

# The multiple aspects of ‘time’ rendering justice for war crimes in Iraq

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## 1. Introduction

Transitional justice discourse has in recent years made a series of claims relating to its expanded application and relevance, including that transitional justice can and should deal with what has been termed ‘historic’ violations. ‘Time’ has always been a central concept in the transitional justice literature, but as this article will show, new perspectives are emerging. The passage of time is now often viewed as presenting new possibilities for justice. This is because previous obstacles to meaningful justice, typically relating to a sensitive political context where those responsible for violations continue to yield a level of power, may vanish over time. In a sense, the new mainstream perception has become that as time passes, justice for past violations may become more likely or we will see a ‘deeper’ and more meaningful application of justice tools, as has indeed been the case in some Latin American countries.<sup>1</sup>

At the same time, transitional justice is increasingly seen as relevant not only to countries emerging out of authoritarian rule (so-called paradigmatic transitions) or civil wars, but also as a framework to address abuses committed by so-called consolidated democracies including major powers in the West.<sup>2</sup> The ever-expanding nature of transitional justice has been addressed in a series of recent

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<sup>1</sup> See e.g., C. Collins, ‘The End of Impunity? ‘Late Justice’ and Post-Transitional Justice in Latin America’, in N. Palmer, P. Clark, and D. Granville (eds.), *Critical Perspectives in Transitional Justice* (Intersentia, 2012), pp. 399-424.

<sup>2</sup> See e.g., J. Gallen, ‘The European Court of Human Rights, Transitional Justice and Historical Abuse in Consolidated Democracies’, 19(4) *Human Rights Law Review* (2019), 675–704.

publications, including by this author,<sup>3</sup> but views are diverse concerning the implications for transitional justice theory and practice.

Examining the case study of UK/Iraq, this article engages some of these developments. Observing that justice for conflict-related crimes committed by major powers is much needed and a somewhat neglected topic in the literature, the article addresses some of the assumptions made in transitional justice discourse. In particular, the article observes that the passage of time may make justice less likely, less meaningful and less real to the victims. Indeed, the passage of time can serve as a justification for creating new obstacles to justice, as we see in the case of the UK/Iraq.

Unsurprisingly, this may especially be the case where there is limited support, or indeed outright hostility, in the current political leadership for accountability, redress and other objectives normally associated with transitional justice. Strong states with sophisticated bureaucracies and robust legal systems such as the UK have unique opportunities to counter justice processes and may, if the goal is to avoid meaningful justice, benefit from the passage of time. This is partly because of how domestic and international accountability regimes work and intersect and partly because narratives change over time. Especially where crimes were committed in conflicts abroad, as the UK case reveals, these can easily come to be viewed as ‘historical’, in the sense of belonging to an era that is seen as distant, both in temporal and moral terms, and therefore largely irrelevant to contemporary affairs. Legal reforms may work to further such narratives; as a pretext to minimise justice for this type of violations. This contradicts the general assumption in transitional justice scholarship that legal reforms in the context of dealing with past crimes are almost inevitably productive to justice.

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<sup>3</sup> See e.g., T. O. Hansen, ‘The Vertical and Horizontal Expansion of Transitional Justice: Explanations and Implications for a Contested Field’, in S. Buckley-Zistel et al. (eds.), *Transitional Justice Theories* (Routledge, 2013), pp. 105-124.

The article therefore observes that while some passage of time in the context of war-related crimes tends to be a precondition for any kind of justice, the passage of time can easily end up complicating and obscuring the prospects for justice. The article demonstrates how accountability at the domestic level in the UK for these crimes has become increasingly implausible with time. This is partly due to the development of a prevailing narrative of ‘cycles’ of ineffective investigations (and re-investigations) that have become politically loaded and increasingly unpopular, especially in what could be labelled the ‘pro-military establishment’.<sup>4</sup> These long-lasting but unproductive investigations have served as a justification for the current conservative government in the UK to introduce a number of initiatives and measures aimed at protecting service personnel from legal accountability – and equally important, protect the State from the liability that normally flows from violations by the military. This includes a statute of limitations-like proposal, referred to as a ‘presumption against prosecution’ covering crimes committed in conflicts abroad, a so-called ‘civil litigation longstop’ and other measures that are characterised by a common objective of creating barriers for justice for crimes committed by the military in armed conflicts abroad.<sup>5</sup> While some of these measures are controversial from a human rights and international law perspective, they have gained traction in the UK, where many in the pro-military establishment and beyond view the pursuit of justice for war-related crimes in Iraq as a form of unfair targeting of soldiers who ‘got the job done’ in a conflict that is increasingly viewed as ‘historic’.<sup>6</sup>

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<sup>4</sup> The term ‘pro-military establishment’ is used in this article to refer broadly to actors in and outside of the military that tend to be outspoken in their support of the activities of the armed forces and use their influence to promote its agenda.

<sup>5</sup> These mechanisms are included in the Overseas Operations (Service Personnel and Veterans) Bill 2020, which is detailed below in section 3 of this article.

<sup>6</sup> Some of the arguments in this article apply beyond the Iraq case study. Notably, allegations of a war crimes cover up in Afghanistan have recently resurfaced as a result of documents revealed in a case that is currently before the High Court. See e.g., ‘Rogue SAS Afghanistan execution squad exposed by email trail’, *The Sunday Times*, 2 August 2020. See also ‘Defence Secretary to review Afghanistan emails’, *BBC News*, 3 August 2020.

The passage of time is also connected to a range of other challenges for promoting justice which will be discussed in this article, including giving effect to the International Criminal Court's (ICC) complementarity regime. International legal regimes, almost by definition, are slow delivering justice,<sup>7</sup> but especially so when exercising their jurisdiction is premised on passing a verdict of the *quality* of on-going domestic legal proceedings – and by extension the competence of national authorities. Of course, this is even more so when the situation involves a country with a legal system that is generally viewed as competent and robust, such as the UK (which is also among the Court's key supporters and funders).

The novelty of this article thus lies mainly in its attempt to view justice processes covering conflict-related violations by a major power, in this case the UK, through the lenses of transitional justice. The article thus relies on a case study of justice for war crimes in Iraq, with a view to setting out how these legal processes have unfolded and particular obstacles to justice and what this case tells us more generally about some of the assumptions made in the transitional justice and international criminal justice fields. In that sense, the article seeks to bridge the author's previous research on transitional justice theory and research on justice processes covering crimes committed in the Iraq war. The hope is that this will raise a range of novel, perhaps partly provocative, questions, both case-specific and more generally, more than it will necessarily seek to offer qualified answers to all of these questions. Importantly, the article does not claim that justice for war crimes in Iraq is necessarily best viewed as a question of 'transitional justice'; rather it seeks to explore what we can learn from looking at these justice processes through the lenses of a particular normative and conceptual framework.

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<sup>7</sup> See e.g., J. Galbraith, 'The Pace of International Criminal Justice', 31(1) *Michigan Journal of International Law* (2009), 79-155.

In the following, the article sets out key assumptions made about time, transition and justice in the transitional justice field as well as a brief analysis of how the field treats issues of justice in the context of violations by major powers. The article then digs into the UK/Iraq case study, focusing in particular on understanding the relevance of ‘time’ to the prospects of achieving justice for war-related crimes.

## **2. Assumptions About Time, Transition and Justice in the Transitional Justice Field**

### ***2.1. The Origin of the Transitional Justice Field: Assumptions About Relevant Transitions and a ‘Window of Opportunity’ for Justice***

The field of transitional justice emerged in the context of the so-called third wave of democratisation,<sup>8</sup> taking the starting point in the question of how the new democracies in Latin America and East and Central Europe could and should address violations committed by previous authoritarian or totalitarian regimes. Transitional justice scholars at the time argued that these fundamental political transitions created a window of opportunity, permitting the new regimes to adopt justice tools that were seen as special or extraordinary. Teitel’s definition of transitional justice illustrates the point well: transitional justice is about ‘the conception of justice associated with periods of political change, characterized by legal responses to confront the wrong-doings of repressive predecessor regimes’.<sup>9</sup> By political change, Teitel refers to one particular form of transition, namely ‘the move from less to more democratic regimes’.<sup>10</sup> While there are numerous definitions of transitional justice, Teitel’s proved particularly influential in the sense that it laid the

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<sup>8</sup> See further S. Huntington, *The Third Wave: Democratization in the Late Twentieth Century* (University of Oklahoma Press, 1991).

