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Defence Committee

UK Armed Forces Personnel and the Legal Framework for Future Operations

Twelfth Report of Session 2013–14

*Report, together with formal minutes and
written evidence*

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The Defence Committee

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Conclusions and recommendations

Conclusions

1. The Armed Forces and the Ministry of Defence (MoD) have faced an unprecedented number of legal cases over the past ten years. This is perhaps not surprising given the nature of the conflicts in which the Armed Forces have been engaged and the growing use of challenges under human rights law in UK courts. As we have made clear, we make no criticism of the families of Armed Forces personnel who have brought cases against the MoD. Families understandably want to know the circumstances surrounding the death or injury of their family member. Much of our evidence has pointed to the adverse impact of the judicial consideration, process and development of the law underpinning these claims on the conduct of military operations. We note that these developments are driven by judicial decisions and we recommend that the Government, not just the MoD, reappraise these matters and address them in a strategic way and, where necessary, introduce legislation in Parliament to provide the necessary legal clarity. (Paragraph 127)

2. International Humanitarian Law (IHL), also called the Law of Armed Conflict (LOAC), was developed to regulate the conduct of parties to an armed conflict. We agree with the International Committee of the Red Cross that IHL has withstood the test of time as a realistic body of law that finds a balance between military necessity and humanity. We also agree with ICRC's view that IHL needs to evolve in respect of non-international armed conflicts, in particular in the protection of detainees. The majority of armed conflicts involving UK Forces have not been wars between international states but what IHL and LOAC defines as non-international armed conflicts such as the operations in Iraq and Afghanistan. The Government should work to ensure that IHL is the body of law regulating the conduct of armed conflicts with primacy over human rights law. It should also continue to participate freely in the development of IHL to protect civilians and to regulate armed conflict of whatever type, in particular when working in coalition. (Paragraph 128)

3. Most of the growing number of cases brought against the MoD have resulted from claims of breaches of the European Convention on Human Rights, many of which have proved to be unfounded. The tension and overlap between the two bodies of law—IHL/LOAC and human rights law (HRL)—have resulted in a lack of certainty and clarity, together with a growing number of cases against the MoD. There are two aspects of the use of human rights law that most concern us. First, on the extraterritorial application of the European Convention on Human Rights to allow claims in the UK courts from foreign nationals. Detainees should be treated with humanity and respect and where this is found not to be the case, the individuals and the MoD should be prosecuted. However, the number of cases and the requirement for full and detailed investigations of every death resulting from an armed conflict is putting a significant burden on the MoD and the Armed Forces, not just in resources spent but in the almost unlimited potential for retrospective claims against them. (Paragraph 129)

4. Secondly, we are concerned about the failure of the previously well understood and accepted principle of combat immunity, most recently evidenced in the Supreme Court

majority judgment in June 2013 allowing families and military personnel to bring negligence cases against the MoD for injury or death. This seems to us to risk the judicialisation of war and to be incompatible with the accepted contract entered into by Service personnel and the nature of soldiering. It also challenges the doctrine of the best application of proportionate response with the unintended consequence that it might lead to far bloodier engagements on the battlefield as commanders may take fewer risks with their own troops and make more use of close air support or remotely actioned weapons, resulting in greater violence against the opposition with potentially greater numbers of civilian casualties. More legal certainty might result in less destructive conflicts. (Paragraph 130)

5. We have not attempted to impute motives for claims against the MoD or tried to describe these developments in terms of the concept of a doctrine of 'lawfare'. Nor have we attempted to provide solutions to this growing challenge. It is for the Government to consider the best way forward in respect of the problems of clashes between IHL and HRL which it agrees exist. However, we have identified some of the options to provide more clarity and certainty with regard to the law which the Government should consider. Unless Government policy as determined by Parliament, military doctrine and legal principles are clarified, then uncertainty for military personnel and claimants will continue to grow. For these reasons, we are convinced that the Government requires a strategic plan to address these issues. (Paragraph 131)

6. We recognise that individual members of the Armed Forces have no personal liability in the cases described above as they are brought against the MoD. However, many personnel have been called to give evidence in court cases, Coroner's inquests and inquiries. The reputational risk to Armed Forces personnel and the fear that they and their legitimate actions are exposed to extensive and retrospective legal scrutiny has led many to question their position serving in the UK Armed Forces. Recently retired senior commanders have told us that this undermines the willingness of personnel to accept responsibility and to take necessary risks with the consequent impact on operational effectiveness. Armed Forces personnel need to have the right training and advice to allow them to conduct armed conflicts legally and ethically. They should also have the confidence to know that they have the support of the Armed Forces when facing legal action whether as a witness or defendant rather than being isolated as they are currently. (Paragraph 132)

7. The next Strategic Defence and Security Review provides the Government with the opportunity to look strategically at the legal framework for future armed conflict and the whole spectrum of military operations including peacekeeping and post-conflict stabilisation. Future military operations will involve Armed Forces personnel, civilian staff from departments such as International Development, the Home Office and the Stabilisation Unit and increasingly the staff of contractors. Much of this examination has to be done by the whole of Government, including the Ministry of Justice. We urge the Government, in concert with the MoD, to begin work now in order to re-establish the clarity of the doctrine, the legal framework including the legal protection of Armed Forces personnel and public legitimacy. We believe that this work needs to be done in support of the next Strategic Defence and Security Review and should recognise the move to

contingency operations which are by their nature open ended. (Paragraph 133)

Introduction

8. We recognise that the UK Government has had a long and honourable involvement in the establishment and continued application of International Humanitarian Law and human rights law. The Government should continue to participate actively in the development of such law to protect civilians and to regulate the conduct of Armed Conflict. (Paragraph 13)

9. We have found no evidence that adversaries of the UK are deliberately misusing UK and international law by bringing cases under human rights law to undermine military operations. However, we are concerned about the forced use of civilians as shields by insurgents strategically exploiting the restraint shown by UK and other Forces mindful of the need for humanitarian respect for civilians and of their legal obligations. (Paragraph 17)

Growing legal challenges—the problem

10. The increasing number of legal actions being brought against the MoD about the conduct of military operations by the Armed Forces raises a range of questions about the legal context of operations. The UK Government needs to take account of the tension between International Humanitarian Law and human rights law with reference to the nature of conflicts. The Government also needs to consider the implications of what is expected to be the continuing practice of conducting operations in coalition with international partners when determining the legal framework of operations. (Paragraph 29)

11. There is a concern amongst Armed Forces personnel that they and their legitimate actions are frequently exposed to extensive legal scrutiny in coroners' courts, public inquiries and cases brought under human rights law. The MoD should identify the extent of and concern about legal developments amongst Armed Forces personnel at all levels to identify the impact on their operational effectiveness and, in particular, the willingness of personnel to accept responsibility and take necessary risks. We recommend that, in order to identify the extent of the concern, the MoD ask for the Army Personnel Research Establishment to include a section on the subject in its next survey. When the MoD has identified the concerns, it should take steps to provide Armed Forces personnel with appropriate assurances and adequate training to illustrate where personnel are not personally liable. It should also offer its support when Armed Forces personnel come before the courts to testify in coroners and other courts where the MoD is being challenged. The MoD should also inform Armed Forces personnel of what it is doing to tackle the difficult legal challenges it faces. (Paragraph 37)

12. There are clearly a number of legal challenges facing the MoD and the Armed Forces as a result of recent legal cases and developments. Views as to the extent of these challenges differ but no one doubts that they exist. These challenges should be addressed head on and in a strategic manner rather than on a case by case basis. (Paragraph 43)

13. In the light of the many recent cases challenging aspects of military operations, and as part of the lessons learned from operations in Iraq and Afghanistan, we believe that the

time is right for the Government to reassess the current legal framework for military operations and to develop its response to the many legal challenges in a more strategic way. Recognising the changing nature of conflicts, legality, ethics and the importance of the media, the resulting questions should be considered as part of the next Strategic Defence and Security Review. (Paragraph 46)

Human Rights Law and International Humanitarian Law

14. The number of legal challenges facing the MoD in respect of human rights law is large, uncertain and growing. We recognise that there is nothing the MoD can do to prevent these existing cases but we recommend it should fight each of them vigorously. We will cover possible future arrangements including legislation and procedural changes later in this Report. The MoD should inform us of the size and costs of the legal challenges it is facing in regard to the challenges from people in Iraq and Afghanistan on human rights grounds. It should also set out the arrangements it has introduced for carrying out the required inquiries akin to Coroners' inquests on those people who died in Iraq as a result of the actions of the UK Armed Forces. (Paragraph 65)

15. The MoD should identify the lessons from the legal issues arising in Iraq and Afghanistan and ensure that in all future operational deployments, the Armed Forces are clear about the legal position of the deployment and that all measures have been taken to ensure that they will not be open to legal challenge. (Paragraph 66)

16. Baha Mousa's treatment and subsequent death in detention was an horrific example of a few Armed Forces personnel behaving inhumanely and illegally. It is obviously right in such cases that individuals and the Armed Forces should feel the weight of the law. In its response, the MoD should detail how it is addressing the recommendations from the Baha Mousa Inquiry and the progress made to date in the implementation of these recommendations. (Paragraph 67)

17. We await with interest the results of the Government's work on the reform of legal aid. The MoD should inform us how any such reform will impact on the legal challenges it faces. The Government should also tell us of its intentions to limit the use of judicial review in respect of military operations. (Paragraph 70)

18. The UK Government should participate in appropriate international work to strengthen International Humanitarian Law and, in particular, should be more actively involved in the ICRC consultations on detention in non-international armed conflict and on strengthening compliance with IHL. (Paragraph 74)

19. We are concerned about the implications of the Supreme Court judgment in June 2013 in the Smith case for the principle of combat immunity. We recognise that the judgment appeared to limit the scope of the cases to the 'middle ground' between the policy and the conduct of the armed conflicts. However, we believe that this may still open up decisions, taken in situations of intense armed conflict where commanders are forced to make the best judgments they can, to examination by the Courts. (Paragraph 86)

Possible ways forward

20. We are not in a position to determine which of these solutions, if any, would help the Government resolve the sense that the law is adversely impacting on operational effectiveness. However, we are strongly of the opinion that the Government should think of these issues strategically and start to determine long-term solutions now to enable the Armed Forces to conduct armed conflict certain in the knowledge of which laws apply and how their military judgments are likely to be challenged in the future. We are also aware that some of the areas to be pursued may have reputational risks for the UK, but that this should not allow the Government to duck the difficult issues. (Paragraph 96)

21. The Government should bear in mind that whichever solutions it adopts for the Armed Forces and military operations, there are likely to be implications for FCO, DFID, Stabilisation Unit and Home Office activities in post-conflict stabilisation and peacekeeping operations. The approach taken by the Government and the MoD must be appropriate and applicable to them where relevant. (Paragraph 97)

New developments

22. Given the MoD's stated intention to develop a cyber warfare capability, we are pleased to note that the UK Government is talking with ICRC on the legal and humanitarian implications of cyber warfare. We noted in our recent Report on deterrence that difficulty in identifying the perpetrator of a cyber attack brought into question the legality of a response to such an attack. The MoD should inform us of its work in determining the legal framework of possible cyber operations and its plans to incorporate such work into training of personnel and the preparation of appropriate manuals. (Paragraph 101)

23. The MoD should prepare the legal framework for new forms of weapons or conflict at the start of their development. We welcome the MoD's assurance that no planned weapons system will be able to attack a target without the involvement of a human being. The MoD should think through the legal and moral consequences of new forms of conflict and developments in new weapons systems. This work should start immediately in parallel with work in progress to develop new capabilities in particular in the cyber field and in autonomous weapons. We seek assurance from the MoD that such consideration has already begun in respect of autonomous weapons and indeed for highly evolved automated weapons. (Paragraph 108)

Practical questions for the Armed Forces

24. We support the ICRC view that the UK should assist other states by providing technical advice and capacity building in International Humanitarian Law. This work should form part of the planned capacity building by the Armed Forces. The UK Government should participate in appropriate international work to strengthen International Humanitarian Law and, in particular, should continue to be actively involved in the ICRC to strengthen IHL. We also support the view that the UK should take proactive steps to reconfirm the primacy, continued value and distinct nature of IHL. (Paragraph 112)

25. The MoD and the Armed Forces should re-examine their legal training for all ranks in the Armed Forces to ensure that it is as up to date as possible and is consistent with the latest cases. It should also clarify and detail where Armed Forces personnel have personal liability and where they do not. (Paragraph 117)

26. An understanding of the underpinning doctrine of the Law of Armed Conflict is crucial to the Armed Forces. The consequent manuals are important tools in ensuring that the Armed Forces act within the law. They provide clarity and a measure of certainty. The MoD should update the UK Manual on the Law of Armed Conflict and ensure that it is fully maintained in future. (Paragraph 120)

27. The MoD should review its arrangements for providing legal advice and guidance to the Armed Forces to ensure it has the best available knowledge, expertise and experience—both legal and military. It should ensure that the civilian and military lawyers work together to best effect; if necessary, it should change the arrangements and structures for the provision of legal advice to the individual Services and to the MoD to ensure this happens. (Paragraph 124)

28. The media is an increasingly important player in armed conflicts. It can and has been exploited by the UK's adversaries and will increasingly be so in the future. The MoD should ensure that it has an effective media strategy in place to deal with accusations of war crimes and violations of International Humanitarian Law. (Paragraph 126)

1 Introduction

1. We announced our inquiry into UK Armed Forces Personnel and the Legal Framework for Future Operations on 9 July 2013. This inquiry is one of four strands that we are pursuing as part of our overarching inquiry *Towards the next Defence and Security Review*. We published our preliminary report on this overarching inquiry in January¹, and expect to publish our final report in this series in the summer. Our intention, in this series of reports, is to help shape and inform the next Strategic Defence and Security Review which is expected to be conducted in 2015.

2. The strands have been entirely paper-based inquiries in that no formal evidence was taken on each. In another change to our usual practice, the Committee has appointed Committee Members to act as rapporteurs on each of the strands who have presented their findings to the Committee. The rapporteurs on this strand were Dai Havard and Julian Brazier.

3. In recent years, legal judgments by courts in the UK and elsewhere have raised a number of legal, ethical and practical questions for the Armed Forces and their conduct of operations. Some of these questions may be more matters of perception than actual threats to the conduct of operations themselves but there is nevertheless a feeling of disquiet amongst military personnel and informed commentators about the extent and scale of judicial involvement in military matters. We believe the Armed Forces, the Ministry of Defence (MoD) and the Government need to address these challenges strategically rather than simply reacting to events and to individual court cases.

4. This inquiry has focused on the legal aspects of the conduct of operations—*jus in bello*. It deals with International Humanitarian Law (IHL), (also known as the Law of Armed Conflict (LOAC)), and international human rights law (HRL). We sought written evidence from a wide range of experts, including legal, human rights and military professionals on:

- The legal protections and obligations applying to UK Armed Forces personnel (both regular and reservist) when deployed in the UK or abroad in UK-only or coalition operations;
- The effects of the developing concepts and doctrines of ‘lawfare’ and ‘universal jurisdiction’;
- The judicial development of Duty of Care concepts and of domestic UK law and claims of negligence, and on UK operational decision-making processes and arrangements for recording decisions and events by operational commanders.

5. We set out to consider what changes are necessary to the current legal framework and processes to accommodate the particular position of UK Armed Forces on all forms of future operational deployments and the changing nature of conflict.

1 Towards the next Defence and Security Review, Seventh Report of the Committee, Session 2013–14, HC 197

Evidence

6. We are grateful to all those who submitted written evidence to this inquiry. We have not been able to reflect the full complexity of the arguments and discussion contained in the written evidence in this overview, however we commend these written submissions. We have taken no formal oral evidence but have had private briefings from the International Committee for the Red Cross (ICRC) based on its written evidence as its mandate is to promote the laws that protect victims of war.² We also had a briefing from Air Commodore Doctor Boothby, former deputy director of legal services (RAF) on the law relating to cyber warfare and on the targeting of weapons. In addition, we held a roundtable discussion with key experts which proved invaluable. The Royal United Services Institute submitted a summary of the discussion at the roundtable as written evidence, although none of the views expressed in the summary should be attributed to individual participants. We would like to put on record our gratitude for the participation of the following people at that discussion, some of whom have also submitted written evidence:

- Professor Michael Clarke, Royal United Services Institute
- Major General Tim Cross
- Professor Charles Garraway, University of Essex
- Professor Francoise Hampson, University of Essex
- Martin Hemming, former head of legal services in the MoD
- General Sir Nick Parker
- Professor Sir Adam Roberts, Balliol College Oxford
- Lt Colonel Tom Tugendhat, Territorial Army
- Air Chief Marshal Glen Torpy

We would like to express our thanks to our Specialist Advisers, in particular to Major General Tim Cross and Professor Michael Clarke, for their contribution to the inquiry and to the staff of the Committee.³

7. This inquiry does not address situations in which members of the Armed Forces or the MoD behave improperly, break the criminal law or the Geneva Conventions and Additional Protocols. Such behaviour is unacceptable and, in the rare instances where such incidents occur, they should be fully investigated and individuals appropriately prosecuted.

2 The ICRC website describes its mission as ‘The ICRC, established in 1863, works worldwide to promote humanitarian help for people affected by conflict and armed violence and to promote the laws that protect victims of war. An independent and neutral organisation, its mandate stems from the Geneva Conventions of 1949. Based in Geneva, Switzerland, it employs some 12,000 people in 80 countries; it is financed mainly by voluntary donations from governments and from national Red Cross and Red Crescent societies.

3 The declarations of relevant interests by our Specialist Advisers are recorded in the Committee’s Formal Minutes which are available on the Committee’s website.

8. The Report is written for the public and Parliament. It is an expression of the Committee's views based on the evidence we have received and is written in layman's language. The law in this field is complex and uncertain and is the study of a great many academics and lawyers who inevitably have different views and perspectives. We have illustrated our concerns and those of others with high profile legal cases but have not reported on all relevant cases. We have not attempted to determine legal solutions to the issues and challenges we have found but have sought to identify areas where the MoD and the Government must investigate remedies as part of the development of the next Strategic Defence and Security Review and of its implementation.

Background

9. The legal framework that has a bearing on military operations is of long standing, and is multi-faceted. It includes:

- The law relating to the legitimacy of resort to force (called the *jus ad bellum*);
- UK law and practice (statute law, military manuals, the decisions of courts and commissions of inquiry);
- International Humanitarian Law, also known as the Law of Armed Conflict, the laws of war—*jus in bello*; and
- International human rights law.⁴

This report does not deal with the legitimacy of decisions to go to war or to intervene militarily in a situation. The legal aspects of intervention are being dealt with in our parallel inquiry on *Intervention: Why, When and How?*. The inquiry has also not considered the Military Justice System, including the courts martial system, or the Coroners court system for investigating military deaths of UK Armed Forces personnel except in consideration of the way in which they have impacted on the perceptions and behaviour of Armed Forces personnel.

10. We make no criticism of the families of Armed Forces personnel who have brought cases against the MoD. Families understandably want to know the circumstances surrounding the death or injury of their family member.

Importance of the legal framework to military operations

11. The legal framework is fundamental to the conduct of military operations and the UK has made a vital contribution to the development of that framework. The framework protects civilians drawn into conflicts and gives certain protections and responsibilities to states and combatants, including the UK Armed Forces. In particular, IHL “has withstood the test of time as a realistic body of law that finds a balance between military necessity and humanity”.⁵ Recent concerns around the application of human rights law to military

4 Ev 58

5 Ev 14

operations should not bring into question the validity of the LOAC. Professor Adam Roberts, Emeritus Professor of International Law at Balliol College, Oxford, explained it thus:

The fact that there is some criticism of the way in which certain legal rules and procedures have impinged on the UK armed forces in this century should not overshadow the enduring importance of the legal framework within which the activities of armed forces take place. [...] While it is nothing new that there should be controversies about it, the resulting legal framework has had (and continues to have) at least three significant benefits for this country and its armed forces:

- It provides assurances for the armed forces (most obviously in confirming their right to prisoner-of-war status if captured).
- It is one key basis for recognizing the legitimacy of particular campaigns and activities.
- It has particular importance in facilitating close working relations with allies in multinational operations of various kinds.⁶

12. Successive UK Governments have been involved in the development of a wide range of international agreements and institutions that have a bearing on war and peacekeeping.⁷ Dr Katya Samuel, barrister and lecturer at University of Reading and formerly of the Royal Navy, said:

The UK's heritage is at the forefront of the development of international human rights standards, and should not be forgotten. Specifically, in the aftermath of World War II, the UK participated in the drafting of the European Convention on Human Rights (ECHR)—a document considered necessary for civilised nations to live in peace through abiding by minimum human rights standards.⁸

13. We recognise that the UK Government has had a long and honourable involvement in the establishment and continued application of International Humanitarian Law and human rights law. The Government should continue to participate actively in the development of such law to protect civilians and to regulate the conduct of Armed Conflict.

‘Lawfare’

14. In recent years, it has been said that the law has been used or misused by adversaries to undermine the operation of the Armed Forces or as a substitute for traditional military means to achieve a military objective—a concept known as ‘lawfare’.⁹ Whilst not convinced

6 Ev 59

7 *Ibid*

8 Ev 79

9 Ev 60

of the validity of the concept of lawfare, we were concerned to see whether there was any evidence that the law had been deliberately misused in this way.

15. Professor Roberts pointed out that the use of the law as a propaganda tool was a widespread phenomenon and a very old practice exploiting the intentions of responsible states not to break IHL. He further said:

In recent decades the capacity of the US and a few allies to wage high-technology warfare has led to a pattern of response in those less developed societies that are the subject of their military attentions. In wars in Kosovo, Iraq, Afghanistan and elsewhere, the USA's adversaries, faced with US capacity to hit certain types of military target almost at will and to spare civilian areas and objects, have resorted to actions that violate the obligation to keep military assets and targets out of civilian areas, and especially violate the obligation to keep them away from protected sites such as hospitals and mosques. Any subsequent US attack on such a site may then be portrayed as a war crime. In some cases, too, the USA's adversaries may have simply fabricated US attacks on such sites in order to discredit the US. Such lawfare has increased in importance because of the role of media in contemporary conflicts. Since by nature it involves legal violations, mendacity, and publicity, there needs to be a robust public response tailored to the circumstances of each case.¹⁰

16. Martin Hemming, former head of legal services at the MoD, doubted that the lawfare tag served any useful purpose and said that it unhelpfully impugned the motives of those who legally challenged the Government on military issues.¹¹ He also said:

I think it was also inevitable that the common law boundaries of combat immunity in civil claims would have been tested in the wake of UK involvement in military operations over the last 15 years.¹²

In its memorandum, the MoD said:

The Government has bitter critics among the community of lawyers most engaged in bringing cases against the Ministry of Defence, but it sees no real benefit in speculating publicly on their motives for doing so. No doubt reasons of personal prestige, economic advantage and political commitment will have different weightings among different practitioners at different times.¹³

17. We have found no evidence that adversaries of the UK are deliberately misusing UK and international law by bringing cases under human rights law to undermine military operations. However, we are concerned about the forced use of civilians as shields by insurgents strategically exploiting the restraint shown by UK and other Forces mindful of the need for humanitarian respect for civilians and of their legal obligations.

10 Ev 60–61

11 Ev 96

12 *Ibid*

13 Ev 2

2 Growing legal challenges—the problem

The origins of the legal difficulties facing the MoD and the Armed Forces

19. The MoD faces unprecedented challenges in the application of the law to the conduct of military operations. These challenges have, in part, arisen because of the conflict between International Humanitarian Law (IHL) and Human Rights Law (HRL); the nature of recent conflicts; and the increasing practice of conducting military operations in coalition with other states. In its memorandum, the MoD reported that recent legal developments were of increasing concern to the Government.¹⁴ However, it said that some of the legal scrutiny had been constructive:

[..] it is undoubtedly true that the actions of the armed forces have been subjected to unprecedented levels of legal scrutiny in recent years, particularly as a result of military operations in Northern Ireland, Iraq, and Afghanistan. Some of this scrutiny has been necessary and beneficial, [...].¹⁵

20. The MoD reported that until recently the legal position on deployments had been broadly understood and enforced:

Until the past ten years the legal protections and obligations applying to the Armed Forces when deployed abroad on operations were thought to be well understood. They derived from common law, statute law, service law, and from international law, EU Law, the European Convention on Human Rights, but, in particular, as to events occurring as part of operations, the branch of international law that comprises International Humanitarian Law, and the obligations created by the Geneva Conventions.¹⁶

Conflict between International Humanitarian Law and human rights law

21. IHL was developed to regulate the conduct of parties to an armed conflict. It is based on a number of treaties, in particular the Geneva Conventions of 1949 and their Additional Protocols and a series of other conventions and protocols covering specific aspects of the law of armed conflict. The International Committee of the Red Cross (ICRC) told us that current IHL had withstood the test of time as a realistic body of law that finds a balance between military necessity and humanity.¹⁷ Michael Meyer, head of international law at the British Red Cross, explained the difference between IHL and human rights law:

IHL and international human rights law, while generally complementary, are two distinct bodies of law. [...] IHL seeks to establish a balance between the war-fighting objectives of the adversaries and the requirements of humanity. In contrast, human rights law seeks to protect persons from abusive power by governments, the latter to

14 Ev 1

15 Ev 2

16 Ev 1

17 Ev 14

be curbed through the assertion of individual rights. Consequently, whereas IHL aims to protect, so far as possible, certain categories of persons affected by armed conflict, and to limit (but not to eliminate) the methods and means of warring parties, human rights law sets out inherent entitlements belonging to all individuals.¹⁸

22. Professor Garraway, University of Essex and formerly of the Army Legal Services, identified the problem of the growing overlap between IHL and HRL and said that a series of judgments by the International Court of Justice and the European Court of Human Rights had highlighted that the relationship between the two bodies of international law was not straightforward.¹⁹ He further said:

As ‘war’ and ‘peace’ increasingly morph into a spectrum of violence where, like a rainbow, it is difficult to identify the boundaries between the various levels of violence, there has been a battle for legal supremacy between those from the international humanitarian law end who wish to see the definition of ‘armed conflict’ extended down to as low a level of violence as possible so as to extend the protections given by ‘Geneva law’, dealing with the protection of victims of war, as widely as possible, and those from the human rights perspective who insist that human rights is the foundational law, the *lex generalis*, and that international humanitarian law, as the *lex specialis*, must be secondary. With each of these bodies of law claiming priority, what happens when they disagree?²⁰

23. Others have been concerned about the use of the law in conflict situations. In February 2013, the Supreme Court considered three cases arising from the deaths and serious injury of servicemen serving in Iraq (*Smith and others v the Ministry of Defence*, *Ellis v the MoD* and *Allbutt and others v the MoD*—hereafter referred to as the Smith case).²¹ In June 2013, the Supreme Court ruled that British servicemen deployed overseas could fall within UK jurisdiction for the purposes of the European Convention on Human Rights (ECHR) and that a separate negligence claim should not be struck out on the ground of combat immunity or on the ground that it would not be fair, just or reasonable to extend the MoD’s duty of care to those cases. The effect of the Court’s judgment is that all three sets of claims may proceed to trial. These cases are considered further in paragraphs 81 to 86 in Part 3 of the Report below. Lord Mance in a minority opinion on these cases said that the majority judgment of the Court was:

[...] likely to lead to the judicialisation of war, in sharp contrast with Starke J’s dictum in *Shaw Savill* (1940) 66CLR 344 that “war cannot be controlled or conducted by judicial tribunals”. [...] there is no precedent for claims to impose civil liability for damages on states whose armed forces are killed or injured in armed combat as a result of alleged failures of decision-making either in the course, or in procuring equipment or providing training for, such combat. All the claims made in these

18 Ev 56

19 Ev 10

20 *Ibid*

21 [2013] UKSC 41

appeals fall in my view within one or other of these areas where common law should not tread.²²

24. Martin Hemming said that, had the above statement been made by a Minister or a senior military commander, it would have been characterised as alarmist but, as it came from a Justice of the Supreme Court, consideration should be given to the necessary steps that might ameliorate the operational consequences of the judicialisation of war.²³

Nature of conflicts

25. The UK Armed Forces have been involved in a range of operations overseas, from combat to non-combat military operations including intense armed conflict at one end of the spectrum through peace enforcement, peace support, peacekeeping, humanitarian and post-conflict stabilisation operations at the other end. Operations often move from one type of mission to another because of the changing nature of the demands. The great majority of armed conflicts have not been international wars between well organised industrial states.²⁴ Many recent conflicts such as Iraq and Afghanistan are defined as non-international armed conflicts as they take place in one nation. The range of conflicts raises the question of which body of law is applicable to each situation. Professor Roberts said:

Many of these conflicts are non-international in character, so it is not self-evident that all the provisions of the laws of war are applicable to them. Outside forces, including those of the UK, may be involved in such conflicts in a variety of roles—as part of a UN or a regional peacekeeping force, as support for the government of the country, or to stop attacks on civilians. The number of actual roles is huge, and each one raises separate questions about what law is applicable and how it is to be applied in practice.²⁵

It is generally recognised that the IHL is an evolving body of law which needs to respond to the changing nature of conflict. The 31st International Conference of the Red Cross and Red Crescent in 2011 requested that the ICRC focus on two priority areas to strengthen IHL: improving compliance with the Law; and the protection of persons detained in non-international armed conflict.²⁶ We discuss legal protections for people detained in non-international armed conflict further in paragraphs 72 to 75.

Working in coalition

26. It is unlikely that the UK will conduct future operations alone; it is more likely to do so in coalition with other states or NATO. General Parker said that “in the timeframe directly affected by the 2015 Strategic Defence and Security Review, the priority will be to consider how to contribute to complex, multinational, multi-agency security operations”.²⁷

22 [2013] UKSC 41 paragraph 150

23 Ev 96

24 Ev 59

25 *Ibid*

26 Ev 15

27 Ev 30

Operating in coalition complicates the application of any legal framework. Participants at our roundtable discussion said that multi-national and national decision-makers often have different legal perspectives and indeed legal systems. There are also multiple chains of command which can lead to different interpretations of the same law. These differences are difficult to reconcile in the short term or sometimes at all.²⁸

27. An additional complication applies to UK Armed Forces personnel embedded in the command chain of another state's armed forces. Martin Hemming said that such personnel were still covered by UK law:

[...] They remain subject to English criminal law and UK military justice under the Armed Forces Act 2006. And the UK's state responsibility under international law for the actions of members of its Armed Forces in such circumstances remains.²⁹

28. Detention has been a particularly problematic area relating to the harmonisation of the particular practices of coalition partners. In Afghanistan, there were differing views amongst the coalition as to the nature of the hostilities. These differences made it difficult to come up with a coherent common policy on detention, and on the transfer of detainees, to be applied to all states involved in operations in Afghanistan.³⁰ Professor Roberts pointed to the problems in Afghanistan with handing over detainees to different jurisdictions with different standards regarding detainee treatment. He further said:

A central preoccupation of the laws of war (as also of human rights law) has always been to develop agreed standards regarding the treatment of individuals in conditions of detention: it is remarkable that there has been some confusion on this issue in recent years.³¹

29. The increasing number of legal actions being brought against the MoD about the conduct of military operations by the Armed Forces raises a range of questions about the legal context of operations. The UK Government needs to take account of the tension between International Humanitarian Law and human rights law with reference to the nature of conflicts. The Government also needs to consider the implications of what is expected to be the continuing practice of conducting operations in coalition with international partners when determining the legal framework of operations.

Why the MoD needs to address the challenges

Impact on the operation of the Armed Forces

On individual members of the Armed Forces

30. Armed Forces personnel need to be confident that their day-to-day decisions in operational conditions are lawful and that they are not vulnerable to personal legal

28 Ev 102

29 Ev 96

30 Ev 101

31 Ev 60

challenge. Dr Samuel told us that there is no personal civil liability for individual battlefield commanders: they may only have personal criminal liability under international humanitarian and criminal law, for example, for ordering or allowing the commission of war crimes.³²

31. Martin Hemming also pointed out that the European Convention of Human Rights (ECHR) had little impact on the personal civil liability of personnel:

[...] The standards of conduct mandated by the criminal law are not affected by the application or non-application of the ECHR. If they comply with the criminal and disciplinary law that applies to them at all times, Service personnel can have high confidence in the legal security of their personal positions. They cannot be held personally liable in proceedings based on the HRA [Human Rights Act]. In so far as the HRA created new legal remedies, they concern the liability of the UK Government (not individuals) for alleged breaches by UK public authorities of the UK's international law obligations under the ECHR. This important point is not always made clear. No claim based on the HRA has ever been brought against any individual member of HM Forces because it is not legally possible to do so.³³

32. However, Martin Hemming stressed the importance for Service personnel of clarity about their legal position, and was concerned that since 2000 the situation had become less clear:

Service personnel need and deserve to have a high degree of confidence that their day-to-day decisions in operational conditions are lawful, and that their own personal position is legally secure. If, after proper training, they feel unable to take such decisions without taking legal advice, then they may justifiably feel that something is wrong with the law. Since about 2000, legal proceedings involving the MOD—including inquests, civil litigation founded on common law claims as well as the Human Rights Act 1998, and the developing jurisprudence of the European Court of Human Rights on the extraterritorial application of the European Convention on Human Rights—are widely perceived as having muddled rather than clarified the legal waters, and to have raised uncertainty about the true legal position in a number of important areas.³⁴

He also argued misconceptions can take root and acquire the status of established truth:

And it is what individuals actually believe, whether or not it is well founded, that informs the way they act and feel, and influences their willingness to assume responsibility and risk.³⁵

33. Air Commodore Boothby reported that “there can be no doubt that law has been propelled into consciousness of military commanders in a way unthinkable two or three

32 Ev 83

33 Ev 95

34 Ev 93

35 Ev 93–94

decades ago and that military lawyers deploy with commanders to advise in the application of the detailed rules”.³⁶

34. Professor Roberts said that the concerns of Armed Forces personnel on operations about the rules under which they operate should be taken very seriously. He believed that the criticisms related more to the impact of human rights law rather than IHL:

When those on operations express concerns, grumbles or complaints (whether at the time or afterwards) about the rules under which they have to operate, these concerns should be taken very seriously and there needs to be a response. Of course it is always necessary to be clear about the nature of the issue at stake. Sometimes the target of criticisms turns out to be, not an international legal requirement, but particular policy decisions taken in London. In those cases where criticisms are clearly about the law’s effect on the operations of armed forces, my impression is that these criticisms relate more to the impact of human rights law rather than to the law of armed conflict. Although these two bodies of law overlap in a number of ways, it is important that they be kept conceptually distinct. The conclusions about where we stand in relation to them, and what action may need to be taken, may be different in each case.³⁷

35. The process of the law, and the way the MoD has supported Armed Forces personnel, has added to concerns about the legal framework itself. At the roundtable, it was pointed out:

The succession of cases taken to the European Court of Human Rights in relation to military justice procedures provided something of a turning point in perceptions. In order to avoid any allegation of ‘command influence’, the military hierarchy were advised to distance themselves from criminal cases, leaving individuals accused of crimes carried out in operational conditions feeling unsupported by their military ‘family’. So too, whilst it was recognised that any judicial scrutiny of a military operation or incident would involve senior officers testifying in court, this has now evolved to the point where junior officers, non-commissioned officers and soldiers are increasingly finding themselves giving evidence, often in complex cases.³⁸

36. Service personnel have, indeed, reacted to the increased level of scrutiny, in particular the difficulty of appearing as witnesses in inquiries or coroners’ inquests on Service personnel. General Parker said that he had detected a growing sense that the ‘system’ was not able to provide as much support to its people who were under investigation for fear of prejudicing a fair hearing. He further said:

Critically this can leave the individual and his/her family feeling isolated and abandoned by the institutional family we have schooled them to rely on.

36 Ev 6

37 Ev 59

38 Ev 101

I have also observed that the growth of non-criminal hearings, such as boards of inquiry, coroner's hearings and civil cases by overseas plaintiff, have caused actual and perceived reputational damage to those who have to appear.³⁹

Martin Hemming reported that the operational judgments of individuals taken in testing circumstances and in good faith, might well be publicly criticised.

37. There is a concern amongst Armed Forces personnel that they and their legitimate actions are frequently exposed to extensive legal scrutiny in coroners' courts, public inquiries and cases brought under human rights law. The MoD should identify the extent of and concern about legal developments amongst Armed Forces personnel at all levels to identify the impact on their operational effectiveness and, in particular, the willingness of personnel to accept responsibility and take necessary risks. We recommend that, in order to identify the extent of the concern, the MoD ask for the Army Personnel Research Establishment to include a section on the subject in its next survey. When the MoD has identified the concerns, it should take steps to provide Armed Forces personnel with appropriate assurances and adequate training to illustrate where personnel are not personally liable. It should also offer its support when Armed Forces personnel come before the courts to testify in coroners and other courts where the MoD is being challenged. The MoD should also inform Armed Forces personnel of what it is doing to tackle the difficult legal challenges it faces.

On the Armed Forces and the MoD

38. We also received evidence on the impact that the application of human rights law and other legal developments could have on military operations more generally. The MoD told us:

During the last decade the increasing importance of international human rights law, arguably to the detriment of IHL, and the expansive interpretations being given to provisions of the ECHR by both our domestic courts and by Strasbourg has not, in the Government's view, been conducive to clarity.⁴⁰

The Government is clearly concerned that the results of some of the recent cases where combat immunity has been challenged could have "serious debilitating effects on the decision-making of commanders on the ground which could in the long term seriously impair this country's military effectiveness".⁴¹

39. Professor Roberts stated that some aspects of the application of human rights law to the operations of the UK Armed Forces had been positive but there were concerns regarding its application in situations of armed conflicts and occupations that needed to be addressed. In particular, the impact of a European Court of Human Rights case (*Al-Jedda*) in July 2011 on the right to detain for imperative security reasons posed serious problems.⁴²

39 Ev 31

40 Ev1

41 Ev 3

42 Ev 58; the *Al Jedda* case is discussed in more detail at paragraphs 59 to 63

He also said that “greater clarity about the respective roles of the law of armed conflict and human rights law is urgently needed, and in London every bit as much as in Strasbourg”.⁴³

40. There are differing views on the impact of the application of HRL to military operations. Professor Haines, Professor of Public International Law at the University of Greenwich and formerly in the Royal Navy, said that he did not believe that HRL undermined the effectiveness of military operations by the imposition of excessive restraints on the use of lethal force. HRL does not contain an absolute right to life but asserts the right of all not to be deprived of their life in an arbitrary fashion.⁴⁴

41. General Shaw, however, believed that “human rights legislation is fundamentally incompatible with the soldier’s unlimited contract on which soldiering depends”. He added that the current incoherence is so stark as to question military viability altogether.⁴⁵

42. As set out in paragraphs 52 to 58 and 81 to 86 below, there are a number of current cases going through the British courts which may lead to further developments in the law and more lengthy, expensive and time consuming cases. Martin Hemming told us:

Time will tell if the Supreme Court majority’s strong direction [*Smith* case] to courts concerning “the very wide measure of discretion which must be accorded to those who were responsible on the ground for the planning and conduct of the operations during which these soldiers lost their lives, and also to the way issues as to procurement too should be approached” is heeded, both in those particular cases, and any that follow, as they surely will. However, the point at which that very wide measure of discretion will come to be accorded is likely only to be reached at the end of a litigation process that is lengthy, expensive, and time consuming, and of a trial in the course of which the operational judgments of individuals taken in testing circumstances, and in good faith, will have been forensically deconstructed, and very possibly publicly criticized.⁴⁶

43. There are clearly a number of legal challenges facing the MoD and the Armed Forces as a result of recent legal cases and developments. Views as to the extent of these challenges differ but no one doubts that they exist. These challenges should be addressed head on and in a strategic manner rather than on a case by case basis.

The time is right

44. There has been a build up of cases challenging military operations over the last few years mainly involving HRL. Many of these cases have arisen out of the conflicts in Iraq and Afghanistan. Professor Roberts believed that it was absolutely right for our Committee to embark on a consideration of what changes might be necessary to the current legal framework:

43 Ev 61

44 Ev 90

45 Ev 93

46 Ev 96–97

In certain recent or ongoing armed conflicts in which the UK has been involved, including those in Afghanistan and Iraq, there has been considerable legal fall-out in the form of official inquiries, cases involving both UK and international courts, and coroner's court procedures. In these circumstances it is right that the Defence Committee has embarked on this consideration of 'what changes may be necessary to the current MoD legal framework and processes to accommodate the particular position of UK Armed Forces at war and when deployed in conflict situations or in peacekeeping and the changing tactical forms of future conflicts.' Armed conflicts have often had the effect of providing a test of the adequacy or otherwise of existing legal norms as well as the adequacy or otherwise of the performance of armed forces in implementing them. Recent conflicts are no exception. This Inquiry is a means of evaluating such tests.⁴⁷

45. In its memorandum, the MoD said that the Government was increasingly concerned about the recent legal developments and the unprecedented levels of legal scrutiny in recent years. It also viewed our inquiry as a timely contribution to the debate.⁴⁸ General Shaw was of the view that the UK was sleepwalking into a situation where soldiers were asked to conduct warlike activity under civilian law.⁴⁹ Interest in the subject is high as illustrated by the House of Lords debate (the Armed Forces and the Legal Challenge) on 7 November 2013.

46. In the light of the many recent cases challenging aspects of military operations, and as part of the lessons learned from operations in Iraq and Afghanistan, we believe that the time is right for the Government to reassess the current legal framework for military operations and to develop its response to the many legal challenges in a more strategic way. Recognising the changing nature of conflicts, legality, ethics and the importance of the media, the resulting questions should be considered as part of the next Strategic Defence and Security Review.

47 Ev 59

48 Ev 1–3

49 Ev 93

3 Human rights law and International Humanitarian Law

Human Rights Law and the European Convention on Human Rights

47. Current IHL has been the basis of the protection of both civilians and combatants since 1947 but, in more recent conflicts, tension between IHL and HRL as to the primary source of legal authority and responsibility has emerged. More recently there have been a number of judgments concerning the application of the European Convention on Human Rights (ECHR) to:

- foreign nationals killed or detained by UK Armed Forces personnel deployed on operations outside the UK;
- UK Armed Forces killed while on military operations.

48. The MoD is particularly concerned with the aspects of human rights law relating to extraterritorial application and the burdens imposed by procedural obligations:

The two principal areas of uncertainty related to the ECHR in the field of military operations have probably been the extent of the Convention's effect extraterritorially and the extent of the burdens imposed by the procedural obligation derived from the right to life and the prohibition on torture (articles 2 and 3).⁵⁰

The MoD further told us that it was concerned about the possibility of a retrospective application of these obligations to events in much earlier conflicts such as the Malayan emergency over 60 years ago and about the number of cases it might face.⁵¹

49. Article 1 of the ECHR requires parties to the Convention to “secure within their jurisdiction the rights and freedoms” defined in the ECHR. This means that the question of appropriate jurisdiction and the extent to which the ECHR applies outside the UK (extraterritorially) is of increasing importance. The traditional understanding of extraterritorial application⁵² held that the notion of jurisdiction was “essentially territorial” and “only in exceptional circumstances” could acts outside a state's own territory constitute “an exercise of jurisdiction” within the meaning of Article 1.⁵³ More recent cases, in particular *Al-Skeini*, have changed this position (see paragraphs 52 to 56 below).

