] Similarly, despite the courts finding the British government liable for the 'torture, rape, castration and severe beatings' of Kenyans in the final decade under British colonial rule during the Mau-Mau rebellion,[71] the 40,000 tort applications which proceeded this finding were dismissed due to the passage of time because the claims were 'rendered significantly less cogent by the delay in issuing the claims'.[72]

4.2.3 Domestic jurisprudence on delayed claims from more recent conflicts

[67] (Application no. 71463/01)
[68] Ibid [163]
[69] Keyu v Secretary of State for Foreign and Commonwealth Affairs [2015] UKSC 69, [2015] 3 WLR 1665.
[70] Ibid [285]
[71] *Mutua (and others) v. FCO* [2012] EWHC 2678; Colin Murray, 'Back to the Future: Tort's Capacity to Remedy Historic Human Rights Abuses' (2019) 30, 2 Kings Law Journal
[72] T Kimathi & Ors v The Foreign and Commonwealth Office [2018] EWHC 2066, [461]; Colin Murray, 'Back to the Future: Tort's Capacity to Remedy Historic Human Rights Abuses' (2019) 30, 2 Kings Law Journal

Alseran and others v Ministry of Defence[73] examined whether the human rights and tort claims against the MOD had been brought in time. The claimants were four Iraqi citizens alleging that they were unlawfully imprisoned and ill-treated by British forces 13 years prior to the hearing. On the tort claim, section 1 Foreign Limitation Periods Act 1984 provided that Iraqi law shall apply which has a limitation period of three years (which can only be circumvented under certain circumstances as prescribed by the Iraqi Civil Code). However, section 2 Foreign Limitation Periods Act 1984, allows this rule to be circumvented 'to the extent that its application would conflict with public policy in any case'.[74] This allows the domestic court to disapply Iraqi limitation law if it would cause 'undue hardship' to the parties. In this case, the court refused to apply this exception given parallel human rights claims existed that mitigated the claimed hardship. In the future, however, this discretion will not apply if the passage of time has been more than six years.

The HRA claims in *Alseran* were permitted despite the prolonged period from when the acts occurred and from when the claim was made. Justice Leggatt found that despite the substantial delay it was not the result of the claimants' fault or lack of diligence and there were in fact 'good reasons for the delay'.[75] Further, following the judicial lambasting of the MOD for alleging 'evidential prejudice' by the delay because some witnesses could not remember and others were untraceable despite not making any serious efforts to investigate the claims,[76] Leggatt concluded it would be equitable to permit the claims under the HRA to be brought.[77] Similarly, in *R (Ali Zaki Mousa) v Secretary of State for Defence (No 2),*[78] the court considered a group of cases brought by the families of Iraqi civilians killed by British soldiers or who died in custody and held that Article 2 ECHR-compliant investigations must be urgently carried out

[73] [2017] EWHC 3289
[74] Section 2, Foreign Limitation Periods Act 1984
[75] [2017] EWHC 3289 [833], [854]
[76] Ibid [856]-[867]
[77] Ibid [870]
[78] [2013] EWHC 1412

without any suggestion that the claims should be dismissed or relief refused on account of the passage of time.

As mentioned, if there is a continuing ECHR breach (such as the continued failure to discharge the Article 2 or 3 ECHR investigative duty), then delay should not be a barrier to a claim as the cause of action is still live. [79] However, even if the claim can be allowed, there are other factors that weigh against claimants due to the delay. The evidential effects of the lapse of time could mean that witness and victim memory declines,[80] evidence is harder to gather, and documents disappear.[81] As such, the court may view it as not being worthwhile to burden state authorities with a duty to investigate claims unless the evidence is strong, or the allegations are of heinous violations. Further, in addition to these difficulties, the cost of investigating can be prohibitively expensive and balanced against the likelihood of discovering significant and valuable evidence.[82] In *Al-Saadoon & Others v Secretary of State for Defence*[83] all of the claims were not brought to the attention of the British authorities until up to 12 years after the incidents, yet the court accepted that there was a reasonable explanation for the delay. Some of the claims, however, were still dismissed because it was deemed they had no prospect of holding an effective or successful criminal investigation.[84] The remaining claims were not struck out despite the judicial assessment that the passage of time had seriously affected the ability to verify the allegations.[85]