<sup>9</sup> R. Teitel, ‘Transitional Justice Genealogy’, 16 *Harvard Human Rights Journal* (2003), pp. 69-94.

<sup>10</sup> R. Teitel, *Transitional Justice* (Oxford University Press, 2000), p. 5.

foundation for an understanding that the relevant ‘transition’ concerns the move from authoritarianism to democracy and that ‘transitional justice’ concerns the types of justice responses that occur in these paradigmatic transitions. Accordingly, the transitional justice field has tended to focus on justice processes occurring in countries in the global south, often fragile States, as opposed to more developed countries in the West. Yet, developed countries in the West can of course too be responsible for serious violations of international human rights and humanitarian law; these countries may also implement or be subject to justice responses that seek to address such violations and which resemble the ones utilised in paradigmatic transitions; and these countries may also undergo various forms of political and structural transition (some of them more recently arguably *away* from the democratic and rule of law standards they have tended to nominally endorse and claim to effectively disseminate to countries elsewhere).

While the transitional justice field is in many ways victim-centric – and arguably increasingly so – it was also said from the outset that there are important societal or structural reasons to use transitional justice; perhaps even that these objectives are the main reason why transitional justice is something ‘inherently good’.<sup>11</sup> By rendering justice for crimes of the past, the rule of law would be reinforced, it was argued, which would in turn help consolidate the new democratic order.<sup>12</sup>

However, much of what has been written about transitional justice in the context of paradigmatic transitions also suggested that these justice processes could potentially jeopardise stability and by extension democratisation, in so far as they did not properly take account of the conditions set by the political transition itself. In a sense, transitional justice thus came to be seen as requiring a delicate balance between the demands for justice and the realities or limitations of politics. A

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<sup>11</sup> See further D. Sharp, ‘Emancipating Transitional Justice from the Bonds of the Paradigmatic Transition’, 9(1) *International Journal of Transitional Justice* (2015), 150–169.

<sup>12</sup> See e.g., the studies in N. J. Kritz (ed.), *Transitional Justice: How Emerging Democracies Reckon with Former Regimes (Volume I and II)* (United States Institute of Peace Press, 1995).

confined window of opportunity, the ‘transitional moment’, it was argued, allowed that novel justice responses could be put in place. But the nature and how far-reaching these justice responses could be and when they should be implemented, it was said, depended heavily on the transitional political context.<sup>13</sup>

The field of transitional justice has thus historically focused mainly on how newly established democratic governments could use a unique and assumedly confined ‘transitional moment’ to respond to the abuses committed by their repressive predecessors. The above also implies that legal processes and reform covering serious crimes are seen as something inherently ‘good’ because they are inevitably productive to justice.<sup>14</sup> As this article will argue, however, using the law and legal processes to respond to serious human rights abuses does not automatically mean that justice and the rule of law are advanced.

Transitional justice literature has tended to assume that there is a relatively well-defined period of time of a ‘transition’ in which transitional justice potentially occurs. Yet, in reality justice processes addressing serious and large-scale human rights or humanitarian law violations are created both before and long after a democratic transition has occurred and in cases where no fundamental political transition is even on the table. Until recently, however, only few scholars have examined what this means for our understanding of transitional justice as a concept – and if it makes sense to refer to such justice processes as ‘transitional justice’ (or indeed, if there is at all any value added speaking about ‘transitional justice’ as opposed to a range of themes relating to justice for serious violations). As Quinn notes, ‘if a state is not in ‘transition’ then surely it ought to be ruled out as a

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<sup>13</sup> See further T. O. Hansen, ‘The Time and Space of Transitional Justice’, in C. Lawther, L. Moffett, and D. Jacobs (eds.), *Research Handbook on Transitional Justice* (Edward Elgar Publishing, 2017), pp. 34-51.

<sup>14</sup> *Ibid.*

case to study within the field, which is by its very definition concerned with transition'.<sup>15</sup> Yet much of the existing self-proclaimed transitional justice scholarship does exactly that. At the same time, as Quinn notes, whereas the term transition is normally understood to imply 'an event that results in a transformation' and thus a fixed point in time, it is not always self-evident exactly what this event is and its time span may be unclear.<sup>16</sup> As argued by Venema, even with respect to paradigmatic transitions, it can be hard to agree on the starting and end points of these transitions as they are 'not historical in the chronological sense, but in the political sense'.<sup>17</sup> Indeed, some scholars now argue that any transition, rather than happening at a particular moment in time, takes place over a long period, and may continue, incomplete, for years after the transition has begun.<sup>18</sup>

Transitional justice has therefore evidently lost its connection to 'an exclusive 'moment' in time'.<sup>19</sup> New questions have emerged as to when a transition commences and ends; when justice tools addressing serious abuses can and should be applied; and, more generally, when it makes sense to refer to justice processes that address serious international law violations as a matter of transitional justice (and indeed whether there is any importance attached to such framing).

To summarise: the field of transitional justice, as it emerged, endorsed an assumption that we have a repressive and violent past; a (brief) transitional moment where special or even unique justice tools can be adopted (and these are inherently 'good'); and a (never ending) peaceful and

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<sup>15</sup> J. R. Quinn, 'Whither the "Transition" of Transitional Justice?', paper prepared for presentation at the *Annual Meeting of the Canadian Political Science Association*, 16 May 2011, Waterloo, Canada, pp. 1–2  
[http://heinonline.org/HOL/Page?handle=hein.journals/ijhr18&div=7&g\\_sent=1&collection=journals](http://heinonline.org/HOL/Page?handle=hein.journals/ijhr18&div=7&g_sent=1&collection=journals).

<sup>16</sup> *Ibid.*

<sup>17</sup> D. Venema, 'Transitions as States of Exception: Towards a More General Theory of Transitional Justice', in N. Palmer, P. Clark, and D. Granville (eds.), *Critical Perspectives in Transitional Justice* (Intersentia, 2012), pp. 73-90.

<sup>18</sup> D. E. Curtis, 'Transforming a Rebel: Peace and Post-Conflict Governance', *paper presented at the Annual Convention of the International Studies Association, Montreal*, 17 March 2011.

<sup>19</sup> K. McEvoy and L. McGregor, 'Transitional Justice from Below: An Agenda for Research, Policy and Praxis', in Kieran McEvoy and Lorna McGregor (eds.), *Transitional Justice from Below: Grassroots Activism and the Struggle for Change* (Hart, 2008), p. 6.



democratic future, at least in so far as transitional justice is used appropriately (and put in place at the right time). However, these assumptions are increasingly challenged, and for good reasons as we will understand from the discussions below.

## ***2.2. Developments in the Field: Transitional Justice to Address Abuses by ‘Consolidated Democracies’ and Great Powers?***

Transitional justice scholarship has developed significantly in recent years. The paradigmatic transitions that shaped the early field are now seen to be only one type of situation where transitional justice potentially comes into play. With that, the perception of relevant forms of transition and ‘time’ has changed radically. The three-phase perception of time outlined above – involving a repressive and violent past, a transitional moment and a peaceful and democratic future – is no longer taken for granted (although there has been limited engagement with the question of what alternative perception of time is more suitable). Contemporary studies of transitional justice are preoccupied with examining justice processes in a myriad of contexts that are not best characterised as liberalising political transition, including situations where there is no apparent ongoing political transition but rather a move from violent conflict to peace or at least some form of stability, situations where conflict and abuses remain ongoing; situations where a political transition has occurred but that transition is not liberal, or indeed may be the opposite, and situations where consolidated democracies in the West attend to past violations (often framed as ‘historical abuses’, as discussed in more detail below).<sup>20</sup> It is the latter category of cases that is of most interest to this article.