50. Professor Roberts said that human rights law and the relevant institutions are here to stay and, in some respects, their role had been positive and should not be rejected but he also recognised that there were some issues which needed to be addressed:

To criticise the role of all law on the grounds that it hampers military operations would be to misunderstand the long-standing and important role of the law of

50 Ev 1

51 Ev 2

52 Set out by the Grand Chamber of the European Court of European Rights in *Bankovic v Belgium* [2001] II BHRC 435

53 *Bankovic v Belgium* [2001] II BHRC 435, paragraph 67

armed conflict in this area. Even a more limited rejection of any and all application of human rights law in armed conflicts and occupations overseas would be problematic: it would deny aggrieved parties a mechanism of redress, and would invite extensive international criticism. There are, however, issues, particularly in relation to the application of human rights law in situations of armed conflict and occupation, that need to be addressed.⁵⁴

The law as it relates to insurgents/combatants/civilians

51. The MoD told us that “it is an essential element of the Government’s position that International Humanitarian Law together with domestic law provides a proper framework for the protection and legitimate rights of combatants and non-combatants alike”.⁵⁵

Deaths in Iraq—Al Skeini

52. In 2004, the families of six Iraqis who died in Basra in 2003 brought a legal action against the MoD, claiming that the British authorities had failed to conduct adequate investigations into the deaths of their relatives (*Al Skeini* case). Four of the deceased had been shot by British troops out on patrol; one was a bystander who had been shot and killed in the course of an exchange of fire between British troops and Iraqi gunman; and the sixth, Baha Mousa, died at a military base while in the custody of British troops.⁵⁶

53. In March 2004, the Secretary of State for Defence decided not to order an independent inquiry into the deaths. The families then applied for a judicial review of this decision. The High Court found that the death of Baha Mousa came within the scope of the ECHR and the Human Rights Act and that there had been a breach of the obligation arising under Articles 2 and 3 of the Convention to carry out a proper investigation. However, the High Court ruled that the complaints of the other five claimants did not fall within the UK’s jurisdiction. This decision was upheld by the Court of Appeal in 2005 and the House of Lords in 2007.⁵⁷ However, the Grand Chamber of the European Court of Human Rights took a different view and ruled that, in Iraq, the UK had assumed the exercise of some of the powers normally to be exercised by a sovereign government, in particular responsibility for the maintenance of security in south-east Iraq.⁵⁸ The Court also held that the UK had failed to carry out an adequate investigation under Article 2 into the deaths of the Iraqis with the exception of Baha Mousa which was by then the subject of a public inquiry.⁵⁹

54. Further legal claims have been brought against the Government regarding the form that inquiries take into deaths and allegations of abuse. In 2010, the Government established an Iraq Historic Allegations Team (IHAT) to investigate allegations of abuse of Iraqi citizens by British service personnel. However, the High Court decided that where deaths had occurred, IHAT was not sufficient and that more inquest-style inquiries should

54 Ev 61

55 Ev 1–2

56 House of Lords library note: the Armed Forces and Legal Challenge 1 November 2013, LLN 2013/03

57 [2005] EWCA Civ 1609 and [2007] UKHL 26,

58 *Al Skeini and others v the UK* [2011] 55721/07

59 House of Lords library note: the Armed Forces and Legal Challenge 1 November 2013, LLN 2013/03.

be conducted.⁶⁰ In October 2013, the Divisional Court ruled that compelling service personnel to give evidence would be the only effective way of determining what happened as soldiers might be reluctant to give evidence at all.⁶¹

55. The MoD told us that there was still uncertainty as to the extent of the ECHR requirement for scrutiny of the circumstances in which people were killed. The MoD is making arrangements for the inquisitorial inquiries into deaths akin to Coroners' inquests to take place once IHAT investigations and any resulting prosecutions have been concluded.⁶²

56. The death of Baha Mousa while in UK detention in Iraq in 2003 was a horrific incident in which some members of the UK Armed Forces behaved illegally and inhumanely in their treatment of an individual, resulting in his death. The public inquiry into Baha Mousa's death reported in September 2011. The Report said that "During his detention, Baha Mousa was subjected to violent and cowardly abuse and assaults by British servicemen whose job it was to guard him and treat him humanely". Nine other Iraqis, detained with him were also subjected to significant abuse. The Report detailed 73 recommendations to the MoD.⁶³ Professor Roberts commended the Public Inquiry:

The Baha Mousa Public Inquiry Report (September 2011), is excellent both as an analysis of the facts and as an exposition of the legal situation surrounding them. Part XVII made 73 recommendations to the MoD. The MoD has made certain responses to the report's recommendations, including initiating certain much-needed improvements to training in detainee-related matters.⁶⁴

57. The Al Sweady Inquiry is a public inquiry, announced in November 2009, into allegations that Iraqi nationals were detained after a firefight with British soldiers in Iraq in May 2004 and unlawfully killed at a British camp, and that others had been mistreated at that camp and later at a detention facility. On 20 March 2014, the lawyers acting for the Iraqi nationals withdrew the cases of unlawful deaths of five Iraqi. The allegations of the mistreatments of Iraqi civilians in British custody remain. The website for Al Sweady Inquiry states:

It is for the Chairman to reach all conclusions and he will detail findings of fact in his report. In so doing he will draw on all the evidence he has seen and heard, including the statement made today by the legal representatives for the Iraqi Core Participants.

The Inquiry continues and will hear closing submissions from Core Participants on 16 April 2014. Thereafter, the Chairman will write his report.⁶⁵

58. The burden on the MoD of the number and costs of the necessary investigations and legal inquiries is likely to be great. It is estimated that as many as 150 to 160 deaths of Iraqi

60 *Ibid*

61 [2013] EWHC 2941 (Admin)

62 Ev 2

63 The Report of the Baha Mousa Inquiry, HC 1452, September 2011

64 Ev 59–60

65 <http://www.alsweadyinquiry.org/>

citizens may need to be investigated with a further 700 to 800 allegations of mistreatment. The Baha Mousa Inquiry cost £25 million and the Al Sweady Inquiry⁶⁶ has cost more than £22.2 million to 28 February 2014. Other inquiries launched before the High Court ruling on the need for inquest-style inquiries are costing some £7.5 million a year.⁶⁷

Detention in Iraq—Al Jedda

59. In 2005, Halal Abdul Razzaq Ali Al-Jedda, who had been arrested on suspicion of being a member of a terrorist group involved in weapons-smuggling and then detained in a British detention centre in Basra, took legal action to challenge his indefinite detention without trial. Broadly, British courts agreed that the UK was authorised by UN Security Council Resolution to exercise powers of detention where it was necessary for reasons of security in Iraq. The Grand Chamber of the European Court of Human Rights, however, took a different view, holding that because the Resolutions authorised the UK to detain prisoners, but did not oblige it to do so, the case fell within the UK's jurisdiction and that the UK had violated Article 5 of the ECHR.⁶⁸

60. Professor Roberts thought that there had been significant weaknesses in the UK's performance regarding implementation of the laws of armed conflict:

Perhaps the most important weaknesses have been the cases of maltreatment of detainees in Iraq following the 2003 invasion.⁶⁹

The death of Baha Mousa in British custody was a shocking example of this.

61. Professor Roberts was, however, concerned with the European Court of Human Rights judgments and the legal approach taken by the UK in two cases, *Al-Skeini and Al-Jedda*:

The record of the European Court of Human Rights with respect to UK and other military actions is far from being problem-free. A particular issue in which its record has been widely questioned is the relation between human rights law and the law of armed conflict. Naturally the court is more familiar with human rights law, and in some cases it has been criticized for apparently giving priority to human rights law, even in the circumstances of international armed conflict—for which, of course, the law of armed conflict is the *lex specialis*. This issue arose in two major judgments against the UK in July 2011, *Al-Skeini* and *Al-Jedda*.⁷⁰

He further said that the second case (*Al Jedda*) was more problematic and should have been legally argued in a different way by the UK:

In the second case, the Court decided that states parties to the European Convention on Human Rights may not intern civilians unless there is a binding and explicit UN Security Council mandate, or a derogation to Article 5 of the European Convention

66 *Ibid*

67 House of Lords library note: the Armed Forces and Legal Challenge 1 November 2013, LLN 2013/03

68 *Ibid*

69 Ev 59–60

70 Ev 61

has been entered. This outcome may have been the result of a flawed argument by government lawyers, who had apparently chosen not to raise provisions of the law of armed conflict as a basis for detention, but instead to rely on the authority of a UN Security Council resolution. The legally peculiar judgment simply contradicted clear provisions in the law of armed conflict (especially 1949 Geneva Convention IV) whereby non-criminal detention for imperative security reasons is permitted. The Court's conclusion could even be read to apply equally to the internment of prisoners of war. Legal experts of the International Committee of the Red Cross have been justifiably concerned about the implications of this judgment.⁷¹

62. Martin Hemming was also concerned by the results of the *Al-Jedda* case:

One of the most difficult aspects of recent ECtHR [European Court of Human Rights] jurisprudence has been the view taken on security detention in the *Al Jeddah* case—in effect, that a UN Security Council Resolution that authorizes detention for imperative reasons of security is insufficient to override, in accordance with Article 103 of the UN Charter, Article 5 ECHR obligations such as would arise in relation to a detention within the UK. Only an explicit Security Council requirement or obligation to detain could do that, or a derogation under Article 15 of the ECHR.⁷²

63. On the *Al-Jedda* case, the MoD told us that the Government had been forced to pay large sums of money to persons who were reasonably suspected of attacking and conspiring against UK forces and whose detention was believed at the time to be entirely lawful:

An important example is the European Court of Human Rights' decision in the case of *Al-Jedda*. In this case the Court rejected the submissions of the UK Government that the Convention did not apply to military operations in Iraq and went on to rule that the detention of the claimant, a suspected insurgent, was contrary to their human rights although detention operations had been foreseen at the time the United Nations Security Council Resolutions authorised the military operations.⁷³

Afghanistan

64. The MoD told us that because the circumstances of the military operations in Afghanistan differed in important and legally significant ways from those of the Iraq campaign, the Convention (ECHR) did not apply to the operations of UK Forces in Afghanistan. The primary reason is that such operations are conducted under the auspices of the International Security Assistance Force, NATO and cases were unlikely to fall under UK jurisdiction for the purposes of the ECHR. The MoD did point out though that these matters will be tested in a number of forthcoming cases.⁷⁴

65. The number of legal challenges facing the MoD in respect of human rights law is large, uncertain and growing. We recognise that there is nothing the MoD can do to

⁷¹ *Ibid*

⁷² Ev 98

⁷³ Ev 1

⁷⁴ Ev 1–2

prevent these existing cases but we recommend it should fight each of them vigorously. We will cover possible future arrangements including legislation and procedural changes later in this Report. The MoD should inform us of the size and costs of the legal challenges it is facing in regard to the challenges from people in Iraq and Afghanistan on human rights grounds. It should also set out the arrangements it has introduced for carrying out the required inquiries akin to Coroners' inquests on those people who died in Iraq as a result of the actions of the UK Armed Forces.

66. The MoD should identify the lessons from the legal issues arising in Iraq and Afghanistan and ensure that in all future operational deployments, the Armed Forces are clear about the legal position of the deployment and that all measures have been taken to ensure that they will not be open to legal challenge.

67. Baha Mousa's treatment and subsequent death in detention was an horrific example of a few Armed Forces personnel behaving inhumanely and illegally. It is obviously right in such cases that individuals and the Armed Forces should feel the weight of the law. In its response, the MoD should detail how it is addressing the recommendations from the Baha Mousa Inquiry and the progress made to date in the implementation of these recommendations.

Use of legal aid and judicial review

68. On legal aid, the MoD told us that the use of legal aid by people with little personal stake in the matter caused the Government concern:

[...] The first is the apparently ready availability of legal aid for actions challenging the conduct of military operations, some of them weak or ill-thought out. Such actions are often brought in the name of overseas nationals or of UK nationals who may have little or no personal stake in the matter. While the government recognises that, within the legislative framework for legal aid, decisions on support to be provided to individuals must be made independently, the Ministry of Defence has been concerned that legal aid has been granted recently for at least two judicial review cases to be taken to appeal after having been roundly rejected at the High Court. It therefore welcomes the steps announced by the Ministry of Justice to reform the rules on access to legal aid, particularly in cases brought by overseas claimants.⁷⁵

69. The MoD also told us that it was concerned by the use of judicial review:

The second aspect is the use of judicial review in cases which might more appropriately have proceeded as personal injury claims. Judicial review is there as a mechanism for the scrutiny of decisions primarily made by or on behalf of Ministers. In many cases of alleged personal injury, particularly those arising from operations in Iraq, however, the claimants' lawyers have proceeded by way of judicial review, alleging inadequate investigation even before the investigation has concluded. Given that neither the Minister nor his officials have taken any decision, this seems an

inappropriate way of proceeding and it is certainly one which leads to the expenditure of far larger amounts on legal fees than would personal injury claims.⁷⁶

70. We await with interest the results of the Government's work on the reform of legal aid. The MoD should inform us how any such reform will impact on the legal challenges it faces. The Government should also tell us of its intentions to limit the use of judicial review in respect of military operations.

Work to improve arrangements for detaining people for security reasons

71. There have been a number of attempts to harmonise the standards with regard to holding detainees. The Copenhagen Process⁷⁷ on Handling Detainees in International Military Operations was launched in October 2007 by the Danish Government and concluded in October 2012. Participants recognised that detention is a necessary, lawful and legitimate means of achieving the objectives of international military operations. It did not seek to create new legal obligations under international law but to develop principles to guide the implementation of the existing obligations with respect to detention in international military operations; by facilitating a common approach the Copenhagen Process should theoretically contribute to ensuring the humane treatment of detainees and the effectiveness of international military operations.⁷⁸ On the outcome of the Copenhagen Process, Professor Roberts said:

The Copenhagen Process [...] has been a useful attempt to facilitate a common approach. As paragraph II of this document states, 'it should contribute to ensuring the humane treatment of detainees and the effectiveness of international military operations'; paragraph IV notes a still unresolved doctrinal issue when it recognizes 'the challenges of agreeing upon a precise description of the interaction between international human rights law and international humanitarian law.'⁷⁹

72. Professor Roberts referred to other projects which were attempting to secure the full application of the laws of armed conflict. For example, Geneva Call sought the participation of non-state armed groups, placing particular emphasis on specific issues such as certain weapons and child soldiers. He also mentioned a more ambitious project—the work on Harmonising Standards for Armed Conflict led by Sir Daniel Bethlehem, former legal adviser to the FCO. The project has been working on a model declaration that states might make unilaterally to agree to be bound by the provisions of the 1949 Geneva

76 *Ibid*

77 The Copenhagen Process on the Handling of Detainees in International Military Operations involved representatives from Argentina, Australia, Belgium, Canada, China, Denmark, Finland, France, Germany, India, Malaysia, New Zealand, Nigeria, Norway, Pakistan, Russia, South Africa, Sweden, Tanzania, the Netherlands, Turkey, Uganda, the United Kingdom and the United States of America and representatives from the Africa Union, the European Union, the North Atlantic Treaty Organisation, the United Nations and the International Committee of the Red Cross also attended the meetings as observers. <http://um.dk/en/politics-and-diplomacy/copenhagen-process-on-the-handling-of-detainees-in-international-military-operations/>

78 Ev 60 and Copenhagen Process website <http://um.dk/en/politics-and-diplomacy/copenhagen-process-on-the-handling-of-detainees-in-international-military-operations/>

79 Ev 60

Conventions and 1977 Additional Protocol I (albeit with certain reservations) in conflicts of a non-international character.⁸⁰

73. The ICRC is currently examining ways of strengthening the protection of persons deprived of their liberty in non-international armed conflict which is the predominant form of conflict in the world today. It told us:

[...] there is a significant disparity between the robust and detailed provisions applicable to the deprivation of liberty in the context of international armed conflict, and the very basic rules codified for non-international armed conflict. While the Four Geneva Conventions contain over 175 provisions regulating detention in virtually all its aspects in relation to international armed conflicts, there is no comparable regime for non-international armed conflict. The very limited treaty rules applicable to non-international armed conflict cannot adequately respond to the myriad of legal and protection issues that arise in practice. This relative absence of specificity within IHL has led to uncertainty about the source and content of the rules governing detention in non-international armed conflict, and on-going discussion regarding the applicability and adequacy of human rights law, and the precise contours of customary IHL.⁸¹

The ICRC told us it had identified four key areas in which the law was in need of strengthening: conditions of detention; vulnerable categories of detainees; transfer of detainees; and grounds and procedures for internment.⁸²

74. The UK Government should participate in appropriate international work to strengthen International Humanitarian Law and, in particular, should be more actively involved in the ICRC consultations on detention in non-international armed conflict and on strengthening compliance with IHL.

Human rights law, duty of care and members of the Armed Forces

75. The MoD told us that the judicial development of duty of care concepts is “a matter of real and current concern to the Government”. The MoD described changes to the law on whether Service personnel could sue the MoD for death or injury on operations or training:

Historically the Crown could not be sued in its own Courts. When that rule was abolished after the Second World War (by the Crown Proceedings Act 1947) an exception was made by section 10 of that Act for members of the Armed Forces who remained unable to sue the Government for death or personal injury caused by another member of the Armed Forces if the death or injury was certified as pensionable by the Secretary of State. This exception was repealed by the Crown Proceedings (Armed Forces) Act 1987, although by section 2 of the 1987 Act (which is still in force) the effect of section 10 could be revived [...] in case of either (a) any

80 *Ibid*

81 Ev 15

82 *Ibid*

imminent national danger or (b) for the purposes of any warlike operations in any part of the world outside the UK. Since 1987 no revival order has been made.

It also described the doctrine of combat immunity as follows:

Given the virtually universal recognition that members of the Armed Forces on operations are in an inherently dangerous occupation and that the duty of care applicable to a civilian context cannot apply to them in the same way, the **doctrine of combat immunity** was rapidly adapted by the UK Courts to cover the position of UK armed forces on operations where they come under attack or face the threat of attack or violent resistance: the leading case was that of *Mulcahy v Ministry of Defence* (1996) which related to the first Gulf War, which of course took place four years after the 1987 Act came into force.⁸³

76. Coroners' inquests are held on all Armed Forces personnel killed overseas whose bodies are returned to the UK. The introduction of narrative verdicts⁸⁴ in 2004 has meant that Coroners who often have limited military expertise have been able to comment on the circumstances of an individual's death and on operational matters rather than solely reach a judgment as to the cause of the death. This has led to criticisms of the MoD, the Armed Forces and individual Service personnel by coroners about the circumstances of these deaths.⁸⁵

77. The legal cases about deaths in combat in Iraq and the application of the ECHR to UK Armed Forces personnel deployed outside the UK have yet to be fully resolved by the Courts. It is, therefore, not yet possible to determine their likely impact on military operations although the impacts are likely to be significant.

78. Much disquiet has been expressed about the application of human rights law onto the battlefield. In a debate in the House of Lords on the Armed Forces and Legal Challenge, some Members of the House of Lords expressed concern about the increased "jurification of military conflict" and that legal developments were undermining the Armed Forces' ability to operate effectively in conflict situations. Others defended the use of the law. In particular, Lord Hope, Supreme Court judge in the *Smith* case, said that when a claim was brought before the court, a judge had to deal with it and the issues could not be ducked however difficult or uncomfortable they may be.⁸⁶

79. In his evidence, General Parker expressed his concern about the disconnect between the operational environment and the courtroom:

[...] there is a real risk that future legal examination of an individual's action, which takes place in the sterilised environment of a court room, far away from the front line and with the benefit of hindsight, fails to appreciate the requirement to take action under extreme pressure and with no time to spare. The application of UK domestic

83 Ev 3

84 Narrative verdicts allow coroners to comment on the circumstances of an individual's death as well as reach a judgment as to the cause of death.

85 Ev 101

86 House of Lords debate Armed Forces and Legal Challenge 7 November 2013

law to a counter insurgency situation in a place where the culture, geography and value of life may be entirely different to that at home, must be delivered with extreme care.⁸⁷

80. General Shaw took a very strong view on the impact of human rights legislation on military operations:

HR [human rights] legislation is fundamentally incompatible to the soldier's unlimited contract on which soldiering depend. The intrusion of the right to life on to the battlefield will inevitably undermine the military profession and result in far bloodier engagements on the battlefield as a commander can take fewer risks with their own troops who might sue him so resorts to massive violence against the opposition to lessen the risk to his own troops.⁸⁸

June 2013 Supreme Court Judgment

81. Cases (*Smith and others v the MoD*) relating to deaths and serious injury of Service personnel in Iraq were taken to the Supreme Court in early 2013. One of these incidents was as a result of 'friendly fire'. These cases, brought on both human rights and civil liability grounds, are described by the MoD below:

The implications of this year's Supreme Court judgment in the conjoined cases of *Smith and others v MOD*, *Ellis v MOD*, and *Allbutt and others v MOD* are not yet clear. These are all tragic cases of deaths on the field of combat in Iraq: the Government has every sympathy with the claimants but is obliged to defend these claims on important grounds of legal principle. Briefly, the argument of the claimants is that, while these tragic incidents did indeed take place in the course of combat, combat immunity should not apply because they can be traced back to previous decisions about the provision of equipment and training to the soldiers which could—they argue—have protected them more effectively.⁸⁹

82. The MoD is of the view that this argument could be applied to virtually any claim to which the principle of combat immunity has hitherto been understood to apply, and if accepted could have the effect of opening up the conduct of combat to the scrutiny of the courts after the event. It believes that this could have seriously debilitating effects on the decision-making of commanders on the ground which could in the long run seriously impair this country's military effectiveness.⁹⁰

83. The Supreme Court considered the question of whether, and to what extent, Article 2 (the right to life) of the ECHR imposes positive obligations on the Government to prevent the deaths of its own soldiers in active operations against the enemy. On 19 June 2013, the Supreme Court ruled by a majority of four to three not to strike out these claims but to allow them to proceed to trial. The majority said that the court must avoid imposing positive obligations on the state in connection with the planning for and conduct of

87 Ev 30

88 Ev 93

89 Ev 3

90 *Ibid*

military operations in situations of armed conflict which are unrealistic and disproportionate. Policy decisions made at a high level of command and things done on the battlefield would fall outside the scope of Article 2 but finding whether there is room for claims to be brought in the middle ground would require the exercise of judgment in the light of the facts on each case.⁹¹ In his judgment on the *Smith* case, Lord Hope specifically said:

[...] the court must avoid imposing positive obligations on the state in connection with the planning for and conduct of military operations in situations of armed conflict which are unrealistic or disproportionate. But it must give effect to those obligations where it would be reasonable to expect the individual to be afforded the protection of the article. It will be easy to find that allegations are beyond the reach of article 2 if the decisions that were or ought to have been taken about training, procurement or the conduct of operations were at a high of command and closely linked to the exercise of political judgment and issues of policy. So too if they relate to things done or not done when those who might be thought to be responsible for avoiding the risk of death or injury to others were actively engaged in direct contact with the enemy. But finding whether there is room for claims to be brought in the middle ground, so that the wide margin of appreciation must be given to the authorities or to those actively engaged in armed conflict is fully recognised without depriving the article of content, is much more difficult. No hard and fast rules can be laid down. It will require the exercise of judgment. This can only be done in the light of the facts of each case.⁹²

84. The MoD took comfort in aspects of the majority judgment, in particular, that it upheld the continuing existence of the doctrine of combat immunity and that liability of those actually engaged in active combat was specifically excluded.⁹³ The MoD also said:

As Lord Hope said in his speech explaining the majority view, when the cases come to trial “the trial judge will be expected to follow the guidance set out in this judgment as to the very wide measure of discretion which must be accorded to those who were responsible on the ground for the planning and conduct of the operations during which these soldiers lost their lives and also to the way issues as to procurement too should be approached”.⁹⁴

85. Professor White, Professor of Law at University of Nottingham, told us that he did not regard this judgment as a difficult one as Lord Hope expressed the view that the law should not undermine the state’s ability to defend itself:

The law should enter this field with great caution, according to Lord Hope, and the Courts should not risk undermining the ability of a state to defend itself or risk democracy itself. Thus, it would require a manifest violation of positive obligations

91 House of Lords library note: the Armed Forces and Legal Challenge 1 November 2013, LLN 2013/03

92 *Smith and others v MoD etc* [2013]UKSC 41, paragraph 76

93 Ev 3

94 *Ibid*

to trigger responsibility of the government—either a serious error by a commander, or a serious failure in planning or procurement.⁹⁵

However, he also recognised the strength of the minority view set out by Lord Mance in the *Smith* case which had warned of the ‘judicialisation of war’.⁹⁶

86. We are concerned about the implications of the Supreme Court judgment in June 2013 in the *Smith* case for the principle of combat immunity. We recognise that the judgment appeared to limit the scope of the cases to the ‘middle ground’ between the policy and the conduct of the armed conflicts. However, we believe that this may still open up decisions, taken in situations of intense armed conflict where commanders are forced to make the best judgments they can, to examination by the Courts.

95 Ev 47

96 Ev 47–48

4 Possible ways forward

87. There are many legal cases still to come to trial, including those allowed by the Supreme Court judgment on the *Smith* case but also following the completion of cases from the investigations currently being conducted by IHAT (see paragraphs 54 to 55 above) and possibly the Al Sweady Inquiry. Until the results of some of these cases are known, the ramifications will remain unclear. The law itself is uncertain and complex and in many ways unclear. Many of those who have submitted written evidence to the inquiry have suggested solutions. Other suggestions were made in the recent report “the Fog of Law: An introduction to the legal erosion of British fighting power” by Lt Colonel Tom Tugendhat and Lt Colonel (US Army) Laura Croft.⁹⁷ These options, which are not mutually exclusive and which should be considered in parallel with the strengthening of IHL, are outlined below.

New legislation

88. Brigadier Paphiti, formerly of the Army Legal Service, said that legislating to define combat immunity was a viable option but that as long as the UK was party to the ECHR, all legislation and decisions of the UK courts would be open to scrutiny by the European Court with its recognised poor understanding of the military context. The legislation would however provide a template for the uniform application of principles by UK courts.⁹⁸

89. The Rt Hon Jack Straw MP said that the Government might need to revisit the Human Rights Act. He said that it was never envisaged that the Act would operate in such a way as to directly affect the activities of UK forces in theatre abroad.⁹⁹ He further said:

Had there been any concerns that the Act would over time lead to a situation where military decisions in theatre were to be subject to it, there would have been a very high level of opposition to its passage, on both sides and in both Houses.¹⁰⁰

He added:

However, I believe that the current responsibilities imposed by the courts upon military commanders, and other personnel in the field, go too far. It cannot be acceptable for commanders to have as it were to look over their shoulders in real time to lawyers when making both tactical and strategic decisions in the field, to the extent that now appears by the current law to be required of them.¹⁰¹

97 The Fog of Law: An introduction to the legal erosion of British Fighting Power, <http://www.policyexchange.org.uk/publications/category/item/the-fog-of-law-an-introduction-to-the-legal-erosion-of-british-fighting-power>

98 Ev 28–29

99 Ev 13

100 *Ibid*

101 *Ibid*

90. In its memorandum, the MoD told us that it was contemplating the introduction of new legislation:

The Ministry of Defence is therefore giving some thought to the possibility of legislation to clarify and bound the law on combat immunity. This could in principle operate either by providing a statutory definition of combat immunity or by setting out the considerations which a court would be expected to take into account when hearing relevant cases. This is not a step which would be embarked upon lightly, and certainly not in the immediate future, but the Department considers it prudent to make plans against the contingency that legal developments could make it necessary for Parliament to make provision for this important matter.¹⁰²

91. In response to a Parliamentary question on the infiltration of a human rights culture into the Armed Forces, the Rt Hon Philip Hammond, Secretary of State for Defence said:

There are issues of encroachment of judicial processes into the operations of the armed forces. A number of cases currently before the courts, or pending, could have a significant impact, and we are watching them closely. We are clear that once we commit our armed forces to combat, they must be able to carry out operations without fear of constant review in the civil courts. If we find that the current cases develop in a way that makes that difficult, we will come back to the House with proposals to remedy the situation.¹⁰³

Crown Proceedings Act

92. The Government could use the powers set out in section 2 of the Crown Proceedings (Armed Forces) Act 1987 to restore section 10 of the Crown Proceedings Act 1947 for warlike operations outside the UK, effectively recreating combat immunity. The MoD told us that no revival order for section 10 had been made since 1987.¹⁰⁴ However, Brigadier Paphiti said that this would have the effect of removing the protection for UK troops from negligence by others when not engaged in conflict:

For example, a soldier who arrives in an operational theatre and is then subjected to physical training in temperatures well outside what he has just experienced in his home base and without any chance to acclimatize, who then dies as a result. There is no combat element to connect the death with any required immunity. Restoring Crown immunity in such cases would protect the incompetent.¹⁰⁵

Dr Morgan, Corpus Christi College, University of Cambridge said that if section 2 was used to restore combat immunity, it should be accompanied by a Government commitment to compensate combat injuries fully on a no-fault basis.¹⁰⁶

102 Ev 4

103 Hansard Defence Oral Answers col 554, 17 March 2014

104 Ev 3

105 Ev 28

106 Ev 31

Derogation

93. Brigadier Paphiti said that the encroachment of the ECHR into the battlespace could not be halted while European Court of Human Rights decisions had pre-eminence, with arrest and detention operations subject to the Court's overarching jurisdiction. He did identify a further way forward short of leaving the Convention—that of a derogation under article 15 of the Convention to exempt claims under article 2 (the right to life) for deaths resulting from lawful acts of war, and article 5 (right to liberty) in respect of security operations. It would confirm the supremacy of IHL during conflict.¹⁰⁷ Dr Sari, lecturer in law, University of Exeter, also suggested that derogation from the Convention would be available and might allow the more liberal rules of the law of armed conflict. However, he pointed out that the effect of such derogations might be limited as the UK would have to prove the circumstances satisfied the condition 'in times of war or other public emergency threatening the life of the nation' and the UK would need to comply with all other relevant international law.¹⁰⁸

Clearly defined UN resolutions

94. In the *Al Jedda* case, the European Court of Human Rights found that a United Nations Security Council Resolution that authorises detention for security reasons is not sufficient to override Article 5 ECHR obligations. Only an explicit Security Council requirement to detain could do that.¹⁰⁹ If the UK and the international community wished to place reliance on an UN resolution to detain combatants, it would be necessary for the United Nations to define clearly its missions, authorities and, in particular, the right and requirement to detain combatants as part of the relevant UN resolution. This may be attractive but may be difficult to achieve given the difficulties of agreeing UN resolutions.

Other options

95. Some of the other measures which would help bring further clarity or certainty suggested to us were:

- Better statements by the UK on its intent especially on detention;
- Seeking to replicate the legal situation as it applied in Afghanistan rather than as it applied in Iraq;
- Reacting to individual cases and defending them to the best of the MoD's ability;
- Letting cases go to their end point and adopting policy based on the results.

96. We are not in a position to determine which of these solutions, if any, would help the Government resolve the sense that the law is adversely impacting on operational effectiveness. However, we are strongly of the opinion that the Government should think of these issues strategically and start to determine long-term solutions now to

¹⁰⁷ Ev 29

¹⁰⁸ Ev 51, Ev 56

¹⁰⁹ Ev 98

enable the Armed Forces to conduct armed conflict certain in the knowledge of which laws apply and how their military judgments are likely to be challenged in the future. We are also aware that some of the areas to be pursued may have reputational risks for the UK, but that this should not allow the Government to duck the difficult issues.

97. The Government should bear in mind that whichever solutions it adopts for the Armed Forces and military operations, there are likely to be implications for FCO, DFID, Stabilisation Unit and Home Office activities in post-conflict stabilisation and peacekeeping operations. The approach taken by the Government and the MoD must be appropriate and applicable to them where relevant.

5 New developments

New forms of conflict

Cyber

98. The ICRC defines cyber warfare as the means and methods of warfare that consist of cyber operations amounting to, or conducted in the context of, an armed conflict, within the meaning of IHL.¹¹⁰ Following cyber operations against Estonia in 2007 and Georgia in 2008, the NATO Cooperative Cyber Defence Centre of Excellence in Tallinn, Estonia, initiated a process to produce a manual addressing the law related to cyber warfare. This manual, which does not have the status of law, was published in 2013. The relevant experts concluded that the notion of a cyber attack made legal sense with an attack being defined as the use of violence against an adversary whether in offence or defence. Violence was defined as something that had violent consequences, that is occasioned death, injury, damage or destruction.¹¹¹

99. Cyber attacks against transportation systems, electricity networks, dams and chemical or nuclear plants clearly have far reaching consequences and could cause many civilian casualties. The ICRC said that given the interconnectivity of cyber space, the attacking party might be incapable of distinguishing between military and civilian computer networks when launching a cyber-attack.¹¹² It also said that these challenges underlined the necessity to be extremely cautious when resorting to cyber-attacks.¹¹³ The ICRC wished to:

[...] underscore the importance that States that would develop or acquire cyber warfare capabilities assess their lawfulness under IHL, as for any new weapons, means or methods of warfare. It is indeed crucial to uphold the rules of IHL, which cyber operations must comply with, in particular the rules of distinction, proportionality and precaution. This is not to deny that there might be a need to develop the law further as technologies evolve or their human cost is better understood.¹¹⁴

100. In September 2013, the Secretary of State for Defence announced that the MoD was developing its cyber capabilities including an ability to launch cyber attacks.¹¹⁵ The ICRC said that it was pleased that it had been able to start a dialogue with the authorities on the legal and humanitarian implications of cyber warfare.¹¹⁶

101. Given the MoD's stated intention to develop a cyber warfare capability, we are pleased to note that the UK Government is talking with ICRC on the legal and

110 Ev 16

111 Ev 9

112 Ev 16

113 *Ibid*

114 *Ibid*

115 MoD press notice 29 September 2013 <https://www.gov.uk/government/news/reserves-head-up-new-cyber-unit>

116 Ev 16

humanitarian implications of cyber warfare. We noted in our recent Report on deterrence¹¹⁷ that difficulty in identifying the perpetrator of a cyber attack brought into question the legality of a response to such an attack. The MoD should inform us of its work in determining the legal framework of possible cyber operations and its plans to incorporate such work into training of personnel and the preparation of appropriate manuals.

New weapons

Remotely Piloted Air Systems

102. We have recently reported on the current and future use of Remotely Piloted Air Systems (RPAS) in our Report¹¹⁸ which covered the legal framework surrounding the use of such air systems.

Automated and autonomous weapons

103. The ICRC told us that it believed that the trend towards decreasing human oversight of weapons systems raised serious legal, ethical and societal concerns. The central challenge is to ensure that automated weapons¹¹⁹ were capable of the level of discrimination required by IHL:

Armed conflicts today see increasing use of automated weapons, and research is ongoing to develop autonomous weapon systems. The trend towards decreasing human oversight of weapon systems raises serious legal, ethical and societal concerns.¹²⁰

104. The ICRC expressed greater concerns about autonomous weapons, urging states to consider the fundamental legal and ethical issues before autonomous weapons were developed or at the latest before they were deployed in armed conflict:

Autonomous weapon systems (lethal autonomous robots) would search for, identify and attack targets, including human beings, using lethal force without any human operator intervening. The ICRC is urging all States to consider the fundamental legal, ethical and societal issues before autonomous weapons are developed and/or deployed in armed conflict, as required by IHL¹²¹

105. As yet there are no weapons which have the ability to seek out potential targets, assess their status and then decide when to engage the target, that is deploy the weapon. Moral and ethical arguments against the development of autonomous weapons have already been made. Professor Haines said that there was a reputable philosophical case to be made that

117 Deterrence in the twenty-first Century, Eleventh Report 2013–14, HC 1066

118 Remote Control: Remotely Piloted Air Systems—current and future UK, Tenth Report 2013–14, HC 772

119 ICRC definition: An automated weapon is one that is able to function in a self-contained and independent manner although it may initially be deployed or directed by a human operator.
<http://www.icrc.org/eng/resources/documents/statement/2013/09-03-autonomous-weapons.htm>

120 Ev 16–17

121 *Ibid*

decisions to kill should always be taken by a moral actor—a soldier or military commander. He also said that Article 36 of Additional Protocol I of the Geneva Conventions required legal checks to be made on developing weapons technology at various stages in its development, so there was a legal requirement to consider legality even at the present stage of development. A key issue to be addressed in the legal assessment of any potential future weapon will be its ability to achieve compliance with the principle of distinction, which demands that only combatants be targeted.¹²²

106. The ICRC recommended that the UK explore the legal implications of current and future automated weapons, and carefully consider the fundamental legal, ethical and societal issues posed by potential development of autonomous weapons systems before they are developed or deployed.¹²³

107. In its submission to our inquiry into the Use of Remotely Piloted Air Systems, the MoD said that there would always be a human being involved in the operation of any weapon system:

But current UK policy is that the operation of weapon systems will always be under human control. No planned offensive systems are to have the capability to prosecute targets without involving a human.¹²⁴

108. The MoD should prepare the legal framework for new forms of weapons or conflict at the start of their development. We welcome the MoD’s assurance that no planned weapons system will be able to attack a target without the involvement of a human being. The MoD should think through the legal and moral consequences of new forms of conflict and developments in new weapons systems. This work should start immediately in parallel with work in progress to develop new capabilities in particular in the cyber field and in autonomous weapons. We seek assurance from the MoD that such consideration has already begun in respect of autonomous weapons and indeed for highly evolved automated weapons.

¹²² Ev 92

¹²³ Ev 19

¹²⁴ Remote Control: Remotely Piloted Air Systems—current and future UK use, Tenth Report 2013–14, HC 772, Ev w2

6 Practical questions for the Armed Forces

109. In the course of our inquiry, we have come across a number of practical questions which flow from the need to introduce greater clarity and certainty to the legal framework. These practical aspects are covered below.

International developments and organisations

110. The UK has a long and good track record of working with international organisations and other states in the development of IHL. Michael Meyer told us that it was important that the UK took proactive steps to reconfirm the primacy, and the continued value and distinct nature of IHL.

While some authors point to the growing convergence of IHL and human rights law, there are clear and significant advantages in maintaining the distinct nature of IHL. Importantly, at a general level, IHL is specially tailored to address the unique circumstances of armed conflict, which cannot be equated with peacetime. The parallel, yet mostly separate, codification of IHL and human rights law to date may be interpreted as evidence of the desire of the international community to regulate armed conflicts, both in terms of relations between parties to the conflict and the protection of individuals, through a distinct body of law. As a major military power with a strong tradition of leadership in IHL, it is important that the UK takes proactive steps to reconfirm the primacy, continued value and distinct nature of IHL.¹²⁵

111. The ICRC stated that:

Where possible, States with greater means, such as the United Kingdom, should strive to provide support to other Common law jurisdictions and military partners in the form of capacity building and technical advice to improve universal implementation of and respect for IHL.¹²⁶

112. We support the ICRC view that the UK should assist other states by providing technical advice and capacity building in International Humanitarian Law. This work should form part of the planned capacity building by the Armed Forces. The UK Government should participate in appropriate international work to strengthen International Humanitarian Law and, in particular, should continue to be actively involved in the ICRC to strengthen IHL. We also support the view that the UK should take proactive steps to reconfirm the primacy, continued value and distinct nature of IHL.

125 Ev 57

126 Ev 18

Training, manuals and the MoD legal service

Training

113. Training is essential to provide Armed Forces personnel with increased clarity, and certainty with regard to the legal framework for military operations. This is true for personnel at all levels but in particular for all operational Commanders. In its written submission, the ICRC recommended enhancing the integration of the IHL governing military operations into doctrine, education, training and equipment and ensuring that this is governed by an effective sanction system.¹²⁷

114. Professor Roberts commented that training on the law of armed conflict needed to be improved and to be integrated within all aspects of training:

There remains the broader question of improving the overall standard of training in all aspects of the law of armed conflict. As a member of the Defence Academy Advisory Board I have been involved in correspondence and discussions with the Joint Services Command and Staff College, Shrivenham (about strengthening the coverage in the Advanced Command and Staff Course); and also with Army Legal Services, Warminster (about the armed forces' training policy in the law of armed conflict). In both cases there is general recognition that there is a need for improvement, and for a clear idea of progression in the level of expertise required at different levels in the armed forces. These discussions are ongoing, and are only a very small part of a larger process of improvements in training in these areas. I should add that it is obviously not enough to convey teaching of the law of armed conflict simply in specific law modules of otherwise wide-ranging courses: awareness of such legal issues needs to be an integral part of all aspects of training.¹²⁸

115. Given the brutal and protracted nature of recent conflicts, the Humanitarian Intervention Centre stated that it was essential that military personnel of all ranks were provided with extensive and high quality training and education on the legal framework:

It is also essential that military personnel of all ranks continue to be provided with extensive and high quality training on the rules of engagement as well as the potential consequences of egregious breaches of those rules, so that individuals are aware of the standards that are expected of them and the consequences of choosing to disregard their responsibilities. The UK forces have a strong tradition of acting in accordance with the Geneva Conventions and IHL and individuals are provided with high quality training and education. It is essential that this continues and is regularly updated to take in account the ever-changing nature of armed combat.¹²⁹

116. The evidence from the roundtable reported that the training given to all personnel on legal matters needed to be dramatically improved, especially on the treatment of detainees.

127 Ev 19

128 Ev 60

129 Ev 77–78

There should be a defined scale along which legal training is given to military personnel of various ranks.¹³⁰

117. The MoD and the Armed Forces should re-examine their legal training for all ranks in the Armed Forces to ensure that it is as up to date as possible and is consistent with the latest cases. It should also clarify and detail where Armed Forces personnel have personal liability and where they do not.

Manuals

118. Some participants at the roundtable reported that the Armed Forces needed to create better legal manuals.¹³¹ Air Commodore Boothby said that the UK Manual of the Law of Armed Conflict should be updated:

We should update and develop the UK Manual on the Law of Armed Conflict, and should then keep the text updated, devoting adequate annual resource for that specific purpose so that we have a firm basis for training in the subject. This will enable us, and other states, to be clear on where we stand on all relevant issues. National clarity will tend to reduce concerns based on uncertainty. The UK Manual is influential of global thinking on these matters and deserves proper maintenance.¹³²

119. Professor Roberts reported that the publication of the US manual on the law of armed conflict had been long delayed:

The relation between human rights law and the law of armed conflict is problematic in the US as well as in Europe. Deeply held positions on the applicability or otherwise of human rights law to US military operations overseas have been one factor contributing to the delay in publication of the long-awaited US four-service manual on the law of armed conflict. This failure has many causes. Although the complexity of the law could be cited as a factor, that very complexity makes an authoritative synthesis of the law all the more necessary. In this case a principal obstacle appears to have been a difference between the State Department and the Pentagon about the relative weight to be given to the *lex specialis* of LOAC as distinct from human rights law.¹³³

120. An understanding of the underpinning doctrine of the Law of Armed Conflict is crucial to the Armed Forces. The consequent manuals are important tools in ensuring that the Armed Forces act within the law. They provide clarity and a measure of certainty. The MoD should update the UK Manual on the Law of Armed Conflict and ensure that it is fully maintained in future.

130 Ev 103

131 *Ibid*

132 Ev 7

133 Ev 61

MoD and Armed Forces legal services

121. Each Service—the Royal Naval Service, the Army and the Royal Air Force—in the Armed Forces has its own legal service. In addition, there is a separate legal branch of civilian lawyers based in the MoD.

122. Legal advice in the complex field of IHL and HRL and in respect of all law relating to armed conflict should be provided by those with specialist knowledge. Air Commodore Boothby said:

Future operations will be undertaken in an even more legally complex environment, so the requirement for specialist understanding in these subjects is if anything increasing.¹³⁴

He said that military legal advisers should continue to deploy with commanders to provide advice at combined operations centres.¹³⁵

123. At the roundtable, some participants suggested that military and civilian lawyers should work more closely together:

Military and civilian lawyers should be encouraged to work as closely and effectively as possible together within the MoD. Each group brings particular expertise to the table and there should be more collaboration, particularly at senior levels.¹³⁶

It also stated that not enough emphasis was placed on building up and maintaining a civilian cadre of legal professionals with expert military knowledge.¹³⁷

124. The MoD should review its arrangements for providing legal advice and guidance to the Armed Forces to ensure it has the best available knowledge, expertise and experience—both legal and military. It should ensure that the civilian and military lawyers work together to best effect; if necessary, it should change the arrangements and structures for the provision of legal advice to the individual Services and to the MoD to ensure this happens.