4.3 Securing finality of claims despite less-than-adequate investigations

4.3.1 Repeat investigations

[79] Long v Secretary of State for Defence [2014] EWHC 2391 [120]
[80] Alseran and others v Ministry of Defence [2017] EWHC 3289 [856]
[81] Shohei Sato 'Operation Legacy': Britain's Destruction and Concealment of Colonial Records Worldwide, (2017) *The Journal of Imperial and Commonwealth History*, 45:4, 697-719
[82] Al-Saadoon & Others v Secretary of State for Defence [2016] EWHC 773 [198]
[83] [2016] EWHC 773 [219]; [228]; [248]; [255]
[84] Ibid [222], [228]
[85] Ibid [250], [255]

The origins of the moral panic described at the start of this article come, not from prosecutions, but the 'cycle of investigations'.[86] The Act states where there has been a previous investigation and there is no compelling new evidence, the public interest in finality is assumed to be achieved which is a matter which the prosecutor must give 'particular weight' to when considering whether to proceed with a prosecution (section 3(2)(b)). The Act does not define what compelling evidence is but evidence is not new 'if it has been taken into account in the relevant previous investigation' (section 4(2)(a)).[87] Previous investigations, for example by the RMP, which took account of all the evidence available might deter a prosecutor from proceeding with a prosecution even if another investigation finds that the first one was flawed, unless there is compelling new evidence. These statutory requirements narrow the scope in which a prosecution can be brought by creating an additional bar to meet to counter the presumption against prosecution. Even if there is sufficient evidence to justify a prosecution, the presumption against a prosecution persists. A substandard investigation would be rewarded if it sought to protect those responsible from further investigation or prosecution because the Act makes a prosecution subject to the three 'conditions' that must be met for a prosecution to proceed. Such a scenario is not farcical as the 'closing of ranks' and other forms of non-cooperation have been repeatedly reported as an obstruction to investigations.[88]

The Prosecutor of the ICC noted with concern the IHAT/SPLI's practice of discontinuing investigations based on the application of proportionality criteria, often based on the passage of time and the lack of evidence,[89] because allegations of war crimes might have been closed

[86] HC Deb 18 March 2020, vol 673 col 22-24

[87] Contrast with s.78 Criminal Justice Act 2003 which amended the double jeopardy rule allowing retrials for some serious offences where there is new and compelling evidence. 'New' meaning that the evidence 'was not adduced in the proceedings in which the person was acquitted' and evidence is compelling if it is reliable, substantial and appears highly probative.

[88] For example, the observed 'closing of ranks' in the Baha Mousa case as well as in the deaths of Nadheem Abdullah, Hassan Abbas Said and Saeed Radhi Shabram Wahi Al-Bazooni. See R v Payne and Others H DEP 2007/411; Iraq Fatality Investigations, Consolidated Report into the Death of Nadheem Abdullah and the Death of Hassan Abbas Said (TSO, 2015); and, Iraq Fatality Investigations, In the Matter of an Investigation into the Death of Mr Saeed Radhi Shabram Wahi Al-Bazooni (TSO, 2019).

[89] Office of the Prosecutor of the International Criminal Court, Situation In Iraq: UK Final Report (OTP Report 9 December 2020) paras.351-363, https://www.icc-cpi.int/itemsDocuments/201209-otp-final-report-iraq-uk-eng.pdf [accessed 15 March 2021].

on this ground.[90] Furthermore, scholarship has argued that investigators and the MOD have 'misunderstood' the law on 'impossible or disproportionate burden' (a margin of appreciation when a state is discharging its article 2 ECHR duties given the finite resources a state has to dedicate to investigations) to argue that the investigatory obligation no longer applies in a significant number of Article 2 and, notably given the case law does not apply this standard to such cases, Article 3 ECHR allegations.[91] Such closures are arguably unlawful on the basis that investigators applied the proportionality ground as a justification for closures incorrectly or, as per the OTP Final report, wrongly relied on the exaggerated claims of a lack of credibility in the allegations.[92]

Section 4(1) states that 'relevant previous investigations' means an investigation carried out by an investigating authority, which is no longer active and did not lead to any decision as to whether or not the accused person should be charged or led to a decision that the person should not be charged. Further clarity in this regard is critical if the MOD wishes to maintain that the Act does not infringe upon the procedural rights within Articles 2 and 3 ECHR which demands certain standards of investigations. It is currently unclear what precisely amounts to an investigation and whether there is a value assessment of the adequacy of the investigation.