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<sup>20</sup> Concerning these developments and typologies of transitional justice cases, see further T. O. Hansen, ‘Transitional Justice: Toward a Differentiated Theory’, 13(1) *Oregon Review of International Law* (2011) 1-46.

One important observation in this regard is that, whereas transitional justice scholarship increasingly focuses on justice processes relating to abuses committed by consolidated democracies, the focus has largely been on State-driven processes covering *historical* abuses committed *within* that society, such as past abuse and wrongdoing towards indigenous populations in countries such as Australia or Canada.<sup>21</sup> In contrast, justice for crimes committed by major powers in recent (and sometimes still on-going) armed conflicts abroad tend not to be framed as ‘transitional justice’. While such processes have by and large avoided scrutiny in the transitional justice field, accountability for these types of abuses by major powers is now slowly emerging as a theme in related discourses, in particular international criminal justice.<sup>22</sup>

Yet, some of the points made in contemporary transitional justice discourse relating to consolidated democracies may be relevant also to these war-related crimes committed by invading and occupying powers. For example, scholars who attempt to lay out a more general theory of transitional justice in established democracies, such as Winter,<sup>23</sup> suggest that ‘structural injustices embedded in established democracies require more prolonged and substantive efforts than the time-limited models borrowed from paradigmatic cases’.<sup>24</sup> Some argue that the passage of time and a change in attitudes and prevailing norms *within* a liberal democratic order is a pre-condition for achieving a level of justice for these type of abuses, partly because pressure from civil society groups may in some cases build up over years and ultimately prove a key determinant for the

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<sup>21</sup> See e.g., J. Matsunaga, ‘Two faces of transitional justice: Theorizing the incommensurability of transitional justice and decolonization in Canada’, 5(1) *Decolonization: Indigeneity, Education & Society* (2016) 24-44.

<sup>22</sup> This is of course connected to the ICC’s interventions in Iraq and Afghanistan. See e.g. T. O. Hansen, ‘Accountability for British War Crimes in Iraq? Examining the Nexus between International and National Justice Responses’, in (M. Bergsmo and C. Stahn eds.) *Quality Control in Preliminary Examinations, Vol. 1* (TOAEP, Brussels, 2018); C. Ferstman, ‘The International Criminal Court Prosecutor’s Preliminary Examination on Afghanistan and Possible Impacts on Accountability for Secret Detention and Rendition’, in E. Guild, D. Bigo and M. Gibney (eds.), *Extraordinary Rendition: Addressing the Challenges of Accountability* (Routledge, 2018).

<sup>23</sup> S. Winter, *Transitional Justice in Established Democracies* (Palgrave, 2014).

<sup>24</sup> S. Winter, ‘Towards a Unified Theory of Transitional Justice’ 7(2) *International Journal of Transitional Justice* (2013) 224-44.

State's eventual decision to make some form of justice accessible.<sup>25</sup> Surely, as this article suggests, in the absence of a profound political transition, State opposition to justice for military abuses cannot come as a surprise and almost inevitably results in slow-moving, inefficient justice processes, if they exist at all. Attitudes to accountability in the political leadership are unlikely to become more 'progressive' as the justice processes unfold; indeed, state officials and political leaders, especially right-wing or conservative ones, are likely to harden their opposition, as the 'threat' of meaningful justice becomes more real. Another important observation is that the kinds of justice processes utilised in the cases involving 'consolidated democracies' typically do not involve criminal justice, but rather focus on mechanisms that aim at laying bare the truth of what happened, increase public awareness, avoid repetition of abuses and perhaps provide some form of remedy to victims. Whenever we do see some form of criminal justice process in place covering violations by major powers, they have so far faced significant challenges producing the desired accountability outcomes.<sup>26</sup>

Additionally, the State which has 'historically' been seen as the main actor promoting and implementing transitional justice, is now (for good reasons) understood to be only one among several actors relevant for promoting and implementing transitional justice. Transitional justice occurs at various levels other than the State-level, including the local and the international. This connects to the previous points, in that justice for serious crimes may be possible, at least in theory, in some form even in the absence of political will at the State level. For the purposes of this article, it is significant to understand the role of regional and international courts, in particular the European

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<sup>25</sup> Dustin Sharp argues that the main form of transformation reflected and perhaps furthered by the creation of justice processes in established concerns 'normative transitions with respect to historical injustices'. See D. Sharp, 'Emancipating Transitional Justice from the Bonds of the Paradigmatic Transition', 9(1) *International Journal of Transitional Justice* (2015) 150-169.

<sup>26</sup> See further T. O. Hansen, 'Opportunities and Challenges seeking Accountability for War Crimes in Palestine', 9(2) *Notre Dame Journal of International and Comparative Law* (2019) 1-32.

Court of Human Rights (ECtHR) and the ICC. It is equally important to examine the role lawyers, NGOs and other civil society actors can play in promoting justice in the face of State opposition, even outright hostility, to accountability norms.

In the following sections, the article turns to a case study of justice for war crimes in Iraq, with a view both to setting out how these legal processes have unfolded and particular obstacles to justice and what this case tells us more generally about some of the assumptions made in the transitional justice and international criminal justice fields outlined here.

### **3. Justice for War Crimes in Iraq**

#### **3.1. Context, Crimes and Overview of Justice Responses**

Numerous sources suggest that British forces taking part in the Iraq war and occupation were responsible for serious abuse of Iraqi detainees, unlawful deaths and other crimes under international law, and that crimes were committed on a large scale – and that this happened, at least partly, due to systemic issues.<sup>27</sup> Notably, the Iraq war saw a re-emergence of unlawful interrogation practices used in the Northern Ireland campaign, explained by Sir William Gage as a ‘gradual loss of the doctrine’ prohibiting the use of the ‘five techniques’, involving hooding, white noise, food and drink deprivation, painful stress positions, and sleep deprivation.<sup>28</sup>

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<sup>27</sup> For instance, in 2013, the UK High Court held in *R (Ali Zaki Mousa) v Secretary of State for Defence* (No. 2), that there might have been systemic abuses and that such abuses may have been attributable to a lack of appropriate training”. See EWHC 1412 (Admin), 24 May 2013, para. 176.

<sup>28</sup> See further Hansen, *supra* note 22.

Various human rights organisations have investigated and documented UK forces' ill-treatment of detainees, including torture and deaths of inmates.<sup>29</sup> Some of this documentation was eventually passed on to Public Interest Lawyers (PIL), a UK-based law firm, who took on many of the cases. While these crimes were reported almost from the outset of the conflict, unsurprisingly it took several years to initiate legal proceedings, partly due to the difficulties associated with collecting evidence in a conflict zone. More than a decade after the war started, on 10 January 2014, PIL together with the European Center for Constitutional and Human Rights (ECCHR), a Berlin-based NGO working to promote accountability for serious abuses, submitted a comprehensive communication to the ICC Prosecutor detailing alleged abuses perpetrated by British troops during the Iraq war and asking the Prosecutor to open a preliminary examination.<sup>30</sup>

Action by lawyers and civil society groups thus created a 'window of opportunity' for justice for crimes in Iraq. With clear references to the PIL / ECCHR submission, in May 2014, Chief Prosecutor of the ICC Fatou Bensouda announced that her Office had decided to re-open the preliminary examination into alleged war crimes committed by British soldiers (a previous examination had been terminated by former Chief Prosecutor Luis Moreno-Ocampo on the grounds that the allegations of UK abuses in Iraq were not sufficiently grave because only a limited number of incidents could be substantiated).<sup>31</sup> In November 2017, the Prosecutor concluded that there is a reasonable basis to believe that crimes within the Court's jurisdiction had been committed by UK

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<sup>29</sup> See e.g. Amnesty International, *Iraq: One Year on the Human Rights Situation Remains Dire* (2004), AI Index: MDE 14/006/2004, 10-11. See also, BBC News, 'Timeline: Alleged abuses in Iraq', 10 May 2004, available at [http://news.bbc.co.uk/1/hi/uk\\_politics/3701887.stm](http://news.bbc.co.uk/1/hi/uk_politics/3701887.stm), accessed 12 September 2020.