The public and the media

125. The media has become an increasingly important player in recent conflicts. The speed of communications and the diversity of such communication has meant that the media can be increasingly exploited by adversaries. Professor Roberts reported that there needed to be a robust public response tailored to each case where an adversary claimed there had been attacks on civilians:

In recent decades the capacity of the US and a few allies to wage high-technology warfare has led to a pattern of response in those less developed societies that are the subject of their military attentions. In wars in Kosovo, Iraq, Afghanistan and

134 Ev 7

135 *Ibid*

136 Ev 103

137 *Ibid*

elsewhere, the USA's adversaries, faced with US capacity to hit certain types of military target almost at will and to spare civilian areas and objects, have resorted to actions that violate the obligation to keep military assets and targets out of civilian areas, and especially violate the obligation to keep them away from protected sites such as hospitals and mosques. Any subsequent US attack on such a site may then be portrayed as a war crime. In some cases, too, the USA's adversaries may have simply fabricated US attacks on such sites in order to discredit the US. Such lawfare has increased in importance because of the role of media in contemporary conflicts. Since by nature it involves legal violations, mendacity, and publicity, there needs to be a robust public response tailored to the circumstances of each case.¹³⁸

126. The media is an increasingly important player in armed conflicts. It can and has been exploited by the UK's adversaries and will increasingly be so in the future. The MoD should ensure that it has an effective media strategy in place to deal with accusations of war crimes and violations of International Humanitarian Law.

Conclusions

127. The Armed Forces and the Ministry of Defence (MoD) have faced an unprecedented number of legal cases over the past ten years. This is perhaps not surprising given the nature of the conflicts in which the Armed Forces have been engaged and the growing use of challenges under human rights law in UK courts. As we have made clear, we make no criticism of the families of Armed Forces personnel who have brought cases against the MoD. Families understandably want to know the circumstances surrounding the death or injury of their family member. Much of our evidence has pointed to the adverse impact of the judicial consideration, process and development of the law underpinning these claims on the conduct of military operations. We note that these developments are driven by judicial decisions and we recommend that the Government, not just the MoD, reappraise these matters and address them in a strategic way and, where necessary, introduce legislation in Parliament to provide the necessary legal clarity.

128. International Humanitarian Law (IHL), also called the Law of Armed Conflict (LOAC), was developed to regulate the conduct of parties to an armed conflict. We agree with the International Committee of the Red Cross that IHL has withstood the test of time as a realistic body of law that finds a balance between military necessity and humanity. We also agree with ICRC's view that IHL needs to evolve in respect of non-international armed conflicts, in particular in the protection of detainees. The majority of armed conflicts involving UK Forces have not been wars between international states but what IHL and LOAC defines as non-international armed conflicts such as the operations in Iraq and Afghanistan. The Government should work to ensure that IHL is the body of law regulating the conduct of armed conflicts with primacy over human rights law. It should also continue to participate freely in the development of IHL to protect civilians and to regulate armed conflict of whatever type, in particular when working in coalition.

129. Most of the growing number of cases brought against the MoD have resulted from claims of breaches of the European Convention on Human Rights, many of which have proved to be unfounded. The tension and overlap between the two bodies of law—IHL/LOAC and human rights law (HRL)—have resulted in a lack of certainty and clarity, together with a growing number of cases against the MoD. There are two aspects of the use of human rights law that most concern us. First, on the extraterritorial application of the European Convention on Human Rights to allow claims in the UK courts from foreign nationals. Detainees should be treated with humanity and respect and where this is found not to be the case, the individuals and the MoD should be prosecuted. However, the number of cases and the requirement for full and detailed investigations of every death resulting from an armed conflict is putting a significant burden on the MoD and the Armed Forces, not just in resources spent but in the almost unlimited potential for retrospective claims against them.

130. Secondly, we are concerned about the failure of the previously well understood and accepted principle of combat immunity, most recently evidenced in the Supreme Court majority judgment in June 2013 allowing families and military personnel to bring

negligence cases against the MoD for injury or death. This seems to us to risk the judicialisation of war and to be incompatible with the accepted contract entered into by Service personnel and the nature of soldiering. It also challenges the doctrine of the best application of proportionate response with the unintended consequence that it might lead to far bloodier engagements on the battlefield as commanders may take fewer risks with their own troops and make more use of close air support or remotely actioned weapons, resulting in greater violence against the opposition with potentially greater numbers of civilian casualties. More legal certainty might result in less destructive conflicts.

131. We have not attempted to impute motives for claims against the MoD or tried to describe these developments in terms of the concept of a doctrine of 'lawfare'. Nor have we attempted to provide solutions to this growing challenge. It is for the Government to consider the best way forward in respect of the problems of clashes between IHL and HRL which it agrees exist. However, we have identified some of the options to provide more clarity and certainty with regard to the law which the Government should consider. Unless Government policy as determined by Parliament, military doctrine and legal principles are clarified, then uncertainty for military personnel and claimants will continue to grow. For these reasons, we are convinced that the Government requires a strategic plan to address these issues.

132. We recognise that individual members of the Armed Forces have no personal liability in the cases described above as they are brought against the MoD. However, many personnel have been called to give evidence in court cases, Coroner's inquests and inquiries. The reputational risk to Armed Forces personnel and the fear that they and their legitimate actions are exposed to extensive and retrospective legal scrutiny has led many to question their position serving in the UK Armed Forces. Recently retired senior commanders have told us that this undermines the willingness of personnel to accept responsibility and to take necessary risks with the consequent impact on operational effectiveness. Armed Forces personnel need to have the right training and advice to allow them to conduct armed conflicts legally and ethically. They should also have the confidence to know that they have the support of the Armed Forces when facing legal action whether as a witness or defendant rather than being isolated as they are currently.

133. The next Strategic Defence and Security Review provides the Government with the opportunity to look strategically at the legal framework for future armed conflict and the whole spectrum of military operations including peacekeeping and post-conflict stabilisation. Future military operations will involve Armed Forces personnel, civilian staff from departments such as International Development, the Home Office and the Stabilisation Unit and increasingly the staff of contractors. Much of this examination has to be done by the whole of Government, including the Ministry of Justice. We urge the Government, in concert with the MoD, to begin work now in order to re-establish the clarity of the doctrine, the legal framework including the legal protection of Armed Forces personnel and public legitimacy. We believe that this work needs to be done in support of the next Strategic Defence and Security Review and should recognise the move to contingency operations which are by their nature open ended.

Formal Minutes

Wednesday 26 March 2014

Members present:

Mr James Arbuthnot, in the Chair

Mr Julian Brazier

Mr James Gray

Mr Dai Harvard

Mrs Madeleine Moon

Bob Stewart

Ms Gisela Stuart

Derek Twigg

Draft Report (*UK Armed Forces Personnel and the Legal Framework for Future Operations*), proposed by the Chair, brought up and read.

Ordered, That the draft Report be read a second time, paragraph by paragraph.

Paragraphs 1 to 133 read and agreed to.

Resolved, That the Report be the Twelfth Report of the Committee to the House.

Ordered, That the Chair make the Report to the House.

Ordered, That embargoed copies of the Report be made available, in accordance with the provisions of Standing Order No. 134.

[Adjourned till Tuesday 1 April 2014 at 2.00p.m.]

List of printed written evidence

1	Ministry of Defence	Ev 1
2	Air Commodore (Rtd) Bill Boothby	Ev 4: Ev 7
3	Professor CHB Garraway CBE, Fellow, Human Rights Centre University of Essex	Ev 10
4	Rt Hon Jack Straw MP	Ev 13
5	International Committee of the Red Cross	Ev 14
6	Brigadier (Rtd) Anthony Paphiti	Ev 20
7	General (Rtd) Sir Nick Parker	Ev 29: Ev 31
8	Dr Jonathan Morgan, Director of Studies in Law, Corpus Christie College University of Cambridge	Ev 31
9	Professor Nigel D White, School of Law, University of Nottingham	Ev 44
10	Dr Aurel Sauri, Lecturer in Law, University of Exeter	Ev 51
11	Michael Meyer OBE, Head of International Law, British Red Cross	Ev 56
12	Professor Sir Adam Roberts, Emeritus Professor of International Relations, Balliol College, University of Oxford	Ev 57
13	Human Intervention Centre	Ev 62
14	Dr Katja Samuel, Lecturer, School of Law, University of Reading	Ev 79
15	Steven Haines, Professor of Public International Law, University of Greenwich	Ev 88
16	General (Rtd) Jonathan Shaw	Ev 93
17	Martin Hemming	Ev 93
18	Professor Michael Clarke, Royal United Services Institute (RUSI)	Ev 100

List of Reports from the Committee in Session 2013–14

The reference number of the Government's response to each Report is printed in brackets after the HC printing number.

Session 2013–14

First Report	MoD Supplementary Estimate 2012–13	HC 291 (HC 644)
Second Report	Ministry of Defence Main Estimates 2013–14	HC 517 (HC 670)
Third Report and First Joint Report	Scrutiny of Arms Exports and Arms Control (2013): Scrutiny of the Government's UK Strategic Export Controls Annual Report 2011 published in July 2012, the Government's Quarterly Reports from October 2011 to September 2012, and the Government's policies on arms exports and international arms control issues	HC 205 (Cm 8707)
Fourth Report	The Armed Forces Covenant in Action? Part 3: Educating the Children of Service Personnel	HC 586 (HC 771)
Fifth Report	The Armed Forces Covenant in Action? Part 4: Education of Service Personnel	HC 185 (HC 759)
Sixth Report	The Defence Implications of Possible Scottish Independence	HC 198 (HC 839)
Seventh Report	Towards the Next Defence and Security Review: Part One	HC 197 (HC 1175)
Eighth Report	Ministry of Defence Annual Report and Accounts 2012–13	HC 653
Ninth Report	Future Army 2020	HC 576
Tenth Report	Remote Control: Remotely Piloted Air Systems—current and future UK use	HC 772
Eleventh Report	Deterrence in the twenty-first century	HC 1066

Written evidence

Written evidence from the Ministry of Defence

1. The Ministry of Defence welcomes the Defence Committee's decision to set up an inquiry into the legal framework for future operations by the UK Armed Forces. This is a matter of increasing concern to the Government in the light of recent legal developments and the Committee's views will be a timely contribution to the debate.

2. The Committee has posed three specific topics for examination. There is in practice a good deal of overlap between these questions, but in making its observations the Department will try as far as possible to follow the order in which they are posed.

The legal protections and obligations applying to UK Armed Forces personnel (regular and reservist) when deployed in the UK or abroad in UK-only or coalition operations

3. The position on deployments within the UK is well understood. It is based on the common law, statute (including Service law), EU law (in areas such as sex and race discrimination) and the European Convention on Human Rights (ECHR). Until the past ten years the legal protections and obligations applying to the Armed Forces when deployed abroad on operations were thought to be well understood. They derived from common law, statute law, service law, and from international law (EU Law, and the European Convention on Human Rights, but in particular, as to events occurring as part of operations, the branch of international law that comprises International Humanitarian Law (IHL), and the obligations created by the Geneva Conventions).

4. In the Government's view this provided a satisfactory legal framework for the conduct of military operations, which in effect ensured that members of the Armed Forces were bound to a standard of conduct in many ways stricter than applies to civilians. This is not to claim that these standards were never transgressed: as with any code of rules, there have been violations, some of them very serious. But the important point is that the obligations were broadly understood and enforced. It was also considered that the extent of the rights of members of the Armed Forces, including the protections provided by ECHR, was sufficiently clear.

5. The other aspect to note is that on operations abroad, criminal or service disciplinary jurisdiction remains a national responsibility. This is reflected in the NATO Status of Forces Agreement (SOFA) of 1951 and in the Memoranda of Understanding (MOUs) usually entered into with coalition partners and more importantly with host nation governments. A UK service person would be liable to court martial proceedings conducted by the independent Service Prosecuting Authority in the event of a breach of the criminal law of England and Wales. The police investigation would have been carried out, in normal circumstances, by a UK Service police force.

6. During the last decade the increasing importance of international human rights law, arguably to the detriment of IHL, and the expansive interpretations being given to provisions of the ECHR by both our domestic courts and by Strasbourg has not, in the Government's view, been conducive to clarity. ECHR case law in key areas has developed in directions almost certainly unforeseen by the framers of the Convention as well as by the Governments whose actions have been subject to challenge domestically and in Strasbourg.

7. The two principal areas of uncertainty related to the ECHR in the field of military operations have probably been the extent of the Convention's effect extraterritorially and the extent of the burdens imposed by the procedural obligation derived from the right to life and the prohibition on torture (articles 2 and 3).

Extra-territorial application of the ECHR

8. There has been a gradual extension of the circumstances in which the ECHR has been held to take effect beyond the territorial limits of member states. While there has always been an understanding that in limited circumstances the ECHR could apply extra-territorially, the range of these exceptional circumstances has grown significantly in the last decade as regards operations. The clear position set out in the leading cases of *Bankovic* and *Behrami & Seramati*, arising out of NATO's intervention in the former Yugoslavia, has been muddled.

9. An important example is the European Court of Human Rights' decision in the case of *Al-Jedda*. In this case the Court rejected the submissions of the UK Government that the Convention did not apply to military operations in Iraq and went on to rule that the detention of the claimant, a suspected insurgent, was contrary to their human rights although detention operations had been foreseen at the time the United Nations Security Council Resolutions authorised the military operations. The result has been that the Government has been forced to pay large sums of money to persons who were reasonably suspected of attacking and conspiring against UK forces and whose detention was believed at the time to be entirely lawful. (It is only reasonable to add that many of these people claimed that they had been ill-treated while in detention and that the Government in no way condones such ill-treatment in those cases where it occurred; but this would in any case have been justiciable under domestic law).

10. The circumstances of the military operations in Afghanistan differ in important and legally significant ways from those of the Iraq campaign. The Government position is that the Convention does not apply to the operations of UK forces in Afghanistan. Primarily this is because such operations are carried out under the auspices of the International Security Assistance Force, but there are a number of technical subsidiary

arguments that lead to the same conclusion. These matters will be tested in a number of forthcoming cases. It is an essential element of the Government's position that International Humanitarian Law together with domestic law provides a proper framework for the protection of the legitimate rights of combatants and non-combatants alike.

Article 2 & 3 ECHR procedural obligation

11. The second important area of uncertainty relates to what is termed the "procedural [as opposed to substantive] obligation". In the military context it has been held that where any person has died as a result of the actions of the Armed Forces a full, independent, and expeditious investigation must be carried out. In principle this is of course unexceptionable, but in the Government's view it needs to be applied in a way which takes realistic account of the circumstances of military operations. The Government rejects, for example, any suggestion that deaths in battle must be investigated in the same way as, for example, murders; there must be a presumption that when soldiers are engaged in battle in accordance with their rules of engagement their use of force will be lawful. There have been submissions to the contrary in domestic litigation but at present the Government's position on this matter has not been seriously impugned.

12. Nonetheless there have been areas where the application of the procedural obligation has been contentious. The first of these is retrospectivity. The Government is currently defending a judicial review alleging that it acted unlawfully in refusing to order a public inquiry into events which occurred over 60 years ago during the Malayan emergency. Such a public inquiry would cost the taxpayer many millions of pounds without, in the Government's view, being likely to come to a definitive view of what happened given that virtually all witnesses are now dead. It is confident that the Court of Appeal, like the High Court, will uphold its position, but it is concerned that the costs of the litigation itself will run into the hundreds of thousands of pounds which are unlikely to be recovered by the taxpayer as the claimants are publicly funded.

13. The second area of uncertainty arises from the extent of the procedural obligation to investigate deaths. The Courts have consistently held, despite several attempts to argue otherwise, that in principle the criminal aspects of allegations of death or abuse against members of the Armed Forces can be investigated independently and effectively by the Service police, except where the allegations will necessarily involve a police investigation of the conduct of members of the Service police or other personnel coming within the responsibility of the heads of the Service police. The claimants sought to argue in these cases that there should instead be a public inquiry would almost certainly have dwarfed the costs of the Bloody Sunday Inquiry, which eventually mounted to £191.5 million. These demands have been rejected by the Courts as wholly disproportionate.

14. In the first *Ali Zaki Mousa* case the Court held that the Royal Military Police (RMP) could not be responsible for the police investigation, because the allegations were such as to require possible investigation of the conduct of certain individuals who were also commanded by the head of the RMP. But the Court approved investigation by the Royal Navy Police supported and resourced by the Iraq Historic Allegations Team (IHAT) (comprised essentially of civilians).

15. An area of uncertainty does however remain as to the wider ECHR requirement for scrutiny of the circumstances in which people are killed by agents of the state. This goes beyond criminal investigations. Within the UK this wider obligation is met by a coroner's inquest and by consideration by the Government (where relevant) of any wider issues that emerge. The Court called for inquisitorial inquiries akin to Coroners' inquests particularly in the small number of cases where Iraqi nationals had died in the custody of British forces. The Government is making arrangements for these inquiries to take place once IHAT investigations and any resulting prosecutions have been concluded.

The effects of the developing concepts and doctrines of "lawfare" and universal jurisdiction

16. We turn now to the Committee's second question. Something has already been said about the extension of ECHR jurisdiction in ways previously unpredicted. The Government has been ready to accept the concept of universal jurisdiction as a rare exception to the principle of territorial jurisdiction in the case of certain crimes of an international character where Parliament has been satisfied of the need for it, such as hostage-taking or torture committed by persons acting in an official capacity. This remains its stance. Fears that existed in 2003 concerning the International Criminal Court have proved unfounded. Under the principle of complementarity, the UK retains the right to investigate and where necessary prosecute UK citizens, those resident in the UK and those subject to UK Service law for any crimes caught by the Rome Statute. The ICC cannot investigate or try a case unless a State is unable or unwilling to launch an investigation itself. As a former UN Secretary General put it: "the Court represents no threat to a State with an organized criminal justice system".

17. As to the question of "lawfare", it is undoubtedly true that the actions of the armed forces have been subjected to unprecedented levels of legal scrutiny in recent years, particularly as a result of military operations in Northern Ireland, Iraq, and Afghanistan. Some of this scrutiny has been necessary and beneficial, in particular the findings of coroners' inquests into the deaths of members of the Armed Forces on operations and the reports of the Haddon-Cave Review, and the Baha Mousa Inquiry. The Government has bitter critics among the community of lawyers most engaged in bringing cases against the Ministry of Defence, but it sees no real benefit in speculating publicly on their motives for doing so. No doubt reasons of personal prestige, economic

advantage and political commitment will have different weightings among different practitioners at different times.

18. There are however two aspects of the current extensive litigation which do cause the Government concern. Both are being addressed by the Ministry of Justice. The first is the apparently ready availability of legal aid for actions challenging the conduct of military operations, some of them weak or ill-thought out. Such actions are often brought in the name of overseas nationals or of UK nationals who may have little or no personal stake in the matter. While the government recognises that, within the legislative framework for legal aid, decisions on support to be provided to individuals must be made independently, the Ministry of Defence has been concerned that legal aid has been granted recently for at least two judicial review cases to be taken to appeal after having been roundly rejected at the High Court. It therefore welcomes the steps announced by the Ministry of Justice to reform the rules on access to legal aid, particularly in cases brought by overseas claimants.

19. The second aspect is the use of judicial review in cases which might more appropriately have proceeded as personal injury claims. Judicial review is there as a mechanism for the scrutiny of decisions primarily made by or on behalf of Ministers. In many cases of alleged personal injury, particularly those arising from operations in Iraq, however, the claimants' lawyers have proceeded by way of judicial review, alleging inadequate investigation even before the investigation has concluded. Given that neither the Minister nor his officials have taken any decision, this seems an inappropriate way of proceeding and it is certainly one which leads to the expenditure of far larger amounts on legal fees than would personal injury claims.

Impact of the judicial development of Duty of Care concepts and of domestic UK law and claims of negligence, on UK operational decision making processes and arrangements for recording decisions and events by operational commanders

20. The Committee's final question relates to the judicial development of duty of care concepts. This is a matter of real and current concern to the Government. Historically the Crown could not be sued in its own Courts. When that rule was abolished after the Second World War (by the Crown Proceedings Act 1947) an exception was made by section 10 of that Act for members of the Armed Forces who remained unable to sue the Government for death or personal injury caused by another member of the Armed Forces if the death or injury was certified as pensionable by the Secretary of State. This exception was repealed by the Crown Proceedings (Armed Forces) Act 1987, although by section 2 of the 1987 Act (which is still in force) the effect of section 10 could be revived for all purposes or for such purpose as may be described in an order made by a statutory instrument under the negative resolution procedure in case of either (a) any imminent national danger or (b) for the purposes of any warlike operations in any part of the world outside the UK. Since 1987 no revival order has been made. Given the virtually universal recognition that members of the Armed Forces on operations are in an inherently dangerous occupation and that the duty of care applicable to a civilian context cannot apply to them in the same way, the doctrine of combat immunity was rapidly adapted by the UK Courts to cover the position of UK armed forces on operations where they come under attack or face the threat of attack or violent resistance: the leading case was that of *Mulcahy v Ministry of Defence* (1996) which related to the first Gulf War, which of course took place four years after the 1987 Act came into force.

21. The implications of this year's Supreme Court judgment in the conjoined cases of *Smith and others v MOD*, *Ellis v MOD*, and *Allbutt and others v MOD* are not yet clear. These are all tragic cases of deaths on the field of combat in Iraq: the Government has every sympathy with the claimants but is obliged to defend these claims on important grounds of legal principle. Briefly, the argument of the claimants is that, while these tragic incidents did indeed take place in the course of combat, combat immunity should not apply because they can be traced back to previous decisions about the provision of equipment and training to the soldiers which could—they argue—have protected them more effectively.

22. The Government is concerned that this argument could be applied to virtually any claim to which the principle of combat immunity has hitherto been understood to apply, and if accepted could have the effect of opening up the conduct of combat to the scrutiny of the courts after the event. This in turn could have seriously debilitating effects on the decision-making of commanders on the ground which could in the long run seriously impair this country's military effectiveness. It therefore sought to have the claims struck out by the courts on the grounds of combat immunity.

23. The Government was therefore disappointed when the Supreme Court decided on 19 June, by a majority of 4 to 3, not to strike out the claims but to allow them to proceed to trial. The Government notes the analysis in the dissenting speech of Lord Mance, which warned that "the approach taken by the majority will in my view make extensive litigation almost inevitable after, as well as quite possibly during and even before, any active service operations undertaken by the British army. It is likely to lead to the judicialisation of war".

24. There were aspects of the majority view from which the Government takes comfort. The judgment upheld the continued existence of the doctrine of combat immunity. The majority specifically excluded liability on the part of those actually engaged in active combat. It also stated that, where it was alleged that a prior decision was the true cause of the injury or death, the more "political (in a broad or narrow sense)" that decision, the more reluctant the court should be to go behind it. As Lord Hope said in his speech explaining the majority view, when the cases come to trial "the trial judge will be expected to follow the guidance set out

in this judgment as to the very wide measure of discretion which must be accorded to those who were responsible on the ground for the planning and conduct of the operations during which these soldiers lost their lives and also to the way issues as to procurement too should be approached”.

25. The Government’s initial response to the judgment will, therefore, be to defend these and similar cases vigorously. Its determination to do so goes hand in hand with its commitment to compensate service personnel or their families for injury, illness or death that is predominantly caused by service, whether that be in the course of active operations, training or maintaining fitness, on a no-fault basis through the statutory Armed Forces Compensation Scheme. It firmly believes that this approach is preferable in principle to the stress and uncertainty involved in litigation.

26. If these and similar cases come to trial, the Government has strong reasons to anticipate success. Nonetheless, it must give thought to the possibility of adverse developments in case law which could bring closer the prospect of “judicialisation of warfare” referred to by Lord Mance. The Ministry of Defence is therefore giving some thought to the possibility of legislation to clarify and bound the law on combat immunity. This could in principle operate either by providing a statutory definition of combat immunity or by setting out the considerations which a court would be expected to take into account when hearing relevant cases. This is not a step which would be embarked upon lightly, and certainly not in the immediate future, but the Department considers it prudent to make plans against the contingency that legal developments could make it necessary for Parliament to make provision for this important matter.

27. The Committee’s question rightly calls attention to the importance of recording all important decisions and events in the course of operations. There have been many instances in which failure to document matters which have subsequently come before the courts have prejudiced the Government’s position, and in some cases forced it to concede claims which might otherwise have been successfully defended. The importance of the requirement to document significant events and decisions is regularly explained to personnel in training as well as being emphasised in relevant instructions and regulations.

November 2013

Written evidence from Air Commodore (Retd) Bill Boothby, Doktor Iuris, former Deputy Director of Legal Services (RAF)

Author: Weapons and the Law of Armed Conflict (2009); The Law of Targeting (2012); Conflict law: Thoughts on some Contemporary Legal Issues (forthcoming 2014).

I will address each of the topics listed in the TORs in sequence, and briefly. Please advise if greater detail is required.

1. THE LEGAL PROTECTIONS AND OBLIGATIONS APPLYING TO UK ARMED FORCES PERSONNEL (REGULAR AND RESERVIST) WHEN DEPLOYED IN THE UK OR ABROAD IN UK-ONLY OR COALITION OPERATIONS

Let us start by considering the position in war, or armed conflict as the law now terms it. The core legal obligation in all armed conflicts applies equally to regulars and reservists, to UK only and coalition operations and in UK and abroad. It is to comply with applicable law in the conduct of all military operations. The context of the military deployment will determine which body of law applies. Armed conflict is regulated by a set of rules designed to maintain a distinction between persons and objects involved in the conflict, which may be attacked, and those that are not so involved that may not. Indiscriminate attacks are prohibited. The most important rules regulating the conduct of hostilities require that only enemy members of the armed forces, objects that contribute effectively to military action, civilians who are directly participating in the fight and, in the case of an armed conflict within a state, fighters, can be attacked. Particular classes of person and object, for example medical and religious personnel and cultural property, are entitled to specific protections under the law, but the detail of those rules lies beyond the scope of this skeleton submission. There are specific prohibitions and restrictions on the weapons that can be used in warfare. Chemical, biological and poisonous weapons, anti-personnel mines, certain fragmentation weapons and exploding anti-personnel bullets and cluster munitions are, for example, prohibited.

In armed conflicts between states, members of the armed forces are classed by the law as “combatants” and thus have the legal right to take part in the armed conflict. So, provided the international law rules briefly referred to in the previous paragraph are complied with, combatants are immune from prosecution for acts such as killing an enemy soldier which, if undertaken by a civilian, would be murder. In armed conflicts within a state, this combatant immunity does not apply, but members of the armed forces that use force that complies with international law commit no offence.

Members of the armed forces, both regular and reservist, who are put out of the fight, eg due to wounds, sickness, capture or surrender, are legally protected from being attacked. If captured, armed forces personnel are prisoners of war with detailed rights set out in the Third Geneva Convention. If they are wounded, sick or shipwrecked, armed forces members are to be respected and protected in accordance with the Geneva Conventions.

Human rights treaties also apply in warfare subject to derogation. Derogation may not be possible where UK is intervening to assist another state, or is involved in certain “armed conflicts of choice”. So you can have a situation where a commander is bound by human rights law and the law of armed conflict, and the two bodies of law do not always produce the same results. The law of armed conflict permits the attack of enemy combatants because of their status as combatants. Human rights law protects the right to life and limits lethal force to when it is absolutely necessary, planned, strictly proportionate and complies with other legal rules. The European Court has recently reaffirmed that the right to life implies an obligation to investigate all deprivations of life by state agents, such as the armed forces, subject to certain considerations of practicability, and that this applies during armed conflict (Al Skeini judgment, paragraph 164). This kind of intrusiveness and prescriptiveness may contribute to a feeling that effective conduct of operations is being put in jeopardy by the law.

Uncontrovertedly, UK armed forces that are not parties to an armed conflict eg because they are peacekeepers in a war zone, must obey domestic and human rights law rules in relation to persons within the UK’s jurisdiction, including for example the right to life and must only use lethal force in self-defence. Conversely, members of the UK armed forces also enjoy human rights in circumstances referred to below.

Unfortunately, the treaty law dealing with the conduct of hostilities in armed conflict has not kept pace with technical developments so commanders may find the legal rules within which they must operate less than clear. There is no ad hoc treaty law to regulate air to air combat, cyber warfare and new automated and autonomous attack technologies. The treaty rules as to most armed conflicts, namely those within a state, and the treaty rules as to warfare in outer space are sparse. Experts argue that binding customary law rules, derived from the practice of states, fill the gap, but views differ as to what exactly these customary rules provide. The resulting ambiguous legal environment does not help commanders striving to be legally compliant. Ideally, new treaty law would be negotiated on these matters, but such a process might open Pandora’s Box, prejudicing the vitally important legal protections we already have. Experts produce International Manuals to cover some of these gaps, a process that should be applauded as showing how existing law can be applied in the novel circumstances and rendering that law more accessible, but new law can only be made by states and perhaps now is the time for such a process at least to be considered.

Similarly, if deployed to a situation where no armed conflict is taking place, for example to deal with internal tensions, riots, sporadic terrorism and the like, domestic criminal law and human rights law alone will apply.

So the law that applies on deployed operations varies depending on what is going on, and what is going on can change rapidly in time and space. In a situation of sporadic disturbances, the killing by the security forces of an insurgent outside the scope of self-defence is likely to be a crime. If a foreign state intervenes on the side of the insurgents, that situation can rapidly change to international armed conflict in which the use by the security forces of similar lethal force against a fighter of the adverse party is lawful by virtue of the combatant immunity we are discussing. Assiduous monitoring of the developing situation, careful adjustment of rules of engagement accurately to reflect what the law, and evolving policy considerations, allow at any particular moment and proper training and briefing of personnel are among the steps taken to seek to ensure action taken always complies with legal rules that apply to the situation as it then exists.

The core principles in this section apply whether UK forces are operating in UK or abroad and whether alone or in a coalition or alliance. Application of law and disciplinary enforcement are single national responsibilities.

2 THE EFFECTS OF THE DEVELOPING CONCEPTS AND DOCTRINES OF “LAWFARE” AND “UNIVERSAL JURISDICTION”

Those involved in recent operations will relate their experiences with practical examples. One familiar challenge is the tendency of our adversaries to use human shields, volunteers or otherwise, unlawfully to shield lawful targets. The intention in doing so is to cause the armed forces of western states to cancel attacks because those whom the law protects have located themselves or have been located near the target, thus rendering the planned attack potentially indiscriminate. Another example would be a tendency of enemy personnel to target persons and objects clearly marked with the Red Cross distinctive emblem. For UK armed forces to respond to such unlawful activities by breaching the legal rules, even where such action is justifiable as a reprisal, would contradict our likely strategic purpose to bring or restore legal respect to the area concerned. We should however insist on repeated media coverage of all such enemy legal breaches to ensure balanced reporting of the conflict and so that the correct legal position is widely understood.

Lawfare, coined by retired Deputy Judge Advocate General of the US Air Force, Charlie Dunlap, refers to the misuse of law as a substitute for traditional military means to achieve an operational objective. Proponents of “lawfare” or “legal encirclement” argue that law and its practice in certain quarters are getting in the way of the efficient conduct of hostilities. There can be no doubt that law has been propelled into the consciousness of military commanders in a way unthinkable two or three decades ago. Military lawyers deploy with commanders to advise on the application of the detailed legal rules summarily referred to in this submission. Media reporting of hostilities frequently comments when law seems to have been broken. Legal proceedings, in which the legality of action taken on operations can be challenged, may take place for example in coroner’s courts, in the High Court on Judicial Review, before the civil and military court systems and in international tribunals such as the International Criminal Court. To a degree, this increasing profile of law reflects trends in

wider society. Legal compliance is also important because of its coherence with the strategic objective of recent interventions to bring respect for rule of law to places where that has been lost.

Notions of legal encirclement may, in some minds, also involve some recent applications of domestic, social and rights-based legislation to the armed forces. Some social, national and international legislation and jurisprudence may leave commanders with the feeling that accomplishing the military mission is being impeded/imperiled in order to achieve unrealistic levels of political correctness. There is probably, however, a limit to how far the volunteer armed forces can remain exempt from core rights applying to the population at large. The policy of pursuing exemptions only when combat effectiveness so demands would seem to strike a sensible balance. The corollary is that where combat effectiveness does so demand, the exemption should indeed be granted and upheld by all concerned, including the courts.

If the treaty law on the conduct of hostilities has not developed greatly in recent years, the same cannot be said of the law relating to weapons. The adoption and subsequent ratification by the UK of the Ottawa Convention on Anti-Personnel Landmines required the UK armed forces to remove from service certain munitions that, absent ratification, would have remained available for military use. The adoption, and ratification on 4 May 2010 by the UK of the Cluster Munitions Convention also required the UK to dispose of weapons prohibited under that treaty but which fulfilled a clear operational purpose. While the humanitarian arguments in favour of these bans are well understood, our adversaries may not be similarly constrained. When deciding whether to participate in future weapon prohibitions, military requirements must be carefully considered, and capabilities must be replaced satisfactorily before ratification, and disposal of newly prohibited weapons, take place.

Some new weapons technologies arouse controversy. Much research work is currently under way to address the challenges posed in developing autonomous attack technologies. Before the research has achieved maturity, however, Human Rights Watch is already calling for a ban. We must avoid a situation in which the liberal democracies deprive themselves of potentially vital technologies, in this case perhaps a potentially viable way of countering certain mass attack techniques, while adversaries are not similarly constrained. There is, however, much to be said for international engagement by officials to develop joint understandings, particularly with allies and the like-minded, as to how the law applies to emerging technologies and where new legal provision might be required.

Universal jurisdiction applies to war crimes, crimes against humanity and to genocide, and will apply to the crime of aggression when that offence in due course becomes available to International Criminal Court prosecutors. The significance of universal jurisdiction is that perpetrators of these most egregious breaches of the law of armed conflict will find it that much more difficult to escape justice. Ensuring that the law applicable to warfare is enforced, and thus complied with, is a continuing priority that is consistent with the wider policy purpose behind most UK interventions, namely to promote respect for the rule of law. Universal jurisdiction for the crimes committed by foreign war criminals necessarily implies similar arrangements if UK service personnel breach the rules, although the UK military and civil justice systems will promptly investigate cases where legal breaches are suspected and will prosecute and punish where the evidence supports this, thereby usually forestalling reference to international courts.

3 THE JUDICIAL DEVELOPMENT OF DUTY OF CARE CONCEPTS AND OF DOMESTIC UK LAW AND CLAIMS OF NEGLIGENCE, ON UK OPERATIONAL DECISION MAKING PROCESSES AND ARRANGEMENTS FOR RECORDING DECISIONS AND EVENTS BY OPERATIONAL COMMANDERS.

It is convenient here to take together the issue of combat immunity, which is not quite the same thing as “combatant immunity” from prosecution referred to earlier, and the question of the application of human rights law to members of our own armed forces on deployed operations as these twin issues were addressed together relatively recently by the Supreme Court. In very broad terms, the combat immunity principle under English law precludes claims in negligence relating to decisions made in the conduct of combat. The Supreme Court addressed the jurisdiction issue in the light of European Court of Human Rights decisions, and concluded that UK’s human rights jurisdiction requires us to secure the right to life to members of the armed forces when they are serving outside UK territory. (Smith and others, *Ellis, Allbutt and others v Ministry of Defence*, [2013] UKSC 41, judgment dated 19 June 2013, paragraph 55). The Supreme Court went on to consider planning for and conduct of military operations in armed conflict, and acknowledged that it, the Court, “must avoid imposing positive obligations on the State... which are unrealistic or disproportionate” but must give effect to those obligations where it would be reasonable to expect the individual service person to have the protection of the right to life.

So decisions relating to procurement of equipment, relating to higher level command of military operations, relating to the exercise of political judgment or policy and decisions by persons actively engaged in contact with the enemy will be easier to exclude from the right to life, and will therefore be less likely to be the subject of legal challenge; (Smith et al, paragraph 76).

Where combat immunity is concerned, the Court has recognised the need to be “especially careful” to consider the public interest, the unpredictable nature of armed conflict and its inevitable risks when striking the balance as to what is fair, just and reasonable; (Smith et al, paragraph 100).

what changes may be necessary to the current MoD legal framework and processes to accommodate the particular position of UK Armed Forces at war and when deployed in conflict situations or in peacekeeping and the changing tactical forms of future conflicts.

At the international level, ideally, states would come together and sort out in treaty form: the relationship between human rights law and the law of armed conflict, more detailed rules for armed conflicts within a state; and they would have consultations as to their concerns over new weapons technologies and as to whether new law is needed. If new treaty law on the conduct of hostilities cannot be arranged, or risks unraveling the law we have, we should support initiatives to develop International Manuals to address gap areas and should be prepared to take the lead in stating our own legal position in terms that recognize our military requirements.

We should update and develop the UK Manual on the Law of Armed Conflict, and should then keep the text updated, devoting adequate annual resource for that specific purpose so that we have a firm basis for training in the subject. This will enable us, and other states, to be clear on where we stand on all relevant issues. National clarity will tend to reduce concerns based on uncertainty. The UK Manual is influential of global thinking on these matters and deserves proper maintenance.

At all levels legal advice in connection with armed conflict hostilities should be given by those with specialist knowledge. This topic should not be regarded as yet another portfolio to add to the CV of a generalist, because the importance of the issues involved and their complexity preclude such an approach. Future operations will be undertaken in an even more legally complex environment, so the requirement for specialist understanding in these subjects is if anything increasing.

Military legal advisers should continue to deploy with commanders at appropriate levels of command, to provide advice at combined operations centres and should advise at departmental level. The UK's system for the legal review of new weapons should be maintained and should be well-resourced. The UK should be prepared to engage with other nations to develop common understandings as to the legal challenges posed by new technologies. We should resist plans to prohibit technologies whose opportunities and costs have yet to be fully revealed or assessed.

We should maintain exemptions from legislation that would impede combat effectiveness. On human rights-related litigation before domestic, European or other courts, arising from events associated with armed conflict, we should, where appropriate, be prepared to argue vigorously for the primacy of law of armed conflict rules and for court judgments based on operable legal interpretations. Those with experience of law in combat should be closely involved in briefing counsel and in case preparation. We should monitor, and be prepared to intervene either as *amicus curiae* or otherwise in, litigation addressing issues relevant to combat effectiveness. We should be prepared to make national statements if, eg, International Courts make decisions that conflict with national legal interpretations. Maintaining our Manual will enable us to comment by reference to our publically stated position.

Our national perspectives, as a state that is frequently involved in military operations, will not necessarily be shared by states that are not similarly involved. We should, however, be prepared to explain our position clearly, and then stick to it and may be surprised how many states will take our lead.

My closing thought is that we have benefited in recent decades from a technological edge over certain adversaries. However, some of the technological and systemic developments that we are seeing in warfare, cyber warfare and the advent of loosely associated yet highly potent groups like AQ spring to mind, may be expected to challenge and erode that advantage. UK armed forces must continue to strive for the highest standards of legal compliance and the UK should vigorously advocate those standards to others and should actively disseminate them.

October 2013

Further written evidence from Air Commodore (Retd) Bill Boothby, Doktor Iuris, former Deputy Director of Legal Services (RAF)

Author: Weapons and the Law of Armed Conflict (2009); The Law of Targeting (2012); Conflict law: The Influence of New Weapons Technology, Human Rights and Emerging Actors (forthcoming 2014).

I have been asked to provide some further written evidence to the House of Commons Defence Select Committee. I have been asked to address the core rules of the law of armed conflict relating, respectively, to targeting and to weaponry, to explain how the law of armed conflict caters for remotely piloted aircraft, to explain what legal difference it makes when autonomous and automated weapons are concerned and to address certain core legal issues concerning the use of cyber capabilities in armed conflicts. I will take each topic in turn and will keep the discussion as succinct as possible. It must be understood that important matters of detail will inevitably be sacrificed in order to achieve appropriate brevity.

Central to the law of targeting is the notion that not all methods of attacking the enemy are lawful. There are limits to what is permissible.¹ Certain core principles and rules lie at the heart of the law of targeting. First among these is the principle that requires the parties to an armed conflict to maintain a distinction at all

¹ Additional Protocol I, 1977 (API) article 35(1).

times between persons and objects that may lawfully be made the object of attack and those that must be respected and protected². To put the matter in the briefest of terms, in armed conflicts attacks can be lawfully directed at members of the armed forces or, in the case of armed conflicts internal to a state, against fighters. Attacks may also be directed against objects that contribute effectively to the enemy's military action and the attack of which therefore advantages the attacker militarily. Civilians and objects that do not come within the description in the previous sentence and which are therefore known as civilian objects are generally protected from attack unless, in the case of civilians, they take a direct part in the hostilities. In armed conflicts between states, there are rules as to doubt the detail of which lies beyond the scope of the current submission.³

Some persons and objects are granted specific, sometimes enhanced, protection, for example medical and religious personnel, medical facilities, medical transports, cultural property, certain installations containing dangerous forces, journalists etc. Targeting law recognises that civilians and civilian objects may be injured, killed or damaged as a result of lawfully directed attacks and that fact will not per se render the lawfully directed attack unlawful. However attacks that are of a nature to strike civilians and civilian objects and military objectives and combatants without distinction and that are thus indiscriminate are prohibited,⁴ and one example of such indiscriminate attacks would be an attack which is expected to cause excessive injury or damage to civilians or civilian objects by reference to the anticipated military advantage.⁵ The treaty law addressing armed conflicts internal to a state is less well developed than that relating to international armed conflicts, but the legally binding custom of states recognises many of those principles and rules as applicable in such intra-state conflicts, and such customary rules bind all states irrespective of their participation in particular treaties.⁶ Having set these rules, targeting law then requires attackers to take all practically possible precautions to fulfil those requirements while also requiring that precautions be taken by the parties to the conflict against the effects of attacks.⁷

Weapons law, by contrast, addresses the weapons that it is lawful for a party to an armed conflict to possess and use, providing that some are prohibited while the use of others is restricted. States are obliged legally to review new weapons they study, develop or acquire before fielding them to determine whether their use would be prohibited in some or all circumstances.⁸ That review must apply the law by which the relevant state is bound. All states are prohibited to use weapons that are of a nature to cause superfluous injury or unnecessary suffering,⁹ ie weapons that, when used for their designed or intended purpose, inevitably cause injury or suffering which exceeds that required to achieve the generic military advantage the weapon is designed to afford. Equally, all states are prohibited from using weapons that are indiscriminate by nature, for example because the weapon does not permit the damaging effects to be controlled or directed.¹⁰ States that are party to Additional Protocol I, such as the UK, must not use weapons that are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment. In addition, there are ad hoc rules prohibiting or restricting the use of particular weapon types. So, for example, poisons and poisoned weapons,¹¹ explosive anti-personnel bullets,¹² bullets that expand or flatten easily in the human body,¹³ asphyxiating gases,¹⁴ chemical¹⁵ and biological weapons,¹⁶ anti-personnel landmines¹⁷ and cluster munitions¹⁸ are prohibited, and the use of incendiary weapons is restricted.¹⁹

Remotely piloted aircraft, or drones as they are colloquially called, are subject to the same body of targeting and weapons law as other weapon systems, such as manned attack aircraft. The lawfulness of drone attacks during armed conflicts is determined by applying the same rules as very briefly summarised above. Conflicts that do not amount to either an international or an intra-state armed conflict, for example in the latter case because the required degree of sustained violence is not maintained, are regulated by domestic and human rights law. This means that, for example for a state that is party to the European Convention on Human Rights, lethal force may only be used in the very limited circumstances that are consistent with respect for the right to life as interpreted pursuant to that treaty.

So, when drone strikes are undertaken in places where an armed conflict is under way, and where lawful targets are engaged in a discriminating way with all required precautions being complied with, the attack will prima facie be lawful. Where no armed conflict is taking place, domestic and human rights law must be

² API, article 48.

³ API, articles 50(1) and 52(3).

⁴ API, article 51(4).

⁵ API, article 51(5)(b).

⁶ See ICRC Customary Humanitarian Law Study, 2005.

⁷ API, articles 57 and 58 respectively.

⁸ API, article 36.

⁹ API, article 35(2).