The MOD's memorandum on the ECHR compatibility of the Act does not answer these questions.[93] As such, it is likely that the operation of the Act will become subject to litigation to gain clarity on what exactly is meant by relevant previous investigations in circumstances

[90] European Centre of Constitutional and Human Rights, Situation in Iraq/UK - Request for review of the Prosecutor's decision not to open an investigation, 1 July 2021, https://www.ecchr.eu/fileadmin/Juristische_Dokumente/20210701_ECCHR_Request_for_Review_ICC_Iraq-UK_Decision-FILED.pdf [accessed 2 December 2021]

[91] Elizabeth Stubbins Bates '"Impossible or disproportionate burden": the UK's approach to the investigatory obligation under articles 2 and 3 ECHR' (2020) European Human Rights Law Review, 5, 499-511; Elizabeth Stubbins Bates, 'Distorted Terminology: The UK's Closure of Investigations into alleged Torture and Inhuman Treatment in Iraq' (2020) 68(3) *ICLQ* 719-739

[92] Office of the Prosecutor of the International Criminal Court, Situation In Iraq: UK Final Report (OTP Report 9 December 2020), https://www.icc-cpi.int/itemsDocuments/201209-otp-final-report-iraq-uk-eng.pdf [accessed 15 March 2021].

[93] MOD, 'Overseas Operations (Service Personnel and Veterans) Bill: ECHR Memorandum' (2020) para 21-24 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/920358/ECHR_Memo_-_OO_SPV__Bill_-_FINAL.pdf [accessed 2 September 2021]

where initial investigations have repeatedly been shown to be below adequate and without the necessary independence, or investigations were not completed at all until legal action was brought by claimants.[94] As at least two issued judicial review claims arising from the UK's conduct in Afghanistan, and the subsequent investigations, have been granted permission but there have not been any substantive hearings, it is not clear whether these legal actions will trigger the Act's provisions or not.[95] Future claims challenging the findings made by the RMP, IHAT/SPLI or SPA might engage the Act if they challenge the basis of the closures, for example on the grounds that the evidential and criminal standards were incorrectly applied.

Alongside but separate to the Act, there will be a judge-led inquiry into how allegations of wrongdoing are raised and investigated by the Service Police and considered by the SPA as well as internal barriers within the Armed Forces such as operational processes.[96] Already, on the basis of the recommendation of the appointed judge, Sir Richard Henriques, (along with the Lyons/Murphy Review[97]), any credible historic criminal allegations that emerge in the future will be referred to the Defence Serious Crime Unit.[98]

4.3.2 The inadequacy of initial investigations

The Articles 2 and 3 ECHR procedural duty demands investigations are able,

> 'to ensure so far as possible that the full facts are brought to light, that culpable and discreditable conduct is exposed and brought to public notice, that suspicion of deliberate wrongdoing if unjustified is allayed, that dangerous practices and procedures

[94] For example, see the cases of Radhi Natna; Abdul Jabbar Mossa Ali; Naheem Abdullah; Hassan Abbas Said and Ahmed Jabber Kareem Ali all referenced in the OTP report. Office of the Prosecutor (OTP) of the International Criminal Court, Situation In Iraq: UK Final Report (OTP Report 9 December 2020) para 479, https://www.icc-cpi.int/itemsDocuments/201209-otp-final-report-iraq-uk-eng.pdf [accessed 15 March 2021]
[95] Noorzai v Secretary of State for Defence CO/3665/2020; Saifullah v Secretary of State for Defence CO/4200/2019
[96] Statement made by Secretary of State for Defence, UIN HCWS507, 13 October 2020
[97] John Murphy, 'Service Justice System Policing Review (Part 1)' (2018) https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/918869/SJS_Part_1_Policing_Review_for_publication__accessible_.pdf [accessed 15 March 2020]
[98] Statement made by Secretary of State for Defence, UIN HCWS323, 18 October 2021

are rectified, and that those who have lost their relative may at least have the satisfaction of knowing that lessons learned from his death may save the lives of others.'[99]

Under the Rome Statute, a State must be able to show that it is willing and able to carry out investigations and pursue prosecutions to the required standard of those bearing the greatest responsibility for genocide, war crimes and crimes against humanity.[100]