<sup>30</sup> ECCHR and PIL, 'The Responsibility of Officials of the United Kingdom for War Crimes Involving Systematic Detainee Abuse in Iraq from 2003-2008', 10 January 2014.

<sup>31</sup> Office of the ICC Prosecutor, *OTP response to communications received concerning Iraq*, 9 February 2006, <http://www.legal-tools.org/doc/5b8996/>, accessed 12 September 2020.

forces (with respect to persons in UK forces' custody, but not beyond that) and hence that the requirements to subject-matter jurisdiction appeared to be satisfied.<sup>32</sup> Following a long-lasting review of domestic proceedings in the UK, in December 2020, the Prosecutor decided to close the preliminary examination without requesting that a formal investigation be opened. The Prosecutor published a detailed report setting out the reasons for that, which are discussed below.<sup>33</sup>

Despite the very active engagement of civil society and lawyers and ongoing ICC scrutiny, pursuing justice for crimes in Iraq has, to put it mildly, been a prolonged affair with little tangible outcome to date. As of September 2020, there have been only a handful of convictions in the UK, and it is unlikely we will see any renewed effort towards accountability domestically, especially as it has become clear the ICC will not open an investigation. Following six years of analysis at the preliminary examination stage, much of which focused on asserting whether potential cases would be admissible under the ICC's complementarity regime whereby the Court can only exercise jurisdiction insofar as national authorities are unable or unwilling to pursue the persons and crimes subject to ICC investigation,<sup>34</sup> in December 2020 the ICC Prosecutor closed the preliminary examination. This further undermines hope that justice for crimes in Iraq will ever occur, not only because it will not happen at the ICC level but also because the removal of a threat of such an investigation being opened could likely make UK authorities even less inclined to pursue meaningful justice domestically. One can certainly question if the duration of this preliminary examination was reasonable, and more importantly whether the Prosecutor's decision in December 2020 to close the examination is reasonable in light of the factors pointed to by the Prosecutor herself and others. As Andreas Schüller rightly observes, the Prosecutor's 'strong findings on the

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<sup>32</sup> Office of the ICC Prosecutor, 'Report on preliminary examination activities 2017', paras. 193-196.

<sup>33</sup> Office of the ICC Prosecutor, 'Situation in Iraq/UK: Final Report', <https://www.icc-cpi.int/itemsDocuments/201209-otp-final-report-iraq-uk-eng.pdf>, 9 December 2020.

<sup>34</sup> Office of the ICC Prosecutor, 'Report on preliminary examination activities 2019', para. 172.

commission of international crimes by UK troops and on the failure of the UK's domestic justice system do not correspond at all with the [Prosecutor's] final decision to close the preliminary examination.<sup>35</sup>

Part of the reason for the ICC process being so prolonged and ultimately unproductive in terms of facilitating accountability has to do with developments in the UK, specifically the existence of complex domestic investigative processes, which means the ICC Prosecutor has had to carefully scrutinise whether the requirements relating to complementarity were satisfied. While there is a rich (and often quite technical) literature on complementarity, transitional justice scholarship has paid less attention to these types of interplays between international and national justice processes.

To understand these interplays, we need to first outline the domestic legal processes. Indeed, a range of investigative processes have been put in place in the UK, most importantly the Iraq Historic Allegations Team (IHAT), which was the body originally tasked with criminal investigations of the Iraq claims. However, due to political pressure and claims of inefficiency, IHAT was terminated in 2017, leaving a smaller team of investigators – the Service Police Legacy Investigation (SPLI) – to complete the investigation of remaining cases.<sup>36</sup> Despite thousands of claims and years of investigation, criminal accountability has been absolutely minimal.<sup>37</sup> IHAT was set up prior to the ICC's re-opening of the preliminary examination in 2014 and was initially intended to respond to rulings by the ECtHR and British courts concerning the need to conduct

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<sup>35</sup> See A. Schüller, *The ICC, British War Crimes in Iraq and a Very British Tradition*, *Opinio Juris*, December 2020, <https://opiniojuris.org/2020/12/11/the-icc-british-war-crimes-in-iraq-and-a-very-british-tradition/>.

<sup>36</sup> See GOV.UK, *Service Police Legacy Investigations*, <https://www.gov.uk/guidance/service-police-legacy-investigations>, accessed 12 September 2020.

<sup>37</sup> See further C. Ferstman, T. O. Hansen and N. Arajärvi, *Discussion Paper: The UK Military in Iraq: Efforts and Prospects for Accountability International Crimes Allegations*, October 2018, [https://www1.essex.ac.uk/hrc/documents/THE\\_UK\\_MILITARY\\_IN\\_IRAQ\\_1Oct2018.pdf](https://www1.essex.ac.uk/hrc/documents/THE_UK_MILITARY_IN_IRAQ_1Oct2018.pdf), accessed 12 September 2020.

independent investigations relating to complaints of European Convention on Human Rights (ECHR) article 2 and 3 violations, rather than function as a mechanism of complementarity in the context of the ICC's jurisdiction.<sup>38</sup> However, once the ICC Prosecutor re-opened the preliminary examination in 2014, IHAT was portrayed by British authorities as facilitating a process that ought to lead the ICC Prosecutor to terminate the preliminary examination with reference to the complementarity principle.<sup>39</sup> Accordingly, this investigative process is not static but its stated goals and *modus operandi* have changed over the years, seemingly much to the convenience of British officials. Other justice processes are in place in the UK to address the Iraq claims, which deserve brief mentioning here.

First, preceding IHAT, criminal investigations by the Royal Military Police (RMP) led to a limited number of courts martial, but overall these investigations have been deemed flawed and led only to minimal accountability, which is a key reason for the subsequent investigations and re-investigations by IHAT and SPLI.<sup>40</sup> Furthermore, the UK has conducted a coroner type process, known as the Iraq Fatality Investigations (IFI). IFI was established following a High Court ruling in *R (Ali Zaki Mousa) v Secretary of State for Defence (AZM2)* in 2013, which held that the fatality investigations conducted by IHAT should be followed up where necessary with a coronial inquest, which involves the families of the deceased and considers the wider circumstances to the extent

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<sup>38</sup> Decisions by the ECtHR have significantly impacted the way British courts have approached questions relating to IHAT's independence – and hence the various re-structuring of IHAT over the years. Notably, in *Al-Skeini v United Kingdom*, the ECtHR held that human rights law applies to the Iraq war and occupation in situations where UK forces were an occupying force or when they had custody over an individual and that the RMP investigations were not sufficiently independent to satisfy the standards in the Convention. See ECtHR (Grand Chamber), *Al-Skeini and Others v The United Kingdom*, Appl. no. 55721/07, 7 July 2011.

<sup>39</sup> See further the statements cited in the section below.

<sup>40</sup> Altogether four courts martial relating to the situation in Iraq have been completed, leading to the conviction of seven soldiers, out of which only one concerned a war crime. Most defendants have been acquitted or the cases discontinued by the Advocate General. See further R. Kerr, 'The UK in Iraq and the ICC: Judicial Intervention, Positive Complementarity and the Politics of International Criminal Justice', in M. Bergsmo and C. Stahn (eds.), *Quality Control in Preliminary Examination: Volume 1*, (TOAEP, Brussels, 2018), p. 451.



required by ECHR Article 2.<sup>41</sup> Although dealing only with a very limited number of cases, the IFI process has contributed to shedding light on the circumstances of some deaths, in some sense resembling what a truth commission is typically tasked to do (although of course on a much smaller scale).

A separate category of cases aim, as Rachel Kerr notes, ‘not at ensuring *individual* criminal responsibility but at ensuring *institutional* accountability at the level of the state’.<sup>42</sup> These cases, brought by British lawyers acting for Iraqi civilian claimants, sought to require the Government to conduct inquiries into alleged unlawful killing, abuse and mistreatment of Iraqi civilians.

Altogether, 13 judicial review cases relating to abuses in Iraq have been brought before British courts and these have contributed significantly to shedding light on shortcomings in the military’s approach to prisoner of war handling and other crucial issues, often raising serious critique of the government’s handling of the legal processes.<sup>43</sup>

Additionally, numerous civil suits seeking compensation for Iraqi victims have been brought, leading to settlements in hundreds of cases, which is significant from the perspective of victims’ redress (but less so in terms of establishing government liability since these settlements are not available to the public).