¹⁰ API, article 51(4)(b) and (c).

¹¹ Hague Regulations 1907, article 23(a).

¹² See UK Manual on the Law of Armed Conflict, para. 6.10.

¹³ Hague Declaration 3, 1899; the prohibition applies in armed conflicts between states and, except in limited circumstances, the same rule applies as customary law to intra-state armed conflicts.

¹⁴ Geneva Gas Protocol, 1925.

¹⁵ Chemical Weapons Convention, 1993.

¹⁶ Biological Weapons Convention, 1972.

¹⁷ Ottawa Convention, 1997.

¹⁸ Cluster Munitions Convention, 2008.

¹⁹ Protocol III to Conventional Weapons Convention, article 2.

complied with. The use of lethal force against an individual coming within the jurisdiction of a state, such as the UK, that is party to the European Convention will only be permissible if the procedural and other safeguards associated with the right to life are complied with, including that the use of force was absolutely necessary, that it was strictly proportionate, that the operation was carefully planned and that the circumstances have been appropriately investigated. It is the responsibility of those who plan, order and undertake drone strike operations to ensure that the relevant legal rules are complied with.

Autonomy and automation of attack decisions are the subject of significant current research.²⁰ It is evident however that there is no current internationally agreed interpretation of eg the precise meaning of autonomy. My current view is that autonomy can most sensibly be seen as something of an absolute in which it is the machine that, by understanding higher level intent and by perceiving its environment, itself decides on appropriate action without human oversight or control. Its individual actions may not be predictable.²¹ This interpretation of autonomy is not universally shared. I consider that reaching an internationally agreed interpretation of terminology is a necessary precursor to a sensible international discussion of the acceptability of such technologies.²² For the time being, however, it would seem sensible to regard autonomy as an absolute state in which the weapon system learns its own lessons, modifies its behaviour accordingly and in which its behaviours are not constrained by human involvement. All lesser forms of mechanical decision-making would then be classed as automation, so there will be “degrees of automation” but not “degrees of autonomy”.

Weapon reviews must determine whether a new weapon system being reviewed would breach existing law in some or all circumstances. Existing law is therefore the criterion against which new autonomous or automated systems must be judged. The weapons law rules mentioned earlier in this paper must be applied. In addition, and because a person is not involved in the relevant decisions, it will be necessary to determine whether the weapon is capable of undertaking the precautions that the law requires.²³ While object recognition technology may enable such systems to verify that an object to be attacked is a lawful target, it is likely to be considerably more difficult to verify that a person is a lawful target as opposed, for example, to a civilian or a person, whether combatant or directly participating civilian, who has been rendered hors de combat and who therefore is protected from attack. The precautions rules also require attackers to do everything practically possible to verify that the planned attack will not breach the discrimination rule. Accordingly, attackers must, for example, satisfy themselves that the expected civilian injuries and damage will not be excessive in relation to the anticipated military advantage. While there is, in my opinion, no legal requirement that human beings take particular decisions, evaluative decisions of this sort are for the foreseeable future likely to prove challenging for automated or autonomous weapon systems. It should be understood that this is only one example of the kinds of legal issue that such technologies may be expected to raise. The important point is that it is the technology that must be made to comply with existing legal obligations; absent new ad hoc treaty arrangements, it is not for the law to be re-interpreted to accommodate peculiarities of the new, emerging technology.

Following cyber operations involving Estonia in 2007 and Georgia in 2008, the NATO Cooperative Cyber Defence Centre of Excellence in Tallinn, Estonia, initiated a process that led to the preparation of a Manual addressing the law applicable to Cyber Warfare. Experts from NATO states worked for between three and four years to produce the Manual published earlier this year. The Manual does not have the status of law as such. It is, rather, the best assessment of the Experts as to what the law is. The lawfulness of the resort to the use of cyber force and the lawfulness of particular kinds of cyber operation undertaken during an armed conflict are both addressed in the Manual. While it is appreciated that certain states, notably Russia and China, do not necessarily agree with all of the Manual’s conclusions, the document represents, it is suggested, a useful first step in seeking to clarify the law that applies to military operations in this new, man-made environment of cyberspace.

Briefly, the Tallinn Experts concluded that the notion of a cyber attack makes legal sense. “Attack” is defined in law in terms of a use of violence against an adversary, whether in offence or defence.²⁴ The Tallinn Experts concluded that the “violence” requirement is met by acts that have violent consequences, that is, that occasion death, injury, damage or destruction.²⁵ If, as I believe, this conclusion is correct it follows that the bulk of targeting law, very briefly referred to earlier, applies to cyber operations having these consequences and the Manual explains how the relevant rules can be so applied.

Similarly, for the Tallinn Experts cyber weapons are cyber means of warfare that are by design, use or intended use capable of causing injury, death, damage or destruction. By the same token, therefore, if this notion of cyber weapons is accepted, it follows that the law of weaponry is capable of being applied to cyber capabilities designed, intended or used to have those consequences and the Manual explains how the relevant rules can sensibly be so applied.

²⁰ See for example R C Arkin, *Governing Lethal Behaviour in Autonomous Robots* (2009).

²¹ For a full definition see UK MOD Joint Doctrine Note 2/11, *The UK Approach to Unmanned Aircraft Systems* (March 2011), paragraph 205.

²² In this regard, the weapons that Human Rights Watch refers to in its call for a global ban would seem to me to include both autonomous and automated weapons as referred to in the present paper.

²³ The relevant precautions are set out in API, article 57.

²⁴ API, article 49(1) and Tallinn Manual, rule 30.

²⁵ Tallinn Manual, paragraph 3 of commentary accompanying rule 30.

You asked me about the inter-relationship between the law of armed conflict and human rights law. I explained that international courts, notably the International Court of Justice (ICJ) in its Nuclear Weapons Advisory Opinion and in the Palestinian Wall case, and the European Court of Human Rights have addressed the issue. I pointed out the ICJ determination that human rights law applies throughout armed conflict, but that whether the right to life is breached must sometimes be determined by reference to law of armed conflict norms, sometimes by reference to human rights law norms and sometimes by reference to both sets of norms. In my view, the difficulty lies in enabling commanders and personnel to know in advance which norms will apply to which activity. I drew attention to the European Court cases of Al Jedda and Al Skeini and commented that there are aspects of these judgments that seem hard to reconcile with the practical needs of military operations. I expressed the view that the UK and other states might wish to consider issuing appropriately worded statements asserting national positions when national interpretations of the law diverge from the judgments of such courts as the European Court of Human Rights.

This is of necessity a very abbreviated discussion of complex issues, but it is hoped that it is nevertheless useful.

December 2013

Written evidence from Professor CHB Garraway CBE, Fellow, Human Rights Centre, University of Essex

1. I am Professor Garraway, formerly Stockton Professor of International Law at the United States Naval War College and currently a Fellow of the Human Rights Centre at the University of Essex. Prior to my academic appointments, I was for thirty years, an officer in Army Legal Services and ended my career dealing with international and operational law. I worked with UK delegations to international treaty negotiations as well as having operational experience in the 1990–91 Gulf War. I was part of the Coalition Provisional Authority in Baghdad in 2003 and visited Afghanistan twice in 2006 to advise on security matters.

2. Whilst I note the subject matter that the Committee wishes to examine, there is, in my view, an underlying problem contained in the title, namely identifying the legal framework in the first place. The problem is the growing overlap between international humanitarian law, otherwise known as the law of armed conflict or the laws of war, and human rights law. A series of judgements by the International Court of Justice and, most notably, by the European Court of Human Rights, have highlighted that the relationship between these two great bodies of international law is not straightforward.

3. As “war” and “peace” increasingly morph into a spectrum of violence where, like a rainbow, it is difficult to identify the boundaries between the various levels of violence, there has been a battle for legal supremacy between those from the international humanitarian law end who wish to see the definition of “armed conflict” extended down to as low a level of violence as possible so as to extend the protections given by “Geneva law”, dealing with the protection of victims of war, as widely as possible, and those from the human rights perspective who insist that human rights is the foundational law, the *lex generalis*, and that international humanitarian law, as the *lex specialis*, must be secondary. With each of these bodies of law claiming priority, what happens when they disagree?

4. Furthermore, lost in all of this is the branch of international humanitarian law known as “Hague law” which deals the conduct of hostilities. It is under this branch of law that we find the balance between military necessity and humanity, leading to the acknowledgement that in time of war lives, even innocent ones, will be lost and things will get broken. This runs counter to the underlying philosophy of human rights law and even “Geneva law” where it is the rights of the victim that are paramount and thus any breach of those rights has to be justified.

5. A simple example is in targeting. Under “Hague law”, a “combatant” is targetable at all times because of his status as such. He does not need to be posing an immediate threat nor is there any requirement to employ graduated levels of force. He can immediately be engaged with lethal force. This would normally amount to murder under domestic law but the soldier is subject to “combatant immunity” which means that providing his actions are within the law of armed conflict, he is protected from domestic prosecution. Under human rights law, the right to life is paramount and only such force is permissible as is absolutely necessary to meet the threat posed. Thus the use of lethal force where life is not in immediate danger and there is no other way of removing that danger would be a breach of the right to life. There is no equivalent to “combatant immunity” in human rights law though the International Court of Justice has stated that:

“In principle, the right not arbitrarily to be deprived of one’s life applies also in time of armed conflict. The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities.”²⁶

6. However, the term “arbitrary deprivation of life” refers to the wording of Article 6 of the International Covenant on Civil and Political Rights. The European Convention on Human Rights is somewhat differently worded. Article 2 reads:

²⁶ ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 8 July 1996, I.C.J. Reports 1996, p. 240.

“1. Everyone’s right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

2. Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary:

- (a) in defence of any person from unlawful violence;
- (b) in order to effect a lawful arrest or to prevent escape of a person lawfully detained;
- (c) in action lawfully taken for the purpose of quelling a riot or insurrection.”

7. This would not in principle include killings during an international armed conflict though Article 15, when dealing with derogation, provides that there can be “[n]o derogation from Article 2, except in respect of deaths resulting from lawful acts of war...” It would appear therefore that killings within the law of armed conflict would be permissible provided that there has been a derogation entered. So far as I am aware, the United Kingdom has never entered a derogation to Article 2 of the European Convention in any armed conflict to which it has been party. I am not aware of any other European State derogating in this way either. It is still unclear therefore whether the European Court of Human Rights would accept the lawfulness of a killing carried out within the law of armed conflict but where the State concerned had not made a derogation. It is to be hoped that they would take a similar line to the International Court of Justice but in the light of Article 15, it is not clear that they would do so.

8. Furthermore, it is becoming increasingly unclear when the law of armed conflict would overrule human rights law in such circumstances. The law of armed conflict was originally designed to cover international armed conflicts, wars between States. Non-international armed conflicts, civil wars, were outside its ambit until 1949 when the four Geneva Conventions of that year introduced Article 3 common to all four Conventions which applied basic protections to those taking no active part in hostilities or rendered *hors de combat*, in non-international armed conflicts. This protection was extended in 1977 by Additional Protocol II to the Geneva Conventions but there was little or no treaty law governing the conduct of hostilities in such conflicts. There was no “combatant status” and hence no “combatant immunity” and it was not clear to what extent the “Hague law” on the conduct of hostilities and in particular the looser rules on targeting would apply. For example, in Northern Ireland, although it was never accepted by the United Kingdom that the level of violence constituted an “armed conflict”, the campaign was conducted throughout under domestic (and human rights) law with no suggestion that active members of the IRA were subject to lethal force at all times, simply because of their status. It is only since the conflicts in the Former Yugoslavia and the subsequent decisions of the International Tribunal for the Former Yugoslavia that the “Hague law” on the conduct of hostilities has been considered to apply, as a matter of customary law, to non-international armed conflicts.²⁷ This trend was subsequently supported by the International Committee of the Red Cross in their seminal Study into Customary International Humanitarian Law.²⁸ The difficulty is that, as already stated, “Hague law” introduces the balance between military necessity and humanity. If those provisions based on humanity, such as the prohibition of attacks on civilians and civilian objects, are extended, what of those based on military necessity, such as status targeting? This brings into play the wider relationship between the law of armed conflict and human rights law.

9. Again, it is accepted that human rights law applies at all times, including during armed conflict, but what is not clear is how human rights law is affected by the contemporaneous applicability of international humanitarian law. The International Court of Justice has opined:

“As regards the relationship between international humanitarian law and human rights law, there are thus three possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law. In order to answer the question put to it, the Court will have to take into consideration both these branches of international law, namely human rights law and, as *lex specialis*, international humanitarian law.”

10. What is unclear is where the dividing lines between these situations fall. The greatest areas of controversy are non-international armed conflicts and situations of occupation, the very situations in which UK armed forces have principally found themselves operating since the fall of the Saddam regime in 2003. Increasingly, it is being argued that the relevant law is “situation specific”. Thus, within a theatre of operations, different rules may apply to different situations. An example is provided by the use of checkpoints. If a soldier is manning a checkpoint, is it part of the conduct of hostilities and thus governed by the rules of targeting under the law of armed conflict or is it a law enforcement exercise governed by human rights law? An example can be found in the debates over the death of Sergeant Roberts in 2003 during the advance to Basra. An Iraqi was killed as well as Sergeant Roberts and a number of soldiers faced investigation on possible charges of murder.²⁹ It was unclear then—and I would submit remains unclear—whether the foundational legal regime under which the soldiers were operating at that checkpoint was the law of armed conflict or human rights law.

²⁷ See ICTY, *Prosecutor v. Tadic*, Decision on Jurisdiction, Appeals Chamber, Case No. T-94-1-A, 15 July 1999, 105 International Law Reports 453.

²⁸ Customary International Humanitarian Law (2 volumes: Vol. I, Rules; Vol. II, Practice (2 Parts)) (Jean-Marie Henckaerts & Louise Doswald-Beck eds.), CUP, 2005.

²⁹ See statement by Lord Goldsmith, HL Deb, 27 April 2006, c262.

That incident took place during an international armed conflict. The situation may be even less clear at a checkpoint in Helmand or Kabul.

11. It is often said that Rules of Engagement are designed to provide clear guidance for soldiers in these circumstances. However, Rules of Engagement are only partly governed by the law. They also take into account military and political factors. They should not be more permissive than the law allows but may be—and frequently are—more restrictive. Thus, if a soldier breaches his Rules of Engagement, he may still be acting within the wider law even though he could be charged with disobeying a lawful order. The difficulty comes when the underlying law is unclear. Obedience to Rules of Engagement do not provide a defence to a soldier should the Rules prove to be incompatible with the law. The Clegg case in Northern Ireland confirmed that.³⁰

12. I therefore would submit that the underlying problem which affects all the issues that the Committee wishes to examine is the uncertainty over the boundaries between human rights law and the law of armed conflict and the inevitable overlap between the two legal regimes. I will now deal briefly with how this affects each issue.

13. *Legal protections and obligations:* It is impossible to analyse accurately the protections and obligations without clarity as to the underlying legal framework.

14. *Lawfare and universal jurisdiction:* When the law is unclear, it is open to interpretation and argument. Those who wish to restrict the operations of the armed forces are provided with plenty of ammunition with which to do so. It is generally accepted that it is impossible to conduct high intensity operations, whatever their nature, under human rights restrictions. There is a difference between the conduct of law enforcement operations and the conduct of high intensity military operations which is reflected in the more liberal provisions of the law of armed conflict, particularly in relation to targeting and detention. Those who argue that the law of armed conflict is subservient to human rights in all circumstances are effectively declaring that it is impossible for the UK armed forces to conduct high intensity operations.

15. The fear of “universal jurisdiction” usually centres around the International Criminal Court (ICC). I was part of the UK delegation that took part in the development and drafting of the Rome Statute and am confident that the provisions inserted in the Statute relating to complementarity effectively preclude any attempt by the ICC to claim jurisdiction over UK Service personnel.

16. *Duty of care:* The Ministry of Defence again finds itself caught between two opposing principles. Under the law of armed conflict, there is a requirement that, in the conduct of military operations, “constant care shall be taken to spare the civilian population, civilians and civilian objects”.³¹ This will on occasion inevitably involve military personnel accepting greater risk. However, the Ministry is also under a duty of care towards its own Service personnel under human rights law. Whilst under human rights law that duty may also extend to civilians within the jurisdiction of the United Kingdom (which has been widely interpreted by the European Court of Human Rights), this will not normally extend to civilians in areas of hostilities (outside the United Kingdom and situations of occupation). To give an example, if the Taliban adopts new tactics of such a manner that it increases the danger to British forces, is the UK obliged to withdraw those forces until the requisite equipment to protect against the increased threat can be procured? If so, what effect does that have on the duty to protect the Afghan population? Again there is a balance between force protection and mission accomplishment which may not be reflected in current legal trends. Commanders—and Ministers—must be given a “margin of appreciation” within which to conduct their operations. Minute ex post facto scrutiny of operational decisions, often taken in difficult circumstances and without full information, does not assist in encouraging decision taking. However, I have more confidence than many in the higher echelons of the British judiciary and therefore am of the view that the guidance given by the Supreme Court in *Smith*³² is likely to be sensibly interpreted in the British courts. However, judges are only as good as the material they are given and much will depend on how competently Government lawyers plead their cases. Criticisms have been made that few lawyers arguing cases have military experience and therefore there is a degree of ignorance which may not help the decision making process.

17. To conclude, until the underlying problem is resolved, there will continue to be serious legal difficulties facing both the Ministry of Defence and the individual service member. No man can serve two masters and the danger is that law will become increasingly irrelevant to operations on the ground. This will place politicians in an increasingly difficult position as they seek to justify the use of British forces in operational situations.

October 2013

³⁰ R v Clegg, HL, 1995 1 All ER 334.

³¹ Art. 57(1), Protocol (I) Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, 8 June 1977.

³² Smith & Ors v Ministry of Defence, Supreme Court, [2013] UKSC 41.

Written evidence from the Rt Hon Jack Straw MP

This letter is to respond briefly to your invitation to submit evidence to your inquiry on “UK Armed Forces Personnel and the Legal Framework for Future Operations”.

1. I welcome this inquiry.

2. As Shadow Home Secretary (1994–97) I led the very careful consideration which we gave in opposition to the development of human rights law, and specifically as to whether, and if so how, we could incorporate the European Convention on Human Rights into UK law, without this undermining the sovereignty of the British Parliament.

3. As Home Secretary (1997–01) I was the Minister responsible for the introduction of the Human Rights Bill, its passage into law, and for the detailed preparations which were made before it was brought into force two years later, on 2nd October 2013.

4. As Lord Chancellor and Justice Secretary (2007–10) I resumed responsibility for the Human Rights Act.

5. The short point I make, which I suggest should be one focus of your inquiry, is that to the very best of my recollection it was never anticipated that the Human Rights Act would operate in such a way as directly to affect the activities of UK forces in theatre abroad. I shall in slower time check this against all the records I have, and against the documents which were issued (Including “Bringing Rights Home”, the opposition policy paper), the White Paper in 1997, and what I and other Ministers said about the Bill during its passage through Parliament.

6. I am however pretty certain that my recollection is correct. That is supported in my mind by the progress which was made on the Bill. Some parts of it were controversial, not least in relation to its potential impact on the churches, and on the press. The Conservative Opposition voted against it at Second Reading in the Commons. Substantial amendments were then made (eg section 12 and 13) to accommodate much of the concern about the Bill. At Third Reading the Conservative spokesman said “We now wish [the bill] well”,³³ and allowed it to pass.

7. Had there been any concern that the Act would over time lead to situation where military decisions in theatre were to be subject to it, there would have been a very high level of opposition to its passage, on both sides, and in both Houses.

8. This means that the law has developed in a way which was not within the imagination of Parliament when the Act was passed.

9. There is nothing unusual about this. One of the great strengths of our common law system is that it allows our senior judiciary to develop our law to take account of new circumstances, including new norms of expected behaviour.

10. Such developments are always subject to the over-riding ability of our sovereign Parliament to correct—or reject—such developments.

11. I think that your Committee, and subject to its recommendations, Parliament in due course, will need to give consideration as to whether in this area to make such corrections.

12. In principle I believe that it will have to do this.

13. There is no argument that our military, especially on active service, have to be subject to both domestic and international law. That has long been the case. Intense obligations are imposed by, *inter alia*, the laws of war, on military personnel.

14. However, I believe that the current responsibilities imposed by the courts upon military commanders, and all other personnel in the field, go too far. It cannot be acceptable for commanders to have as it were to look over their shoulders in real time to lawyers when making both tactical and strategic decisions in the field, to the extent that now appears by current law to be required of them.

15. I hope this is helpful.

16. I should be happy to supplement this written submission, and to give oral evidence.

October 2013

³³ Hansard, 21 October 1998, col. 1362.

Written evidence from the International Committee of the Red Cross

EXECUTIVE SUMMARY

It is impossible to know exactly what future armed conflicts will look like. But today's conflicts give us an indication of possible developments and trends, and at the same time an indication about the possible challenges that they pose to international humanitarian law (IHL)

First and foremost, the International Committee of the Red Cross (ICRC) is convinced that respect for IHL contributes to a better protection to the victims of armed conflict. Current IHL has withstood the test of time as a realistic body of law that finds a balance between military necessity and humanity. It is as relevant today as ever and there is no reason to believe that it will not continue to be the main body of law governing the conduct of parties in future armed conflicts.

This is not to deny that IHL is an evolving body of law and that some of its aspects need further strengthening, and this is particularly true of the area of compliance with IHL and the protection of persons deprived of liberty. The ICRC hopes that the United Kingdom will continue to actively participate in the discussions around these areas in order to find ways to better protect the victims of armed conflicts.

Challenges in new conflicts will arise, in particular, from the increased reliance on cyber operations and on other new technologies. It is important that the United Kingdom Armed Forces assess the lawfulness of new weapons, means or methods of warfare, as foreseen in Article 36 of Additional Protocol I to the Geneva Conventions. It is crucial that military operations conducted with new technologies comply with IHL, in particular the rules of distinction, proportionality and precaution.

It is likely that the United Kingdom will conduct a number of its future military operations under the auspices of a United Nations Security Council mandate (whether on its own or in coalition with other States). Also, a number of future military operations might be conducted with the understanding that they are "humanitarian" in nature or "to protect civilians". In this respect, it is important to recall that the mandate and the legitimacy of military operations are *jus ad bellum* issues. They have no bearing on the applicability of IHL to these operations, which depends on the IHL criteria that govern the classification of conflicts.

Recent conflicts have brought to light an issue of grave humanitarian concern which is the lack of respect for healthcare in armed conflict situations. IHL contains clear obligations on the duty to protect and care for the wounded and sick and the respect for the medical personnel, units and transports. With this in mind the ICRC has launched its project on "Health care in danger" (HCiD) aimed at improving the efficiency and delivery of effective and impartial health care in armed conflict and other emergencies.

Lastly, the ICRC calls for renewed efforts to ensure that IHL instruments are fully and universally implemented. This requires a commitment by States to take the necessary legislative action and to invest in adequate military training on IHL. Also, the establishment of the obligation to exercise universal jurisdiction for grave breaches found in the four Geneva Conventions of 1949 must be recalled as an important means to counter impunity for war crimes.

INTRODUCTION: THE ICRC'S MISSION AND ROLE AS GUARDIAN OF IHL

(1) Established in 1863, the International Committee of the Red Cross (ICRC) is an impartial, neutral and independent organization whose exclusively humanitarian mission is to protect the lives and dignity of victims of armed conflict and other situations of violence and to provide them with assistance. The ICRC is at the origin of the Geneva Conventions, the law applicable in situations of armed conflict and was entrusted the role of "guardian" of international humanitarian law (IHL) by the international community.

(2) The ICRC thus endeavours to prevent suffering by promoting and strengthening IHL and universal humanitarian principles. It does so by fostering an environment conducive to the respect for the life and dignity of persons affected by armed conflicts and other situations of violence; and respect for the ICRC's work as well by reminding parties to the conflict of their IHL obligations.

(3) States Party to the Geneva Conventions of 1949 have an obligation to respect and ensure respect for the Conventions and make sure the law is widely known and understood.³⁴ The ICRC offers its expertise and practical experience of armed conflicts to help governments meet their responsibilities by passing legislation, instructing the armed forces and the police and promoting IHL widely.

(4) The inquiry into the United Kingdom Armed Forces personnel and the legal framework for future operations represents an opportunity for the ICRC to make a submission on account of its role in armed conflict as guardian of IHL. It is against this background that the ICRC is pleased to have the opportunity to submit to the United Kingdom Defence Select Committee its positions and recommendations on some aspects of IHL which appear of particular relevance in contemporary armed conflicts and require further thinking as the nature of armed conflicts and the means and methods of warfare evolve in the future. The submission outlines some of the challenges of IHL in today's armed conflicts and concludes with some recommendations.

³⁴ A similar obligation exists for AP I, see Art. 1 and more generally for IHL under customary international law: Rule 139, Jean-Marie Henckaerts and Louise Doswald-Beck, Customary International Humanitarian Law, ICRC and Cambridge University Press, Vol I, 2009.

SPECIFIC IHL ISSUES THAT MAY INFORM THE NEXT DEFENCE AND SECURITY REVIEW³⁵1. *Strengthening international humanitarian law (IHL)*

(5) It is the ICRC's view that IHL remains the appropriate legal framework for ensuring protection of victims of armed conflicts; what is mostly needed is greater compliance with the existing rules, rather than adoption of new rules. However, the ICRC has identified serious challenges that need to be addressed. It has submitted these for the consideration of the 31st International Conference of the Red Cross and Red Crescent in 2011.³⁶ Following a request from the International Conference,³⁷ the ICRC is currently focusing on two priority areas on strengthening IHL: strengthening protection for persons deprived of their liberty in non-international armed conflict (NIAC) and strengthening overall compliance with IHL.³⁸

1.1 The protection of persons deprived of their liberty in non-international armed conflict

(6) Non-international armed conflict (NIAC) is the predominant form of conflict in the world today. However, there is a significant disparity between the robust and detailed provisions applicable to the deprivation of liberty in the context of international armed conflict (IAC), and the very basic rules codified for non-international armed conflict. While the Four Geneva Conventions contain over 175 provisions regulating detention in virtually all its aspects in relation to international armed conflicts, there is no comparable regime for non-international armed conflict. The very limited treaty rules applicable to non-international armed conflict cannot adequately respond to the myriad of legal and protection issues that arise in practice. This relative absence of specificity within IHL has led to uncertainty about the source and content of the rules governing detention in non-international armed conflict, and on-going discussion regarding the applicability and adequacy of human rights law, and the precise contours of customary IHL. Further reflection is needed to ensure that IHL remains practical and relevant in providing legal protection to all persons deprived of their liberty in relation to armed conflict. The ICRC has identified four key areas in which the law is in need of strengthening: (1) conditions of detention; (2) vulnerable categories of detainees; (3) transfer of detainees; and (4) grounds and procedures for internment. These four topics are highly relevant to detention carried out by the United Kingdom in current and future armed conflicts, in order to ensure that any detention is consistent with IHL.

(7) In 2012 and early 2013, the ICRC held four regional consultations with States, aimed at exploring whether and how the substantive rules of IHL in this area should be strengthened. In total, the regional consultations involved 170 government experts from 93 States (including the United Kingdom). The States have generally agreed with all the topics identified by the ICRC as key humanitarian concerns and with the need to address them. States clearly support there being an outcome of the process, and thus far most have generally expressed a preference for an outcome that is not legally binding. The ICRC is currently finalising publicly available reports on the consultations. Further consultations planned for 2014 will include more focused expert meetings on the four priority areas. Following all consultations, the ICRC will be preparing a report with options and its recommendations for consideration by the 2015 International Conference.

1.2 The mechanisms for monitoring compliance with IHL

(8) Insufficient respect for applicable rules is the principal cause of suffering during armed conflicts. In recent years, the emphasis has been on developing criminal law procedures to prosecute and punish those who have committed serious violations of IHL. However, there remains an absence of effective means for identifying and halting violations while they are occurring. Contrary to most other branches of international law, IHL has only a limited number of mechanisms to ensure compliance with its norms. However, these mechanisms have not or have almost never been used in practice. Further, they only apply in cases of international armed conflict.

(9) Pursuant to the request by States at the 31st International Conference,³⁹ the ICRC and Switzerland are jointly leading consultations with States and other relevant actors on how to improve compliance with IHL through developing stronger international mechanisms. Through a series of consultations with States throughout 2012 and 2013 (in which the United Kingdom has participated actively), States have agreed that lack of compliance with IHL is a major concern and affirmed the need for more work to address this. Upcoming consultations in 2013–14 will focus on four priority areas identified by States: periodic reporting on national

³⁵ Some of the issues submitted here are addressed in the report on "International humanitarian law and the challenges of contemporary armed conflicts" submitted by the ICRC to the International Conference of the Red Cross and Red Crescent, 31 October 2011, available at <http://www.icrc.org/eng/resources/documents/report/31-international-conference-ihl-challenges-report-2011-10-31.htm>.

³⁶ The International Conference is the supreme deliberative body of the International Red Cross and Red Crescent Movement. It brings together ICRC, the International Federation, and the 187 national Red Cross and Red Crescent societies around the world and all 194 States that are party to the Geneva Conventions. It normally meets once every four years.

³⁷ The challenges and areas in which IHL needs strengthening are identified in the report mentioned *supra*, note 2. 31st International Conference 2011, Resolution 1 on "Strengthening legal protection for victims of armed conflicts", available at <http://www.icrc.org/eng/resources/documents/resolution/31-international-conference-resolution-1-2011.htm>.

³⁸ These are discussed further in the 2011 ICRC report on "IHL and the Challenges of Contemporary Armed Conflicts" (*supra*, note 2). Pursuant to Resolution 1 of the 31st International Conference, the ICRC is undertaking research and consultation in cooperation with States and other relevant actors, with a view to proposing options and recommendations for strengthening legal protection in these two areas. Beyond the two priority areas, the report indicates a number of further topics deserving international discussion.

³⁹ See Resolution 1 of the 31st International Conference, *supra*, note 4.

compliance with IHL, thematic discussions on IHL issues, fact-finding and a regular Meeting of States, as an anchor for other elements of a possible IHL compliance system.

2. *New technologies, weapons, means and methods of warfare*

(10) There is no doubt that IHL applies to new technologies developed and used in armed conflict. Any new weapon, means or method of warfare must be capable of being used in compliance with the rules of IHL and States are obliged under existing law to assess the legality of the new weapons they wish to develop or acquire (see Art. 36 AP I).

(11) The development and use of new technologies can challenge and influence the application and interpretation of IHL. Applying the law's rules to a new technology often raises the question of whether such rules are sufficiently clear in light of the technology's specific characteristics, and with regard to the foreseeable humanitarian impact on civilians. Developments in relation to cyber-warfare, drones, autonomous weapons systems and incapacitating chemical agents are of particular concern to the ICRC.

2.1 Cyber warfare

(12) The growing number of States developing cyber capabilities reinforces the ICRC's humanitarian concerns about cyber warfare—that is, means and methods of warfare that consist of cyber operations amounting to, or conducted in the context of, an armed conflict, within the meaning of IHL. It appears that cyber-attacks against transportation systems, electricity networks, dams, and chemical or nuclear plants are technically possible. Such attacks could have wide-reaching consequences and cause many civilian casualties. Furthermore, given the interconnectivity of cyber space, the attacking party might be incapable of distinguishing between military and civilian computer networks when launching a cyber-attack. It might also be difficult to evaluate the indirect effects on civilian networks if military networks are attacked. These challenges underline the necessity to be extremely cautious when resorting to cyber-attacks. They also underscore the importance that States that would develop or acquire cyber warfare capabilities assess their lawfulness under IHL, as for any new weapons, means or methods of warfare. It is indeed crucial to uphold the rules of IHL, which cyber operations must comply with, in particular the rules of distinction, proportionality and precaution. This is not to deny that there might be a need to develop the law further as technologies evolve or their human cost is better understood. That will ultimately have to be determined by States. The United Kingdom government has announced that it is developing its cyber capabilities, and the ICRC is pleased that it has been able to start a dialogue with the authorities on the legal and humanitarian implications of cyber warfare.

2.2 Drones

(13) An armed drone is a remotely piloted aircraft, eg a weapon platform that is not as such unlawful under IHL. While armed drones allow combatants to be physically absent from the "battlefield" they remain under the control of human operators at all times and are, in this respect, similar to manned weapons platforms such as helicopters or other combat aircraft.

(14) There is currently a lot of controversy about the lawfulness of the extraterritorial use of force by drones. Beyond the *jus ad bellum* questions, extraterritorial use of force by drones can be governed either by IHL or by international human rights law and the relevant domestic law, depending on whether the situation in which they are used amounts to an armed conflict or not. The geographic reach of IHL when drones are used extraterritorially has become a matter of debate. It is important that this issue continue to be discussed and clarified among States. In the view of the ICRC there is no "one-size-fits-all" approach. The ICRC takes a case-by-case approach in determining which body of law is applicable to which situation of violence and, consequently, which rules have to be followed.

(15) Furthermore, it is important to get more clarity in the factual debate surrounding drones. Advocates of the use of drones argue that they have made attacks more precise and that this has resulted in fewer casualties and less destruction. But it has also been asserted that drone attacks have erroneously killed or injured civilians on too many occasions.

(16) In light of the legal and humanitarian implications of the use of force by drones—and of the importance to carefully monitor such consequences,⁴⁰ the ICRC urges States to abide by IHL when they use force by drones in armed conflict situations, bearing in mind that not all use of force by drones implies a situation of armed conflict.

2.3 Automated and autonomous weapons

(17) Armed conflicts today see increasing use of automated weapons, and research is on-going to develop autonomous weapon systems. The trend towards decreasing human oversight of weapon systems raises serious legal, ethical and societal concerns. An automated weapon is one that is able to function in a self-contained

⁴⁰ See report on "IHL and the challenges of contemporary armed conflicts", *supra*, note 2, at sections III.3 and V.1.; Interview with the President of the ICRC, Peter Maurer, of 10.05.2013, "The use of armed drones must comply with IHL", available at <http://www.icrc.org/eng/resources/documents/interview/2013/05-10-drone-weapons-ihl.htm>.

and independent manner although it may initially be deployed or directed by a human operator. A central challenge is to ensure that such weapons are capable of the level of discrimination required by IHL. Autonomous weapon systems (lethal autonomous robots) would search for, identify and attack targets, including human beings, using lethal force without any human operator intervening. The ICRC is urging all States to consider the fundamental legal, ethical and societal issues before autonomous weapons are developed and/or deployed in armed conflict, as required by IHL.⁴¹

2.4 Chemical weapons: Use of toxic chemicals as weapons for law enforcement purposes

(18) The use of chemical weapons is prohibited in armed conflict. Persistent military and law enforcement interest in using highly toxic chemicals as weapons (eg dangerous anaesthetic drugs) raises serious health and legal concerns. In February 2013 the ICRC called on all States to limit the use of toxic chemicals as weapons for law enforcement purposes to riot control agents (ie “tear gas”) only,⁴² as permitted under the Chemical Weapons Convention.⁴³ Legitimate use of riot control agents may include use by military forces performing law enforcement functions.⁴⁴ Over 10 years ago the United Kingdom articulated a position similar to that of the ICRC,⁴⁵ in April 2013 the United Kingdom argued that States “...should work together to establish a norm to discourage the use of chemicals more toxic than riot control agents for law enforcement...”⁴⁶ While the established practice of virtually all States is to limit the use of toxic chemicals for law enforcement operations to riot control agents only, there remains ambiguity in the current United Kingdom position. The United Kingdom should clarify its view on this matter.

3. Notion of “armed conflict” and scope of application of IHL

(19) It is likely that the United Kingdom armed forces will conduct many, if not most, of its military operations pursuant to a mandate given by the UN Security Council (UNSC) and in coalition with other States. Also, a number of the United Kingdom’s military operations might be conducted with the understanding that they are “humanitarian” in nature, or conducted to protect civilians.

(20) In this respect, it has sometimes been argued that armed forces mandated by the Security Council cannot be qualified as belligerents within the meaning of IHL, as their sole objective is the restoration and preservation of international peace and security or, on occasion, the protection of civilians; and that accordingly, IHL is not applicable as such and *de jure* to such operations. It has also been argued that so-called “humanitarian” operations do not amount to armed conflicts governed by IHL. Similarly, it has been argued that a higher threshold of intensity would be required in order to determine that armed forces authorized by the UNSC have become party to an armed conflict.

(21) This position ignores the longstanding distinction between *jus in bello* and *jus ad bellum* and the fact that the applicability of IHL to armed forces depends on the factual circumstances prevailing on the ground and on the fulfilment of specific legal conditions, namely the IHL criteria for the classification of armed conflicts. The mandate and the legitimacy of a mission entrusted to these forces by the UNSC are *jus ad bellum* issues and have no bearing on the applicability of IHL to them.

(22) Thus, States that conduct military operations (with or without a UNSC mandate) become party to an international armed conflict as soon as they resort to force against one or more States, irrespective of the duration and intensity of the armed violence (common article 2 to the Geneva Conventions). States become party to a non-international armed conflict once they are opposed to organized armed group(s) during armed confrontations reaching a sufficient level of intensity.

(23) In relation to non-international armed conflict, it is also worth mentioning the specific situation when States intervene in a pre-existing non-international armed conflict—as for instance the one that opposes the Afghan government to the armed opposition groups in Afghanistan. In such circumstances, the intervening State may become party to the armed conflict on the basis of the nature of the support they provide to one of the belligerents, even if the operation by itself would not reach the threshold of intensity required for NIACs. This is because by grafting its military actions onto a pre-existing conflict, which already reaches the threshold of violence of NIAC, it cannot conduct military actions without being bound by IHL. The intervening State

⁴¹ See report on “IHL and the challenges of contemporary armed conflicts”, *supra*, note 2, at section V.1; FAQ “Autonomous weapons: States must address major humanitarian, ethical challenges, 02.09.2013, available at <http://www.icrc.org/eng/resources/documents/faq/q-and-a-autonomous-weapons.htm>.

⁴² ICRC position on the use of toxic chemicals as weapons for law enforcement, 6 February 2013, <http://www.icrc.org/eng/assets/files/2013/2013-02-toxic-chemicals-icrc-position-eng.pdf>.

⁴³ A riot control agent is defined as: “Any chemical not listed in a Schedule, which can produce rapidly in human sensory irritation or disabling physical effects which disappear within a short time following termination of exposure.” CWC, article II.7.

⁴⁴ However, it is prohibited to use riot control agents as a method of warfare. CWC, article I.5.

⁴⁵ United Kingdom (1992) Mr Douglas Hogg, Minister of State, Foreign & Commonwealth Office, written response to a Parliamentary question from Mr Macdonald to the Secretary of State for Foreign & Commonwealth Affairs, 7 December 1992, Hansard (Commons) Vol 215 No 89 cols 461–462, <http://www.publications.parliament.uk/pa/cm199293/cmhansrd/1992-12-07/Whittens-1.html>.

⁴⁶ United Kingdom (2013) Statement by Mr Alistair Burt, Parliamentary Under Secretary of State for Foreign and Commonwealth Affairs at the Third Review Conference, RC-3/NAT.22, 9 April, http://www.opcw.org/index.php?eID=dam_frontend_push&docID=16326.

will become involved as a co-belligerent if this involvement consists in actions related to the conduct of hostilities undertaken in support to a party to that non-international armed conflict.

4. Health care in armed conflict—protection of the wounded and sick, and medical personnel, units and transports

(24) IHL requires that the wounded and sick, whether civilian or military, including wounded fighters, must be respected and protected in all circumstances and must receive impartial medical care. Parties to the armed conflict must also search for, collect and evacuate any wounded and sick without delay. These are obligations of means, subject to the best efforts in terms of the prevailing security situation and capacities. The ICRC believes that the best efforts to discharge these obligations include permitting impartial humanitarian organisations to assist in these tasks when the parties themselves are unable or unwilling to fulfil their obligations. While such medical relief operations require consent from the parties to the conflict -except in situations of occupation-, such consent must not be denied or limited arbitrarily.

(25) In contemporary armed conflicts, the ICRC has repeatedly witnessed collateral damage to medical personnel and objects, especially when military operations are carried out in densely populated areas and military objectives are in the vicinity of such specially protected persons and objects. These circumstances underline the specific importance of respecting the rules on distinction, proportionality and precautions required by the obligations to respect and protect medical personnel and objects, and the prohibition of attacking them, unless they commit, or are used to commit, acts harmful to the enemy, outside their humanitarian functions. In the ICRC's view, any assessment of the expected incidental harm under the rule of proportionality must take into account potential harm among all medical personnel and objects, including military medical ones.

(26) The ICRC has also witnessed some checkpoint controls and armed entries into medical units by parties to the conflict which had the negative effects of patients not receiving the necessary medical care and medical personnel and facilities prevented from functioning. Parties to the conflict are generally not prevented from performing security checks for medical transports or from interrogating and arresting persons inside medical units for imperative reasons of security. But the obligations to respect and protect the wounded and sick, medical personnel and objects require parties to the conflict to have appropriate doctrine and practical procedures in place to mitigate the impact of these measures on the delivery of impartial health care.

(27) With these challenges in mind, the ICRC, as part of its Health Care in Danger (HCiD) project aimed at improving security and delivery of impartial health care, has been engaging States on strengthening military practice and doctrine on ground evacuations of wounded and sick, including on the issue of checkpoints; on search operations in health-care facilities; on precautions in attack and defence to avoid harm to medical personnel and objects; and on the use of the protective emblems. A workshop on these issues will be held in Sydney in December 2013 with military experts, and preliminary consultations with military experts have shown that specific military doctrine on these issues is lacking.⁴⁷

5. Promotion of IHL into domestic legislation and practice (training, national legislation, military policy)

(28) The implementation of IHL is an on-going process that requires continuing efforts by State authorities.

(29) From a legislative perspective, the ICRC is fully aware that the drafting, parliamentary vetting and adoption of any new laws are exercises that can be fraught with frustrations, capacity constraints and delays. Moreover, in these days of economic turmoil, it is arguably understandable that calls to push through laws to give effect to such instruments as the Geneva Conventions, and treaties regulating conventional weapons, including chemical and biological weapons, will not necessarily be heard, let alone embraced as priorities by Governments.

(30) However, it is exactly because of the times we now live in, with numerous on-going armed conflicts, many with serious humanitarian consequences, that efforts need to be redoubled to ensure that IHL instruments are fully and universally implemented, and fundamental IHL norms respected in conflicts. States are to be encouraged to meet their obligations under IHL treaties, both through legislative action but also in terms of military training. Where possible, States with greater means, such as the United Kingdom, should strive to provide support to other Common law jurisdictions and military partners in the form of capacity building and technical advice to improve universal implementation of and respect for IHL.

(31) Ratifying IHL or international human rights law (IHRL) treaties, implementing them in domestic law, and disseminating them are indeed essential steps, but not the end of the story. The behaviour of armed forces during operations is shaped by four broad factors: (1) doctrine, (2) education and training, (3) equipment, and (4) sanctions. In order to enhance compliance during military operations, the law must therefore become an integral part of all four factors—what the ICRC describes as the integration cycle. To support States in their endeavour to integrate the law, the ICRC provides tailored guidance and assistance.

⁴⁷ "Health Care in Danger" is an ICRC-led project of the Red Cross and Red Crescent Movement scheduled to run from 2012 to 2015 and aimed at improving the efficiency and delivery of effective and impartial health care in armed conflict and other emergencies. This will be done by mobilizing experts to develop practical measures that can be implemented in the field by decision-makers, humanitarian organizations and health professionals, see <http://www.icrc.org/eng/what-we-do/safeguarding-health-care/solution/2013-04-26-hcid-health-care-in-danger-project.htm>.

(32) Similarly, the ICRC will continue to provide assistance to States Parties for the development of national implementing legislation. The ICRC has developed a number of tools to assist States in the development of their national implementing legislation, including model laws on specific issues. The ICRC also works closely with National International Humanitarian Law Committees or similar inter-ministerial advisory bodies which have been established by Governments in 104 countries worldwide, including in the United Kingdom.