Will the Act apply to prevent prosecutions in cases where prior investigations were manifestly flawed (as many have been found to be)? Initial investigations during overseas operations are conducted by the RMP. Yet, RMP investigations have repeatedly been found to be ineffective and lacking in independence.[101] Failures by the RMP to investigate killings and other crimes quickly, adequately and independently is often why new investigations have been initiated years later. In the court martial of *R v. Evans et al*,[102] on review of the evidence submitted to support the charge for murder and violent disorder against the seven paratroopers, the Judge Advocate said that 'there is no doubt that the investigation in this case has been inadequate…[due to the] serious omissions' made by the investigators in failing to obtain basic evidence.[103] Ongoing RMP investigations into detainee abuse and killings were challenged in the High Court on the basis they were inadequate,[104] in violation of Articles 2 and 3 of the ECHR,[105] and involved repeated failures.[106] In some instances RMP investigators have

[99] R (Amin) v Secretary of State for the Home Department [2003] UKHL 51 as per Lord Bingham at [31]. See also Hugh Jordan v UK (2003) 37 EHRR 2; McKerr v UK (2002) 34 EHRR 20; McShane v UK (2002) 35 EHRR 23; Finucane v UK (2003) 37 EHRR 29.
[100] Article 17(2) and (3), Rome Statute
[101] Al-Skeini and Others v UK Application no. 55721/07, Council of Europe: European Court of Human Rights, 7 July 2011 [171-173]; Ali Zaki Mousa v Secretary of State for Defence [2013] EWHC 1412
[102] R. v Evans and others (OJAG Case Reference 2005/59, 3 November 2005) in the court-martial of seven British soldiers in respect of the death of Nadhem Abdullah in Iraq, https://www.asser.nl/upload/documents/20120412T015138-Evans%20et%20al%20-%20Decision%20of%20No%20Case%20to%20Answer%20-%2003-11-2005%20-.pdf [accessed 17 October 2021]
[103] Ibid [30]
[104] Ali Zaki Mousa v Secretary of State for Defence [2013] EWHC 1412, [128]
[105] Al-Skeini and Others v UK, Application no. 55721/07, Council of Europe: European Court of Human Rights, 7 July 2011, [171], [173]
[106] R (Al-Sweady and others) v SSD [2009] EWHC 2387 [52]-[56].

concluded that deaths in custody had been due to heart attacks – even where there was clear evidence of severe ill-treatment.[107]

Recent reports indicate a lack of independence within the military's internal investigative system. According to a journalistic probe, the killing of the unarmed Afghani civilians (including three children), shot in the head whilst sitting on the floor,[108] was covered up by senior members of the armed forces.[109] This case, now subject to a judicial review, also included evidence of falsification.[110] As these claims had already been investigated by the RMP and the information presented by the journalists was not new, the Act would apply to any attempts to prosecute in these cases even though there had clearly been a failure within the initial investigations.[111] Other reports accuse senior military figures of directly influencing investigations into abuses,[112] and senior RMP commanders pressuring RMP investigators to alter witness statements in ongoing proceedings.[113] The MOD has even been accused of interfering in independent investigations to pressure investigators to promptly close cases,[114] as well as claims that it pressured the Solicitors Regulation Authority to come down on firms that represented Iraqi claimants.[115] The Intelligence and Security Committee published

[107] Consider the case of Radhi Nama, currently the subject of an Iraq Fatality Investigation, following the finding by IHAT that although his family were told Mr Nama died of a heart-attack, he had died following systemic ill-treatment at Camp Stephen. See Confirmation of Appointment letter, 4 November 2020 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/947058/Confirmation_of_Appointment_and_Terms_of_Reference.pdf [accessed 17 October 2021]

[108] *AB v Secretary of State for Defence* [2013] EWHC 4479 (QB)

[109] BBC, 'Panorama: War Crimes Scandal Exposed' *BBC* (18 Nov 2019) https://www.bbc.co.uk/programmes/m000bh87 [accessed 17 October 2021]; Insight, 'Revealed: the evidence of war crimes ministers tried to bury: Torture, murder, abuse, beatings and sexual humiliation — Camp Stephen in Iraq was Britain's Abu Ghraib, our investigation finds', *The Sunday Times* (17 November 2019) 8; Insight, 'War crimes scandal: Army 'covered up torture and child murder' in the Middle East' *The Sunday Times* (17 November 2019) 1

[110] Noorzai v Secretary of State for Defence CO/3665/2020. A substantive hearing was pending at the time of writing.