The UK Government has also initiated two public inquiries relating to allegations of ill-treatment and unlawful killing by British troops in Iraq, one concerning the killing of Baha Mousa which

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<sup>41</sup> [2013] EWHC 1412 (Admin), 24 May 2013, paras. 212-225 and [2013] EWHC 2941 (Admin), 2 October 2013.

<sup>42</sup> Kerr, *supra* note 40, p. 465.

<sup>43</sup> *Ibid.*, p. 465.

pointed to ‘corporate failure’ by the British Army as a reason for the use of banned interrogation techniques.<sup>44</sup>

There is thus no shortcoming of legal processes covering violations in Iraq; yet the challenge remains achieving accountability and meaningful change. Indeed, quite the opposite appears to be occurring, at least with regard to the government’s attitude towards the rule of law and accountability for war-related violations. The justice processes outlined here have not been associated with any ‘transition’ towards increased observance of the rule of law and behavioural change at the leadership level; rather, perhaps, a transition away from upholding and respecting the rule of law seems to be occurring. Notably, as will be discussed in more detail below, as a result of frustration with the legal processes outlined above among government actors and policymakers (and a broader concern about litigation arising out of conflicts abroad), the government has taken a number of unprecedented steps towards shielding the military from accountability, including challenging the lawyers working on the cases and working to end the ICC preliminary examination.<sup>45</sup>

Most recently, as will be detailed further below, the Government has introduced the so-called Overseas Operations (Service Personnel and Veterans) Bill in 2020, to regulate legal proceedings stemming from operations of the UK armed forces outside of the British Islands. The Bill, which received its first reading in Parliament in March 2020 and passed its second reading in September 2020, introduces a statute of limitations-like proposal, referred to as a ‘presumption against prosecution’, which could substantially change how the competent UK authorities go about investigating and prosecuting crimes committed by British soldiers serving abroad, including

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<sup>44</sup> Sir William Gage, ‘The Report of the Baha Mousa Inquiry’, Vol I, HC 1452–I, 8 September 2011, para. 2.1551.

<sup>45</sup> See further Hansen, *supra* note 22.

crimes under international law. The Bill also includes a duty for the Secretary of State to consider derogation from the ECHR for overseas operations (although the practical impact of that may be less significant);<sup>46</sup> amendments to the UK's legislation domesticating the ECHR – the Human Rights Act (HRA), and a so-called 'civil litigation longstop', which, if implemented, is likely to severely limit civil litigation arising from the actions of the UK military when operating abroad. More generally, the government, or at least parts of it, no longer seems embarrassed to say it is ready to break international law when it is deemed convenient.<sup>47</sup>

To summarise, whereas a wide range of justice processes have with time been put in place to address claims of war crimes by British soldiers in Iraq, taken together, these have been slow-moving, are generally resisted by government actors and have so far led to only a very limited amount of meaningful justice.<sup>48</sup> These justice measures thus exist by and large, not because the government has actively sought to promote justice and behavioural change, but rather because lawyers and civil society groups have engaged and creatively utilised existing justice tools with a view to pursue redress and accountability for crimes in Iraq. While we have seen some redress to victims, mainly through out of court settlements of civil suits, criminal accountability to date has been extremely limited and State liability remains somewhat obscure. Rather than improving existing efforts or creating new and more legitimate justice processes, the government has used the passage of time to create a narrative of 'ambulance-chasing lawyers' and 'historical' violations that

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<sup>46</sup> On the derogation clause, see further A. Sari, 'The Duty to Derogate: Suspending Human Rights in a Very Limited and Specific Way?', *EJIL:Talk*, 18 September 2020, <https://www.ejiltalk.org/the-duty-to-derogate-suspending-human-rights-in-a-very-limited-and-specific-way/>, accessed 12 September 2020.

<sup>47</sup> The UK's disregard for international law is also emerging as an issue in the context of Brexit. See e.g. Raphael Hogarth, 'The Internal Market Bill breaks international law and lays the ground to break more law', *Institute for Government*, 9 September 2020, <https://www.instituteforgovernment.org.uk/blog/internal-market-bill-breaks-international-law>, accessed 12 September 2020.

<sup>48</sup> See similarly Human Rights Watch, 'Pressure Point: The ICC's Impact on National Justice: Lessons from Colombia, Georgia, Guinea, and the United Kingdom', May 2018, p. 120.

are wrongly subject to cycles of re-investigation and more recently invented new legal restrictions and obstacles to justice which specifically cites the passage of time as a justification for not pursuing justice.<sup>49</sup> One can therefore say that justice has not been associated with political and normative transition, though without the justice processes that we have seen unfolding, there would of course have been less awareness and acknowledgement that serious crimes were committed by British forces in Iraq (and elsewhere). In the following, the article further details and exemplifies how the passage of time affects justice in the case of war crimes in Iraq.

### ***3.2. The Passage of Time can Complicate Existing Justice Efforts***

Whereas some passage of time tends to be a precondition for justice processes to emerge which cover conflict-related crimes, ‘time’ can also complicate efforts to promote accountability for these types of crimes. As noted above, despite multiple long-lasting investigative processes in Britain, there has been very limited success in holding to account those responsible for crimes in Iraq.<sup>50</sup> It is important to note that the UK *is* indeed conducting criminal investigations into the Iraq claims – and has done so for many years. The IHAT/ SPLI process lasted close to ten years, cost tax-payers millions of pounds, but did not lead to any successful prosecutions; indeed the vast majority of the more than three thousand cases examined were closed either due to a decision that there was not a case to answer, lack of evidence, or it was considered not proportionate to conduct a full investigation.<sup>51</sup> The problem is therefore not one of ‘inactivity’, but rather that the activity that is occurring appears to be never-ending and does not produce any meaningful accountability. Indeed,

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<sup>49</sup> See further T. O. Hansen, ‘Complementarity (in)action in the UK?’, *EJIL:Talk*, December 7, 2018, <https://www.ejiltalk.org/complementarity-inaction-in-the-uk/>, accessed 12 September 2020.

<sup>50</sup> See further Ferstman, Hansen and Arajärvi, *supra* note 37.

<sup>51</sup> See further House of Commons Library, *Briefing Paper: Overseas Operations (Service Personnel and Veterans) Bill 2019-21*, Number 8983, 22 September 2020.

as time passes, accountability appears to have become increasingly unlikely for reasons that will be explained here.

Previous research by this author together with Ferstman and Arajärvi points to various structural issues that have resulted in long-lasting but inefficient investigations, in particular insufficient independence in the original set-up of these investigatory bodies and the consequent re-structuring over time.<sup>52</sup> Structural issues resulting in inefficiencies and delays in the IHAT investigative process were also pointed to as a key issue by Sir David Calvert-Smith,<sup>53</sup> and a series of court rulings, including *Ali Zaki Mousa v SSD No. 2*, where the Divisional Court raised a number of concerns about the effectiveness of the IHAT investigative process, including timeliness as the Court noted that the investigations were lengthy and very time-consuming.<sup>54</sup> Given the large number of claims involving incidents occurring at many different times and in different locations, the Court thought it was unlikely that IHAT would be able to complete its mandate without significant delays.<sup>55</sup> Because of these and other issues, the Court expressed concern that the UK was not effectively discharging its investigative obligations under Articles 2 and 3 of the ECHR.<sup>56</sup> Concerns about delays in criminal investigations, however, continued to be an issue mentioned by judges and others.<sup>57</sup>

Time is thus a central concept for understanding the deficiencies of these investigative processes. Justice processes do not occur in a confined window of opportunity, but rather can be dragged on for years with little tangible outcome. One key reason for that, which is under-explored in the scholarship,

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<sup>52</sup> Ferstman, Hansen and Arajärvi, *supra* note 37.

<sup>53</sup> Sir David Calvert-Smith, 'Review of the Iraq Historic Allegations Team', 15 September 2016, para. 13.11.