6. Universal jurisdiction

(33) Universal jurisdiction is an essential tool for bringing to justice perpetrators of war crimes, crimes against humanity and genocide. The basis for universal jurisdiction over serious violations of IHL can be found both in treaty law and in customary IHL. The treaty basis for universal jurisdiction over war crimes was laid down in the 1949 Geneva Conventions for the protection of war victims in relation to those violations of the Conventions defined as grave breaches and expanded with AP I. Whilst the Geneva Conventions do not expressly state that jurisdiction is to be asserted regardless of the place of the offence, they have generally been interpreted as providing for universal jurisdiction.

(34) Moreover, although the relevant provisions of the Geneva Conventions and AP I are restricted to “grave breaches”, State practice has confirmed as a norm of customary IHL the rule that States have the right to vest their courts with universal jurisdiction over all violations of the laws and customs of war that constitute war crimes.⁴⁸ This includes serious violations during non-international armed conflict of Article 3 common to the Geneva Conventions and of Additional Protocol II of 1977, as well as other war crimes, such as those recognized in Article 8 of the Statute of the International Criminal Court.

(35) A number of other IHL related instruments provide a similar obligation for States to vest universal jurisdiction over certain crimes when they are committed during armed conflict. These include the Second Protocol of 1999 to the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict.

(36) Under IHL, it remains the responsibility of States to bring to justice those who commit serious violations of IHL. In some instances though, States may be unable or unwilling to prosecute their citizens or other individuals who committed such crimes on their territory or under their jurisdiction. State practice has shown that, where international courts are unable to act, the exercise of universal jurisdiction by other States can be effective in overcoming this impunity gap. The ICRC thus encourages greater use of the exercise of universal jurisdiction to overcome any deficit in the repression by States for war crimes committed locally.

RECOMMENDATIONS

In view of the recommendations that will inform the United Kingdom Armed Forces Covenant and the development of the Strategic Defence and Security Review, the ICRC recommends that the United Kingdom:

- Continue to participate actively in the ICRC-led consultations on strengthening legal protection for persons deprived of their liberty in non-international armed conflict.
- Continue to participate actively in the ICRC-led consultations on strengthening compliance with IHL.
- Explore the legal implications of current and future automated weapons, and carefully consider the fundamental legal, ethical and societal issues posed by the potential development of autonomous weapons systems before they are developed or deployed.
- Confirm a national policy that riot control agents are the only toxic chemical permitted for law enforcement purposes and confirm this interpretation of its national legislation (or amend the legislation if necessary).
- Carefully analyse the legal implications and possible humanitarian consequences of the use of cyber weapons and—building on the United Kingdom’s public assertion that IHL applies to cyber warfare—adopt positions that uphold the protection of IHL for victims of armed conflicts, and share these positions publicly.
- Carefully analyse the legal implications and possible humanitarian consequences of the extraterritorial use of force by drones so as to be compliant with the applicable legal framework in each circumstance (IHL or other bodies of law, depending on whether the situation is one of armed conflict or not).
- Apply the legal criteria for IHL applicability in accordance with the relevant provisions of this body of law to all its military operations.
- Contribute to the reflections that result from preliminary consultations already conducted, including with UK military medical experts, that indicate the need for further work on specific military doctrine in the area of healthcare in armed conflict, both internally in the United Kingdom and more globally, and favour participation at a military expert workshop in Sydney in December 2013.
- Enhance the integration of the IHL governing military operations into doctrine, education, training and equipment, and ensure that they are governed by an effective sanction system.

⁴⁸ Rule 157, Customary International Humanitarian Law, *supra*, note 1.

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- Encourage greater use of the exercise of universal jurisdiction to overcome any deficit in the repression by States for war crimes committed locally.

October 2013

Written evidence from Brigadier (Rtd) Anthony Paphiti

IMPACT OF LAW ON THE SERVICEMAN

There are 3 key operational areas where the impact of the law on the Serviceman⁴⁹ is of concern:

1. Law as it relates to actual combat, where decisions are taken “on the battlefield” using available resources; and
2. The law as it relates to advance preparations for combat, equipment supply etc, where knowledge and foreseeability are relevant.
3. The Encroachment of Human Rights law into the battlespace.

Legal authorities show the “combat immunity” exemption applies in the first case, whereas there is a good case for denying the exemption and supporting the rights of servicemen in relation to the second. The reasons are set out below.

PART 1: LAW AS IT RELATES TO MILITARY OPERATIONS

Combat Immunity—The principle of Combat Immunity has been confirmed in domestic law by the cases of *Mulcahy—v- MoD* [1996], *Multiple Claimants v Ministry of Defence* [2003] and, more recently, *Smith and Others v the Ministry of Defence* [2013], UKSC 41 in that that there is no common law liability for negligence in respect of acts or omissions on the part of those who are *actually engaged in armed combat*.

In the case of *Mulcahy—v- Ministry of Defence* [1996], the court cited with approval the words of in Dixon J, in *Shaw Savill & Albion Co Ltd v Commonwealth*:⁵⁰

“To hold that there is no civil liability for injury caused by the negligence of persons *in the course of an actual engagement* with the enemy seems to me to accord with common sense and sound policy.” [My emphasis added].

At paragraph 62, Sir Ian Glidewell said:

“... it is in my judgment clear that public policy does require that, when two or more members of the armed forces of the Crown are engaged *in the course of hostilities*, one is under no duty of care in tort to another. Indeed, it could be highly detrimental to the conduct of military operations if each soldier had to be conscious that, even *in the heat of battle*, he owed such a duty to his comrade.... If during the course of hostilities no duty of care is owed by a member of the armed forces to civilians or their property, it must be even more apparent that no such duty is owed to another member of the armed forces.”

These views contrast with the situation where there is the ability to provide equipment and the financial resources to do so, with knowledge that deficiencies are causing death and injury to our servicemen, yet a conscious decision is taken not to provide that equipment, or there is unjustified dilatoriness in its procurement. This is discussed in Part 2.

In *Multiple Claimants Owen*, J held, at §2C:

“*no duty of care arises* “...in a service setting *when related to immediate operational decisions and actions within a theatre of war or analogous situations*”, a principle that has been variously described as the common law immunity or battle immunity; but which I propose to call the “combat immunity”, a term that describes the context in which it arises and is wider than the term battle immunity, a battle being ordinarily understood to be a prolonged fight between large organised armed forces.”

However, in *Smith*, Lord Hope went further and considered that:

“It is of paramount importance that the work that the armed forces do in the national interest should not be impeded by having *to prepare for or conduct active operations against the enemy* under the threat of litigation if things should go wrong”.⁵¹

Lord Carnwarth, giving a dissenting judgment in *Smith*, pointed out, at para 157:

“We have not been referred to any authority in the higher courts, in this country or any comparable jurisdiction, in which the state has been held liable for injuries sustained by its own soldiers in the course of active hostilities.”

While the court decided that combat immunity should be narrowly construed, it refused to interfere in policy decisions by government or the MoD (eg the decision to go to war).

⁴⁹ Unless otherwise specifically stated or the context makes clear, references to the masculine include the feminine.

⁵⁰ Also confirmed in *Groves v. Commonwealth of Australia* (1982) 150 CLR 113; 40 ALR 193

⁵¹ At p.37

Although the applicants in *Smith* are now able to institute proceedings for negligence, not all judges were confident of success. Significantly, though, *Smith* does not make commanders on the ground liable for decisions taken on the battlefield. The commander is thus still free to make his tactical decisions on the basis of his assessment of the task, his troops to task and available equipment and munitions. He fights with what he has to achieve mission success.

Military Operations—Military Operations cover the spectrum from combat to non-combat operations. In combat operations International Humanitarian Law (IHL) applies. In between there are two other broad situations: “peace enforcement” and “peace building” the concepts of which developed from the 1992 vision of the then UN Secretary General.⁵²

“Peace Enforcement”, is defined by the UN as “the application of a range of coercive measures, including the use of military force” to restore international peace and security in situations where the Security Council has decided to act in the face of a threat to the peace, breach of the peace or act of aggression.⁵³ It recognises the hostile environment in which the force, under UN authority, is attempting to establish stability and peace, while not being obviously at war, but with the authority to carry out war-like operations. Again, IHL will apply to all combat operations.

Peace building is the transitional phase which

“aims to reduce the risk of lapsing or relapsing into conflict by strengthening national capacities at all levels for conflict management, and to lay the foundation for sustainable peace and development. It is a complex, long-term process of creating the necessary conditions for sustainable peace. Peacebuilding measures address core issues that effect the functioning of society and the State, and seek to enhance the capacity of the State to effectively and legitimately carry out its core functions.”⁵⁴

These are not finely demarcated lines. They merge into each other as the mission transitions to a more stable and less threatening state. At the end of a period of combat operations, always regarded as the exclusive province of IHL as the *lex specialis* (the governing law), a force may turn into an occupying force. In occupation the Geneva Conventions and Protocols are applicable still, and the Hague Rules 1907. However, now the ECHR encroaches as, inherent in the concept of occupation is the fact of territorial control, which means that the jurisdiction of the Convention extends to that occupied territory. The two regimes do not sit easily together as IHL recognises the role of combat forces in an area where indigenous institutions may have broken down, while the ECHR functions more easily in a peace-time environment with fully operating institutions of law and order.⁵⁵

This relationship between IHL and the ECHR is further complicated by those circumstances when, although still very much a military operation, the effort to re-establish sovereign government institutions requires detailed and constructive cooperation between the military force and that government. This happened in Iraq, as illustrated by the case of *Al Saadoon*.⁵⁶ This relationship is seriously under threat as a result of that decision.

After the Iraq war the allies were ultimately engaged in a peace building/nation building transition, under UNSCR 1483, with the Coalition Provisional Authority (“the CPA”) exercising most of the powers of government during the occupation. This process involved re-establishing the sovereign state of Iraq, repairing and rebuilding infrastructure and institutions and enabling the nascent government to begin functioning efficiently after the vacuum created by war. In this process, our forces gradually moved from being in occupation to working with the Iraq Host Nation and being *in situ* with its consent, reinforced in a UN Security Council mandate.⁵⁷ Similarly, in Afghanistan our forces were there under a UN mandate⁵⁸ to assist the Afghan government.

During peacebuilding and peace keeping, a key consideration is the applicable sovereignty of the Host Nation and the fact that the military force acts in support of their government. All territory is subject to the sovereign authority of their government. So, when the ECtHR seeks to impose obligations on the UK force that are in direct conflict with the law of the Host Nation and the terms of our agreements/SOFAs, or the UN mandate, the UN mission is actually imperilled. It is wholly incompatible with the aim of the UN, in attempting to rebuild a nation emerging from war, to effectively deny the very sovereignty of that non-Council of Europe (CoE) nation by passing down decisions which essentially override agreements made with a Sending State (a nation which sends troops).

⁵² Boutros Boutros-Ghali, “An Agenda for Peace, Preventive diplomacy, peacemaking and peace-keeping”, A/47/277—S/24111, 17 June 1992

⁵³ See: Peace and security, <http://www.un.org/en/peacekeeping/operations/peace.shtml>

⁵⁴ See, <http://www.un.org/en/peacekeeping/operations/peace.shtml>

⁵⁵ This is examined further in the section on the ECHR.

⁵⁶ ECtHR (Fourth Section), Application Number 61498/08. See also, *Mission Impossible*, Counsel Magazine, July 2010.

⁵⁷ UNSCR 1790 of 2007 noted that “that the presence of the multinational force in Iraq is at the request of the Government of Iraq and reaffirms the authorization for the multinational force as set forth in resolution 1546 (2004) and decides to extend the mandate as set forth in that resolution until 31 December 2008...”

⁵⁸ Starting with UNSCR 1386 (2001), establishing the International Security Assistance Force (ISAF) “to assist the Afghan Interim Authority in the maintenance of security in Kabul and its surrounding areas, so that the Afghan Interim Authority as well as the personnel of the United Nations can operate in a secure environment”. This was followed by UNSCR 1401 (2002) establishing a Nations Assistance Mission in Afghanistan (UNAMA). However, it was UNSCR 1444 (2002) which provided a Chapter VII mandate to the ISAF.

Whither Combat Immunity

The case of *Smith* did not remove the defence of combat immunity, but there remains an issue whether the defence more widely covers preparation for or conduct of active operations against the enemy, or is narrowly constrained to death/injuries sustained in the course of active hostilities.⁵⁹ The Supreme Court made no finding on the issues of negligence in the procurement process. The cases are justiciable on this point,⁶⁰ although there was little optimism about the outcome. What the court did say is that combat immunity must be construed narrowly.

For as long as the ECtHR continues to stretch the reach of the ECHR into more areas, rubbing up against IHL in combat operations, our forces will continue to be hampered in the carrying out of the mission objective. This is the case even where we act under a UN mandate.

PART 2—LAW AS IT RELATES TO PREPARATIONS, EQUIPMENT ETC, WHERE KNOWLEDGE AND FORESEEABILITY ARE RELEVANT

A case for liability—The thought-provoking Policy Exchange paper, “The Fog of Law”,⁶¹ expressed the view that “recent legislation and judicial findings have extended the domestic law of negligence to the battle zone”.⁶² *Smith* essentially held that the issues of negligence were justiciable, while expressing reservations about their eventual success. However, there is indeed a need to ensure clarity as to the province of the law of negligence in these circumstances. It is suggested a distinction should be made between (a) conduct in the course of military operations where combat immunity is applicable and (b) conduct in the preparation and lead up to operations where the law of negligence is of import in relation to any failures to address obvious and grave shortcomings, of which the chain of command and government are aware. Decisions made in the safety and calm of an office in Whitehall, with time to consider the facts and views of experts, assess risk and make the decision, should not be covered by any legal exemption. Yet the court—even the majority—in *Smith* accepted that

““high level” decisions about procurement or conduct of operations are not open to review in the courts”⁶³

This excuses the egregious failures of government to act when in possession of the salient facts. That situation contrasts starkly with a decision taken on the battlefield whether operationally, for example, it is necessary to wear body armour or helmets. That decision might turn out to be wrong, but if it was an operational decision it should fall within combat immunity and should not give rise to any liability against the commander on the ground. An exception might arise where the decision in question was deferred so as not to give an enemy advance warning of preparations for war. That may have a legitimate strategic purpose, provided it is rectified as soon as possible once war starts.⁶⁴ However, the shortcomings in “Snatch Landrover” were being regularly relayed to the MoD⁶⁵ and Government. Personnel were dying or suffering horrible life-changing injuries through inadequate protection. Government was slow to react.⁶⁶ These vehicles were not replaced until the end of 2010 by Foxhound (Ocelot), followed by Huskys. Should an exemption from tortious liability exist in such a case?

The RAF Nimrod Aircraft fleet, according to the Hadden-Cave Inquiry, was known to have a serious safety problem. That report “criticised the Ministry of Defence for sacrificing safety to cut costs.”⁶⁷ One senior officer was criticised for failing to give “adequate priority, care and personal attention to the preparation of the NSC [*Nimrod Safety Case*].” The inquiry cited “incompetence, complacency and cynicism” as being at the

⁵⁹ See above, on page 3

⁶⁰ Reference was made in at para 68 to a number of cases and to the fact that “but Depending on the facts, this duty (on a state to take appropriate measures to secure the health and well-being of prisoners or people who are in some form of detention) could extend to issues about training and the procurement of equipment before the forces are deployed on operations that will bring them into contact with the enemy. The second, which is also directly in point in this case, is to ensure that, where there is a real and immediate risk to life, preventative operational measures of whatever kind are adopted to safeguard the lives of those involved so far as this is practicable.

⁶¹ Published in October 2013

⁶² *Ibid*, page 11

⁶³ *Ibid*, paragraph 159

⁶⁴ For example, a decision by MoD not to acquire better protected vehicles.

⁶⁵ “Major Sebastian Morley retired from the army after four his soldiers were killed when their lightly armoured Snatch Land Rover hit a landmine in Helmand province in early 2008. Morley, the commander of D Squadron, 23 SAS, blamed “chronic under investment” in equipment by the Ministry of Defence for their deaths, the Daily Telegraph reported. The paper said he believed the MoD was guilty of “gross negligence” and that its failure to supply better equipment was “cavalier at best, criminal at worst”. Guardian, 1 November 2008. He alleged “Men and women have been dying for three or four years now and will continue to as long as these unsuitable vehicles are deployed for unsuitable duties.”

⁶⁶ “Why has it taken 8 years to come up with a suitable replacement? A question which is both pertinent and poignant as at least 37 soldiers have died to date in Iraq and Afghanistan as a direct result of being attacked whilst travelling in the vulnerable Snatches?”—see Caledonian Mercury, September 23rd, 2010, Snatch Landrover replacement—a case of shutting the door after the horse has bolted? This article pointed out that “Colonel Stuart Tootal, former Commanding Officer of 3 PARA, the first battlegroup to deploy to Helmand, has pointed out that the deficiencies of the Snatch Landrover first came to light in Iraq in 2003, when insurgents started favouring IEDs as their weapon of choice when targeting coalition troops.” Disquiet of senior commanders was also evident, as “former Army chief Gen Sir Richard Dannatt said the problem of the Land Rovers should have been dealt with earlier.” See BBC News, 22 September 2010—<http://www.bbc.co.uk/news/uk-11388724>

⁶⁷ <http://www.independent.co.uk/news/uk/home-news/silence-thwarts-justice-for-nimrod-victims-6423172.html>

root of the deaths. The Government was accused of putting costs before lives. More noteworthy was the conclusion that

“Airworthiness in the MOD became a casualty of the process of cuts, change, dilution and distraction commenced by the 1998 Strategic Defence Review.”⁶⁸

Hadden-Cave pointed out that the key problems were in fact known about for some time prior to deployment of the aircraft. This is a crucial point because, it is not the deployment of such defective aircraft at an urgent time of operational requirement which is the issue—most servicemen recognise that we go to war with what we have—it is the failure to ensure, in the years preceding a deployment that the equipment is safe and meets operational requirements. 14 highly experienced crew with two of the Nimrod Force’s most capable and knowledgeable aviators, lost their lives in that incident.

More recently, in *Smith*, reference was made in at by Lord Hope, at paragraph 68, to a number of cases and to the positive duties placed upon the state, among which are two general obligations:

“The first is *a systemic duty*, to put in place a legislative and administrative framework which will make for the effective prevention of the risk to their health and well-being or ... effective deterrence against threats to the right to life. Depending on the facts, *this duty could extend to issues about training and the procurement of equipment before the forces are deployed on operations that will bring them into contact with the enemy*. The second, which is also directly in point in this case, is to ensure that, *where there is a real and immediate risk to life, preventative operational measures* of whatever kind are adopted to safeguard the lives of those involved so far as this is practicable.”

PART 3—ENCROACHMENT OF THE ECHR

Some recent decisions of the ECtHR, such as *Al Jedda*, *Issa*, *Al Skeini* and *Al Saadoon and Mufdhi* serve to illustrate how the ability of a military force to operate effectively in combat operations has been seriously hampered. In particular, arrest and detention operations are now more problematic. The need to arrest and detain enemy combatants and insurgents in a conflict zone should not be expected to comply with peace-time standards such as those exercised by a civilian police force in Tonbridge Wells on a Saturday night. These demands are simply unrealistic and inhibit the need to gather intelligence without delay. They also inhibit our ability to operate with allies outside the CoE by being able to pass over detainees to other nations who may have a security interest in them. In Iraq, the Multi-National Force (MNF) had a UN mandate to take all necessary measures to contribute to the maintenance of security and stability in Iraq, reinforced by the decree of the UN-appointed Coalition Provisional Authority (CPA) which authorised criminal and security detentions.⁶⁹

If unrealistic peace-time standards are placed on the force in relation to arrest and detention, the outcome may also be the least beneficial to the putative detainee—a failure to arrest and detain him might condemn him to a much worse fate. Such an outcome would not only be unsatisfactory for him, but also for the force; we would have lost an opportunity to obtain intelligence that might assist our mission and save lives. This prolongs a conflict rather than assists its resolution. It also means more people might be killed or injured.

A prisoner is not without rights and protections in such circumstances. He has protected status under IHL and, even in a non-international armed conflict, enjoys the basic protections of common article 3. However, it is quite normal for a force Op Plan to stipulate that, whether strictly applicable or not, the standards of the GCs and Protocols are to be adhered to, whether or not each participating state is signatory to those treaties. Under IHL it is permissible for prisoners to be passed to an allied nation which is also party to the GCs. However, the arresting power remains responsible for the wellbeing of those prisoners and must retrieve them in the event of concerns about their treatment. This is set out in article 12 of the 3rd Convention. Similar provisions are contained in the 4th GC, concerning detention and internment of protected persons who are civilians. Due to ECHR encroachment, if the receiving nation is non-CoE, the handover process may be impeded by challenge to UK courts and the ECtHR.⁷⁰

Handing prisoners over to the authorities of the nation in whose territory the conflict occurs may not be possible as their facilities may be non-existent or inadequate (see *Al Saadoon and Mufdhi*),⁷¹ or they may be treated to lower standards than acceptable. In any event detention on operations is not primarily for the purpose of gathering admissible evidence for prosecution, but for intelligence gathering and removing from circulation people who present a threat or danger to the force, without any intention to prosecute. There is a paradigm shift from peace-time law enforcement. Giving ECHR protection to such dangerous individuals and bringing them to the UK imports the risk they pose, turning the UK into a safe haven for identified as a danger to our security.

⁶⁸ *Ibid*, p.359

⁶⁹ CPA Memorandum No.3 (Revised). This was continued in force by the Governing Council of Iraq (“the IGC”). However, a Memorandum of Understanding (MOU) between UK and the Ministries of Justice and Interior of Iraq, dated 8 November 2004, was concerned with “criminal suspects” who could be interned under UNSCR 1546 “for imperative reasons of security”.

⁷⁰ See also the approach of the ECtHR to extradition/deportation decisions where the target country is not party to the ECHR and where the death penalty exists, or where conditions are found to breach art.3 standards: *Al Saadoon*; *Othman (Abu Qatada)* -v- *United Kingdom* (Application no. 8139/09).

⁷¹ Human rights lawyers may argue that the ECHR would apply here, to stop the transfer of anyone who might then be subjected to torture etc. See the case of *The Queen (on the application of Maya Evans)-v- Secretary of State for Defence*: [2010] EWHC 1445 (Admin)

In *Bankovic*,⁷² the Grand Chamber of the ECtHR was clear in its reference to the geographical reach of the ECHR.⁷³ The decision in *Issa*⁷⁴ extended the reach of article 1 of the Convention to northern Iraq, where a number of civilians had been allegedly killed by Turkish forces who had entered Iraq briefly. They withdrew after a day. The court laid out 6 principles (emphasis added):

- (1) Iraq was an independent and sovereign State which exercised effective jurisdiction over its national territory. It was neither a member of the Council of Europe nor a signatory to the Convention.
- (2) The exercise of jurisdiction is a necessary condition for a Contracting State to be able to be held responsible for acts or omissions imputable to it which give rise to an allegation of the infringement of rights and freedoms set forth in the Convention.
- (3) The words “within their jurisdiction” in Article 1 of the Convention must be understood to mean that a State’s jurisdictional competence is primarily territorial (see *Bankovic and Others*), but also that jurisdiction is presumed to be exercised normally throughout the State’s territory.
- (4) *A State’s responsibility may be engaged where, as a consequence of military action—whether lawful or unlawful—that State in practice exercises effective control of an area situated outside its national territory.* The obligation to secure, in such an area, the rights and freedoms set out in the Convention derives from the fact of such control, whether it be exercised directly, through its armed forces, or through a subordinate local administration.
- (5) *It is not necessary to determine whether a Contracting Party actually exercises detailed control over the policies and actions of the authorities in the area situated outside its national territory.*
- (6) Moreover, a State may also be held accountable for violation of the Convention rights and freedoms of persons who are in the territory of another State but who are found to be *under the former State’s authority and control through its agents* operating—whether lawfully or unlawfully—in the latter State.

It is a worrying decision because the exercise of “effective control” in the *Issa* case was just for a few hours. This approach by the court effectively extended jurisdiction to anywhere troops are operating. It stretched *Bankovic*.⁷⁵

The House of Lords decision in *Al Skeini* recognised that anyone in our physical custody eg as a prisoner in a detention facility, was “within the jurisdiction”. This covered the detention of Baha Mousa and his fellow detainees.⁷⁶ However, in relation to the other five claimants, killed in the course of combat activities, they were outside the scope of the Convention. The court preferred the *Bankovic* view of jurisdiction, that it was only in exceptional circumstances that the Convention applied extraterritorially.⁷⁷ The ECtHR disagreed with this finding and decided that even civilians were within the jurisdiction of the ECHR, as the UK was in occupation. It held that

“Court has recognised the exercise of extra-territorial jurisdiction by a Contracting State when, *through the consent, invitation or acquiescence of the Government of that territory, it exercises all or some of the public powers normally to be exercised by that Government.* Thus where, in accordance with custom, treaty or other agreement, authorities of the Contracting State carry out executive or judicial functions on the territory of another State, the Contracting State may be responsible for breaches of the Convention thereby incurred, as long as the acts in question are attributable to it rather than to the territorial State” [para. 135].

The logical conclusion of this finding is that every civilian killed in operational exchanges of fire with an enemy or insurgents, must have his or her death investigated to article 2 standards by an independent police/

⁷² Application no. 52207/99 Grand Chamber

⁷³ “In keeping with the essentially territorial notion of jurisdiction, the Court has accepted only in exceptional cases that acts of the Contracting States performed, or producing effects, outside their territories can constitute an exercise of jurisdiction by them within the meaning of Article 1 of the Convention”. Application no. 52207/99, Grand Chamber, paragraph 67.

⁷⁴ *Issa and Others -v- Turkey*: Application no. 31821/96, Second Section decision, 16 November 2004, being a first instance tribunal of the ECtHR

⁷⁵ In *Bankovic*, a decision of the Grand Chamber, the definition of “effective control” was based on the decision in *Loizidou v. Turkey*, which was a situation more akin to an occupation than a temporary military presence in a foreign territory. It also concerned acts by one CoE member state against the nationals of another CoE member state. At para 70 it held: “In its subsequent *Cyprus v. Turkey* judgment ..., the Court added that since Turkey had such “effective control”, its responsibility could not be confined to the acts of its own agents therein but was engaged by the acts of the local administration which survived by virtue of Turkish support. Turkey’s “jurisdiction” under Article 1 was therefore considered to extend to securing the entire range of substantive Convention rights in northern Cyprus.” This is substantially different to the temporary presence of troops in *Issa*.

⁷⁶ *Al-Skeini and others -v- Secretary of State for Defence*: House of Lords, [2007] UKHL 26. The court HELD (4:1) that subject only to a few narrow exceptions the Convention applies solely within the Council of Europe area and must then apply in full measure. An exception that permitted the Human Rights Act and Convention to apply extra-territorially was when a person was within the jurisdiction of the United Kingdom for the purposes of article 1 of the Convention. On this basis, as a prisoner in British military custody, Baha Musa was “within the jurisdiction”. Neither the Act nor Convention applied to the deaths of the other 5 who were shot by British soldiers during the course of security operations.

⁷⁷ See the minority view of Lord Bingham, *Al Skeini* [2007] UKHL on pages 20 and 21 of his judgment: “So it does not appear that military action abroad has generally been regarded as giving rise to an exception.”

investigative force.⁷⁸ It is wholly unrealistic. However, as seen below, the UK military Shooting Incident Review Policy (SIR) does require a form of investigation through the Serious Incident Report (SINCREP).

Unfortunately, the eagerness of the ECtHR to extend the applicability of the ECHR to combat, almost to the point that the Geneva Conventions are no longer truly the *lex specialis*, is to fail to recognise the mechanisms which the Geneva Conventions themselves have for dealing with the sort of egregious behaviour witnessed in the *Al Skeini* case, concerning the treatment of detainees and the death of Baha Mousa. The ECHR was in fact completely irrelevant to the prosecution of the accused in the Baha Musa case. That prosecution was based upon the fact that soldiers were alleged to have committed offences contrary to English law. Cpl Payne and two others were charged with a War Crime under section 51(1) of the International Criminal Court Act (inhuman treatment). The fact that the House of Lords, in *Al Skeini*, found that the ECHR applied, exceptionally,⁷⁹ to those within the custody of the British Military—and therefore included the detainees—had no bearing upon the decision to prosecute the soldiers responsible before a court martial. As for financial compensation, Lord Rodger, stated, at p.23,

“It is obvious, but nevertheless worth mentioning, that, depending on the facts, the appellants may have various other rights, such as a right to damages in tort, under English law.”

These rights apply, absent any invocation of the ECHR.⁸⁰ However, it is not being suggested that acting decisively should mean acting unlawfully, or breaching the provisions of IHL. Soldiers are taught that in combat they fall under the Law of Armed Conflict and can kill an enemy. Yet it seems now this is not so clear. Moreover, how does one define the battlefield in asymmetric ops? How does one define an enemy? What legal regime governs the capture and holding of prisoners? Can we still hand over prisoners to our allies, whose detention techniques are a little more robust than ours and whose legal system may carry the death penalty and not be subject to the ECHR, or must CoE nations have their own detention facilities, with the huge cost and manpower implications that carries, at a time when our government has pared back its army? What impact does that have on intelligence gathering and putting the force intelligence jigsaw together, if detention and interrogation is carried out by different nations? These are difficult issues for lawyers to grapple with, let alone commanders and soldiers on the front-line. What is often given short shrift is the fact that detention processes are usually subject to legal oversight. In fact, the Geneva Convention lays down a requirement in conflict, but the deploying force will normally make this part of its Op Plan, whatever the type of operation.

The judgements of the ECHR do not make easy reading for those conducting military operations. The realities and challenges faced by the force do not appear to be well understood by the tribunals that hear human rights claims brought by individuals. The ECtHR has arrogated to itself what appears to be a supremacy over even the UN Charter provisions. The law also appears contradictory.⁸¹

In the case of *Behrami and Saramati*,⁸² it was accepted that art 103 of the UN Charter was authoritative⁸³ and the ECHR had to give precedence to it. At the material times, UNSC Resolution 1244 of 10 June 1999 provided for the establishment of a security presence (KFOR) by “Member States and relevant international institutions,” “under UN auspices,” with “substantial NATO participation” but under “unified command and control.” UNSC Resolution 1244 also decided on the deployment, under UN auspices, of an interim administration for Kosovo (UNMIK) and requested the Secretary General (“SG”) to establish it and to appoint a Special Representative to control its implementation. The ECtHR decided that, in accordance with the view of the International Court of Justice, Article 103 means that the Charter obligations of UN members prevail over conflicting obligations from another international treaty, regardless of whether the latter treaty was concluded before or after the UN Charter or was only a regional arrangement. The issuing of detention orders fell within the security mandate of KFOR. Importantly, it held that Chapter VII constituted the foundation for the delegation of UNSC security powers, while the UN Security Council retained ultimate authority and control

⁷⁸ See paragraph 163. Article 1 of the ECHR requires “...some form of effective official investigation when individuals have been killed as a result of the use of force by, *inter alios*, agents of the State (see McCann...). The essential purpose of such an investigation is to secure the effective implementation of the domestic laws safeguarding the right to life and, in those cases involving State agents or bodies, to ensure their accountability for deaths occurring under their responsibility.” Later, at paragraph 167, “For an investigation into alleged unlawful killing by State agents to be effective, it is necessary for the persons responsible for and carrying out the investigation to be independent from those implicated in the events. This means not only a lack of hierarchical or institutional connection but also a practical independence.”

⁷⁹ “[W]hile the jurisdiction of states for the purposes of article 1 of the Convention is essentially territorial, in exceptional cases, “acts of the contracting states performed, or producing effects, outside their territories can constitute an exercise of jurisdiction by them within the meaning of article 1 of the convention”” *Bankovic v Belgium* (2001) 11 BHRC 435, 450, para 67, cited by Lord Rodger in *Al Skeini*, at paragraph 56. In any event, in the case of the deceased Baha Musa, claimant number 6, Lord Rodger noted at para 61, “The Secretary of State accepts that, since the events occurred in the British detention unit, Mr Mousa met his death “within the jurisdiction” of the United Kingdom for purposes of article 1 of the Convention.”

⁸⁰ See article 3 of Hague Convention 1907

⁸¹ The Maltese member of the court, Judge Vanni Bonello, remarked upon this in his concurring opinion in the Grand Chamber decision in *Al Skeini*, although his solution would bring virtually every act by a soldier within article 1 jurisdiction. In his view, “the United Kingdom is arguing, sadly, I believe, that it ratified the Convention with the deliberate intent of regulating the conduct of its armed forces according to latitude: gentlemen at home, hoodlums elsewhere.” At paragraph 18. His forthright view was that the UK was an occupying power, so as to confer jurisdiction as understood by article 1 and, as such, could not intellectually deny responsibility for its state agents acting there and, effectively, controlling that part of the country.

⁸² Application Number 71412/01; 78166/01. 2 May 2007

⁸³ “In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.”

so that operational command only was delegated by UNSC Resolution 1244. Most importantly, the ECtHR decided⁸⁴ that

Since operations established by UNSC Resolutions under Chapter VII of the UN Charter are fundamental to the mission of the UN to secure international peace and security and since they rely for their effectiveness on support from member states, *the Convention cannot be interpreted in a manner which would subject the acts and omissions of Contracting Parties which are covered by UNSC Resolutions and occur prior to or in the course of such missions, to the scrutiny of the European Court of Human Rights. To do so would be to interfere with the fulfilment of the UN's key mission in this field. It would also be tantamount to imposing conditions on the implementation of a UNSC Resolution which were not provided for in the text of the Resolution itself.* This reasoning equally applies to voluntary acts of the respondent States such as the vote of a permanent member of the UNSC in favour of the relevant Chapter VII Resolution and the contribution of troops to the security mission: such acts may not have amounted to obligations flowing from membership of the UN but they remained crucial to the effective fulfilment by the UNSC of its Chapter VII mandate and, consequently, by the UN of its imperative peace and security aim. [Emphasis added].

Importantly, the Court identified that the “key question”⁸⁵ to determine whether the delegation by the UN was sufficiently limited to meet the requirements of the Charter, and for the acts of the delegate to be attributable to the United Nations, was whether “the [Security Council] retained ultimate authority and control so that operational command only was delegated”. The Court had further identified factors which established that the UN had retained “ultimate authority and control” over KFOR, among which was the requirement that the Resolution put sufficiently defined limits on the delegation by fixing the mandate with adequate precision as it set out the objectives to be attained, the roles and responsibilities accorded as well as the means to be employed. *The broad nature of certain provisions could not be eliminated altogether given the constituent nature of such an instrument whose role was to fix broad objectives and goals and not to describe or interfere with the detail of operational implementation and choices.* Furthermore, the leadership of the military presence was required by the Resolution to report to the UNSC so as to allow the UNSC to exercise its overall authority and control.

In *Al Jedda*,⁸⁶ the applicant, an Iraqi granted asylum in the UK, was detained in Iraq by British forces operating under a UN mandate. He was interned for over three years. At that time, the Iraqi Interim Government was in power and the Multi-National Force, including British forces, remained in Iraq at the request of the Government and with the UN Security Council’s authorisation. He challenged his detention as a violation of article 5 of the ECHR, but the House of Lords rejected that claim and, rightly it is suggested, held UNSC Resolution 1546 placed the UK under an obligation to intern individuals considered to threaten the security of Iraq and that, in accordance with Article 103 of the UN Charter,⁸⁷ that obligation to the UNSC had to take primacy over the UK’s obligation under ECHR not to hold anyone in internment without charge. *Al Jedda* challenged the decision in the ECtHR. The Government relied on the *Behrami* decision, contending that the internment was attributable to the UN and not to the UK, and that the applicant was not, therefore, within UK jurisdiction under Article 1 of the Convention. Further and in the alternative they submitted that the internment was carried out pursuant to UNSCR 1546, which created an obligation on the United Kingdom to detain the applicant which, pursuant to Article 103 of the UN Charter, overrode obligations under the ECHR. In its decision, the ECtHR again pushed the boundaries of ECHR jurisdiction and unanimously rejected the House of Lords judgment, finding “ambiguity” in the UN resolution requiring that “*the Court must therefore choose the interpretation which is most in harmony with the requirements of the Convention and which avoids any conflict of obligations.*”⁸⁸ Yet in *Behrami* it had recognised the “broad nature of certain provisions” in the mandate. The regrettable effect of *Al Jedda* is to require that UN resolutions, which are usually loosely drafted to enable the greatest degree of flexibility⁸⁹ of operation, may have to be drafted with a contract lawyer’s precision of wording to ensure the requisite authorities will not be overruled by the ECtHR. This, in itself, may open up another avenue of challenge for keen-eyed human rights lawyers eager to argue over the wording of the mandated authorities.

The case of *Al Saadoon and Mufdhi* shows how the ECtHR continues to misunderstand operational imperatives and the realities of UN ops. The case concerned two men suspected of involvement in the murders of two British servicemen. They were held by the British military authorities, at the request of the Iraqi authorities, pending their trial by the Iraqi High Tribunal (“the IHT”). They were produced to the IHT whenever required, and that court exercised its jurisdiction over them. When the UN mandate was about to run out, so that UK forces would have to leave Iraq, the men argued unsuccessfully before the High Court that it would breach the ECHR to hand them over to the Iraqi authorities. They appealed to the Court of Appeal which roundly rejected their claims. That court held that they were not within the jurisdiction of the UK because article 1:

(a) is an exceptional jurisdiction;

⁸⁴ At paragraph 149 of its judgment

⁸⁵ See §66 of the ECtHR judgment

⁸⁶ Application no. 27021/08, Grand Chamber, 7 July 2011

⁸⁷ See note 35

⁸⁸ *Ibid*, paragraph 102

⁸⁹ Although, in the wake of the Libya mandate, some might seriously question this practice.

- (b) is to be ascertained in harmony with other applicable norms of international law;
- (c) reflects the regional nature of the Convention rights; and
- (d) reflects the indivisible nature of the Convention rights.

Importantly, the court was obliged to have regard to the UK's obligation, arising under international law, to transfer the appellants to the custody of the IHT in deciding whether to grant relief for the purpose of upholding Convention rights.

On appeal to the ECtHR it was decided they were within the UK's jurisdiction. The court failed to truly comprehend the dilemma faced by the UK force: we had no legal right to retain the men, as the Iraqi authorities could at any time have exercised their sovereign right and removed them from our detention facility, *a fortiori* after the mandate had run out when the British force itself had no right to remain in Iraq. The fears expressed about the fate which would befall the men if tried before the IHT were later proved to be totally unfounded. Both men were acquitted by the IHT! The dissenting judge in the case, Judge Bratza, while not questioning the general principles laid down in the Court's case-law, was not persuaded that they had any direct application to the special circumstances of the case, where the two men were held by a contingent of a multinational force on foreign sovereign territory, whose mandate to remain on that territory had expired and who had no continuing power or authority to detain or remove from the territory nationals of the foreign sovereign State concerned.

Article 2 Investigations—In *Al Skeini* the ECtHR found that the obligation to conduct an effective investigation exists in armed conflict, as a consequence of lawful or unlawful military action, when the state acts as an occupying power.⁹⁰ As to what constitutes an effective investigation into acts committed by agents of the State the ECtHR held, in *Tahsin Acar v. Turkey*⁹¹

1. The investigators must be independent from those implicated in the events. This means not only a lack of hierarchical or institutional connection but also a practical independence;
2. The investigation must be capable of leading to the identification and punishment of those responsible. The authorities must have taken the reasonable steps available to them to secure the evidence concerning the incident. Any deficiency in the investigation which undermines its ability to identify the perpetrator(s) will risk falling foul of this standard;
3. A requirement of promptness and reasonable expedition is implicit and may generally be regarded as essential in maintaining public confidence in adherence to the rule of law and in preventing any appearance of collusion in or tolerance of unlawful acts;
4. There must be a sufficient element of public scrutiny of the investigation or its results to secure accountability in practice as well as in theory. In all cases, next-of-kin of the victim must be involved in the procedure to the extent necessary to safeguard his or her legitimate interests

As the Open Society Justice Initiative rightly pointed out:⁹²

“The ECtHR has stated in a number of cases that the right to an effective remedy is denied when there is a failure to take certain specific steps in an investigation. Some of these key steps include:

- (i) taking fingerprints;
- (ii) performing a medical examination that fully examines the injuries on a victim's body, and results in “a complete and accurate record of possible signs of ill-treatment and injury and an objective analysis of clinical findings”;
- (iii) taking initiative in investigating all the circumstances of the abuse ; and
- (iv) taking reasonable steps available to “secure the evidence concerning the incident, including, inter alia , eyewitness testimony, forensic evidence ...”

In general, the responsible authorities must, “where appropriate, [carry out] a visit to the scene of the crime.”

The ECtHR has also indicated that a medical examination must also provide “a complete and accurate record of injury and an objective analysis of clinical findings.”⁹³

These are exceptionally onerous requirements. The reality is that access to the scene of death may be extremely difficult and dangerous; there is a breakdown of law and order; many people carry weapons of varying lethality; there is an hostility (either expressed or not) to the foreign force; the deceased may have been buried quickly by family, in accordance with local custom or religion, making *post mortem* examination impossible; there may be a reluctance for witnesses to cooperate with the Service police. Imposing article 2 duties on the Service police for every death places huge demands on poorly resourced Service police units—deaths are normally investigated by the Special Investigation Branch, a highly trained but smaller component of the military police.

⁹⁰ *Al Skeini-v-United Kingdom*, Application no. 55721/07) , Grand Chamber, §§90–91 and 138

⁹¹ ECtHR, Application no. 26307/95. Grand Chamber, 8 April 2004

⁹² Comparative Analysis Of Preliminary Investigation Systems In Respect Of Alleged Violations Of International Human Rights and/or Humanitarian Law, at paras 19 and 20, citing the decision in *Bati and Others v. Turkey*, ECtHR Judgment of 3 September 2005, at para. 135

⁹³ Open Society Justice report, *ibid* para 23

Notwithstanding article 2, the army does have a mandatory procedure for investigating deaths of civilians, which is in the form of a Serious Incident Report (SINCREP). As explained in Hansard,⁹⁴

“The most recent issue of the UK SIR policy was on 4 January 2010 and it is regularly reviewed. The first report of all shooting incidents is the Serious Incident Report (SINCREP). This report is sent by the military unit involved to their unit operations room in the first instance. It will then be forwarded as appropriate up the Chain of Command. From the SINCREP, the Commanding Officer (CO) of the Battlegroup must make one of three decisions:

- If only positively identified enemy forces have been killed or injured and there is no suggestion of any breach of the Laws of International Armed Conflict (LOAC) or Rules of Engagement (ROE) then no further action will be necessary.
- *If civilians may have been killed or injured although there is no indication that LOAC/ROE have been breached an SIR should be initiated.* (My emphasis)
- If it appears there may have been a breach of the ROE or LOAC or a friendly fire incident or any other circumstances deemed appropriate then the incident is reported to the Service police.

If a SIR is required then it should be completed within 48 hours and should set out the detailed facts to enable the CO to conclude if any further action is required. The review is to be conducted by an officer of at least the rank of Captain, who was not involved in the incident. The review will involve the collation of all documents, ledgers and logs that deal with the incident, as well as reports from those present. At the conclusion of the SIR the CO will have three options, depending on its outcome: inform the Service police; recommend an investigation from within unit resources; or take no further action.

If a service police investigation or unit investigation is commenced this may or may not lead to disciplinary proceedings. Any investigation will clearly produce documentation and a report.

19.4 Investigations

A Service Police investigation will be conducted in the usual manner in accordance with the Police and Criminal Evidence Act (PACE), including the taking of statements and, in most cases, the interviewing of suspects after caution. This will produce a report which will be sent to the relevant authority. A unit investigation will be less formal than a Service Police one and will not be conducted in accordance with PACE. A unit investigation will report to the CO who will then decide if disciplinary action is appropriate.”