[111] HC Deb 7 January 2020, vol 669, col 360-362

[112] Michael Selby-Green, 'British army sent unqualified investigators to Iraq where troops 'got away with murder', veterans say' *Daily Maverick* (23 June 2020) https://www.dailymaverick.co.za/article/2020-06-23-exclusive-british-army-sent-unqualified-investigators-to-iraq-where-troops-got-away-with-murder-veterans-say/#gsc.tab=0 [accessed 24 June 2020]

[113] Michael Smith and Steven Swinford, 'Colonel 'told staff to lie over Iraqi killings' *The Times* (26 September 2010) https://www.thetimes.co.uk/article/colonel-told-staff-to-lie-over-iraqi-killings-wf8wbmp5wq3 and Al-Sweady JR [accessed 24 June 2020]

[114] BBC, 'Panorama: War Crimes Scandal Exposed', *BBC* (18 Nov 2019) https://www.bbc.co.uk/programmes/m000bh87 [accessed 17 October 2021]; Insight, 'Revealed: the evidence of war crimes ministers tried to bury: Torture, murder, abuse, beatings and sexual humiliation — Camp Stephen in Iraq was Britain's Abu Ghraib, our investigation finds', *The Sunday Times* (17 November 2019) 8; Insight, 'War crimes scandal: Army 'covered up torture and child murder' in the Middle East', *The Sunday Times* (17 November 2019) 1

[115] Jamie Doward, 'Ministers 'undermined law' over Iraq war crimes allegations' *The Guardian* (22 July 2017) https://www.theguardian.com/law/2017/jul/22/iraq-war-crimes-ministry-of-defence [accessed 11 July 2020]

document extracts suggesting senior military approval of detainee mistreatment and Government officials successfully blocking a criminal investigation into those human rights breaches.[116] Particularly serious, were official findings that members of the RMP have overlooked signs of torture.[117]

Even when independent criminal investigation teams have been established, whistle-blowers have alleged that investigators have been blocked from investigating those in higher authority[118] and research indicates they have applied the wrong criminal and evidentiary standards to the allegations.[119] The Act does not apply to inquiries which are non-criminal but does apply to investigations that 'have ceased to be active' regardless of whether a decision was made on whether to charge someone or not. Without oversight, this can only incentivise investigative inactivity.[120]

Even when evidence is clearly documented and culpable individuals have been identified, years later there are still no prosecutions.[121] For example, there has not been a prosecution following the Baha Mousa Public Inquiry which concluded that Mousa 'was subjected to violent and cowardly abuse and assaults by British servicemen' which killed him in 2003.[122] Although Corporal Donald Payne was found guilty of inhumane treatment – he pled guilty and is the only solider who served in Iraq to have been found guilty of a war crime,[123] the inquiry led to

[116] Intelligence and Security Committee, 'Detainee Mistreatment and Rendition 2001-2010' June 2018, p.26-28, https://irp.fas.org/world/uk/isc-detainee.pdf [accessed 17 October 2021]
[117] William Gage, 'Baha Mousa Public Inquiry Report' (2011) HC 1452–I, Vol 2, para 2.1121
[118] Samira Shackle, 'Why we may never know if British troops committed war crimes in Iraq' *The Guardian* (7 June 2018) https://www.theguardian.com/news/2018/jun/07/british-troops-war-crimes-iraq-historic-allegations-team [accessed 14 July 2019]; Richard Norton Taylor 'British army 'blocked investigation into treatment of Iraqi prisoners'' *The Guardian* (17 March 2014) https://www.theguardian.com/world/2014/mar/17/british-army-iraqi-prisoners-military-police-danny-boy [accessed 11 July 2019]
[119] Office of the Prosecutor (OTP) of the International Criminal Court, Situation In Iraq: UK Final Report (OTP Report 9 December 2020) https://www.icc-cpi.int/itemsDocuments/201209-otp-final-report-iraq-uk-eng.pdf [accessed 15 march 2021]; Elizabeth Stubbins-Bates, 'Distorted Terminology: The UK's Closure of Investigations into alleged Torture and Inhuman Treatment in Iraq' (2020) 68, 3 ICLQ 719-739
[120] s.4 of the Act.
[121] Of the few referrals to the SPA in relation to crimes covered by the legislation, it has always decided not to proceed. Even in cases where wrongdoing is clear, (e.g Baha Mousa case). See SPLI, Quarterly Update, 16 November 2020 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1026583/20210730_Final_Qtrly_Report-30SEP20_16NOV20.pdf [accessed 26 October 2021]
[122] William Gage, 'Baha Mousa Public Inquiry Report' (2011) HC 1452–I, Vol 2
[123] Section 51(5), International Criminal Court Act 2001; R v Payne and Others H DEP 2007/411

the identification of another 25 culpable individuals.[124] Indeed, the SPLI final quarterly report stated when confirming the closure of its Baha Mousa investigation, without any referral to the SPA for prosecution, that:

> 'Both IHAT and SPLI's exhaustive enquiries could not conclude that Mr Mousa's death was caused unlawfully…The final [IHAT/SPLI] report concluded there were no further reasonable or proportionate lines of enquiry that would lead to there being sufficient evidence to charge any British Serviceperson in direct relation to Baha Mousa's death or that there is any likelihood of obtaining any evidence which would enhance the prospect of proving any form of criminal liability for the death of Baha Mousa on the part of any British Forces personnel.'[125]

Notwithstanding reforms to the military justice system[126] since Operations Telic and Herrick it remains questionable whether the RMP and the court martial process can hold service personnel to account for crimes.[127] They have not been shown to be able or willing to.[128]

IHAT investigators re-examining previously closed cases found evidence of war crimes which the initial investigations did not pursue and which they were unable to pursue further due to the passage of time. The effect of the Act therefore, may be to further encourage a culture of delay, inactivity and cover-up of criminal investigations with the only possibility of forcing proper investigations being by judicial review. This leads to a further point: how will the Act

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[124] European Centre for Constitutional and Human Rights and Public Interest Lawyers, 'Communication to the Office of the Prosecutor of the International Criminal Court: The Responsibility of Officials of the United Kingdom for War Crimes Involving Systematic Detainee Abuse in Iraq from 2003-2008 (Submission)' (10 January 2014) 224 – 226, https://www.ecchr.eu/fileadmin/Juristische_Dokumente/January_2014_Communication_by_ECCHR_and_PIL_to_ICC_OTP_re_Iraq_UK__public_version_.pdf [accessed 2 August 2020]

[125] SPLI work completed (table) https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1026579/20210929-SPLI_Work_Completed_Table.pdf [accessed 1 December 2021], case 'W8'.

[126] The Armed Forces Act 2006 brought in various reforms including the establishment of the Service Prosecuting Authority, formed on 1 January 2009. See Huw Bennett 'The Baha Mousa Tragedy: British Army Detention and Interrogation from Iraq to Afghanistan' (2014) The British Journal of Politics and International Relations 16, 2 pp. 211-229

[127] John Murphy, 'Service Justice System Policing Review (Part 1)' (2018) https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/918869/SJS_Part_1_Policing_Review_for_publication__accessible_.pdf [accessed 15 March 2020]

[128] N. Rasiah 'The Court-martial of Corporal Payne and the Future Landscape of International Criminal Justice' *Journal of International Criminal Justice*, 7 (2009) p.187

apply to prosecutions brought many years after the crime due to delays by the investigation?[129] The answer seems to be that the Act will discourage prosecutions in such cases which, due to the inactivity, would likely lead to a weak prosecutorial file in any case as was seen in the series of Iraq cases closed by IHAT/SPLI due to lack of evidence. Such a position undermines the UK's (positive) obligations under international law as investigative inactivity is rewarded.

4.3.3 Investigations as a remedy

Articles 2 and 3 ECHR establish procedural obligations which can include independent investigations. The ECtHR considers claims for compensation to be 'theoretical and illusory' unless there has been an effective investigation capable of leading to the identification and punishment of those responsible.[130] In light of this, as well as judicial interpretation of the temporal scope of the ECHR, it is not clear that the Act can be consistent with the right to a remedy under Article 13 of the ECHR as well as Article 2 and 3 ECHR. According to Article 13, individuals shall have 'an effective remedy before a national authority' if their human rights are violated. Article 41 ECHR permits the ECtHR to provide just satisfaction to victims. The Court is concerned by unreasonable delays in or an inability for victims to obtain remedies, an issue which has repeatedly featured in its caseload.[131] The Committee of Ministers have reiterated that 'domestic remedies exist for anyone with an arguable complaint of a violation of the Convention'.[132]

The human rights and personal injury 'longstops' prevent claims to be brought beyond six years. While civil actions can discharge the state's remedial duty, ineffective investigations