<sup>54</sup> [2013] EWHC 1412 (Admin).

<sup>55</sup> *Ibid.*, paras. 213-251.

<sup>56</sup> *Ibid.*, paras. 180-182.

<sup>57</sup> See e.g. *Al-Saadoon v. SSD* [2015] EWHC 1769 (Admin), para. 33, and House of Commons Defence Committee, *Who guards the guardians? MoD support for former and serving personnel*, 10 February 2017, Annex 1.

is that a central objective among national decision-makers may be to keep in place domestic investigative bodies in order to avoid the opening of an ICC investigation. In other words, by maintaining these investigative bodies at the national level and keeping some investigations open, British officials have been able to claim that domestic investigations are ongoing, which appear to be a key reason the ICC's preliminary examination was ongoing for six years but never resulted in the opening of an investigation. The complementarity principle underpinning the ICC system (explained elsewhere in this article) can therefore pose an obstacle to justice, at least to the extent ICC officials take up an overly stringent conception of 'unwillingness', as was regrettably done in the Iraq/UK situation.<sup>58</sup>

This points to an important issue, which was largely overlooked by the ICC Prosecutor in the decision to not proceed with an investigation: the intention of British decision-makers. It became clear this did not involve ensuring accountability for international crimes, but rather to utilise domestic processes with the aim of avoiding the ICC's intervention. As Mark Lancaster, then Parliamentary Under-Secretary of State for Defence Veterans, Reserves and Personnel, explained: '[IHAT] was set up for entirely the right reasons. Without having [IHAT], potentially our troops could have been subjected to inquiries by the International Criminal Court'.<sup>59</sup> Or in the words of former Secretary of State for Defence, Michael Fallon: 'If we were unable to demonstrate that these [criminal allegations] were being properly investigated, we could have ended up [...] opening the way to the International Criminal Court. That would have got us into a far more difficult situation'.<sup>60</sup> Accordingly, a key intention of having domestic investigative processes in place and spanning investigations over many

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<sup>58</sup> See similarly Schüller, *supra* note 35.

<sup>59</sup> The Telegraph, 'Unanswered questions behind the failed witch hunt of Iraq', 11 February 2017, <https://www.telegraph.co.uk/news/2017/02/11/unanswered-questions-behind-failed-witch-hunt-iraq-veterans/>, accessed 12 October 2020.

<sup>60</sup> House of Commons Defence Committee, *supra* note 57, para. 117.

years has been to avoid that the ICC would proceed to the next stage. This is of course problematic in so far as these domestic processes are not intended to bring about any meaningful justice and even more so when coupled with legislative moves towards creating new ‘justice barriers’, as discussed below.

An ‘unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice’ is one factor that the ICC Prosecutor considers in the admissibility assessment at the preliminary examination stage.<sup>61</sup> Delays in national proceedings may be assessed in light of indicators ‘such as, the pace of investigative steps and proceedings; whether the delay in the proceedings can be objectively justified in the circumstances; and whether there is evidence of a lack of intent to bring the person(s) concerned to justice’.<sup>62</sup> The ICC Prosecutor has previously noted that the *intention* of national authorities is key to its determination, stating that the Office would accept a ‘reasonable delay’ in national proceedings if ‘the fight against impunity’ is perceived to remain a priority of the relevant national authorities.<sup>63</sup> One can certainly question if this is the case in the UK, both in light of the type of government statements cited above and the recent developments relating to the Overseas Operations Bill, which are discussed further below.

Given the time that has passed since the crimes in Iraq under preliminary examination occurred as well as the time that has passed since domestic investigations into these crimes commenced, the question of whether there has been an ‘unjustified delay’ with respect to taking forward the investigation of these crimes naturally arose in the ICC Prosecutor’s assessment. In this regard, the ICC Prosecutor’s 2018 report on preliminary examinations noted: ‘The information available

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<sup>61</sup> Office of the ICC Prosecutor, ‘Policy Paper on Preliminary Examinations’, *November 2013*, paras. 50–54.

<sup>62</sup> *Ibid.*

<sup>63</sup> Office of the ICC Prosecutor, ‘Report on preliminary examination activities 2016’, paras. 271–272 (remarks in regard to the situation in Guinea).

indicates that some early investigations of physical perpetrators and their immediate supervisors were beset with challenges, notably the delay in time taken to address certain incidents. This delay appears to have been occasioned by the repetition of processes, itself caused by the inadequacy of some initial investigations'.<sup>64</sup> Yet, despite expressing concern about the delays in the UK's investigative processes,<sup>65</sup> the Prosecutor report in December 2020, issued in connection with its decision not to proceed with an investigation, ultimately concluded these delays were not the product of a deliberate attempt to shield the suspects from justice (with reference to the very high threshold the Prosecutor created for that standard).<sup>66</sup>

One important point here, frequently overlooked in the discourse on transitional and international justice, is that long-lasting but unproductive domestic investigations appear to be 'common practice' in countries that may be seeking to avoid being subject to the mechanisms of international justice. These delays can cause substantial complexity in the ICC's complementarity assessment, especially in situations involving States with significant resources and robust legal systems. Such States may be able to demonstrate that investigations into the conduct of their armed forces are on-going, and claim that these take a long time to complete due to their complexity, but they may ultimately lead to no or very limited accountability (typically focusing on low-level perpetrators as opposed to those responsible for creating an environment where widespread abuses occur). It is a hard choice for the ICC Prosecutor to proceed with an investigation when States with sophisticated legal systems are able to demonstrate that some form of criminal investigation into the conduct of

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<sup>64</sup> Office of the ICC Prosecutor, 'Report on preliminary examination activities 2018', para. 205. The 2019 report does not add to those observations, but notes that 'during 2019, the Office has focussed on bringing its determination on the scope and genuineness of domestic proceedings to a conclusion' (but as of September 2020, the examination was still on-going with no reported news). Office of the ICC Prosecutor, 'Report on preliminary examination activities 2019', para. 164.

<sup>65</sup> Office of the ICC Prosecutor, 'Situation in Iraq/UK: Final Report', *supra* note 33, paras 6; 426.

<sup>66</sup> *Ibid*, eg. para. 10.



their armed forces remains on-going, even if this investigatory activity is long-lasting and has not at the time of assessment resulted in a substantial number of prosecutions, if any.<sup>67</sup> Because the scope and ultimate outcome of on-going national proceedings is surrounded by a degree of uncertainty, the existence of such proceedings may therefore work to delay the Prosecutor's complementarity assessment – and, as the UK cases has shown, ultimately serve as the reason for not proceeding to an investigation, even if it is clear the domestic proceedings will not advance any meaningful justice. The very limited transparency surrounding accountability measures in Britain, especially since SPLI took over investigations in 2017, only exacerbates these challenges.<sup>68</sup> While the ICC Prosecutor was not blind to these factors, as noted above, by setting the bar so high for what constitutes 'unwillingness', the Office effectively has created a blueprint for how resourceful states may avoid the opening of an ICC investigation.<sup>69</sup>

In sum, despite the difficulties associated with proceeding to a full investigation in situations where some form of domestic investigatory process is on-going, one can certainly question whether it is a reasonable timeframe for the ICC prosecutor to have spent more than six years conducting a preliminary examination into the situation in Iraq, the last three of them focusing on asserting whether domestic investigations satisfy the requirements to complementarity, only to close it while yet pointing to inadequate and delayed domestic proceedings. In short, one could say that the passage of time has certainly not worked in the interest of justice in this case.

### ***3.3. The Passage of Time can Serve as a Justification for Creating New Obstacles to Justice***

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<sup>67</sup> See further Hansen, *supra* note 26.

<sup>68</sup> See further Ferstman, Hansen and Arajärvi, *supra* note 37.

<sup>69</sup> See similarly Schueller, *supra* note 35.