However, in *Smith*, while examining combat immunity, Lord Hope considered the ambit of article 2 and held, at page 21:

“in my opinion a finding that in all circumstances deaths or injuries in combat that result from the conduct of operations by the armed forces are outside the scope of article 2 would not be sustainable. It would amount, in effect, to a derogation from the state’s substantive obligations under that article. Such a fundamental departure from the broad reach of the Convention should not be undertaken without clear guidance from Strasbourg as to whether, and in what circumstances, this would be appropriate.”

CONCLUSIONS

The Supreme Court in *Smith* did not neutralise the concept of combat immunity. However, it did consider that it should be narrowly defined and that a distinction exists with pre-deployment procurement, which may be subject to the scrutiny of the courts. When a serviceman signs up, he recognises that implicit in the job description is the duty to train for and fight combat operations and, therefore, to risk his life in the furtherance of government foreign policy. What he expects in return is for government to do its utmost to minimise the risks he will face. As ECHR jurisdiction extends to even civilians in a non-CoE territory under our “effective control”, there is a logic in arguing the same privilege for a soldier, not engaged in combat, who is a member of a force from a CoE State.

The extension of ECHR jurisdiction so that virtually all operations are subject to the ECtHR’s scrutiny, has a direct impact upon the ability to effectively conduct arrest and detention operations. The concept of “effective control” covers the situation of even a most transient military presence on the soil of another state.

OPTIONS

1. *Legislation*: Legislating to define “combat immunity” is a viable option but, for as long as we remain party to the ECHR, all legislation and decisions of our courts will be open to scrutiny by the ECtHR with its recognised poor understanding of the military context. Moreover, decisions taken in the heat of battle already fall within the definition. However, it is conceded that legislation will at least provide a template for the uniform application of principles by our courts, in each case. It is recommended that such a definition should recognise the distinction between:

- a. Decisions made:

⁹⁴ Defence Committee—Written Evidence, Operations in Afghanistan, para 19.3 of the Report, printed 6 July 2011: <http://www.publications.parliament.uk/pa/cm201012/cmselect/cmdfence/554/554we02.htm>

- i. when a nation goes to war, when there is little time for preparation and we deploy with what we have; and/or
 - ii. by commanders in the field, using their best judgment and resources available, either in preparation for a military engagement or during such an engagement; and
- b. Decisions made in the procurement of equipment which:
 - i. Put cost before safety; and/or
 - ii. Show a signal failure to match the product with the known or understood or intended requirement; and/or
 - iii. Ignore the reports of commanders regarding equipment requirements/shortcomings and/or defects; and/or
 - iv. Do not have a justifiable strategic objective as a result of which our Servicemen suffer foreseeable death or injury.

Falling within b(iv) would be any strategic decision not to undertake procurement, to avoid alerting an enemy of our intentions. Although once combat commences, necessary procurement should proceed without delay.

A reckless decision by a commander to expose his troops to exceptional danger without proper military justification would remain an offence under the Armed Forces Act 2006 (eg an offence under section 2(2) of the Armed Forces Act 2006 of Misconduct on operations, which carries a maximum penalty of life imprisonment).

Legislation would not put a stop to the line of ECtHR decisions imposing ECHR obligations on our forces in operational circumstances or where we act under a UN mandate.

2. Restoring section 10 of the Crown Proceedings Act 1947: This is a sweeping provision which would apply to “a member of the armed forces of the Crown while on duty”. It would have an unfair effect on the protection of our troops from negligence by others, when not engaged in combat. For example, a soldier who arrives in an operational theatre and is then subjected to physical training in temperatures well outside what he has just experienced in his home base and without any chance to acclimatize, who then dies as a result. There is no combat element to connect the death with any required immunity. Restoring Crown immunity in such cases would protect the incompetent.

Clearly Defined UN Resolution: While defining the mission and authorities in detailed terms in a UN Resolution would be an option, it would not remove scope for challenge based upon whether the wording in fact permitted the activities complained about. But it would make it more difficult for the ECtHR to brush aside the primacy of UN Charter art 103.

3. Unified approach: Council of Europe nations should come together to agree a unified approach to the problem of prisoner handling/detention ops. This may then produce an initiative for changing the ECHR.

4. Derogation from Articles 2 and 5: The encroachment of the ECHR into the battlespace cannot be halted while ECtHR decisions effectively have pre-eminence. Arrest and detention operations are all subject to the ECtHR’s overarching jurisdiction. The clear and pragmatic judgment of the Court of Appeal in the *Al Saadoon and Mufdhi* case shows how wide the gap is between our courts and the ECtHR and how incongruous the result. Short of leaving the ECHR altogether, derogation under article 15 would be the only viable course to exempt claims under articles 2 (right to life) for deaths resulting from lawful acts of war, and article 5 (right to liberty) in respect of security operations. It would confirm the supremacy of IHL during conflict. Such a course would not deprive a victim of justice. The Hague Convention of 1907- and the Regulations made under it—provides a way for the recovery of compensation in appropriate cases. At present the ambit of article 2 over our troops overseas is not clear. Training is a different matter. Our servicemen and women are the military’s most valued asset. While realistic training is vitally important, it should not expose those involved to unnecessary and reckless risk. There must be more openness in the information made available to injured servicemen or the families of deceased servicemen of the circumstances of any incident causing injury or death.

November 2013

Written Evidence from the General (Rtd) Sir Nick Parker

1. I have been asked to provide written evidence to the Defence Committee in relation to their inquiry into the protections and obligations—ensuring legality and legitimacy—for operational and deployed UK Armed Forces personnel. I am doing this from the very specific perspective of the deployed operational commander, I do not have any legal training and I have not studied the emerging legal landscape in any detail. I would wish to make four broad observations on:

- The relationship the level of acceptable risk and the threat. The application of a single legal framework in a 3 Block War.
- Information and remotely deployed munitions.
- Collective responsibility.
- The disconnect between the operational environment and the courtroom.

2. We have become used to making judgements on the levels of risk that we are prepared to take in relation to a threat which may seem distant to the UK public perception. Whatever the strategic narrative in Iraq and Afghanistan it will not appear to the public as if the territorial integrity of the UK has been threatened. The balance between risk and threat means that judgements on behaviour can stand the luxury of detailed scrutiny from a domestic perspective. If the enemy was at the White Cliffs of Dover the perceptions of the threat by those who were about to be overrun, and level of risk that they expected their forces to take, would be markedly different. Indeed the idea that lives should be put at risk, and that extreme violence should be applied within the bounds of the rules of warfare, would be entirely acceptable politically. In such “binary” conflicts the winner will also be able to justify actions better to a jubilant population than the loser who will be vulnerable to retribution.

3. This Grand Strategic Threat has to provide the backdrop to everything we do, but it will vary. It is safe to assume that in the timeframe that will be directly affected by the 2015 Defence and Security Review the priority will be to consider how to contribute to complex, multi-national, multi-agency security operations. The threat/risk relationship will be fragile (threat down: risk down) and our actions should take this into account. However a professional Defence Force must always be able to operate in the most challenging circumstances, where National survival is the objective and where the boundaries of acceptable behaviour are clearly articulated by the Geneva Convention.

4. Moving from the very highest level of threat to the lowest: The perception of the rifleman at the corner of a building who is being engaged by small arms fire will be that he is in a high intensity conflict! Even though this may be localised (a component in a 3 Block War) it will require very similar behaviours to achieve a successful military outcome as the soldier in a Divisional assault battling for National survival (Threat up: risk down). This rifleman will need to suppress enemy fire, he will need to manoeuvre with the prospect of exposing himself, requiring suppressive fire, and then the enemy’s position will have to be neutralised, normally by seizing ground. But to achieve this without risk is impossible, although the risk to our own forces might be minimised by high levels of prophylactic fire this will increase the risk of civilian casualties and collateral damage is likely to increase. So our troops must be sufficiently empowered to apply force appropriately, they have to be able to manoeuvre in a manner that is consistent with the environment that they are operating within. The concept of Courageous Restraint in Afghanistan potentially put our people at greater risk in order to achieve the consent of local people.

5. Information and Technology are areas where developments have been significant and we have much more to come. We will need to achieve “information dominance” in order to pre-empt and outmanoeuvre our enemy. This will require the management of (Big) data to a level that we have not yet considered. This may well have an impact on civil liberties and could be constrained by a liberal western interpretation. If that is the case it may constrain our command and decision-making systems to a degree that makes information superiority difficult to achieve. At the moment this may only appear to apply at the Strategic (GCHQ) level, but it will soon have an impact at every level in the military chain. Linked to this is our ability to deliver munitions from remote platforms. Again this is an area which will descend down the chain, it will be possible in a networked battlespace for any individual on the network to trigger an attack, based on the threat. Targeting may morph into a more generic requirement for fire control which will require very clear delegation of authority if it is to be effective.

6. The empowered military hierarchy can challenge an interpretation of the law where individuals are held responsible for their actions. Military effect is almost always delivered by a combination of capabilities and, within those capabilities by teams who are given orders down a chain. In a combat arm the military capability is often represented by a fire team (of 4 under a JNCO) or a tank crew. In contemporary operations it is increasingly easy to scrutinise an individual’s actions and to make deductions on the appropriateness of behaviour without taking account of the orders that have been given. There is a risk that while the full legal consequence of an action can be thrown at the individual, that is not the case for those who have collective responsibility for the employment of capability. Individuals do need to retain some protection for acting within orders.

7. And lastly there is a real risk that future legal examination of an individual’s action, which takes place in the sterilised environment of a court room, far away from the front line and with the benefit of hindsight, fails to appreciate the requirement to take action under extreme pressure and with no time to spare. The application of UK domestic law to a counter insurgency situation in a place where the culture, geography and value of life may be entirely different to that at home, must be delivered with extreme care.

Further written evidence from General (Rtd) Sir Nick Parker

1. I have been asked to provide some additional written evidence to the Defence Committee to expand on some aspects of my original submission and the discussion which took place at the workshop at RUSI.

2. In my later appointments in the Armed Forces I detected a growing sense that the “system” was not able to provide as much support to its people who were under investigation for fear of prejudicing a fair hearing. This may be more perception than fact, but I felt that there was a tendency for the chain of command to distance itself from any official enquiry since it was increasingly conditioned to believe that it represented the institution rather than the individual. Critically this can leave the individual and his/her family feeling isolated and abandoned by the institutional family we have schooled them to rely on.

3. I have also observed that the growth of non-criminal hearings, such as boards of inquiry, coroner’s hearings and civil cases by overseas plaintiffs, have caused actual and perceived reputational damage to those who have to appear, both plaintiffs and witnesses. I consider that a lack of support to these individuals, even though it may once again be perceived rather than in fact, can have an impact on relationships that sit at the heart of the military hierarchy.

4. I understand the requirement to ensure rigorous and fair scrutiny, but I am not convinced that the MoD has achieved an entirely impartial balance between defence and prosecution, with the weight erring on the side of the prosecution. This has the potential to impact in two ways: for the individual it means that the essential trust in the chain of command may be threatened, and for the chain of command it means that commanders may be predisposed to take decisions that are designed to reduce risk rather than exploit opportunity. All this is happening at a time when we expect our subordinates to accept high levels of delegation and make rapid decisions when lives may be at stake.

March 2014

Written submission from Dr Jonathan Morgan, Director of Studies in Law, Corpus Christi College, University of Cambridge

MILITARY NEGLIGENCE:

REFORMING TORT LIABILITY AFTER *SMITH V. MINISTRY OF DEFENCE*

EXECUTIVE SUMMARY

The Supreme Court’s decision in *Smith v. Ministry of Defence* (failing to strike out negligence and human rights claims over combat injuries) is deplorable. It will have damaging consequences for military effectiveness. It also leads the judiciary beyond the limits of their proper constitutional role. Accordingly *Smith* should be reformed. Although the legal basis for the *Smith* decision is fairly weak, it would be naive to expect any radical change of approach from the courts in the near future. Therefore legislation will be necessary to restate the proper limits of tort liability for military negligence. A power exists under s.2 of the Crown Proceedings (Armed Forces) Act 1987 which can largely achieve this goal. But a consideration of the desirable functions of tort liability shows that simply introducing an immunity would be undesirable (to say nothing of its political acceptability). It is therefore argued that a new Government commitment to compensating combat injuries fully, on a no-fault basis, be coupled with the revival of Crown immunity using the 1987 Act.

ABOUT THE AUTHOR

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THE STRUCTURE OF THIS PAPER

At the heart of the paper is a consideration of the Supreme Court’s decision in *Smith v. MoD* and how that approach should be reformed. But the paper opens with two sections that lay the ground by considering the purpose and social function of tort claims more generally, and the basic forms of liability (fault-based, strict, and immunity from liability) available to satisfy those purposes. The third section critically analyses *Smith v. MoD*. The legal basis of the decision (both common law and European Convention on Human Rights) is explored and found to be questionable. More importantly, the likely damaging effects of the decision are outlined—the threat of litigation’s impact on military effectiveness, and the constitutional danger of courts intruding into non-justiciable political territory. The fourth section explores how to reform *Smith*. The damaging effect of the decision can best be avoided by a combination of exclusion of negligence claims (a statutory

power that the Secretary of State already possesses) and, in place of negligence, a commitment to pay full compensation on a no-fault basis. It is suggested that a direct commitment to this effect by the Government, rather than a radical reformulation of the Armed Forces Compensation Scheme, is the best way to achieve this. A brief recapitulation of these conclusions and recommendations concludes the paper. (In an appendix the author's 2013 case-note on the Court of Appeal decision in *Smith v. MoD* follows.)

I. The Purpose of Tort Claims

While an action in negligence is a claim to be *compensated* for an injury, tort claims can play other social functions too, such as *detering* culpable behaviour and *holding to account* governmental or other powerful institutional defendants. These are explored below as the basis for later discussion of claims for injuries sustained during military operations.

Compensation

In a common law negligence claim “damage is the gist of the action”, so that the action will lie only if somebody has actually been injured by the negligence of another. This may be contrasted with tort claims for (eg) battery or false imprisonment, or claims under ss. 6–8 of the Human Rights Act 1998, where all that need be shown is invasion of the necessary right. These torts are “actionable per se”—and nominal damages (or a declaratory judgment) may be granted to vindicate the right in question where such an invasion is shown. But where actual losses are proved these may also be recovered in such a “vindicatory” claim.

Tort compensation aims to put the claimant back where he or she would have been had it not been for the tort—*restitutio in integrum*. This takes full account of the personal situation of the claimant, for example his or her particularised “loss of the amenities of life”, medical needs and earnings forgone, in a catastrophic injury case.

Deterrence

The prospect of being sued in tort may clearly act as an incentive to avoid the negligent behaviour that gives rise to the liability. However, it seems that tort liability is but an imperfect way of deterring negligence in practice.

On one hand, the deterrent edge of tort liability is blunted by the widespread presence of insuring against such liabilities (through “liability” or “third party” insurance—which is often a legal *requirement* as for eg motorists or employers). The criminal law avoids this drawback since it is (obviously) against public policy to insure oneself against the risk of being fined or imprisoned after criminal conviction. Moreover, criminal penalties are tailored to the degree of culpability of the defendant, whereas damages for negligence are calculated according to the severity of the claimant's injuries rather than the gravity of the defendant's fault. (And a highly negligent defendant who, through luck rather than judgment, injures nobody will escape tort liability altogether.)

Conversely, it is possible that tort liability may sometimes over-deter. Instead of inducing an activity to be carried on carefully the spectre of liability may cause that activity to cease. Such “overkill” is obviously a matter of concern where the activity forgone is something that benefits the public, such as a discretionary public service.⁹⁵ An example would be a local authority removing a children's playground from a public park because of the fear of litigation were a child injured using it—and/or because of the (high) level of insurance premiums charged to indemnify the authority against such claims (which may often be the direct source of deterrence in practice). Judges have often been alive to this possibility, stressing (in a slightly different context) that: “Of course there is some risk of accidents arising out of the joie-de-vivre of the young. But that is no reason for imposing a grey and dull safety regime on everyone.”⁹⁶

Whether negligence liability induces optimum levels of carefulness, or under-deters such behaviour, or over-deters it, is a complex question that in the end requires real-world empirical evidence. Whether the legendary national “compensation culture” really exists (inducing widespread timidity), or is largely the result of media presentation of anecdote, is a case in point.⁹⁷

Accountability

In his famous account of the Rule of Law in Victorian England, AV Dicey placed tort law at the centre of government accountability.⁹⁸ Dicey argued that a French style *droit administratif* was at best unnecessary (and perhaps positively undesirable). In England, public officials were subject to the same law as everyone else. If they commit torts they are liable in the same way as anyone else, unless they can rely on positive legal authority to act in the way they have done (a mere plea of “state interest” not being sufficient authority): *Entick v. Carrington* (1765) 19 State Trials 1029. This remains a salutary principle today. Tort claims (for battery or

⁹⁵ Cf. *Rowling v Takaro Properties Ltd* [1988] AC 473, 504 per Lord Keith of Kinkel (cited in *Smith v. MoD* [2013] UKSC 41, [127] per Lord Mance).

⁹⁶ *Tomlinson v. Congleton Borough Council* [2004] 1 AC 46, [94] per Lord Scott of Foscote. See also last footnote.

⁹⁷ See e.g. Lewis R, Morris A and Oliphant K, “Tort Personal Injury Claims Statistics: Is There A Compensation Culture In The United Kingdom?” [2006] *Journal of Personal Injury Law* 87.

⁹⁸ AV Dicey, *An Introduction to the Study of the Law of the Constitution* (1885).

false imprisonment) are still a straightforward way of requiring (for example) the police to show that they correctly used their powers of arrest and detention. But when public authorities now have such extensive statutory powers, it is not surprising that a system of administrative law has grown up (through the application for judicial review) to police the limits and exercise of those powers.

But albeit the “accountability” function of tort is diminished from its Diceyan heights, it has not disappeared altogether. Even negligence claims may perform a similar function. In alleging negligence against a public body, citizens can (providing sufficient *prima facie* evidence exists) oblige the authority to explain and justify the conduct that led to the injury of which the citizen complains. In one well-known case Doreen Hill, the mother of one of the victims of the “Yorkshire Ripper” serial killer, sued the West Yorkshire police for their negligence in having failed to apprehend him before he murdered her daughter. The plaintiff stated that any damages awarded to her would be devoted to an appropriate charity; her motive in bringing the claim was not financial but rather “with the object of obtaining an investigation into the conduct of the West Yorkshire police force so that lives shall not be lost in the future by avoidable delay in the identification and arrest of a murderer”.⁹⁹ The House of Lords held that no duty of care had been owed to the deceased and so the claim failed. But Lord Templeman commented that Mrs. Hill’s motive for bringing the claim had anyway been misconceived: “The efficiency of a police force can only be investigated by an inquiry instituted by the national or local authorities which are responsible to the electorate for that efficiency.”¹⁰⁰ So while it is widely thought important that government should be held accountable for its fault, there are doubts over a tort claim’s suitability to function as a full public investigation into wider public policy failings.

II. The Extent of Liability

For a given type of claim (in respect of a particular kind of loss, or against a particular class of defendant) there are logically three possible forms of liability. Most favourable to claimants, a defendant might be liable for the loss in question irrespective of fault—*strict liability*. Secondly, the defendant may be liable only when the loss was caused by his or her *fault*, as in the tort of negligence. Thirdly, the defendant may not be liable for a certain kind of injury at all, irrespective of fault—an *immunity* (absence of liability).

All three of these positions have obtained in cases of injuries to armed forces personnel over the past decades. Most obviously, there was a sharp change away from the historical Crown *immunity* from tort claims to ordinary *fault-based* (negligence) liability, with the enactment of the Crown Proceedings (Armed Forces) Act 1987. The recent decision of the Supreme Court in *Smith v. Ministry of Defence* shows how far-reaching that change has been.¹⁰¹ But these changes in tort liability have taken place against the constant backdrop of the Government’s compensation/pension arrangements for wounded personnel. These date back (at least) to the War Pensions Scheme of 1917, today being embodied in the Armed Forces Compensation Scheme (AFCS).¹⁰² The import of this scheme, broadly speaking, is that service personnel are entitled to government compensation for injuries or death caused by service, *irrespective of fault* on the part of the armed forces/MoD.

These three basic positions on liability can be analysed using the functions of tort liability suggested above.

Immunity

As noted, the armed forces were immune from liability until the historical privilege of the Crown in this respect was removed by Parliament’s 1987 amendment of the Crown Proceedings Act 1947. Furthermore, it was accepted by all the judges in *Smith v. MoD* that there remains today a common law principle of “combat immunity”.¹⁰³ Its precise ambit was, however (and remains) controversial.

It is obvious that any immunity from tort liability, whether general or specific, obstructs all of the social functions identified above. Those injured cannot claim compensation, and any deterrence or accountability effects of liability are lost. Two further points should be noted. First, that such immunity may nonetheless be justified, where the effects of liability for society as a whole would be so serious that removing an injured individual’s claim is the lesser evil. But we must be clear that individual hardship is being inflicted for the wider public good.¹⁰⁴ Secondly, that the removal of tort liability’s valuable social effects concentrates attention on the other means by which the same social functions can be performed. In the present context, the AFCS provides an alternative route to compensation for deaths and injuries in military service.¹⁰⁵ Accountability for (and so the deterrence of) military errors is expressed through Parliament generally and the Defence Committee specifically; through coroner’s inquests into deaths and through other (ad hoc) public inquiries; through the investigation of complaints made to the Service Complaints Commissioner for the Armed Forces; and even (potentially) through courts-martial. Also, in the ordinary courts, immunity from tort actions would not exclude judicial review of MoD decisions, including review under the Human Rights Act 1998.

⁹⁹ *Hill v. Chief Constable of West Yorkshire* [1989] A.C. 53, 64 per Lord Templeman.

¹⁰⁰ Cf. *ibid.*, 64–65.

¹⁰¹ [2013] UKSC 41; [2013] 3 W.L.R. 69.

¹⁰² Armed Forces (Pensions and Compensation) Act 2004; Armed Forces and Reserve Forces (Compensation Scheme) Order 2011.

¹⁰³ NB [2013] UKSC 41, [89] per Lord Hope (the doctrine’s existence is “not in doubt”) (judgment of majority).

¹⁰⁴ Cf. *Van Colle v. Chief Constable of the Hertfordshire Police* [2008] UKHL 50, [75] per Lord Hope of Craighead; [139] per Lord Brown.

¹⁰⁵ The argument that providing no-fault compensation also has a valuable deterrent effect is developed below.

Liability for Fault

This is the general law of negligence, given considerable impetus for service personnel's claims by *Smith v. MoD*. But despite their preliminary victory in the Supreme Court in *Smith*, the various claimants still face the considerable hurdle of showing that there was a negligent breach of duty on the facts of the cases. By definition, this kind of liability provides compensation only for victims whose injuries are the result of demonstrable fault. But while the fault principle limits the number of victims who can claim compensation, it can be considered to have a salutary effect on the conduct of defendants. Sanctioning negligence holds defendants to account by investigating whether they have been at fault. Obliging the payment of compensation when they have been seems likely to deter negligent behaviour, on some level.¹⁰⁶

Strict Liability

Payment of compensation without fault is the salient feature for present purposes of the AFCS. The obvious advantage of such strict liability for victims of injury is that compensation does not depend on their proving fault; so more victims will receive payments. But where the level of payments is lower than at common law there will still be an incentive to bring negligence claims, hoping to prove fault to obtain higher ("full") compensation. Distributive concerns are raised by the generosity of compensation: is full compensation on a no-fault basis affordable? Why, in justice, should it be available for only one set of employees?

It might seem that strict liability cannot deter mistakes nor hold bodies accountable for them, since fault is not investigated (indeed for the defendant to prove the *absence* of fault is no defence). Such an assumption would, however, be erroneous. Strict liability provides an inherent incentive to take all reasonable (ie cost-justified) precautions, through the logic of cost-internalisation. Where risky activities cause injuries to others, making the activity bear ("internalise") the cost of the injuries provides a financial incentive to reduce their occurrence and severity, on the person or body carrying such activities out. The actor will realise that investing to reduce injuries to others is justified by rational self-interest under such a regime, until the point is reached when the cost of taking additional precautions outweighs the financial savings from the reduction in the injuries for which they are liable. In other words, making an activity internalise the cost of injuries to others means that it also internalises the benefits of accident prevention.

Any alternative approach "externalises" costs from the risk-generating activity onto the injured parties, subsidising the activity at their expense. This is clearly the position with tort immunities but also, in part, with negligence liability. In adjudicating on fault, the courts are in practice limited to deciding whether a particular activity was carried out negligently (eg negligent driving). They do not adjudicate on whether carrying out the activity in the first place was "negligent", even though it creates a risk of injuries (driving in general, or taking the particular journey which caused the accident). The result is that the level of the activity (and thus the number of injuries it causes) is higher under a negligence regime than under strict liability.

So, arguably, strict liability offers a superior form of deterrence (and avoids difficult questions about "fault"). Also, with public authority defendants whose expenditure tends to receive very close scrutiny (eg of the Ministry of Defence by the House of Commons Defence Committee), strict liability heightens the financial effects of injuries for which the defendant must pay. This makes injury prevention a more important aspect of overall financial accountability.

III. *Smith v. Ministry of Defence*

The Supreme Court Decision in *Smith*

A number of claims were heard together in *Smith*, one group relating to the use of allegedly inadequate Snatch Land Rovers and the other group arising from a "friendly fire" incident on (and by) a British Challenger tank. Some of the claims relied on common law negligence, other claims relied on the right to life under Article 2 of the European Convention on Human Rights (ECHR) as incorporated into English law by the Human Rights Act 1998 (HRA), and some relied on both negligence and Article 2. The Ministry of Defence (as defendant) had applied to have the claims struck out as disclosing no cause of action, or for summary judgment in its favour on the basis that the claims were bound to fail. The approach of Lord Hope's majority Supreme Court judgment to these various issues was broadly similar. The various claims were allowed to proceed to trial (and the Ministry of Defence's applications refused). Lord Mance (with the agreement of Lord Hughes) and Lord Carnwath delivered separate dissenting judgments.

Departing from an earlier decision,¹⁰⁷ the Supreme Court unanimously held that the ECHR applied in principle to the military operation of British armed forces outside the UK. On the substance of Article 2 ECHR, the majority stated that they accepted that battlefield decision-making and military procurement were "a field of human activity which the law should enter into with great caution",¹⁰⁸ and that the existence of "issues relating to the conduct of armed hostilities [which] are non-justiciable is not really in doubt".¹⁰⁹ But on the other hand:

¹⁰⁶ Cf. discussion of Deterrence above, and of the specific effects of *Smith v. MoD*, below.

¹⁰⁷ *R (Smith) v Oxfordshire Assistant Deputy Coroner* [2011] 1 AC 1.

¹⁰⁸ [2013] UKSC 41, [64]-[66].

¹⁰⁹ *Ibid*, [58].

a finding that in all circumstances deaths or injuries in combat that result from the conduct of operations by the armed forces are outside the scope of Article 2 would not be sustainable. It would amount, in effect, to a derogation from the state's substantive obligations under that article. Such a fundamental departure from the broad reach of the Convention should not be undertaken without clear guidance from Strasbourg [ie the European Court of Human Rights].¹¹⁰

No such clear guidance existed. Thus, upon striking the balance between individual rights (ie the claimants' right to life) and the public interest (that the courts should not adjudicate on non-justiciable issues), "No hard and fast rules can be laid down. It will require the exercise of judgment. This can only be done in the light of the facts of each case."¹¹¹ It followed that the claims must proceed to trial and the issue of whether the MoD had breached the claimants' Article 2 rights decided only after hearing all of the evidence.¹¹²

As for common law negligence, while accepting that there is a defence of "combat immunity",¹¹³ the Court similarly held in the *Snatch Land Rover* cases that its applicability could not be determined on the bare statement of alleged facts in the pleaded claims. Since "the details that are needed to place the claims in context will only emerge if evidence is permitted to be led in support of them", the *Snatch Land Rover* claims had to proceed to trial before the combat immunity issue could be decided.¹¹⁴ The Court again warned that while the "risk ... of judicialising warfare" through negligence claims must "of course" be avoided, the facts of cases arising out of active military operations were very various and could not be "grouped under a single umbrella" as if that risk were equally serious in every case.¹¹⁵ Therefore, in deciding whether a duty of care was owed in the first place (would liability be "fair, just and reasonable"?), as a separate question from combat immunity, the facts again had to be investigated first. Thus the court could weigh each claim in context against the consideration (of "paramount importance") that:

the work that the armed services do in the national interest should not be impeded by having to prepare for or conduct active operations against the enemy under the threat of litigation if things should go wrong.¹¹⁶

The Challenger (friendly fire) cases were determined in a similar way, save that the Court actually decided that no defence of combat immunity was available on the facts as pleaded and so that aspect of the MoD's defence should not be allowed at the trial. The Court held that the Challenger claims related to training and equipment decisions that had been "sufficiently far removed from the pressures and risks of active operations" that it was "not to be unreasonable to expect a duty of care to be exercised", by planning, exercising judgment and thinking things through—"so long as the standard of care that is imposed has regard to the nature of these activities and to their circumstances".¹¹⁷ This suggests a greater emphasis on the fact-specific question of whether those for whom the MoD was being held responsible (as employer) were *actually negligent* in the particular case, rather than the abstract question of whether such claims should be allowed to proceed at all.¹¹⁸

The thrust of all of the decision on negligence and Article 2 ECHR alike was that weighing the claimants' rights (to life and to compensation for negligent injury) against the public interest that military operations not be impeded by judicial scrutiny had to take place on a factual, case-by-case basis. Although the Court did not (and could not) decide that any of the claims would succeed, it could not hold that any of them were bound to fail at this preliminary stage before the trial of fact had taken place.

Legal Basis of *Smith*: Common Law

The basis for the Supreme Court majority's decision on common law negligence is frankly weak. In similar fashion to the judgment below of the Court of Appeal,¹¹⁹ Lord Hope made no serious attempt to engage with the formidable barrage of case-law denying that (eg) the police owe a duty of care to the public to catch criminals (on the basis that this would deter the police from the effective discharge of their duties).¹²⁰ Lord Hope's judgment merely notes the names of the relevant authorities (to record their citation by counsel for the defendant).¹²¹ This passing mention leaves one entirely unclear as to why those leading cases were not thought applicable to the not dissimilar issues in *Smith*. Lord Carnwath (dissenting) said that he found the majority's approach "difficult to understand" (which it surely is, because it is unexplained).¹²² After a detailed account of the police cases and their reasoning,¹²³ Lord Carnwath suggested that the considerations against liability in

¹¹⁰ Ibid.

¹¹¹ Ibid, [76].

¹¹² Ibid, [78]-[80].

¹¹³ [2013] UKSC 41, [89] per Lord Hope (the doctrine's existence is "not in doubt")

¹¹⁴ Ibid, [96].

¹¹⁵ Ibid, [98].

¹¹⁶ Ibid, [100].

¹¹⁷ Ibid, [95].

¹¹⁸ Ibid, [98]—"the question in the case of the Challenger claims is not whether a duty was owed but whether, on the facts, it was breached".

¹¹⁹ [2012] EWCA Civ 1365, criticised by the current author: J Morgan, "Negligence: Into Battle" [2013] Cambridge Law Journal 14-17. (This case-note was cited by Lord Carnwath [2013] UKSC 41, [170]. It is included as an appendix to the current paper.)

¹²⁰ E.g. *Hill v. Chief Constable of West Yorkshire* [1989] AC 53 (HL), *Brooks v. Commissioner of Police of the Metropolis* [2005] UKHL 24, *Van Colle v. Chief Constable of Hertfordshire Police* [2008] UKHL 50.

¹²¹ [2013] UKSC 41, [97].

¹²² [2013] UKSC 41, [170].

¹²³ [2013] UKSC 41, [167]-[169].

Smith (“issues of vital national security raised by the preparation for and conduct of war”) were if anything weightier than the “purely domestic policy concerns arising from police powers of investigation”.¹²⁴ Lord Mance (dissenting) similarly observed that “The claims that the Ministry failed to ensure that the army was better equipped and trained involve policy considerations of the same character as those which were decisive in *Hill, Brooks and Van Colle*.”¹²⁵

The most charitable thing that one could say about the majority’s decision is that the case-law on public authority negligence liability is notoriously confused. Aside from the police cases, there have conversely been some notable high-profile relaxations, with the House of Lords proving more receptive to arguments that authorities owe duties of care in the immediate wake of the HRA.¹²⁶ More widely, there has been judicial abolition of the historic “immunities”¹²⁷ from suit of advocates presenting cases in court,¹²⁸ and now of expert witnesses.¹²⁹ But on the other hand, the police cases certainly do not stand alone. There have been equally high-profile recent affirmations of a negative judicial stance to public authority liability.¹³⁰ With such contradictory lines of authority it is easy to cherry-pick useful cases to support any given conclusion. That is, unfortunately, the best way of describing the selective engagement (really, the absence of serious engagement) with the case-law in the majority judgment of Lord Hope. A clear example is the citation of Lord Bingham’s hope that common law negligence will always march in step with liability under the HRA in the *Van Colle* case,¹³¹ without recording that Lord Bingham was in a dissenting minority of one in that case with the majority holding that there was no common law duty of care irrespective of any rights under Article 2 ECHR!¹³²

Legal Basis of *Smith*: ECHR

As noted above, there is no positive authority from the European Court of Human Rights (the Strasbourg Court) on the application of Article 2 in a situation such as *Smith*. As seen, the majority treated this as a reason for caution, and refused to strike out the ECHR claims. Article 2 could only be held inapplicable *tout court* to soldiers killed during active operations if there were clear Strasbourg authority to that effect. There was not.

Other judges have taken different views. Dissenting in *Smith*, Lord Mance was not willing to hold that Article 2 went any further than the law of negligence (inapplicable in his view, on the grounds of combat immunity and the non-justiciability of military decision-making).¹³³ The dearth of authority left the path open to reach the same conclusion on the ECHR: “In my opinion it is not possible to conclude that the Strasbourg court would hold that such matters are justiciable under the [European] Convention, any more than they are at common law.”¹³⁴ Lord Mance expressed scepticism about the European Court of Human Rights’ having evolved what amounts to an “independent substantive law of tort, overlapping with domestic tort law, but limited to cases involving death or the risk of death” in the first place.¹³⁵ He concluded:

The prospect of the Strasbourg court reviewing the conduct of combat operations [by making the state liable for the death in combat of one soldier due to alleged negligence of his commander or of another soldier] seems to me sufficiently striking, for it to be impossible to give this question a positive answer. If the European Court considers that the Convention requires it to undertake the retrospective review of armed conflicts to adjudicate upon the relations between a state and its own soldiers, without recognising any principle similar to combat immunity, then it seems to me that a domestic court should await clear guidance from Strasbourg to that effect.¹³⁶

Lord Carnwath pointed out that sending the cases in *Smith* to trial would not resolve the difficulty: “if the problem is a lack of directly relevant guidance from Strasbourg, it is hard to see how, simply by hearing further evidence or finding further facts, [the trial judge] will be better able to fill that gap, still less to do so “with complete confidence”.”¹³⁷

Lord Mance also emphasised the continuing relevance of Lord Brown of Eaton-under-Heywood’s “evident scepticism” when, in an earlier case, Lord Brown had rhetorically asked:

Is it really to be suggested that ... Strasbourg will scrutinise a contracting state’s planning, control and execution of military operations to decide whether the state’s own forces have been subjected to

¹²⁴ [2013] UKSC 41, [170].

¹²⁵ [2013] UKSC 41, [128].

¹²⁶ Cf. *Barrett v. Enfield London Borough Council* [2001] 2 AC 550 and *Phelps v. Hillingdon London Borough Council* [2001] 2 AC 619, discussed and relied upon in the decision below in *Smith* [2012] EWCA Civ 1365.

¹²⁷ As they have been misdescribed: cf. *Barrett v Enfield London Borough Council* [2001] 2 AC 550, 559 per Lord Browne-Wilkinson, cited by Lord Carnwath in *Smith* [2013] UKSC 41, [163].

¹²⁸ *Arthur JS Hall & Co v. Simons* [2002] 1 AC 615.

¹²⁹ *Jones v Kaney* [2011] UKSC 13, cited by Lord Hope in *Smith* [2013] UKSC 41, [94].

¹³⁰ E.g. *Gorringe v. Calderdale Metropolitan Borough Council* [2004] UKHL 15, *JD v. East Berkshire Community NHS Trust* [2005] 2 AC 373, *Jain v. Trent Strategic Health Authority* [2009] 1 AC 853, *Mitchell v. Glasgow City Council* [2009] 1 AC 87 (all decisions of the House of Lords).

¹³¹ [2013] UKSC 41, [98].

¹³² *Van Colle v. Chief Constable of Hertfordshire Police* [2008] UKHL 50.

¹³³ [2013] UKSC 41, [151].

¹³⁴ [2013] UKSC 41, [143].

¹³⁵ [2013] UKSC 41, [142].

¹³⁶ *Ibid.*

¹³⁷ [2013] UKSC 41, [156].

excessive risk (risk, that is, which is disproportionate to the objective sought)? May Strasbourg say that a different strategy or tactic should have been adopted—perhaps the use of airpower or longer-range weaponry to minimise the risk to ground troops notwithstanding that this might lead to higher civilian casualties?¹³⁸

Lord Mance noted another point. If domestic UK courts were to construe the ECHR narrowly against an individual claimant's right, he or she would still be able to go to the Strasbourg Court to argue for a wider construction of the Convention rights. But if domestic courts construe the Convention generously against their state, it has no mechanism for "appealing" beyond the UK Supreme Court against the (arguably over-wide) construction of the rights. Lord Mance said he was "not over-enamoured" of this "one-way street" argument.¹³⁹ But it is still a very proper reason cautioning against over-expansive readings of the Convention by domestic courts, ahead of anything that the Strasbourg Court has recognised.

Connexion between Negligence and Human Rights Reasoning

Orthodoxy prior to *Smith* was established by the House of Lords' decision in *Van Colle*. The fact that there might be infringement of a Convention right does not of itself give rise to any claim in negligence at common law.¹⁴⁰ The claims may run in parallel channels (NB Lord Mance's comments above about Article 2 jurisprudence having generated an independent law of quasi-tort). But they do not mix.

There have been suggestions that HRA adjudication has had a more pervasive influence on tort liability, in particular whether courts should decline to adjudicate altogether on non-justiciable issues. In a case decided the year before the House of Lords' decision in *Van Colle*, Lady Justice Arden suggested that the preliminary question of whether a given matter was justiciable at all had "assumed less importance" in tort cases because of the HRA: "following the 1998 Act courts have now to consider questions of social policy with which they were not previously concerned. From this, in my judgment, it is possible to conclude that courts will hold that fewer matters are now non-justiciable [in negligence] on the grounds that they involve policy issues."¹⁴¹

It seems that notwithstanding *Van Colle*,¹⁴² such reasoning may have influenced the majority decision in *Smith*. Both Lord Mance and Lord Carnwath specifically complained in their dissenting judgments that Lord Hope and the majority had given priority to the ECHR claims (followed, as discussed above, by a relatively brief treatment of common law negligence). Lord Carnwath stated that negligence ought to have been considered *first*, since "our primary responsibility should be for the coherent and principled development of the common law, which is within our own control", whereas "We cannot determine the limits of Article 2".¹⁴³ His Lordship suggested that the focus of counsel's submissions on the ECHR jurisdictional question had "distorted" "the balance of the relevant issues" (with the unspoken implication that the majority judgment was similarly unbalanced).¹⁴⁴ So Lords Mance and Carnwath, having held (after lengthy discussion) that there was no duty of care in common law negligence, used this conclusion as the basis for dismissing an alternative claim under Article 2. Conversely, in the majority judgment, the decision that Article 2 liability could not be ruled out seemed to drive the conclusion that a negligence claim could not be denied either, by declaring there to be no duty of care.

Consequences of *Smith*: Practical and Constitutional

All the judgments in *Smith* recognise the potentially damaging practical consequences of extending legal liability too far. But the dissenting judges allege with good reason that having identified this trap, Lord Hope and the majority blundered into it regardless.

As Lord Hope himself says:

A court should be very slow indeed to question operational decisions made on the ground by commanders, whatever their rank or level of seniority.¹⁴⁵

The allocation of resources to the armed services and as between the different branches of the services, is also a question which is more appropriate for political resolution than it is by a court. Much of the equipment in use by the armed forces today is the product of advanced technology, is extremely sophisticated and comes at a very high price. Procurement depends ultimately on the allocation of resources. This may in turn be influenced as much by political judgment as by the judgment of senior commanders in Whitehall as to what they need for the operations they are asked to carry out. It does not follow from the fact that decisions about procurement are taken remote from the battlefield that they will always be appropriate for review by the courts.¹⁴⁶

¹³⁸ *R (Smith) v Oxfordshire Assistant Deputy Coroner* [2011] 1 AC 1, [146], cited in *Smith v. MoD* [2013] UKSC 41, [130].

¹³⁹ [2013] UKSC 41, [142].

¹⁴⁰ *Van Colle v. Chief Constable of Hertfordshire Police* [2008] UKHL 50: contrast the judgment of the Court of Appeal in the same case, sub nom. *Smith v. Chief Constable of Sussex* [2008] EWCA Civ 39.

¹⁴¹ *Jain v. Trent Strategic Health Authority* [2008] Q.B. 246, [62].

¹⁴² NB criticisms above of the side-lining of the whole line of police case-law.

¹⁴³ [2013] UKSC 41, [156].

¹⁴⁴ [2013] UKSC 41, [155].

¹⁴⁵ [2013] UKSC 41, [64].

¹⁴⁶ [2013] UKSC 41, [65].

Therefore:

subjecting the operations of the military while on active service to the close scrutiny that may be practicable and appropriate in the interests of safety in the barrack block or in the training area is an entirely different matter. It risks undermining the ability of a state to defend itself, or its interests, at home or abroad. The world is a dangerous place, and states cannot disable themselves from meeting its challenges. Ultimately democracy itself may be at risk.¹⁴⁷

it is of paramount importance that the work that the armed services do in the national interest should not be impeded by having to prepare for or conduct active operations against the enemy under the threat of litigation if things should go wrong.¹⁴⁸

All of this is a welcome recognition of the dangers of over-judicialisation. But while the rhetoric sounds well, does the actual decision in *Smith* live up to the strictures? It does not. As Lord Mance stated, “I do not consider that the majority approach reflects or meets this imperative” (ie the last statement quoted above).¹⁴⁹

As seen above, the majority decision largely refused to decide whether Article 2 was engaged, or whether there was a duty of care at common law (either whether it would be “fair just and reasonable” or ruled out by “combat immunity”). All of these were, it held, questions that required the case to go to trial and for all the evidence to be heard before they could be resolved. The single exception to this studied indecision was the ruling that combat immunity was *not* an applicable defence in the Challenger claims.¹⁵⁰ Lord Carnwath complained, correctly, that the majority had failed to give “adequate” guidance to the eventual trial judge, and future courts faced with such issues: it was not enough to exhort the eventual decider to be “cautious”, etc—“Having heard full argument on all these issues, [the Supreme Court] should be able to rule whether the claims are in principle viable or not”.¹⁵¹

Lord Mance commented that the majority’s decision would lead to more litigation on such matters in the future. This is obviously true of the *Smith* claims themselves, which were allowed to proceed to trial, but Lord Mance predicted a much wider effect:

the approach taken by the majority will in my view make extensive litigation almost inevitable after, as well as quite possibly during and even before, any active service operations undertaken by the British army. It is likely to lead to the judicialisation of war...¹⁵²

This would indeed seem “inevitable”. If the highest court in the country is unable to say whether or not there is liability in principle without a full trial of the action, then no future case alleging negligence in active military operation can safely be decided in favour of the defendant (MoD) without such a trial. But as Lord Hope himself accepted, it is “the threat of litigation if things should go wrong” that may have an adverse effect on military decision-making. The majority’s decision, however, seems to make such litigation unavoidable. This is particularly true of the majority’s comment that breach of duty (ie fault) is to be given more emphasis than deciding (as an abstract proposition) whether a duty of care is owed. Fault can never be decided without detailed examination of the facts of the case. As Lord Mance says, negligence claims must “involve courts in examining procurement and training policy and priorities over years, with senior officers, civil servants and ministers having to be called and to explain their decisions long after they were made”. The same point holds, of course, for commanders in claims based on failures in decision-making in the theatre of combat.