[129] See also In the matter of an application by Geraldine Finucane for Judicial Review (Northern Ireland) [2019] UKSC 7
[130] See El-Masri v. "the former Yugoslav Republic of Macedonia", App. No. 39630/09, 13 December 2012 [261]; Cobzaru v. Romania, App. No.48254/99, 26 July 2007, [83]; Carabulea v. Romania, App. No. 45661/99, 13 July 2010, [166]; Soare and Others v. Romania, App. No. 24329/02, 22 February 2011, [195]
[131] Broniowski v. Poland [GC], no. 31443/96, ECHR 2004-V. See also Broniowski v. Poland (friendly settlement) [GC], no. 31443/96, ECHR 2005-IX
[132] Committee of Ministers, 'Rec (2004) 6 of the Committee of Ministers to member states on the improvement of domestic remedies' (12 May 2004) https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016805dd18e [accessed 16 October 2021]

undermine the possibility of successfully bringing civil actions for damages.[133] In international law, reparations are broader that just satisfaction and can include restitution[134], compensation[135], rehabilitation[136], satisfaction[137] and guarantees of non-repetition.[138] They are crucial in trying to ensure justice in post-conflict environments by 'redressing to the extent possible the consequences of the wrongful acts'[139] and by helping deter future violations. However, reparation rights are harder to enforce in domestic courts by individual victims, particularly outside of human rights mechanisms as international humanitarian law does not have comparable procedures for the implementation of victim reparation rights even though there is overlap between International Humanitarian Law (IHL) and International Human Rights Law (IHRL).[140] This is especially so if an overseas operation is a non-international armed conflict because although reparation norms exist in relation to international armed conflict, it is silent on how to obtain redress at a domestic level when protections under IHL have failed. The law seems to be silent on reparations within non-international armed conflicts[141] which the UK's conflict in Afghanistan was in part (it was arguably also an international armed conflict when it came to conflict with the Taliban), as was the early stage of the UK's deployment to Iraq. Furthermore, and most importantly for the purpose of this article, accountability is inextricably linked and part and parcel of reparations both of which this Act will limit.

In conclusion, as an absolute minimum, this Act should be accompanied by reforms to the RMP and court martial process to ensure investigations are adequate and there can be faith in

[133] See section *Finality through less-than-adequate investigations.*
[134] General Assembly Resolution 60/147 (2005) para. 19
[135] Ibid para. 20
[136] Ibid para. 21
[137] International Law Commission.'Draft Articles on Responsibility of States for Internationally Wrongful Acts with commentaries' Article 37 (2001) UN Doc A/CN4/L602/Rev 1
[138] General Assembly Resolution 60/147 (2005) para. 23
[139] Theo Van Boven, 'Study concerning the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms: Final report' (E/CN.4/SUB.2/1993) pp.137
[140] Christine Evans, The Right to Reparation in International Law for Victims of Armed Conflict (Cambridge University Press 2012)
[141] Common Article 3 of the Geneva Conventions 1949 and Protocol Additional to the Geneva Conventions of 12 August 1949, and the Protection of Victims of Non-International Armed Conflicts (Protocol II) are silent on reparations.

previous investigations, or even an independent, skilled, and properly funded service for investigations.[142]

5. Entrenching British State Impunity during Overseas Operations

5.1 Examining impunity

Green and Ward[143] define impunity 'as a failure to apply significant sanctions (i.e. significant from the point of view of the criminal actor) to violations of norms that are accepted as a standard of behaviour by a social audience'.[144] While the policy objectives claim to stop to troublesome litigation and ensuring the efficacy of overseas operations, the consequence is a partial creation of British executive impunity overseas.

Murder and manslaughter are subject to the protections offered by the Act but killing is already legal under certain situations of armed conflict and is subject to a broad self-defence basis. Within armed conflict, if a soldier who has shot someone, including a civilian, can demonstrate that they acted in self-defence and within the boundaries of the rules of engagement then that soldier is highly unlikely to be prosecuted even if the rules of engagement are relaxed to allow unarmed civilians to be shot (which raises serious questions under IHL and IHRL).[145]

5.2 Immunising the MOD

The Act provides further protection for an already protected institution. The common law doctrine of combat immunity excludes civil liability for negligence to property or person