The assumption in transitional justice literature tends to be that legal reforms are introduced in the wake of serious human rights and humanitarian law violations with a view towards enabling *more* or *improved* forms of accountability, truth, redress, non-recurrence of violations and other goals of transitional justice. Of course, this assumption is associated with the field's origin in examining paradigmatic transitions where a new democratic and rule of law-oriented leadership replaces an authoritarian regime responsible for the violations, and thus assumedly would tend to implement legal reform with a view towards promoting justice. As follows from the discussion here, legal reform can also serve to achieve the opposite purpose; to limit the prospects for justice for State violations by putting in place new 'justice barriers' – and 'time' may be an important factor to consider in this regard. Indeed, the passage of time can serve as a justification for creating new obstacles to justice through legal reform.

As briefly noted above, the UK Government has introduced the Overseas Operations (Service Personnel and Veterans) Bill to regulate legal proceedings stemming from operations of the UK armed forces outside of the British Islands. The background to the Bill is the large number of allegations regarding ill-treatment of detainees and related abuses that have been levied against British soldiers serving in Iraq but also in other conflicts, including Afghanistan, and a perception that legal proceedings against the armed forces have been brought with too much ease or that they are unfounded. The Bill is closely connected to IHAT/SPLI's handling of criminal investigations and a perceived need to protect soldiers and veterans from similar investigation in the future.<sup>70</sup>

The Bill introduces various measures which could severely restrict the possibility of bringing legal claims relating to conflict-related offences, including a duty for the Secretary of State to consider

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<sup>70</sup> Common's Defence Sub-Committee, 'Drawing a line: Protecting veterans by a Statute of Limitations', 16 July 2019, p. 30.

derogation from the ECHR for overseas operations and amendments to the UK's legislation domesticating the ECHR – the Human Rights Act (HRA), but for the purpose of this Article the most relevant measures to consider involve a statute of limitations-like proposal, referred to as a 'presumption against prosecution', and a so-called 'civil litigation longstop'.<sup>71</sup>

The time barriers for bringing civil suits manifest in two proposals. One relates to the introduction of an absolute six-year limitation longstop for personal injury and death claims in respect of overseas military operations, and a restriction on the courts' discretion to extend the normal time limit for bringing such claims in relation to operations outside the UK (Sections 8-10 of the Bill). Another relates to the introduction of an absolute six-year limitation longstop for claims under the HRA in respect of overseas military operations, and a restriction on the court's discretion to extend the normal time limit for bringing HRA claims in relation to operations outside the UK (Section 11 of the Bill).<sup>72</sup>

These time barriers are likely to severely restrict access to justice because claims relating to violations in conflict zones are typically slow-moving. It will often prove difficult or even impossible to access evidence and witnesses while the conflict is still ongoing, and once it ends, shattered infrastructure and other logistical challenges may cause considerable delay preparing legal cases. Critics also argue that changing time limits for bringing civil claims undermine the discretion given to the courts (and that the main beneficiary will be the government, rather than service personnel, who would not generally be personally liable in such cases).<sup>73</sup>

Concerning the 'presumption against prosecution' proposal, the Bill makes clear that it is to be exceptional for a relevant prosecutor to take a decision that proceedings should be brought against a

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<sup>71</sup> Overseas Operations (Service Personnel and Veterans) Bill, available at <https://publications.parliament.uk/pa/bills/cbill/58-01/0117/20117.pdf>.

<sup>72</sup> *Ibid.*

<sup>73</sup> See the critics cited in House of Commons Library, *supra* note 51, p. 41.

person for crimes allegedly committed by British soldiers in conflicts abroad where these crimes are said to have occurred more than five years ago. There is no clear justification in the Bill or related documents why a five year period should be seen as the appropriate timeframe; indeed it appears somewhat arbitrary (a previous proposal had suggested ten years).<sup>74</sup> The Bill lists as factors to be taken into account and to be given particular weight, any adverse effect on the person of the conditions the person was exposed to during deployment, on their capacity to make sound judgments or exercise self-control, or any other adverse effect on their mental health; or in a case where there has been a relevant previous investigation and no compelling new evidence has become available, the public interest in finality (as regards how the person is to be dealt with) being achieved without undue delay.<sup>75</sup> Whereas certain sexual offences are excluded from the Bill, other international crimes such as torture are not, which raises important questions concerning its compatibility with the UK's international obligations, including under the Rome Statute.<sup>76</sup> Government officials seem to aim at deliberate ambiguity by noting that other cases involving allegations of international crimes could mean the case would be seen as 'exceptional' and thus excluded from the presumptions against prosecution,<sup>77</sup> but this does not follow from the Bill itself.

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<sup>74</sup> Common's Defence Sub-Committee, *supra* note 70, p. 9.

<sup>75</sup> For a discussion of these factors, see Noelle Quenivet, 'Occupational Hazards of Soldiers – A Critique of Section 3 of the Overseas Operations (Service Personnel and Veterans) Bill 2019-21', *EJIL:Talk*, September 17, 2020, <https://www.ejiltalk.org/occupational-hazards-of-soldiers-a-critique-of-section-3-of-the-overseas-operations-service-personnel-and-veterans-bill-2019-21/>, accessed 12 October 2020.

<sup>76</sup> As noted in recent Common's Library Briefing, '[i]t also raises the prospect of the ICC asserting its jurisdiction. Article 29 of the Rome Statute of the International Criminal Court prevents crimes that fall within the jurisdiction of the ICC from being subject to statutes of limitation domestically.'" See House of Commons Library, *supra* note 51, p. 24. On the exception of sexual crimes but not other international crimes, see further Elizabeth Stubbins Bates, 'Legislating by Soundbite: The Overseas Operations (Service Personnel and Veterans) Bill', *EJIL:Talk*, September 18, 2020, <https://www.ejiltalk.org/legislating-by-soundbite-the-overseas-operations-service-personnel-and-veterans-bill/>, accessed 12 October 2020.

<sup>77</sup> See Ministry of Defence, 'Public consultation on legal protections for Armed Forces personnel and veterans serving in operations outside of the United Kingdom: Analysis and response', 22 July 2019, <https://www.gov.uk/government/consultations/legal-protections-for-armed-forces-personnel-and-veterans-serving-in-operations-outside-the-united-kingdom>, p.13.

The camps are widely split concerning the merits of the presumption against prosecution. On the one side, some government actors, the Defence Committee and others including in academia who support the type of measures introduced in the Bill argue that these restrictions are necessary because we have been witnessing what the Defence Committee refers to as ‘cycles of investigation and re-investigation of current and former Service personnel’,<sup>78</sup> which in the words of former Secretary of State for Defence Mordaunt amount to ‘lawfare’.<sup>79</sup> They say those in charge of the justice processes are ‘deaf to the concerns of the Armed Forces, blind to their needs’. According to the Government, the UK’s legal system has been ‘abused to level false charges against our troops on an industrial scale’,<sup>80</sup> and Government officials have expressed regret that service personnel have been ‘subject to repeated investigations in connection with historical operations many years after the events in question’.<sup>81</sup> In sum, they see a need for providing stronger legal protections against prosecution for current and former service personnel and more broadly legal claims relating to past conflicts involving the UK. The passage of time, in their view, creates a presumption against criminal accountability being in the public interest, even for serious crimes that are not normally subject to statutes of limitations in democratic and rule of law respecting societies.

The other camp, in contrast, argue that the passage of time should not serve as a justification for restricting criminal investigations and prosecutions for serious crimes and that the proposed measure amount to a self-amnesty in the style of Latin American dictatorships.<sup>82</sup> They note that the

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<sup>78</sup> Common’s Defence Sub-Committee, *supra* note 70.

<sup>79</sup> Ministry of Defence, ‘Consultation paper: Legal Protections for Armed Forces Personnel and Veterans serving in operations outside the United Kingdom’, 22 July 2019, foreword. As noted in the Common’s Library Briefing, ‘[i]n response to the legal rulings on the application of the ECHR, the outcome of the Al Sweady inquiry and the closing down of IHAT, successive Conservative Governments have indicated their intention to address the increasing influence of ‘lawfare’’. See House of Commons Library, *supra* note 51, p 17.

<sup>80</sup> *Ibid.*, p 15.