In short, it is difficult to see how the Supreme Court’s decision that the *Smith* claims should go to trial could *not* lead to the judicialisation that the majority themselves feared (albeit that the trial judge was counselled to be cautious in actually deciding both Article 2 and common law claims). Lord Mance (perhaps satirically) considered whether various military disasters of the past (from Isandlwana to the Fall of Singapore) might not have sparked litigation for negligent decision-making from planners, trainers and commanders, had they occurred after the decision in *Smith*.¹⁵³ He commented that exhorting trial judges to be cautious (as the majority had done) offered “no real solution”.¹⁵⁴ Only by declaring that there was no liability even in principle could the damaging threat of litigation be avoided.

The point need not be made at any length here that that threat of “over-deterrent liability” must be taken seriously. This argument has had a chequered history in public authority cases generally down the years. As seen, it has consistently been accepted in the police cases.¹⁵⁵ But on other occasions, judges have declared that public servants are made of “sterner stuff” and will not be deterred from their duties by the threat of liability.¹⁵⁶ It has frequently been observed that judges are speculating here about the likely effect of liability on the behaviour of potential defendants. The implication is that overkill or over-deterrence should be ignored as a

¹⁴⁷ [2013] UKSC 41, [66].

¹⁴⁸ [2013] UKSC 41, [100].

¹⁴⁹ [2013] UKSC 41, [147].

¹⁵⁰ Cf. on this point Lord Mance [2013] UKSC 41, [125].

¹⁵¹ [2013] UKSC 41, [154].

¹⁵² [2013] UKSC 41, [150].

¹⁵³ [2013] UKSC 41, [133].

¹⁵⁴ [2013] UKSC 41, [134].

¹⁵⁵ *Hill v. Chief Constable of West Yorkshire* [1989] AC 53 (HL), *Brooks v. Commissioner of Police of the Metropolis* [2005] UKHL 24, *Van Colle v. Chief Constable of Hertfordshire Police* [2008] UKHL 50.

¹⁵⁶ *Dorset Yacht Co v. Home Office* [1970] A.C. 1004, 1033 per Lord Reid (prison officers). See also *Capital and Counties Plc v. Hampshire CC* [1997] Q.B. 1004 (fire brigade).

factor against liability unless there is hard empirical evidence that it has been produced by, or will be the effect of, negligence liability. But when the effects of over-deterrence might be as serious as skewing procurement priorities away from maximum military effectiveness towards a “safety first” approach, or, in battle, the inculcation of (literally) over-defensive strategy or tactics, such hard evidence is (we suggest) unnecessary. The real possibility of disastrous outcomes should satisfy the probative requirement. There is ample material to draw such a conclusion here. Air Chief Marshall Lord Stirrup (a former Chief of the Defence Staff) has recently told a House of Lords Committee that military personnel are increasingly concerned about their personal legal liabilities in wartime situations, concluding: “One of the potential consequences of this is not that you have fewer casualties; it is actually that you have more”.¹⁵⁷ The Committee agreed that the “negative effect on the morale and operational independence of the armed forces” was a justified concern about “courts scrutinising operational decisions”.¹⁵⁸

As well as practical effects on military decision-making, the embrace of liability may have undesirable constitutional implications. Courts traditionally do not review inherently political decisions,¹⁵⁹ recognising that it is proper for the political process (primarily the accountability of Government ministers and departments to Parliament) to play this role. As the House of Lords Constitution Committee has recognised, the fear that military deployment decisions might be rendered justiciable is a strong reason against the legal formalisation of Parliament’s role in approving the deployment of the armed forces.¹⁶⁰ It is precisely because there is consensus that Parliament is the “the appropriate forum for controlling and scrutinising deployment decisions” that any change increasing “a risk of the domestic courts being invited to rule on the lawfulness of a deployment decision” should be avoided.¹⁶¹

In conclusion, the refusal of the Supreme Court in *Smith* to strike out the claims brings a real risk of defensive decision-making among military planners and commanders. Moreover, it inevitably requires judicial examination of sensitive matters of high national policy. As Lord Carnwath observed, these were the opposing horns of a dilemma for the claimants in *Smith*: the stronger they urged that the decisions challenged were taken prior to active operations, the more they implicated issues of planning and procurement (“discretionary decisions about policy and resources [that] are not justiciable”).¹⁶² It is strongly arguable that for these equally unpalatable outcomes to be avoided, the decision in *Smith* urgently needs to be reversed.

IV. Reforming *Smith*

Is Legislation Necessary?

Of course the Supreme Court’s decision in *Smith* is not the final word on this question—not even in the *Snatch Land Rover* and *Challenger* cases themselves, where the questions of duty of care and breach of duty in negligence, and breach of Article 2 ECHR, await determination at trial. Naturally the MoD remains free to argue strenuously against liability on the facts of these and future cases (by denial of duty and breach, invocation of “combat immunity”, and arguing for a narrow application of Article 2). But given the tenor of the majority decision in *Smith*, it is most unlikely that any trial judge (or the Court of Appeal) will lay down any general principles limiting liability under either heading. Indeed, it is most unlikely that the Supreme Court will revisit the question any time soon when it has decided the matter (to its own satisfaction at least) by a seven-judge panel, albeit by a bare majority. As noted above, the MoD will not be able to challenge what seems to be a remarkably broad interpretation of Article 2 before the European Court of Human Rights. Thus, irrespective of whether particular cases succeed on the facts, they will surely continue to be brought and thus the prospect of the military “having to prepare for or conduct active operations against the enemy under the threat of litigation if things should go wrong” remains.¹⁶³

It seems highly unlikely therefore, in the absence of an unprecedented volte face by the Supreme Court, that the mischief of *Smith* will be removed by judicial action (even with a concerted strategy of contesting liability by the MoD). If liability in negligence is to be denied, a legislative solution is needed. In fact a ready-made procedure exists in s.2 of the Crown Proceedings (Armed Forces) Act 1987 for the revival, by ministerial order, of Crown immunity in cases involving the armed forces. This will be considered below.

While such legislation could be attacked on the grounds of constitutional principle (as a breach of the Rule of Law), such criticisms would be weak. Every time the police exercise their powers of arrest and detention they are being immunised by legislation (or by their remaining common law powers) from what would otherwise be liability in the torts of battery and false imprisonment. So legislative immunity for public authorities from what would otherwise be common law torts is widespread and uncontroversial.

It may be worth noting one argument that positively favours legislation. It is sometimes suggested that judges should concern themselves only with (rights-based) “principle” and eschew (consequentialist) “policy”

¹⁵⁷ House of Lords Constitution Committee, Second Report, 2013–4 Session, “Constitutional arrangements for the use of armed force”, para 55.

¹⁵⁸ *Ibid.*

¹⁵⁹ See e.g. *A v. Secretary of State for the Home Department* [2005] 2 AC 68, [29] per Lord Bingham.

¹⁶⁰ House of Lords Constitution Committee, Second Report, 2013–4 Session, “Constitutional arrangements for the use of armed force”, para 50–61.

¹⁶¹ *Ibid* para 54. *Smith v. MoD* was cited to illustrate this danger, *ibid* para 56.

¹⁶² [2013] UKSC 41, [161].

¹⁶³ [2013] UKSC 41, [100].

in tort adjudication, because they are not well equipped to consider the latter. Although a minority position, it has occasionally attracted judicial support,¹⁶⁴ and rather more often that of academic purists.¹⁶⁵ If this argument is correct it fortifies the conclusion above that tort claims arising out of military action will not (indeed cannot, properly) be limited by judicial denial on the grounds of damaging constitutional and operational consequences. The proper way to place limits on the claims and rights that service personnel would otherwise have at common law is through legislation.

The legislative removal of Article 2 claims poses more formidable challenges. States have the power to derogate from the ECHR but only “In time of war or other public emergency threatening the life of the nation” and then only “to the extent strictly required by the exigencies of the situation” (Article 15(1), ECHR). It is obvious that such a derogation could not properly be made in terms wide enough to deal with the general problem of claims against the military posed by *Smith v. MoD*. The courts will, of course, review the legality of such a derogation and although deference will be shown to the judgment of the political arms of government in making it,¹⁶⁶ the argument that *Smith*-type claims against the military under Article 2 represent an emergency threatening the UK would surely not survive scrutiny. Of course Parliament might repeal the HRA altogether, although this would not prevent individuals claiming breach of their Article 2 rights in the European Court of Human Rights. To preclude that would necessitate repudiation of the entire Convention by the United Kingdom. There are respectable arguments for both of those courses of action. But even the most ardent opponent of human rights legislation would have to admit (in best Jim Hacker style) that to repeal the HRA just to reverse *Smith v. MoD* would use a sledgehammer to crack a nut by allowing the tail to wag the dog. At any rate, repeal of the HRA is a much larger question that cannot be adequately addressed in the present paper. Whether a generous enough no-fault compensation scheme (in place of negligence liability) would forestall HRA claims is considered below.

Section 2, Crown Proceedings (Armed Forces) Act 1987

This provision allows the Secretary of State to revive the effect of s.10 Crown Proceedings Act 1947 (which had preserved the common law immunity of the Crown in respect of armed forces claims, but which has now otherwise been repealed by s.1 of the 1987 Act). Such an order is made by statutory instrument subject to negative annulment procedure in both Houses (s.2(5)). Any revival takes effect “either for all purposes or for such purposes as may be described in the order” (s.2(1)(a)). The purposes may be described “by reference to any matter whatever and may make different provision for different cases, circumstances or persons” (s.2(3)). Any order cannot have retrospective effect (s.2(4)). The condition for making such an order is that it “appears” to the Secretary of State “necessary or expedient” either: “by reason of any imminent national danger or of any great emergency that has arisen” (s.2(2)(a)) or: “for the purposes of any warlike operations in any part of the world outside the United Kingdom or of any other operations which are or are to be carried out in connection with the warlike activity of any persons in any such part of the world” (s.2(2)(b)).

It appears that no order has been made to date under s.2 of the 1987 Act. But it could clearly be used to reverse the effect of *Smith* as far as common law negligence, insofar as the conditions in s.2(2)(b) are met. That is to say, that it appeared to the Secretary of State necessary (or expedient) for the effective conduct of warlike operations overseas (and connected activities) that claims by personnel on active service alleging negligence in the training, equipment and/or command of personnel should be barred. The exact terms of the statutory instrument would of course require very careful consideration so that the mischief of *Smith* was reversed without precluding legitimate claims that pose none of the same difficulties. The resulting order might face a challenge as being *ultra vires* s.2 or in some other way violating the principles of judicial review, but considerable deference would have to be shown by the reviewing court to the Secretary of State’s judgment of what “appears ... expedient” on a matter of national security.

An order under the 1987 Act could not entirely remove the vice of *Smith*—for example it would not affect claims for injuries suffered *inside* the UK that alleged negligence in high-level procurement decisions. Such claims still involve courts determining non-justiciable issues, albeit outside the theatre of war. But an order would provide a clear legislative restatement of the supposedly uncontroversial general principle of combat immunity, to which the majority decision in *Smith* has given a narrow and context-specific definition.

Immunities Again

It seems that the Secretary of State could largely reverse *Smith v. MoD* by an order under the Crown Proceedings (Armed Forces) Act 1987, and obviously Parliament could achieve the same goal even more comprehensively by new primary legislation. But *should* this be done?

It was argued above that immunities prevent tort law from performing its functions of compensation, deterrence and accountability. It may be that the public interest in ensuring the effectiveness of the armed forces is so great that individual rights (their claims to tort compensation) can justifiably be sacrificed to protect that public interest. But we should still ensure that individuals’ interest in compensation for their injuries, and the wider social functions of tort law, are still promoted so far as possible.

¹⁶⁴ E.g. Lord Scarman in *McLoughlin v O’Brian* [1983] 1 AC 410.

¹⁶⁵ E.g. R Stevens, *Torts and Rights* (Oxford 2007) ch 14.

¹⁶⁶ See e.g. *A v. Secretary of State for the Home Department* [2005] 2 AC 68.

It was argued above that strict liability offers certain advantages as a deterrent, through the mechanism of cost-internalisation. It has been argued that fault-based liability is unwise in the *Smith* situation because adjudicating upon negligence would over-deter important public functions (effective defence of the realm) and draw the courts into non-justiciable questions. Therefore, the answer seems to be to replace *Smith* not with a complete absence of liability (an immunity, with nothing in the place of negligence) but rather with a form of *strict liability*. This should ensure that the Ministry of Defence still has a keen financial incentive to take all cost-justified precautions to prevent deaths and injuries of forces personnel, while ensuring compensation for the latter without the hurdle of proving fault.

It is then suggested that *Smith v. MoD* be reversed by an order under the Crown Proceedings (Armed Forces) Act 1987, but *only* if the negligence claims in *Smith* are to be replaced by compensation payable to the dead and wounded in battlefield situation on a no-fault basis.

No-Fault: The Armed Forces Compensation Scheme

The Armed Forces Compensation Scheme is the obvious existing source for such no-fault compensation. But clearly the Scheme at least sometimes continues (despite recent reforms) to be less generous than tort damages assessed to provide *restitutio in integrum*. Otherwise negligence claims (with their expense, delay and stress) would never be brought by service personnel. Indeed, the Government's rationale for welcoming what became s.1 of the Crown Proceedings (Armed Forces) Act 1987 (allowing tort claims against the armed forces for the first time) was that damages awarded by the courts in personal injuries cases had risen considerably above the compensation provided by (the forerunner of) the AFCS. In fairness therefore, military personnel ought to be allowed to bring tort claims as any civilian might against his or her employer.¹⁶⁷ But logically, the other answer to this problem would be to raise the level of compensation under the AFCS to parity with tort damages. The need for tort claims by personnel against the Ministry of Defence would then disappear. AFCS claimants would be no worse off in terms of compensation levels, and in fact significantly better off overall since they do not have to show that their injuries resulted from anyone's negligence. (Thus, as noted above, averting the over-deterrence and non-justiciability problems of *Smith*-style negligence claims.)

The feasibility of raising AFCS benefits to exact parity with tort damages is, however, doubtful. First there is the obvious problem of cost to the Ministry of Defence, especially if the common law approach were adopted across the board (ie for all deaths and injuries attributable to service in the armed forces). NB that the Government should absorb the *full* cost of military injuries caused to provide the correct incentive to take all cost-justified precautions, so an increase in the total cost of AFCS would have deterrence as well as (obviously) compensation benefits. But if it proved politically impossible to fund a general uprating of all AFCS payments, a special exception could be considered for injuries and deaths sustained on active service (ie such claims *only* would be entitled to full, tort-level compensation under AFCS).

The current scheme makes no differential in levels of payments between injuries sustained on active service and otherwise. The recent Boyce Review of the AFCS decided against any change to this principle, on the basis of equity of treatment. It is the fact of agreeing to serve and (thereby) signalling willingness to sacrifice that makes service injuries different from others but similar to each other; and since personnel often have no choice about whether they are posted on active operations or not, an "all of one company" approach (not differentiating the circumstances of the injury) remains appropriate.¹⁶⁸ The recommendations of the Boyce Review (which were all accepted by the Government) are, no doubt, quite correct under the existing regime of tort liability. But if the claims of those on active service were to be ruled out by an order under s.2, Crown Proceedings (Armed Forces) Act 1987 as recommended above, there would be a strong reason to give such injuries higher compensation under the AFCS. The Scheme would become the substitute for and not merely an alternative to tort compensation, for such claimants.

A more fundamental obstacle exists to using the AFCS as a means of compensating injuries on the full (tort) measure, even in a subset of active service claims. The AFCS is, like all such schemes, essentially based on *generalised* tariffs and tables, in sharp contrast to the *personalised* approach of tort law. Tort's *restitutio in integrum* principle tailors compensation to the precise losses and needs of each individual claimant. The AFCS does not provide such a bespoke service but rather offers a range of off-the-peg compensation amounts. The AFCS has two basic elements. First, a lump sum from a tariff graduated according to severity of injury; this equates to the pain and suffering (loss of amenity) element of tort damages, or the non-pecuniary loss. The equivalent of pecuniary loss under the AFCS is a regular "guaranteed income payment" based on the salary of the claimant at their point of his or her leaving the services (when the injury is severe enough to have caused this). It is tax-free and index-linked. Notably, however, there is no award for medical, nursing or other care needs under the AFCS: these needs are supplied through the usual state services (NHS, etc). That major exclusion from AFCS compensation has recently been approved by the Boyce Review, rationalised as a "cross-Government approach" to injury support.¹⁶⁹ But it may well be that personnel left with severe disabilities feel compelled to bring tort claims to get compensation to pay for (eg) accessibility modifications to their houses,

¹⁶⁷ *Hansard* HC Deb 8 December 1986, vol 107 cc85–86W (Secretary of State for Defence). Cited by Lord Carnwath in *Smith v. MoD* [2013] UKSC 41, [178].

¹⁶⁸ Ministry of Defence, *Review of the Armed Forces Compensation Scheme*, Cm 7798 (2010), 2.83–2.88.

¹⁶⁹ *Ibid* 2.26.

when such compensation is excluded from the AFCS and may not readily be available under the general social security system.

Leaving aside the latter issue, it would be impossible to adopt the *restitutio in integrum* approach without utterly transforming the AFCS: its very nature (as a tariff-based scheme) and therefore the mode of its administration. The Boyce Review recommended against the introduction of any significant “personal element” into the AFCS. It would make consistent decision-making difficult, and it would raise transparency and fairness concerns (it might not be obvious why different claimants received different payments without the disclosure of personal factors—but confidentiality considerations would prevent such disclosure).¹⁷⁰ Certainly, to expect the Whitehall staff who currently administer the tariff-based AFCS to move seamlessly to quantifying compensation on the tort approach would ask much of them. It would also be a reinvention of the wheel. The tort system (including the judges, lawyers and others who already administer it) possesses all the necessary knowledge.

No-fault Compensation on the Full Tort Quantum

Instead of attempting to transform the AFCS into a para-tortious compensation system, it would instead be neater for the Government simply to agree to pay full, tort-quantum compensation on a no-fault basis (for injuries in service that cannot proceed as tort claims because of an order under s.2 of the Crown Proceedings (Armed Forces) Act 1987). This would operate outside AFCS for the reasons just given.

The commitment to pay compensation without proof of negligence could and ideally should be embodied in legislation. Most conveniently, it could be included in the statutory instrument implementing the order under s.2 of the 1987 Act. However, s.2 does not seem to contemplate such extensive conditions being included in orders made under it, and there would be a serious danger that any no-fault damages provisions included in the statutory instrument would be *ultra vires* s.2. In the absence of primary legislation to authorise the payment of no-fault, tort-level compensation, the Government could then simply declare itself bound to make such payments “under the prerogative”, as the Criminal Injuries Compensation Scheme was originally promulgated in 1964.¹⁷¹ This could be stigmatised as merely an *ex gratia* concession, and one that the Government might withdraw at any time. But in political reality, any Government with a Parliamentary majority is not bound even by primary legislation.¹⁷² The original CICS scheme was no more, but certainly no less, robust than its statutory successor. There is no reason to believe that a Government commitment to full compensation for wounded personnel, as the explicit quid pro quo for restriction of their tort law rights using s.2 of the Crown Proceedings (Armed Forces) Act 1987, would be any less enduring. Political pressure would help ensure this.

Compensation and Human Rights

If the suggestion above were taken up, and full compensation were to be paid on a no-fault basis for all injuries sustained in combat, then a major impetus encouraging the continued initiation of Article 2, ECHR claims would fade. This is important because, as seen, s.2 of the Crown Proceedings (Armed Forces) Act 1987 only applies to common law negligence (pre-1947 Crown immunity is simply irrelevant under the HRA). Injured personnel, or the dependents of those killed in service, would no longer need to bring Article 2 claims (which at the moment are usually brought in tandem with negligence claims) as a means of getting compensation, under the proposal above. It is true that some might still wish to bring claims under the HRA to ensure vindication of Article 2 rights and to hold the Government to account for breach of them. But the Government could plausibly argue that it would be unnecessary for a court to hear the claim (requiring adjudication upon military/procurement decision-making discussed above) when the Government had already made full financial satisfaction. It seems unlikely that damages awarded under s.8 HRA will exceed the level of tort damages; if anything the practice to date has been to award more modest awards in HRA cases.¹⁷³

In short, payment of full compensation on a no-fault basis would in practice preclude most Article 2 claims from being brought in cases like *Smith v. MoD*. Such compensation might even provide a basis for the courts to decline to hear any such cases on the basis that full satisfaction had already been provided by the state.

V. Recommendation

In conclusion it is recommended both:

- (1) That an order be made under s.2 of the Crown Proceedings (Armed Forces) Act 1987 to clarify the scope of combat immunity in tort (which has been left doubtful, and attenuated, by the Supreme Court’s decision in *Smith v. MoD*).
- (2) That in place of the tort claims thus removed, and instead of attempting to weave the tort principle of *restitutio in integrum* into an enhanced Armed Forces Compensation Scheme, the *Secretary of*

¹⁷⁰ Ibid 2.23.

¹⁷¹ For differing views on whether this was truly an exercise of the royal prerogative compare *Regina v. Criminal Injuries Compensation Board, Ex parte Lain* [1967] 2 Q.B. 864 with (e.g.) HWR Wade, “New vistas of judicial review” (1987) 103 LQR 323. The Scheme is now on a statutory basis, cf. Criminal Injuries Compensation Act 1995.

¹⁷² Compare Criminal Justice Act 1988 ss.108–117 and *Regina v. Secretary of State for the Home Department, Ex parte Fire Brigades Union* [1995] 2 A.C. 513.

¹⁷³ See e.g. *Regina (Faulkner) v Secretary of State for Justice* [2013] UKSC 23. For criticism cf. J Varuhas, “A tort-based approach to damages under the Human Rights Act 1998” (2009) 72 MLR 750.

State should declare that compensation will be paid on the full tort quantum to all service personnel who suffer death or injury but have no claim pursuant to the s.2 order, on a no-fault basis.

APPENDIX

JONATHAN MORGAN, “NEGLIGENCE: INTO BATTLE” [2013] CAMBRIDGE LAW JOURNAL 14–17

CAN soldiers killed or injured during combat sue the Ministry of Defence for failing to protect them? At first blush this sounds like the latest in that series of questions to which the terse answer is “no”. Such claims, in negligence, have previously been given short shrift: *Mulcahy v Ministry of Defence* [1996] Q.B. 732 (which P.S. Atiyah said was “surely entitled to the prize for the most undeserving claim of the decade (which is saying something)”: *The Damages Lottery* (Hart, 1997), p. 90). On the other hand, the Ministry clearly owes duties to its employees both at common law and under the Health and Safety at Work Act 1974, as confirmed in cases concerning injuries during military training exercises (eg, *Chalk v MoD* [2002] EWHC 422 (QB) and *Fawdry v MoD* [2003] EWHC 322 (QB)). Furthermore, since the claim in *Mulcahy* was dismissed, the Human Rights Act 1998 has imposed new duties upon the Government. Might the line in the sand now be crossed?

Smith v MoD [2012] EWCA Civ 1365 concerned soldiers wounded or killed during the Iraq war. There were two groups of incidents and claims. In the first, numerous “Snatch” Land Rover vehicles (which were notoriously lightly armoured) had been attacked using “improvised explosive devices”. In the second incident, a tank from a different regiment of the British army had shelled the claimant soldiers (mistaking their identity). The claimants sought to rely upon the MoD’s obligation to safeguard their right to life under Article 2 of the European Convention on Human Rights, or upon common law negligence, or both. The gist of the alleged breaches was a failure to provide suitable equipment (properly armoured Land Rovers; automatic recognition systems to guard against “friendly fire”) or adequate training in vehicle recognition.

***C.L.J. 15** Our focus here will be upon the common law claims. The European Convention was held inapplicable in accordance with the decision in *Regina (Smith) v Oxfordshire Assistant Deputy Coroner* [2010] UKSC 29, [2011] 1 A.C. 1. (It was noted that a Strasbourg challenge was pending against *Smith v Oxfordshire* in *Pritchard v U.K.*, but that any reconsideration would have to await the European Court’s judgment.) The starting point for Moses L.J. (with whom Rimer L.J. and Lord Neuberger M.R. agreed) was the Ministry’s duty *qua* employer to provide a safe system of work for the claimant soldiers. This was too well established to be disputed. The question was whether that duty yielded to the “combat immunity” relied upon in *Mulcahy*. In the end, the Court of Appeal held that that was a question of fact which would have to be determined at the trial of the action. Accordingly, the judge below (Owen J.) had been wrong to strike the claims out on the basis of “combat immunity” (cf. [2011] EWHC 1676 (QB)).

This sounds like an un-illuminating classification of the central issue as one of “fact”. But Moses L.J. gave some guidance on the proper scope of “combat immunity”. It was *not* sufficient that the injuries in question were sustained during battle (otherwise all of these claims would, necessarily, have failed). The question was whether the supposedly negligent *decisions* were taken during “active operations”. Decisions about training and equipment taken some time before the conflict in question could not enjoy “combat immunity”. Otherwise, it would be “difficult to see how anything done by the Ministry of Defence” would fall beyond it (at [62]). So decisions “away from the theatre of war” would not enjoy the immunity, which was to be narrowly construed. Only if the court would be required to sit in judgment on decisions made in the course of active operations would “combat immunity” bar claims.

There are good constitutional grounds for this narrow approach. As Elias J. pointed out in *Bici v MoD* [2004] EWHC 786 (QB) the successful invocation of “combat immunity” hinders the court’s “historic and jealously guarded role of determining [when] rights have been unlawfully infringed by an act of the executive”. His Lordship cited the great case of *Entick v Carrington* (1765) 19 Howell’s State Trials 1029 to show that the Government may not “simply assert interests of state or the public interest and rely upon that as a justification for the commission of wrongs”. This is stirring stuff, and important. There has been public disquiet about the alleged underfunding of Mr Blair’s wars by his Chancellor of the Exchequer. The Ministry of Defence should not be permitted to hide failures to fund vital protective equipment under a cloak designed to protect battlefield decisions against judicial questioning.

***C.L.J. 16** But even assuming that the decisions did not fall within “combat immunity”, is it proper for them to be scrutinised by the courts in an action for damages? In *Smith* the Ministry argued not, although unsuccessfully. Military procurement (involving decisions about the allocation of scarce resources) was said to be a political matter for which ministers were answerable exclusively to Parliament. The courts should not trespass into such matters: they were non-justiciable. Lord Rodger had said as much in *Smith v Oxfordshire* (at [127]). Moreover, arguments that resource allocation is non-justiciable had prevailed in the past, in judicial review cases (eg, *Regina v Cambridge Health Authority, Ex parte B* [1995] 1 W.L.R. 898). Also the courts had consistently protected the autonomy of, for example, the police to decide how best to fight crime by denying a duty of care, ever since *Hill v Chief Constable of West Yorkshire* [1989] A.C. 53). So why did the argument fail?

Moses L.J. held that while justiciability would be relevant if considering a “novel” duty of care (as in *Hill*), it simply did not arise in the case before him when the duty *qua* employer was so well established. But, with respect, this seems a slender ground for distinguishing *Hill*. Earlier cases on the MoD’s employer liability may well have been decided without even considering justiciability. The historical accidents of legal development

provide no sure reason to ignore the justiciability argument when it *does* arise and *is* clearly relevant, especially given its support in the authorities.

Secondly, however, Moses L.J. relied on quite a different line of authority. He cited *Barrett v Enfield L.B.C.* [2001] 2 A.C. 550 and *Phelps v Hillingdon L.B.C.* [2001] 2 A.C. 616 to show that “the mere fact that questions might arise as to policy, and as to the allocation of scarce resources, did not preclude the existence of a duty to take care” (at [48]). Rather, these matters should be taken into account in tailoring the standard of care to be applied (*cf.* *Bolam v Friern Hospital Management Trust* [1957] 1 W.L.R. 582).

This is rather surprising. *Barrett* and *Phelps* were both decided in the febrile months following *Osman v UK* (2000) 29 E.H.R.R. 245, when the courts became most reluctant to strike out *any* claim on duty of care grounds lest they be held to have breached Article 6 of the ECHR. But once the *Osman* heresy had been corrected in *Z v UK* (2001) 34 E.H.R.R. 97, the House of Lords reverted to its previous approach, routinely denying duties of care. The non-justiciability argument in *Smith v MoD* (which involved funding national defence procurement) was anyway much stronger than that in *Barrett* or *Phelps* (which involved decisions by social workers and educational psychologists). Moreover, Moses L.J.’s favoured strategy of controlling liability by means of a variable standard of care (*ie*, **C.L.J.* 17 breach rather than duty) was more recently championed entirely *unsuccessfully* by the late Lord Bingham, dissenting in *JD v East Berkshire Community Health NHS Trust* [2005] UKHL 23, [2005] 2 A.C. 373 and *Smith v Chief Constable of Sussex; Van Colle v Chief Constable of Hertfordshire* [2008] UKHL 50, [2009] 1 A.C. 225. What Lord Bingham tried in vain the Court of Appeal in *Smith v MoD* has now been accomplished, by declining to engage with those authorities at all.

Public authority tort liability is notorious for complexity. For it is a tricky business to weigh up the competing constitutional concerns: the state should not claim sweeping immunities for its (otherwise tortious) actions (*eg*, *Entick v Carrington*); but the courts should not second-guess matters of high policy for which politicians should properly be accountable to Parliament. Yet if ministerial responsibility is seen to be “falling short”, this should be addressed directly; it would be unwise for the judiciary to fill the “vacuum” (*cf.* *Regina v Home Secretary, Ex parte Fire Brigades Union* [1995] 2 A.C. 513, 567 *per* Lord Mustill). By contrast with such inherent problems, *needless* complication arises from incompatible lines of case-law. One might have believed that *Barrett* and *Phelps* had joined *Junior Books v Veichi* [1983] 1 A.C. 520 in “the slumber of the uniquely distinguished” (*cf.* *The Orjula* [1995] 2 Lloyd’s Rep. 395 *per* Mance J.). But *Smith v MoD* has awoken them once more. The Supreme Court may yet restore order (an appeal is to be heard in February 2013).

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Written evidence from Professor Nigel D White, School of Law, University of Nottingham

INTRODUCTION

Rather than viewing human rights as being antithetical to operational effectiveness, this submission is based on the premise that ensuring human rights compliance in military operations, whether in conflict or otherwise, is essential for the legitimacy of the operation and, therefore, the longer term effectiveness of military operations and any peace-building that follows from them. Military operations can be restricted to the initial period of peace enforcement, support, stabilisation and restoration, but the conduct of those operations whether short or long-term sets the framework for what follows. It would be very difficult to both keep and build the peace if the military operation had not been undertaken in accordance with basic human rights.

Traditionally, military operations have been subject to the legal frameworks of national military law and the international law of armed conflict (LOAC—also known as the laws of war or international humanitarian law). Although LOAC has military necessity built into its framework as a basic principle it also has humanity.¹⁷⁴ Therefore, LOAC is not incompatible with human rights law *per se*, although there may be conflicts in certain rules as between what LOAC allows and what is not permitted under human rights law. These conflicts do exist and more will be thrown up as these two areas of law are increasingly applied together to military deployments, but that should be expected as international law develops and its regimes expand.

Just as the rules of LOAC have become more sophisticated since the First and Second World Wars, so international human rights law has been established (first by the Universal Declaration of Human Rights in 1948) and then its coverage widened as its abstract norms have been applied to concrete cases. It is not possible to retreat from the idea, universalised in 1948, that all individuals have basic rights inherent in human dignity in times of war and peace; indeed it is in times of war that human rights come under the greatest threat and therefore require protection. Increasingly wars are being fought over the basic rights of citizens and so it would be incongruous to state that human rights law is inapplicable during that conflict. It follows that both civilians and soldiers are individuals who are entitled in principle to human rights protection, but that can only be the case in practice if it can be established that the state has a duty to protect them in the circumstances. Thus, human rights law does not simply apply as a blanket protection wherever British troops are deployed. There is considerable difference between the ideal of an extensive range of universal *human rights* and the reality of

¹⁷⁴ See UK Ministry of Defence, *The Manual of the Law of Armed Conflict* (Oxford University Press, 2004) pp 21–6, which lists “military necessity”, “humanity”, “distinction” and “proportionality” as the basic principles of the law of armed conflict.

human rights law, which recognises limitations upon a state's duty to respect and protect those rights. The purpose of this paper is to explore those limitations in the context of UK military operations overseas.

THE INFLUENCE OF HUMAN RIGHTS

The unstoppable influence of human rights can be seen not only in the tightening up, over the years, of fair trial rights in civilian courts but also in military courts. Historically courts martial were a crude but effective way of ensuring military discipline was maintained, often consisting of trials of soldiers by their senior officers with little representation or due process. Courts martial have successfully been reformed to conform to human rights laws on the right to a fair trial after the *Findlay* case before the European Court of Human Rights,¹⁷⁵ although the distinctive character of the court as a military court has not been lost. While crude field courts martial no longer occur commanders are still able to maintain discipline over troops for summary offences (with a right of appeal since 2000),¹⁷⁶ while more serious issues are subject to courts martial where the rights of the accused are protected. In other words courts martial have become human rights compliant in response to challenges but they have not been replaced with purely civilian courts with their own clear human rights guarantees. Human rights compliance does not mean one size-fits-all solutions. Courts martial involve jurors who are serving officers and a judge who, although independent, is of a military legal background. Such experience and perspective are necessary to bring to the trial the military environment and expectations for military conduct, which are often very different to those which pertain in civilian life.

The evolution of courts martial shows that military law and discipline can be brought into the human rights era. The question is not so much whether other aspects of military deployments can be made human rights compliant, the question is how. This is particularly important when soldiers are deployed to a situation that does not cross the threshold of an armed conflict—say a crisis, post-conflict, or humanitarian situation—here, by definition, LOAC does not apply. The regulatory framework remains national military law but also international human rights law.¹⁷⁷ Thus, while the right to life is qualified by LOAC during an armed conflict when combatants can kill enemy combatants,¹⁷⁸ it is not so qualified outside that situation. However, even outside of armed conflict, the European Convention on Human Rights (ECHR) allows life to be taken when absolutely necessary for self-defence, defence of others, in order to affect a lawful arrest or prevent escape from lawful detention, or in action lawfully taken to quell a riot or insurrection.¹⁷⁹ Notice that human rights law does not prohibit the taking of life, but it does subject it to a stricter regime than applicable during war—which is only to be expected. We would not expect soldiers in a humanitarian situation to be using the levels of lethal force necessary during an armed conflict, but we might have to accept that lethal force is necessary to prevent attacks on civilians or to prevent insurrections, and human rights law reflects that.

JURISDICTION OVER SOLDIERS UNDER THE ECHR

Much of the *Smith v MOD* case of 2013 was a debate about the positive obligations of the UK government and military to protect the right to life of its soldiers when deployed to Iraq.¹⁸⁰ At the time LOAC applied in Iraq, first in 2003–2004 after the successful invasion as a result of the occupation by US and British troops, and then as a result of the insurgency against the British and US forces present under agreement with the Interim government of Iraq. The fighting between US/UK forces and armed groups reached the level of protracted armed violence necessary for a non-international armed conflict to exist in which LOAC applied.

Despite the applicability of LOAC to British forces in these circumstances, the UK Supreme Court unanimously agreed that human rights law also applied in that the UK's jurisdiction, in the sense of Article 1 ECHR, extended to securing the protection of the right to life under Article 2 ECHR to British soldiers. There no longer seems to be any doubt amongst the senior judiciary at least that British soldiers are covered by the ECHR wherever they are deployed. While this potentially opens up the government to claims by fallen soldiers' families that lives have been lost in violation of Article 2 ECHR, the Court effectively moved the barriers to success for such claims on to the nature of the positive obligations a government owes its soldiers (discussed in the next section). If those barriers are set quite high (as was the case according to the majority led by Lord Hope in *Smith v MOD*), or are of an absolute impenetrable nature (as argued by the minority led by Lord Mance) then litigation will be either largely unsuccessful or fruitless.

The finding that the UK had jurisdiction for ECHR purposes over soldiers operating in combat situations outside their bases in *Smith v MOD* in 2013 is a major step from the *R (Smith) v Oxfordshire Deputy Coroner*

¹⁷⁵ *Findlay v UK* (1997) 24 EHRR 221. See also *Morris v UK* (2002) 34 EHRR 1253; *Grievies v UK* (2003) ECHR 57067/00.

¹⁷⁶ Armed Forces Discipline Act 2000, which entered force at the same time as the Human Rights Act 1998, again showing the influence of human rights.

¹⁷⁷ There is a lack of clarity on when LOAC is applicable in the Policy Exchange Paper by Thomas Tugendhat and Laura Croft, "The Fog of Law: An Introduction to the Legal Erosion of British Fighting Power" (Policy Exchange, 2013), which seems to assume that conflict covers "internal (domestic) tensions, riots and insurrections, conflicts between states, interventions, peace enforcement, peacekeeping and non-international and international armed conflict" (p 20). While LOAC applies to armed conflicts between states and within states, it does not apply to tensions or riots. It may apply to insurrections, interventions, peace enforcement and on occasions peacekeeping if an "armed conflict" arises as a result of, or during these, operations. For LOAC to apply there must be an "armed conflict".

¹⁷⁸ Recognised in Article 15(2) ECHR, which does not allow derogation from the right to life except in cases of deaths arising from lawful acts of war.

¹⁷⁹ Article 2(2) ECHR 1950.

¹⁸⁰ *Smith and others (FC) v The Ministry of Defence* [2013] UKSC 41.

case of 2010, when the Supreme Court restricted the application of ECHR to soldiers within their bases.¹⁸¹ The change in judicial attitude was caused by the European Court of Human Rights' judgment in *Al-Skeini* in 2011, which decided that civilians killed by UK forces in Iraq were protected under the ECHR whether they were killed in detention or on the streets.¹⁸² Given the nature of the British occupation entailing the exercise of public powers by British forces those Iraqi civilians were within the jurisdiction of the UK.

The European Court of Human Rights took the opportunity in *Al-Skeini* to rationalise its case law on jurisdiction, first to situations where a contracting state's agents had effective control over an area in another state and, second, to where state agents exercised authority and control over individuals.¹⁸³ Although the second situation had hitherto been concerned with individuals who came under the authority or control of state agents such as soldiers, in *Smith v UK* the Supreme Court took the second situation and applied it to British soldiers themselves who came within the UK's jurisdiction because they were also under the authority and control of the UK and subject exclusively to UK law.¹⁸⁴ This application of jurisdiction under the ECHR to soldiers serving overseas seems to have been accepted by the Supreme Court without question. It would not be possible to draw a distinction between soldiers and civilians who are under the authority and control of the UK except on the grounds that civilians have human rights and soldiers do not (or have been deemed to have given them up when joining the services). Nonetheless, as Lord Hope admitted, no case had come before the European Court of Human Rights as to whether the jurisdiction that contracting states have over their troops when deployed overseas equates to jurisdiction in the sense of Article 1 ECHR.¹⁸⁵

Lord Hope further admitted that the "extent of the day to day control" over soldiers will, of course vary from time to time when forces are deployed on active service overseas, especially when troops are face-to-face with the enemy.¹⁸⁶ However, the Court did not explore whether this factual variance in control might affect the duty to protect the right to life. It accepted that ECHR rights can be "divided and tailored" so that the state only has to secure rights that are relevant to the individual under state authority and control.¹⁸⁷ It would seem reasonable to argue, for instance, that sending troops into a city, the capture of which is necessary in military terms, in the expectation of hand-to-hand fighting and high casualty rates, would not violate the individual soldier's right to life if the operation was clearly planned, and the soldier was fully trained and equipped. This is not denying that soldiers have a right to life in these circumstances but if the state has acted diligently it cannot be held to have violated that right even if soldiers' lives are lost. It is interesting to note that in making the case for the application of ECHR rights to soldiers when on active service overseas Lord Hope cites recommendation 1742 (2006) of the Parliamentary Assembly of the Council of Europe, which states that soldiers enjoy the same rights and freedoms as any other citizen *within the limits imposed by the specific exigencies of military duties*.¹⁸⁸

DUE DILIGENCE OWED TO SOLDIERS IN COMBAT OPERATIONS

Human rights law requires that a state does not violate the rights of individuals within its jurisdiction (the negative obligation) but also that the state takes measures to ensure that rights are protected within that jurisdiction (the positive obligation). In the *McCann* case, before the European Court of Human Rights, the SAS' actions in shooting known IRA members in the belief that they were about to detonate a bomb in Gibraltar was not deemed to violate the right to life of those killed but poor planning and prevention by the UK was.¹⁸⁹ Due diligence (positive) obligations are obligations of conduct not result, so that the fact that deaths occur does not mean that the obligations are breached if the soldiers' use of lethal force was necessary to preserve life and the government had acted diligently in planning and preparing the operation.¹⁹⁰

The right to life is not absolute even in times of peace and will be further qualified by the relevant rules of LOAC when in a situation of armed conflict. Thus, sending troops into a combat situation where there is a risk of life being taken does not, per se, violate the right to life of the soldiers. Having established that the UK had jurisdiction over its soldiers in Iraq within the meaning of Article 1 ECHR, the Supreme Court in *Smith v MOD* set about examining the extent of the UK's positive obligations to protect the right to life of its soldiers under Article 2 ECHR. Here it is important to note that the test is not absolute—such obligations are ones of conduct not of result—and must be assessed in relation to the facts of the case where, as Lord Hope

¹⁸¹ *R (Smith) v Oxfordshire Assistant Deputy Coroner (Equality and Human Rights Commission intervening)*, [2010] UKSC 29.

¹⁸² *Al-Skeini v UK* (2011) 53 EHRR 589.

¹⁸³ *Smith and others (FC) v The Ministry of Defence* [2013] UKSC 41, Lord Hope, para 31.

¹⁸⁴ *Ibid.*, paras 21, 28 (Lord Hope).

¹⁸⁵ *Ibid.*, para 42 (Lord Hope).

¹⁸⁶ *Ibid.*, para 28 (Lord Hope).

¹⁸⁷ *Ibid.*, paras 37–8 (Lord Hope), relying on the ECtHR in *Al-Skeini* para 137.

¹⁸⁸ *Ibid.*, para 54 (Lord Hope).

¹⁸⁹ *McCann v UK* (1996) 21 EHRR 97.

¹⁹⁰ The European Court of Human Rights has also found that Turkey and Russia violated Article 2 ECHR when conducting security/military operations on their own territory (against the PKK in south-east Turkey and against rebels in Chechnya) due to a lack of proper planning and precautions in the choice of means which meant that not enough had been done to minimise civilian casualties—*Ergi v Turkey* [1998] ECHR 59; *Isayeva, Yusopova and Bazayeva v Russia*, Application Nos 57947/00, 57948/00, 57949/00, 24 February 2005 *Isayeva v Russia*, Application No 57950/00, 24 February 2005 (2005). Similarly, the Court found that the use of gas by Russian security forces, causing the deaths of 125 hostages held by Chechen separatists in a Russian theatre in 2002, was not a violation of the right to life, though the lack of medical preparation for the immediate aftermath of the use of gas was—*Finogenov and Others v Russia*, Application Nos 18299/03 and 27311/03, 4 June 2012.

recognised—a balance has to be struck between the competing interests of the individual and of the community as a whole, giving the state a wide margin of appreciation.¹⁹¹

Arguably, Lord Hope did not explore the key issue of balance enough given there can be no greater expression of state/community interest than a decision to send troops to fight. The trend towards securing a positive vote in the House of Commons in favour of troop deployments indicates that these are no longer just decisions for the government, exercising prerogative powers, but for the country as a whole, as represented by Parliament. Undoubtedly, the vote against the deployment of forces to Syria in August 2013 was in part influenced by the lack of public support for such an operation. That expression of community interest in Parliament does not mean that there are no positive obligations on the part of the state when it does decide to send troops into combat, but it does mean that the Courts should be concerned with balancing those wider interests against the interests of soldiers, which can be achieved by proper planning, training, and ensuring that the equipment was sufficient to achieve the goals of the operation (while not exposing soldiers to manifestly unreasonable risks).