[142] Legislative Scrutiny: The Overseas Operations (Service Personnel and Veterans) Act, Ninth Report of Session 2019-21, HC 665, HL Paper 155, 29 October 2020, para 36
[143] Penny Green and Tony Ward, *State Crime: Governments, Violence and Corruption* (2004)
[144] Thomas MacManus, 'State-Corporate Crime and the Commodification of Victimhood: The Toxic Legacy of Trafigura's Ship of Death' (Routledge 2018)
[145] Ian Cobain 'British army permitted shooting of civilians in Iraq and Afghanistan' *Middle East Eye* 4 February 2019 https://www.middleeasteye.net/news/exclusive-british-army-permitted-shooting-civilians-iraq-and-afghanistan [accessed 6 February 2019]

committed by the armed forces during certain combat operations. The courts have adopted a policy position on the non-justiciability of such actions against the Crown in the context of the armed forces as enabling such actions to be brought would 'be destructive to the morale, discipline and efficiency of the service, and for that reason the common law does not give a remedy…'.[146] This has allowed the MOD to successfully defend itself in negligence claims brought by soldiers or veterans on the basis that no duty of care is owed in combat or battle conditions.[147] The MOD has also successfully resisted calls for corporate responsibility stating that military personnel should be held to account individually.[148]

It is obvious that rejecting MOD corporate responsibility whilst allowing considerations to reduce culpability for military personnel, through the 'matters to be given particular weight' provision in section 3, significantly precludes any accountability. What does 'give particular weight' mean? How much weight? The example of matters which may be considered are infinite. Perhaps most striking is that while it attempts to limit the liabilities of military personnel, it does nothing to facilitate the accountability of politicians and high-ranking military personnel who give the orders.

If the longstops have the desired effect of making it harder for civil and human rights claims to be successfully brought against the MOD, this further reduces the accountability of the government in overseas operations. This is especially important given that much of the information we know about Iraq has arisen from litigation. The fact that much less is known about Afghanistan may arguably be because very few victims were able to lodge claims against

[146] Parker v The Commonwealth [1965] ALR 1094, [302]
[147] Richard Mulcahy v Ministry of Defence [1996] P.I.Q.R. P276; Multiple Claimants v Ministry of Defence [2003] EWHC 1134 (QB); Mohamet Bici, Skender Bici v Ministry of Defence [2004] EWHC 786 (QB); Smith and Others v the Ministry of Defence [2013], UKSC 41
[148] MOD, 'Response to Defence Committee Report 'Drawing a line: Protecting veterans by a Statute of Limitation' (2020) https://publications.parliament.uk/pa/cm5801/cmselect/cmdfence/325/32502.htm [accessed 2 July 2021]

the MOD in the UK. The 'the triple lock/new factors' clauses in combination with the longstops amount to a severe limitation in access to justice.

6. Conclusion

This critique takes the three flawed elements together - the presumptions against prosecution, the curtailing of limitation clauses, and securing finality in the public interest often through inadequate investigations - as legislative techniques to undermine the so-called juridification of war and combat operations. In this particular instance, we observe an inverse correlation between juridification and impunity, in which the waning of the former means the waxing of the latter.

However, the juridification of war, which has been framed by the UK government as a kind of moral panic[149] levelled against unscrupulous lawyers and opportunistic foreigners as folk-devils,[150] prefaces a bigger problem which is the increase of executive power and limits to its accountability. The Act is one such example of this larger trend. This is an especially worrying trajectory that requires further exploration and scrutiny. What this emergent constitutional form of government impunity appears to reflect is not the focus of this paper. However, the *Overseas Operation* Act 2021 must be understood as part of a more general attempt by the government to reconstruct the constitution such that the executive is the real 'guardian of the constitution' and so the 'ultimate legal authority'.[151]

[149] Stuart Hall et al 'Policing the Crisis: Mugging, the State and Law and Order' (Macmillan 1978)
[150] Conall Mallory, 'Folk Heroes, Villains and the Overseas Operations Bill' (*UKHR Blog*, 12 October 2020) https://ukhumanrightsblog.com/2020/10/12/folk-heroes-villains-and-the-overseas-operations-bill-conall-mallory/ [accessed 12 October 2020]
[151] David Dyzenhaus, 'Lawyer for the strongman' Aeon (12 June 2020) https://aeon.co/essays/carl-schmitts-legal-theory-legitimises-the-rule-of-the-strongman [accessed 8 December 2021]