<sup>81</sup> *Ibid.*

<sup>82</sup> Kieran McEvoy, ‘Investigations into the Troubles are vital – and that includes ex-soldiers’, *The Guardian*, 11 May 2018, <https://www.theguardian.com/commentisfree/2018/may/11/investigations-troubles-ex-soldiers-northern-ireland>, accessed 12 October 2020.

measures proposed in the Bill could ‘dent soldiers’ respect for international law, by undermining the part of their training which reminds them that investigations and accountability will follow for violations of international law in armed conflict’ and could ‘entrench flawed investigatory practices, and creating incentives either to close investigations without a prosecution, or to leave investigations incomplete for five or more years’.<sup>83</sup> Some critics note that by adopting this proposal, the UK would ‘effectively decriminalis[e] torture’.<sup>84</sup> The time limits proposed are seen as arbitrary and as running counter to the interests of victims,<sup>85</sup> some noting that the ‘five-year time limit for prosecutions would encourage a culture of delay and cover-up of criminal investigations’.<sup>86</sup> There is also an important question of equal application of the law. As this author argued in a submission together with Carla Ferstman to the Ministry of Defence consultation process, ‘even if some measure was to be enacted whereby investigation and prosecution of crimes committed in armed conflicts would somehow be restricted, it is a fundamental principle of law that the law must apply equally to all persons. Putting in place a legal framework that severely restricts the application of criminal law for certain categories of people accused of having committed serious offences, including international crimes, would blatantly violate the principle of equal application of the law’.<sup>87</sup> In sum, opponents of the measure proposed see a need for providing stronger legal protections for victims and expanding accountability for the armed forces, not restricting it with

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<sup>83</sup> Bates, *supra* note 76.

<sup>84</sup> Alistair Carmichael MP, as cited in House of Commons Library, *supra* note 51, p. 40.

<sup>85</sup> Clare Collier, Advocacy Director at Liberty argues: ‘A war crime does not stop being a war crime after five years [...] Trauma from torture and sexual violence doesn’t have a time limit and Liberty strongly rejects any attempt to put a deadline on justice. It sets a dangerous precedent.’ See Liberty press release, ‘Liberty responds to plans to limit armed forces accountability’, 18 March 2020.

<sup>86</sup> Clive Baldwin, ‘UK Bill a License for Military Crime?’, [hrw.org](http://hrw.org), accessed 12 October 2020.

<sup>87</sup> T.O. Hansen and C. Ferstman, ‘Submission of observations to the UK Ministry of Defence’s open consultation concerning Legal protections for armed forces personnel and Veterans serving in operations outside the United Kingdom’, October 2019, [https://www.ulster.ac.uk/\\_data/assets/pdf\\_file/0006/476700/UK-Ministry-of-Defence-Consultation-on-Legal-Protections-for-Armed-Forces-Personnel-and-Veterans-serving-in-operations-outside-the-United-Kingdom-Submission-by-TO-HANSEN-AND-C-FERTSMAN.pdf](https://www.ulster.ac.uk/_data/assets/pdf_file/0006/476700/UK-Ministry-of-Defence-Consultation-on-Legal-Protections-for-Armed-Forces-Personnel-and-Veterans-serving-in-operations-outside-the-United-Kingdom-Submission-by-TO-HANSEN-AND-C-FERTSMAN.pdf) accessed 12 October 2020.

reference to the passage of time. Rather than implementing legal reforms of this nature, the focus should in their view be on ensuring that investigations are prompt and efficient in the first place.

#### **4. Conclusions**

Transitional justice scholarship has recently made a series of claims relating to the field's expanded application and relevance, including that these justice processes should be used with respect to violations by consolidated democracies in the West and that they are relevant for addressing 'historic' violations. Whereas contemporary transitional justice scholarship tends to assume that the passage of time will usually allow more or improved forms of justice, as this article has shown, the passage of time can in some cases present additional and serious obstacles to justice, with new 'justice barriers' being put in place due to a perception that it is not in the public interest to prosecute crimes, even if serious ones, that occurred years earlier. At the same time, national investigations may be on-going for years but lead only to very limited 'accountability outcomes', not only because these investigations do not lead to domestic prosecutions but also because they can present obstacles for international courts to proceed with their own investigation.

There are of course some significant differences between seeking justice for crimes committed by a major power such as the UK in a recent conflict abroad and the type of cases that have 'historically' informed transitional justice discourse. For one, there has been no fundamental transition in the UK, but as discussed in this article, the existence of such a transition no longer appears a prerequisite for talking about transitional justice. In this case, justice processes, driven by victims and human rights lawyers, have emerged in a context where the government has become increasingly hostile to legal

scrutiny of its armed forces and has taken a number of measures to prevent their continuation or recurrence. Unexpectedly, this hostility is a key reason why only limited justice has been delivered to date.

Justice processes covering war crimes by British soldiers in Iraq have not been framed as a matter of transitional justice. Yet, several obstacles known from transitional justice processes in other cases materialise in this case. Notably, we have witnessed opposition in segments of the political leadership, indeed active steps to curb in these justice processes, as is evident from the introduction of the Overseas Operation Bill, the closure of domestic investigative bodies and opposition to the ICC's examination. Decision-makers in the UK are attempting to frame judicial inquiries into crimes in Iraq as being 'historical', as is evident from the name of the main investigative body, 'The Iraq Historical Allegations Team'. Which crimes should be considered 'historic' is obviously a subjective question, but the framing is important in part because it tends to move perceptions of justice away from criminal justice towards other ways of addressing 'past wrongdoing'.

Notwithstanding the framing of these inquiries as being a matter of 'historic' wrongdoing, the government is seeking to enact measures which would block the prospects for new justice processes. In this sense, we see a connection between the past and the present, in that concerns about legal scrutiny arise out of past conflicts but the aim is equally to block legal claims associated with the military's conduct in future conflicts.

The ambiguity of State actors' behaviour is an important theme arising in the UK/Iraq case, and perhaps one that draws parallels to situations in other countries where justice responses are put in place to address serious violations. On one level, UK authorities state support for the rule of law and the continued application of accountability norms to situations of armed conflict, at least as



long as these flow from domestic law or international humanitarian law (while there is widespread and outspoken opposition to applying human rights law to situations of armed conflict).<sup>88</sup> The Government is firm that only measures which it believes can be enacted ‘in a manner which is consistent with our obligations under domestic and international law’ are being considered,<sup>89</sup> further emphasising: ‘none of these proposals are intended to erode the rule of law, or to prevent Armed Forces personnel or the Ministry of Defence from being held to account’.<sup>90</sup> Yet, the practical effect of some of the current proposals, taken together with the lack of accountability outcomes of long-lasting domestic investigations, would go far to shield the military (and the State) from legal accountability for crimes committed in conflicts abroad. To the extent that the UK will adopt measures that severely restrict the possibility to prosecute crimes committed in conflicts, this can only be understood as a significant step towards combat impunity.

This could harm the UK’s international reputation and ability to promote international and transitional justice elsewhere in the world. The UK, nominally a strong supporter of the international rule of law, has played a vital role in advancing the normative and institutional frameworks for international justice, and has in the past sponsored and supported transitional justice and accountability processes around the globe. However, if the UK takes measures that would effectively grant combat impunity for its own troops, this could undermine its role as a strong defender of human rights in the global arena and a champion of the international rule of law; create additional challenges for upholding accountability standards around the world and, in the longer run, undermine the legitimacy and efficiency of normative and institutional frameworks that seek to

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<sup>88</sup> See Ministry of Defence, *supra* note 77, p. 8.

<sup>89</sup> *Ibid.*, p 5.

<sup>90</sup> *Ibid.*

advance transitional justice.<sup>91</sup> In this sense, the developments explored in this article may not only have implications for justice for violations by the UK military, but potentially also in other contexts.

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<sup>91</sup> See similarly, House of Commons Library, *supra* note 51, p. 24, noting that number of military and political figures argue that creating a presumption against prosecution for war crimes and torture after five years would be ‘a damaging signal for Britain to send to the world’ and would be ‘a stain on the country’s reputation’ if ‘Britain is perceived as reluctant to act in accordance with long-established international law’.