While the use of Land Rovers in Iraq could be criticised as not affording as much protection as say Armoured Personnel Carriers that decision is not, in itself, a breach of the UK's positive obligation to protect the lives of its soldiers under the ECHR. The use of Land Rovers was in fulfilment of the functions of the force (to bring security to Iraq), so the question was whether this exposed soldiers to manifestly unreasonable risk. There was a risk with Land Rovers that soldiers might lose their lives as a result of IEDs but, given the efforts to reduce the chances of loss of life (by the introduction of electronic countermeasures for instance), due diligence steps had been taken. There is a question mark over how quickly those measures were installed on Land Rovers, which is an issue for the trial court, examining all the relevant facts.¹⁹² It is suggested that the due diligence test does not require provision of the best equipment available, rather it requires that the equipment provided is more than sufficient for the tasks set. That is the sort of balancing dictated by due diligence standards—they do not provide for absolute (and very difficult to achieve standards) but are satisfied by reasonable caution and careful preparation. For example, if the government sends troops to a combat operation with only light weapons, it is failing its duty. If it sends troops with light weapons on a peacekeeping mission, where fighting has ceased, it is not.

Lord Hope, representing the majority view in *Smith v UK*, accepted the limitations of positive obligations, both at operational level (where the Court must be very slow to question operational decisions made by commanders), and at the planning level (where allocation of resource is primarily a political decision and not normally appropriate for a Court). The law should enter this field with great caution, according to Lord Hope, and the Courts should not risk undermining the ability of a state to defend itself or risk democracy itself.¹⁹³ Thus, it would require a manifest violation of positive obligations to trigger responsibility of the government—either a serious error by a commander,¹⁹⁴ or a serious failure in planning or procurement.¹⁹⁵

Although the UK Supreme Court allowed the case to proceed to trial, where the facts would be the focus, Lord Hope gave a strong steer that the duties implied in Article 2 ECHR must not “impose an unrealistic or disproportionate burden on the authorities”, and that meant that a “very wide measure of discretion ... must be accorded to those” planning the operations and procuring equipment.¹⁹⁶ He thus put the claimants “on notice”, in effect, as to their limited chances of success.¹⁹⁷ This hardly seems to justify the charges of “legalistic and post-operational questioning” levelled at the majority in *Smith v MOD* in the Policy Exchange Report.¹⁹⁸ Yes the case does establish (without any dissent) that in principle the ECHR applies to soldiers, but it places clear limits on the chances of claims succeeding. Lawyers advising potential claimants should bear this in mind, although this should not stop cases proceeding where, as with the use of Land Rovers in Iraq, there are questions to be answered. Claims will help shape the governments obligations and future military operations, although the claim itself is unlikely to be upheld.

Neither the military nor the government should fear the ECHR, nor should they operate with their eyes on the law rather than on the enemy; for the judgment makes it clear that if they have done their jobs then there will be no liability. Furthermore, the judicial role is a limited one: it does not prevent deployments or dictate operational decision-making, it will provide some limited and retrospective access to justice for the families of soldiers but primarily it will help the government and the military shape future operations in a way that fulfils their positive obligations under human rights law. This will not undermine the effectiveness of war-fighting, in fact it will help to ensure that soldiers have a better chance of both war-fighting success and survival.

While Lord Mance (for the minority) agreed with Lord Hope that the UK had jurisdiction over soldiers within the terms of Article 1 ECHR,¹⁹⁹ he disagreed with the majority that the European Court of Human

¹⁹¹ *Smith and others (FC) v The Ministry of Defence* [2013] UKSC 41, para 61 (Lord Hope).

¹⁹² *Ibid.*, paras 77–8 (Lord Hope).

¹⁹³ *Ibid.*, paras 64–66 (Lord Hope).

¹⁹⁴ “The law should accord the widest measure of appreciation to commanders on the ground who have the responsibility of planning for and conducting operations there”, *ibid.*, para 71 (Lord Hope).

¹⁹⁵ “The court must avoid imposing positive obligations on the state in connection with the planning for and conduct of military operations in situations of armed conflict which are unrealistic or disproportionate”, *ibid.*, para 76 (Lord Hope).

¹⁹⁶ *Ibid.*, paras 78, 81 (Lord Hope).

¹⁹⁷ *Ibid.*, para 81 (Lord Hope).

¹⁹⁸ Policy Exchange, “The Fog of Law”, p 33.

¹⁹⁹ *Smith and others (FC) v The Ministry of Defence* [2013] UKSC 41, para 102 (Lord Mance).

Rights would stretch its jurisprudence to identify positive obligations on contracting states to protect the lives of soldiers when deployed to combat situations.²⁰⁰ He believed the Court would not “invade a field which would involve ... extensive and highly sensitive review with the benefit of hindsight” of the UK’s “policies, strategy and tactics relating to the deployment and use of its armed forces in combat”.²⁰¹ He warned that the approach of the majority would lead to the “judicialisation of war”,²⁰² and instead he argued, in effect, that such matters were non-justiciable ie not appropriate for judicial decision.

The Courts have, over the years, gradually asserted jurisdiction over executive powers but they have been reluctant to exercise it on the basis that matters of high policy (such as going to war) are decisions for the executive and not for the courts. While this remains true for questions of the legality of war where the Courts do not pass judgment upon the legality of the UK’s deployments,²⁰³ this is not the issue raised by *Smith v MOD*. That case raised issues of the human rights of soldiers once deployed and it cautiously extended the coverage of the ECHR to those soldiers. The majority in *Smith v MOD* was careful not to encourage a rash of claims by indicating that it would have to be a serious failure in operational or policy planning or procurement that would breach these obligations. This rights-based approach, although a cautious one, supports the military covenant between the country and its armed forces—that soldiers are there to serve their country but in return we owe them duties, not only to look after them if injured and their families if soldiers are killed, but also we owe them a basic duty to protect them from poor decision-making that leads to unnecessary loss of life.²⁰⁴

LIMITATIONS ON THE APPLICATION OF HUMAN RIGHTS

Jurisprudence under the ECHR has not resulted in the application of every aspect of the Human Rights Act and the ECHR to individuals (soldiers and civilians) involved in British military deployments overseas. First, the Court must establish that the UK has jurisdiction over the individuals in the sense of Article 1 ECHR; second, the Court must decide, in the circumstances, what rights are applicable to the individual and then; third, it must judge whether those rights have been breached. In *Smith v MOD* the Supreme Court found that soldiers were within the jurisdiction of the UK for ECHR purposes, and that the positive obligations under the right to life were applicable in principle, but left the final decision for trial while casting doubt upon whether there had been a breach.

For civilians in countries to which British troops are deployed it is harder for them to progress to the third question. Following the European Court of Human Rights in *Al-Skeini*, jurisdiction is not automatic since claimants must establish that the UK exercised public powers either over the area in which they were present at the time of the alleged violation or over them personally, for instance by means of arrest and detention. With reductions in the level of British troops it seems less likely that British deployments will be able to effectively occupy or otherwise control tracts of territory, so it remains questionable whether civilians who lose their lives during a limited military operation would be within the jurisdiction of the UK for the purposes of the ECHR. If the UK is part of a multilateral operation occupation or other forms of effective control may be undertaken, but it remains the norm in these operations for each national contingent to operate within a specific area of the country, again raising the question of whether the UK would have sufficient forces to do that.

There is some limited jurisprudence from the Inter-American Commission on Human Rights, for making an argument that when soldiers fire weapons at individuals they are, in effect, asserting jurisdiction over them for the purposes of human rights law.²⁰⁵ However, the orthodox view is that found in the General Comment of the Human Rights Committee in 2004 where it stated that parties to the International Covenant on Civil and Political Rights must ensure the human rights of persons “within the power or effective control of the forces of a State Party acting outside its territory”.²⁰⁶ Unless such power or effective control is exercised by UK forces human rights law is inapplicable.

LOAC will apply if UK forces are engaged as combatants in an armed conflict. Direct use of lethal force against civilians is a breach of LOAC, as civilians are protected persons, but indirect collateral civilian losses are permitted, when making targeting choices, if the prospect of such losses is outweighed by the “concrete and direct military advantage anticipated”.²⁰⁷ In the circumstances of war LOAC applies with its balance between military necessity and humanity. This makes practical sense in that where the UK exercises extraterritorial power or effective control then the standards of human rights law applies to civilians, where it

²⁰⁰ Ibid., paras 142–3 (Lord Mance).

²⁰¹ Ibid., para 146 (Lord Mance).

²⁰² Ibid., para 150 (Lord Mance).

²⁰³ See written evidence by author to Political and Constitutional Affairs Select Committee in October 2013 available at <http://data.parliament.uk/writtenevidence/WrittenEvidence.svc/EvidencePdf/2838>

²⁰⁴ But see Policy Exchange, “Fog of Law”, p 18.

²⁰⁵ L. Doswald-Beck, *Human Rights in Times of Conflict and Terrorism* (Oxford University Press, 2011) pp 19–21, citing cases where the state has been held to be in breach of the right to life when firing at a person from a distance; for example, *Armando Alejandro Jr; Carlos Costa, Mario de la Pena and Pablo Morales v Cuba* (Brothers to the Rescue case) Case 11.589, Report No 86/99, 29 September 1999, para 25. But, see the European Court of Human Rights decision in *Bankovic and others v 17 NATO States*, Admissibility Decision (Grand Chamber), 12 December 2001, paras 52–3.

²⁰⁶ Human Rights Committee, General Comment 31, “Nature of the General Legal Obligation on States Parties to the Covenant”, UN Doc CCPR/C/21/Rev 1/Add 13 (2004), para 10.

²⁰⁷ UK Ministry of Defence, *The Manual of the Law of Armed Conflict*, p 81.

does not and UK forces are engaged in an armed conflict then the standards of LOAC apply.²⁰⁸ Civilians are protected under both regimes but the level of protection varies according to the circumstances. Human rights law and LOAC are not, therefore, at loggerheads but work in a complementary way. This is not always the case as the next section will show, but it is often possible to work out how LOAC and human rights law are allies and not enemies.

DETENTION: WHEN HUMAN RIGHTS AND LOAC CONFLICT?

A somewhat discredited view is that LOAC, as the *lex specialis*, qualifies human rights law as the *lex generalis*. This is where most academic literature has been focused following jurisprudence of the International Court of Justice.²⁰⁹ Although the *lex specialis/lex generalis* division does not work in a broad sense it does make sense in two cases where the specific rules of LOAC will prevail. The first has been mentioned above and occurs when a soldier kills an enemy soldier in the course of an armed conflict—this is not seen as a violation of the right to life under human rights law. Similarly, the death of a British soldier in battle is not, by itself, a violation of the right to life by the UK. This is implicit in the ECHR, Article 15 of which provides that derogations are not permitted in respect of right to life, except in respect of deaths caused by lawful acts of war. Furthermore, it is unlikely that human rights law is applicable in the circumstances of one soldier killing another as this does not represent the assertion of jurisdiction in the sense of human rights law.

The second exception is that of prisoners of war who are detained in humane conditions until the conflict is over. Such prisoners, although under the power and control of the detaining state, are not viewed as being detained without charge or trial in violation of the right to due process and fair trial. While there is no express human rights treaty provision to support this there is plenty of state practice to establish the legality of detaining prisoners of war in accordance with the Third Geneva Convention of 1949 for the duration of a conflict, at the end of which they should be released and returned to their home state. States have effectively agreed that this is *lex specialis* in the circumstances of PoWs. In effect, the combat immunity which soldiers have for killing enemy combatants is continued when captured, in the sense that PoW status protects them from prosecution for lawful acts of war.

However, there is a serious problem of conflict between human rights and LOAC when forces detain individuals in the belief they constitute threats to security. Detainees are not captured regular soldiers and, therefore, do not qualify as PoWs, neither are they civilians arrested and charged with crimes who have been placed in detention awaiting trial.²¹⁰ Under LOAC administrative detention or internment should only be used for imperative reasons of security “if the security of the Detaining Power makes it absolutely necessary”.²¹¹ The Fourth Geneva Convention of 1949 states that any individual who has been interned “shall be entitled to have such action reconsidered as soon as possible by an appropriate court or administrative board”. If internment is continued then LOAC provides for periodic review by a court or board to give consideration to the case with a view to a favourable decision if circumstances permit.²¹²

These rules of LOAC are hard to reconcile with ECHR rights, Article 5(4) of which provides that “everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful”. The presumption is in favour of the release of security detainees under human rights law, while under LOAC the presumption is against. The regimes could be brought closer together if review of a security detainee under LOAC is undertaken speedily by a court, but the issue of continuing detention without criminal charge or trial remains.

However, when faced with such practicalities human rights jurisprudence has shown flexibility—the concern being to make such practices as internment human rights compliant, not necessarily to outlaw the practices themselves. The Human Rights Committee in interpreting a similar provision under the International Covenant on Civil and Political Rights has stated that “if so called preventive detention is used, for reasons of public security ... it must not be arbitrary, and must be based on grounds and procedures established by law ... information of the reasons must be given ... and court control of the detention must be available ... as well as compensation if there is a breach And if, in addition, criminal charges are brought in such cases” full due process and fair trial rights must be granted.²¹³ This seems to permit internment for security reasons if the detention is made human rights compliant. Even where such processes of review of detention are established, permanent detention for security reasons would remain prohibited by human rights law.

The European Court of Human Rights, however, has shown less flexibility. In the *Al-Jedda* case the applicant had been interned for imperative reasons of security in a British military facility for over three years, authorised and reviewed by senior military personnel and by the UK government, on the basis of intelligence that was

²⁰⁸ Iraq was exceptional in that, by declaring itself as an occupier, the UK was stating that it had effective control, even though the reality was far from that. This meant that the UK was caught between having a legal obligation to protect civilians under the ECHR and an insurmountable difficulty in fulfilling this.

²⁰⁹ See, for example, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, (1996) ICJ Rep 226 at para 25.

²¹⁰ In the case of penal offences relating to the armed conflict, LOAC provides basic rights to the detained person, which are largely in line with human rights law—see Article 75 Additional Protocol I 1977 in MOD, *Manual of the Law of Armed Conflict*, 217.

²¹¹ Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War 1949, Article 42.

²¹² *Ibid.*, Article 43.

²¹³ Human Rights Committee, General Comment 8, 30 June 1982 para 4.

not disclosed to him. He was able to make written submissions to the British authorities but there was no provision for an oral hearing, nor was it intended to bring any criminal charges against him. The UK government had not derogated from Article 5 ECHR (on the right to liberty and security of person) and therefore the Court held that preventive detention was not permitted where there was no intention to bring charges within a reasonable time.²¹⁴

Much of the UK government's arguments before the Court in *Al-Jedda* had been to try and establish that the applicant's human rights were overridden by obligations arising from a Security Council resolution,²¹⁵ and very little effort was spent trying to justify the internment in human rights terms. This is probably due to the fact that it clearly breached human rights. The judgment does not prevent the UK from using internment but only for limited periods. Indefinite detention amounts to imprisonment without charge or trial, and is clearly contrary to basic human rights standards. The question remains whether the UK could extend the period allowed by means of derogation.

DEROGATION

It follows from the above analysis that there is a problem of conflicting LOAC and human rights obligations in the area of detention. While detention of PoWs captured during an international armed conflict is permitted, there is no entitlement to PoW status in a non-international armed conflict, for instance when the UK is present in another country with the consent of the government and is fighting insurgents. Preventive detention is what the military requires for captured insurgents although the treaty rules of LOAC only clearly provide for this in the case of international armed conflicts.²¹⁶ However, an ICRC study of customary LOAC rules identifies a rule from state practice to the effect that "persons deprived of their liberty in relation to non-international armed conflict must be released as soon as the reasons for the deprivation of their liberty cease to exist".²¹⁷ Human rights law indicates that such detention must be reviewable and then only temporary. Since captured insurgents or other security detainees are not protected personnel, entitled to PoW status, they could be charged and tried for crimes. Thus, the UK could either detain them temporarily for imperative security reasons and release them, or detain them and then hand them over to local authorities for fair trial. Alternatively, the UK could derogate from Article 5 ECHR to allow for longer periods of preventive detention before trial or release, subject to there being proper review.

Article 15 ECHR provides that in times of "war or other public emergency threatening the life of the nation" any ECHR state may take measures derogating from its obligations under the Convention (with certain exceptions such as freedom from torture) to the extent strictly required by the exigencies of the situation. Article 15 is itself evidence that the ECHR was meant to be applicable during wartime but it also shows that it was intended to give states leeway to suspend human rights, if necessary, including the right to liberty in Article 5 ECHR. There are strong arguments to say that preventive detention is absolutely necessary to address a violent insurgency—it is better to detain captured insurgents rather than kill them,²¹⁸ but that necessity does not dictate an absence of judicial oversight of detention. Human rights can be reduced but not eliminated. Furthermore, it is argued that Article 15 ECHR suggests that war per se threatens the life of the nation and that it is not necessary to prove that it does, unlike in the case of "other public emergencies".

The UK Supreme Court in *Smith v MOD*, however, interpreted the phrase "threatening the life of the nation" in a way that suggests the power to derogate is only available in an exceptional situation of crisis or emergency, which "affects the whole population and constitutes a threat to the organised life of the community of which the state is composed".²¹⁹ From this the Court concluded that the power of derogation could only be exercised in circumstances far removed from those where the UK conducts military operations overseas with a view to eliminating threats to the UK's security.²²⁰ This seems a problematic interpretation given that a war or armed conflict did exist in Iraq, which is arguably enough to trigger the right of derogation. It could also be argued that the armed conflict threatened the life of Iraq, and that the UK was there on the basis of agreement with the government of Iraq to protect that country. While the life of the UK was not threatened that of Iraq was, and the UK was acting not only to protect its own security but to preserve Iraq. A purposive interpretation of Article 15, based on the ECHR as a "living instrument",²²¹ should allow the UK to derogate from the ECHR in such circumstances. Furthermore, this part of the judgment in *Smith v UK* was only obiter as the UK had

²¹⁴ *Al-Jedda v UK* (Application No 27021/08) 7 July 2011, paras 98–99.

²¹⁵ The European Court of Human Rights left open the possibility that the Security Council could expressly override human rights, but that in the case before it the Resolution (1546) could not be read in this way (*ibid.*, paras 102, 109). Thus the UK, using its position as a permanent member, is in a position to argue in the Security Council for the insertion of a clause requiring, as a "necessary measure", reviewable preventive detention, accompanied by an express statement that any inconsistent human rights obligations of states acting under the resolution would be suspended for the duration of the operation.

²¹⁶ Doswald-Beck, *Human Rights in Times of Conflict and Terrorism*, p 277—LOAC "relating to non-international armed conflict does not address in any substantial way administrative or pre-trial detention procedures". But see Policy Exchange, "Fog of Law", p 37—"LOAC allows the detention in humane conditions of those deemed security risks until the end of hostilities".

²¹⁷ J-M. Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law* (Cambridge University Press, 2005) Rule 128.

²¹⁸ *Ibid.*, p 42.

²¹⁹ *Smith and others (FC) v The Ministry of Defence* [2013] UKSC 41, para 59 (Lord Hope).

²²⁰ *Ibid.*, para 60 (Lord Hope).

²²¹ The "living instrument" idea—that the ECHR should evolve in the light of new conditions—has been used extensively by the European Court of Human Rights, starting with the case of *Tyler v UK* [1978] ECHR 2 at para 31.

not derogated from ECHR obligations. In future operations a limited derogation from Article 5 ECHR to allow for extended detention with judicial oversight should be possible.

CONCLUSION

In *Smith v MOD* all the judges accepted that the UK had jurisdiction over its troops in Iraq for the purposes of the ECHR. This has not yet been confirmed at the level of the European Court of Human Rights Law, but is likely to be. This does not mean that all the rights listed in the ECHR are applicable to UK operations overseas. In fact, the rights that are often in issue are very few (principally the right to life of soldiers and civilians, to freedom from arbitrary detention of civilians, and to freedom from torture or inhuman treatment of civilians). Nevertheless, even with the establishment of ECHR jurisdiction over troops it is very difficult for claimants to establish that the due diligence obligations of the government towards soldiers to protect their right to life have been breached. This is because issues of resource allocation which lay behind much of the procurement issues and levels of equipment are not primarily decisions for judges but are issues for politicians. Such decisions should activate mechanisms of political accountability, before Select Committees and, if necessary, by public inquiries. Judicial accountability should only be activated where the governmental or operational decisions to deploy allegedly underequipped or undertrained troops to deal with emergency situations is so unreasonable that there has been a manifest failure to protect the lives of soldiers. The right to life of soldiers is protected but this does not prevent deployment or operational effectiveness.

More broadly, the government's due diligence obligations will have been largely fulfilled if it can show that it had a clear process of planning and procurement that took account of the potential negative impact of the operation on the rights of soldiers (to life) and civilians (to life, freedom from arbitrary detention and freedom from torture), and that this process had minimised those impacts. Commanders on the ground must also show that in their decision-making process, which can be very constrained in the heat of battle, they have duly considered the impact of specific operations on the applicable rights of soldiers and civilians. That decision-making must be judged in real time and not with the benefit of hindsight. It follows that only manifestly poor decision-making by commanders will be judged to have breached obligations of due diligence when such decision-making leads to human rights violations.

Derogation from human rights is allowed in cases of war or other instances when the life of the nation is threatened. The living instrument idea (that the European Convention develops with time) should accommodate the exceptional circumstances of expeditionary warfare. Just as the living instrument idea justifies the extraterritorial extension of human rights to soldiers in Iraq so it should recognise the extraterritorial extension of states of emergency to situations like Iraq. The UK Supreme Court in *Smith v MOD* suggested that the UK could not derogate in these circumstances, but this issue is not settled as this part of the judgment was only given obiter. A limited derogation from Article 5 ECHR to allow for reviewable preventive detention in cases of insurgency amounting to an armed conflict would be a legitimate practical compromise between the rules of LOAC and those of human rights. Making LOAC human rights compliant will require a practical interpretation of human rights law if the latter is to work in the context of armed conflict.

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DEROGATIONS FROM THE EUROPEAN CONVENTION ON HUMAN RIGHTS IN DEPLOYED OPERATIONS

I. INTRODUCTION AND EXECUTIVE SUMMARY

1. The European Convention on Human Rights (ECHR) is a key component of the legal framework governing the activities of the British armed forces. In recent years, the Convention's application to military operations has come under growing criticism, leading commentators to call upon the Government to derogate from the ECHR during deployed operations. It is not immediately clear, however, whether or not derogations are in fact available to the UK in such circumstances. The purpose of this submission is to shed some light on this issue. The paper makes the following key points:

- the ECHR applies to deployed operations whenever British forces exercise effective control over a particular area or person, irrespective of whether they are engaged in active hostilities (sec II);
- where the ECHR applies, British forces are bound to secure either the entire range of substantive rights guaranteed by the Convention or those which are relevant to an individual, depending on the circumstances (sec III);
- where the ECHR applies, a derogation from the Convention may be highly desirable, since it appears that in proceedings under the ECHR British forces will formally benefit from the often more liberal rules of the law of armed conflict only as a result of such a derogation (sec IV);
- contrary to the jurisprudence of the House of Lords and the Supreme Court, State practice and the Strasbourg case-law suggests that derogations are available during deployed operations (sec V);
- derogations should not be looked upon as a panacea, as their legal effects may be limited (sec VI).

II. THE APPLICABILITY OF THE ECHR DURING DEPLOYED OPERATIONS

2. The ECHR is an international agreement which is binding on the UK and its organs, including its armed forces, as a matter of public international law.²²² Pursuant to Article 1 of the Convention, the UK is bound to secure to everyone within its jurisdiction the rights and freedoms defined in Section I of the Convention. For the most part, this duty operates within the national territory of the UK. However, already in 1975 the European Commission of Human Rights accepted in the case of *Cyprus v. Turkey* that the scope of application of Article 1, and therefore the scope of application of the Convention itself, is not limited to the territory of the contracting parties, but extends “to all persons under their actual authority and responsibility, whether that authority is exercised within their own territory or abroad.”²²³

3. The notion that international human rights agreements such as the ECHR are capable of extra-territorial effects is now well established,²²⁴ although the extent of the extra-territorial applicability of individual instruments remains subject to debate.²²⁵

4. The European Court of Human Rights has addressed the ECHR’s extra-territorial reach in a successive line of cases. In the seminal case of *Banković*, the Court emphasized that from the standpoint of international law the concept of State jurisdiction is primarily territorial and that Article 1 of the ECHR reflects this ordinary notion of jurisdiction.²²⁶ Accordingly, the scope of the Convention is confined primarily to the national territory of the contracting parties and its application beyond their borders is exceptional.²²⁷ The Court also noted that the Convention “was not designed to be applied throughout the world, even in respect of the conduct of contracting states”, but instead operates in an “essentially regional context and notably in the legal space (*espace juridique*) of the contracting states.”²²⁸ However, in later cases the Court seemed to ascribe extra-territorial effects to the Convention in a broader set of circumstances and to downplay its earlier insistence that the Convention is an essentially regional instrument.²²⁹

5. In *Al-Skeini*, the Court clarified that the regional nature of the ECHR does not imply that “jurisdiction under Article 1 of the Convention can never exist outside the territory covered by the Council of Europe Member States.”²³⁰ The Court also clarified that the extra-territorial applicability of the Convention is triggered in two main circumstances.²³¹ First, under the control over persons paradigm, the Convention applies whenever the agents of a contracting party exercise physical power and control over an individual abroad, for instance by detaining him.²³² Second, under the control over an area paradigm, the Convention applies to individuals within a particular geographical area located abroad whenever a contracting party exercises effective control over that area, for instance as a result of belligerent occupation.²³³ In addition, the case of *Cyprus v. Turkey* establishes that the agents of a contracting party, including its armed forces, themselves remain under its jurisdiction whenever they are sent abroad.²³⁴

6. The ECHR does not specify in express terms whether or not it applies to combat operations and situations of armed conflict. However, its continued applicability in such circumstances is clearly implied by Article 15, which entitles the contracting parties to derogate from their obligations under the Convention in times of “war or other public emergency threatening the life of the nation”. Accordingly, the European Court has entertained claims brought in relation to military operations,²³⁵ non-international armed conflicts,²³⁶ belligerent occupation²³⁷ and the right of access to court for the purposes of reviewing acts of war.²³⁸ It is worth noting

²²² The UK ratified the Convention in 1951. It entered into force for the UK on 3 September 1953.

²²³ *Cyprus v Turkey*, Decision of 26 May 1975 (1975), 2 DR 125, at para 8.

²²⁴ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) (2004) ICJ Rep 136, at paras 107–113. It is worth noting in this respect that the Government of the United States of America, which in the past has rejected the extra-territorial applicability of the International Covenant of Civil and Political Rights, now recognizes the existence of contrary authority. See Fourth Periodic Report, United States of America, 22 May 2012, CCPR/C/USA/4, at para 505. Generally, see Coomans and Kamminga (eds), *Extraterritorial Application of Human Rights Treaties* (2004); da Costa, *The Extraterritorial Application of Selected Human Rights Treaties* (2013).

²²⁵ Eg see Sixth Periodic Report, United Kingdom, 18 May 2007, CCPR/C/GBR/6, at para 59(b).

²²⁶ *Banković v Belgium*, Decision of 12 December 2001, 44 EHRR SE5, at paras 57–64.

²²⁷ *Ibid*, at paras 65–71.

²²⁸ *Ibid*, at para 78.

²²⁹ Notably in *Issa v Turkey*, Decision of 16 November 2004, 41 EHRR 27, at paras 71 and 74. Faced with this inconsistency in the Strasbourg case-law, in *Al-Skeini* the majority in the House of Lords decided to give precedence to the more restrictive approach taken in *Banković*: see *R (Al-Skeini and Others) v Secretary of State for Defence* [2007] UKHL 26 (HL), at paras 65–81.

²³⁰ *Al-Skeini v UK*, Judgment of 7 July 2011, 53 EHRR 18, at para 142. See Milanović, “Al-Skeini and Al-Jedda in Strasbourg” (2012) 23 *European Journal of International Law* 121.

²³¹ *Ibid*, at paras 131–140.

²³² Eg *Al-Saadoon and Mufdhi v UK*, Decision of 30 June 2009, (2009) 49 EHRR SE11.

²³³ Eg *Al-Skeini v UK* (fn 9), at para 149.

²³⁴ *Cyprus v Turkey* (fn 2), at para 8.

²³⁵ Eg *Ergi v Turkey*, Judgment of 28 July 1998, 32 EHRR 18; *Issa* (fn 8), at para 74.

²³⁶ Eg *Khashiyev v Russia*, Judgment of 24 February 2005, 42 EHRR 20.

²³⁷ Eg *Al-Saadoon and Mufdhi* (fn 11), at paras 87–88; *Al-Skeini v UK* (fn 9). See also *Loizidou v Turkey*, Decision of 23 March 1995, 20 EHRR 99.

²³⁸ *Markovic v Italy*, Judgment of 14 December 2006, 44 EHRR 52.

that the applicability of international human rights law in times of armed conflict is now well-established in international jurisprudence,²³⁹ State practice²⁴⁰ as well as the practice of the United Nations.²⁴¹

7. Consequently, the ECHR applies to British forces deployed on operations outside the territory of the UK whenever they are in effective control of a particular area or person, including members of the British military itself, irrespective of whether they are engaged in active hostilities or not.

III. LEGAL CONSTRAINTS IMPOSED BY THE ECHR

8. The duty to secure the rights and freedoms guaranteed by the ECHR applies to all areas of military life.²⁴² In principle, the ECHR is therefore relevant to, and may affect, all activities undertaken by or relating to the armed forces. Notable cases involving the applicability of Convention rights to the British military have included the right to life and the use of force to quell a “riot”,²⁴³ the right to private life and discharge from the armed forces on the grounds of homosexuality²⁴⁴ and the right to a fair trial and the military court martial-system.²⁴⁵ These and other cases have been extensively reviewed elsewhere.²⁴⁶

9. Convention rights are also relevant during deployed operations, although an important distinction must be drawn here between the two paradigms of extra-territoriality. Whenever British forces exercise effective control over an area outside the national territory of the UK, Article 1 imposes a duty on the UK to secure the entire range of substantive rights set out in the Convention within that particular geographical area.²⁴⁷ By contrast, the European Court has now accepted that where the extra-territorial applicability of the Convention is triggered by the exercise of control over an individual pursuant to the personal control paradigm, a contracting party is required to secure only those rights which are “relevant to the situation of that individual.”²⁴⁸ In such cases the scope of the duty to secure Convention rights seems to depend on the nature and level of control exercised by a contracting party over the individual in question.

10. Notwithstanding this concession, it may be questioned whether the duty to secure Convention rights and freedoms during deployed operations is compatible with operational effectiveness. Two broad concerns have been expressed in this respect: first, that the applicability of the ECHR significantly restricts the military’s freedom of maneuver and, second, that it has a corrosive effect on the warfighting ethos by making the armed forces more risk averse. To counter this trend, it has been suggested that the Government should derogate from the ECHR whenever it deploys the armed forces overseas.²⁴⁹

IV. DEROGATIONS AND MILITARY OPERATIONS

11. Pursuant to Article 15 of the ECHR, the contracting parties may take measures derogating from their obligations under the Convention in time of “war or other public emergency threatening the life of the nation”, subject to various procedural and substantive requirements. The effect of such a derogation is to restrict or suspend, but not extinguish,²⁵⁰ the applicability of the relevant Convention rights “to the extent strictly required by the exigencies of the situation”.²⁵¹

12. No contracting party has ever relied on Article 15 to derogate from its Convention obligations specifically with regard to extra-territorial military operations. Ten contracting parties have appended reservations to their instruments of ratification pursuant to Article 57 of the Convention to exclude its applicability to certain domestic laws concerning military discipline.²⁵² However, these measures are of limited relevance here, given that they deal with a distinct subject matter and constitute an entirely different type of legal instrument compared to derogations. While it is fair to conclude that these reservations reflect “a need for the military to be treated differently”,²⁵³ the European Court of Human Rights has already recognized this need of its own

²³⁹ *Eg Legality of the Use by a State of Nuclear Weapons in Armed Conflict (Advisory Opinion)* (1996) ICJ Rep 66, at para 25; *Abella v Argentina*, OEA/SerL/V/II.98 doc. 6 rev, 18 November 1997 (IACCommHR), at 158; *Coard v US*, Report No 109/99, 29 September 1999 (IACCommHR), at para 39.

²⁴⁰ *Eg Targeted Killings Case*, Judgment of 13 December 2006 (Supreme Court of Israel sitting as the High Court of Justice), at para 18; Fourth Periodic Report, United States of America (fn 3), at para 506 (“the United States has not taken the position that the Covenant does not apply “in time of war”. Indeed, a time of war does not suspend the operation of the Covenant to matters within its scope of application”).

²⁴¹ *Eg Security Council Resolution 1894*, Protection of Civilians in Armed Conflict, 11 November 2009.

²⁴² *Cf Engel and Others v The Netherlands* (No. 1), Judgment of 8 June 1976, 1 EHRR 647, at para 54.

²⁴³ *Stewart v UK*, Decision of 10 July 1984 (1984) 39 DR 162.

²⁴⁴ *Smith and Grady v UK*, Judgment of 27 September 1999 (2000) 29 EHRR 493.

²⁴⁵ *Findlay v UK*, Judgment of 25 February 1997 (1997) 24 EHRR 221.

²⁴⁶ Rowe, *The Impact of Human Rights Law on Armed Forces* (2006).

²⁴⁷ *Al-Skeini v UK* (fn 9), at para 138.

²⁴⁸ *Ibid*, at para 137.

²⁴⁹ Most recently, see Tugendhat and Croft, “The Fog of Law: An Introduction to the Legal Erosion of British Fighting Power”, 18 October 2013, Policy Exchange, at 58–59.

²⁵⁰ *Lawless v Ireland* (No. 3), Judgment of 1 July 1961, 1 EHRR 15, at para 22. See also *Wall* (fn 3), at para 106.

²⁵¹ Art 15(1) ECHR.

²⁵² The ten parties are Armenia, Azerbaijan, Czech Republic, France, Moldova, Portugal, Russian Federation, Slovakia, Spain, Ukraine.

²⁵³ “The Fog of Law” (fn 28), at 59.

accord, at least as far as the internal relationship between the armed forces and its individual members is concerned, outside the context of Article 15 and 57 of the Convention.²⁵⁴

13. The failure to make use of Article 15 during military operations, in particular those involving active hostilities, may have significant legal implications. This emerges clearly from the jurisprudence of the European Court on Chechnya. Since the Russian Federation did not avail itself of Article 15 during the Chechen conflict, the Court found that its military operations had to be judged against the “normal legal background” of peacetime law enforcement and not against the legal framework governing the conduct of armed hostilities.²⁵⁵ In the absence of a derogation, the use of lethal force by the Russian armed forces was therefore permissible only to the extent that it was absolutely necessary and served one of the purpose enumerated in Article 2 of the Convention, such as the defence of any person from unlawful violence. By contrast, the law of armed conflict entitles States to employ lethal force on a far more liberal basis, permitting the targeting of persons based on their status or activities rather than on the basis of absolute necessity and the need to protect others from unlawful violence. The Chechen cases demonstrate that the contracting parties do not benefit from this more liberal regime unless they formally derogate from the Convention.²⁵⁶ Compelling legal reasons exists, therefore, for the contracting parties to make use of Article 15, at least during certain types of military operations.

14. This position may be contrasted with the one pertaining under the International Covenant on Civil and Political Rights (ICCPR), which stipulates in Article 6 that no one shall be “arbitrarily deprived of his life”. It is widely recognized that what amounts to an arbitrary deprivation of life in the context of an armed conflict depends on the relevant rules of the law of armed conflict.²⁵⁷ In times of hostilities, the requirements of Article 6 are thus tempered by applying them subject to the special rules of the law of armed conflict.²⁵⁸ The more rigid wording of Article 2 of the ECHR does not permit the same approach. While this has not prevented the European Court of Human Rights from relying on the substantive standards of the law armed conflict without admitting as much,²⁵⁹ demonstrating thereby that it is sensitive to the need to take account of the special circumstances presented by emergency situations even in the absence of a formal declaration of emergency or a derogation, this sensitivity only goes so far. In particular, the Court will continue to assess the use of lethal force against the standard of absolute necessity and the aims listed in Article 2(2) of the Convention, rather than measure it against the benchmark of the principle of military necessity and adopt a position of indifference towards the reasons justifying recourse to lethal force in the first place, as does the law of armed conflict.²⁶⁰ In other words, the Court will not switch from a law enforcement framework to a conduct of hostilities framework, except as a consequence of a derogation under Article 15.²⁶¹

V. ARE DEROGATIONS AVAILABLE IN DEPLOYED OPERATIONS?

15. While derogations may be legally desirable in deployed operations, it is unclear whether Article 15 does in fact apply to such situations at all. This is so because the war or emergency justifying the derogation must be one which threatens the “life of the nation”. The term “nation” refers to the contracting party making the derogation. Although most overseas deployments of the British armed forces pose certain risks to the UK, none of the deployments taking place in recent decades have entailed what could convincingly be described as an “exceptional situation of crisis or emergency which affects the whole population and constitutes a threat to the organised life of the community of which the State is composed.”²⁶² Indeed, as Lord Bingham pointed out in *Al Jeddah*, “[i]t is hard to think that these conditions could ever be met when a state had chosen to conduct an overseas peacekeeping operation, however dangerous the conditions, from which it could withdraw.”²⁶³

16. While overseas operations seldom pose a threat to the UK of the magnitude envisaged by Article 15, a convincing argument can be made that such exceptional situations of crisis or emergency do prevail in the territory of some of the States—such as Iraq and Afghanistan—in which British forces deploy. This raises the question whether Article 15 can be construed in such a way as to extend the meaning of the term “nation” to cover those third States. Such an interpretation is certainly intuitive: if the duty to secure Convention rights applies in an extra-territorial manner, then it is only appropriate that derogations should be available to the contracting parties in those circumstances too.²⁶⁴ Contrary to the position taken by the House of Lords and

²⁵⁴ *Engel* (fn 21), at para 54 (“when interpreting and applying the rules of the Convention in the present case, the court must bear in mind the particular characteristics of military life and its effects on the situation of individual members of the armed forces”).

²⁵⁵ *Isayeva v Russia*, Judgment of 24 February 2005, 41 EHRR 38, at 191. Predictably, the Court found it impossible to reconcile the activities of the Russian armed forces “with the degree of caution expected from a law enforcement body in a democratic society”, *ibid*.

²⁵⁶ See also *Wall* (fn 3), at para 106.

²⁵⁷ *Nuclear Weapons* (fn 18), at para 25; *Abella* (fn 18), at para 161.

²⁵⁸ Essentially, the wording of Article 6 permits an implicit derogation in times of armed conflict by applying the principle of *lex specialis derogat legi generali*.

²⁵⁹ *Ergi* (fn 14), at para 79; *Isayeva* (fn 34), at para 176.

²⁶⁰ See Schabas, “*Lex Specialis? Belt and Suspenders? The Parallel Operation of Human Rights Law and the Law of Armed Conflict, and the Conundrum of Jus ad Bellum*” (2007) 40 *Israel Law Review* 592, esp at 604–613.

²⁶¹ It should be noted in this respect that Art 15(2) ECHR limits derogations from Art 2 to “deaths resulting from lawful acts of war”, thus expressly deferring to the law of armed conflict.

²⁶² *Lawless* (fn 29), at para 28.

²⁶³ *R (Al-Jedda) v Secretary of State for Defence* [2007] UKHL 58, at para 38.

²⁶⁴ See Sassöli “The Role of Human Rights and International Humanitarian Law in New Types of Armed Conflicts” in Ben Naftali, *International Humanitarian Law and International Human Rights Law* (2011) 34, at 66.

now by the Supreme Court, this interpretation also finds support in State practice and the case-law of the European Court of Human Rights.

17. As already noted, in *Al-Jedda* Lord Bingham held that deployed operations are unlikely to ever pose a sufficiently serious threat to sending States that would satisfy the stringent criteria laid down in Article 15. However, he also added that Article 15 was “inapplicable” to deployed operations as a matter of treaty interpretation. In his Lordship’s view, the fact that no State has ever derogated from the Convention during deployed operations constituted “subsequent practice” within the meaning of Article 31(3)(b) of the Vienna Convention on the Law of Treaties, which, in his view, confirmed that Article 15 was inapplicable in such circumstances. This assessment, which was recently upheld by the majority of the Supreme Court in *Smith*,²⁶⁵ rests on a false premise. The State practice in question is not a positive action, but an omission. States abstain from acting in a certain way for all kinds of reasons, both legal and non-legal. For example, the UK did not derogate from the Convention during the Falklands War, a situation where the legal conditions for invoking Article 15 were undoubtedly satisfied. Taken on its own, the Government’s failure to invoke Article 15 in that particular context does not prove that it considered itself unable, as a matter of law, to do so: whether or not its failure to make use of Article 15 during the Falklands War was driven by legal considerations has to be established separately.²⁶⁶ The same applies to the absence of State practice invoking Article 15 during deployed operations: whether or not this State practice constitutes “subsequent practice in the application of the [ECHR] which establishes the agreement of the parties regarding its interpretation” within the meaning of Article 31(3)(b) of the Vienna Convention on the Law of Treaties with the effect claimed by Lord Bingham depends on whether or not these omissions were motivated by a belief that Article 15 does not apply to deployed operations.²⁶⁷ This belief cannot simply be assumed, but must be proven. There is no evidence which suggests that any of the contracting parties to the ECHR were motivated by such a belief. In fact, the evidence points in the opposite direction.

18. As far as the UK is concerned, the Secretary of State for Defence has expressly reserved the UK’s position on Article 15 during the proceedings in *Al-Jedda*.²⁶⁸ Moreover, in *Banković*, the respondent States supported their plea for a restrictive interpretation of Article 1 of the Convention by invoking the absence of derogations in the context of extra-territorial military operations as evidence of their own restrictive understanding of Article 1.²⁶⁹ In other words, the respondent States submitted that their decision not to rely on Article 15 during extra-territorial military operations of the kind contemplated in *Banković* was motivated by their belief that the Convention did not apply to such deployments in the first place. Two significant points emerge from this. First, the respondent States have thus made it clear that their failure to derogate during deployed operations is not in fact based on a belief that Article 15 is inapplicable in such situations—contrary to what the House of Lords and the Supreme Court have assumed. Second, the respondent States have drawn a direct link between the scope of application of Article 1 and the scope of application of Article 15 of the Convention. Critically, the European Court has accepted both of these points. First, it agreed with the respondent States that “no State has indicated a belief that its extra-territorial actions involved an exercise of jurisdiction within the meaning of Art.1 of the Convention by making a derogation pursuant to Art.15 of the Convention.”²⁷⁰ In the Court’s view, the absence of derogations thus constitutes State practice regarding the interpretation of Article 1 and *not* regarding the applicability of Article 15. Second, the Court disagreed with the applicants’ suggestion that Article 15 covered “all ‘war’ and ‘public emergency’ situations generally, whether obtaining inside or outside the territory of the contracting state”, and instead emphasized that Article 15 “is to be read subject to the ‘jurisdiction’ limitation enumerated in Art.1 of the Convention.”²⁷¹ In other words, the Court held that the essentially territorial application of Article 1 rendered Article 15 essentially territorial in its scope of application too. However, nothing in the Court’s reasoning suggests that Article 15 is incapable of applying in an extra-territorial manner whenever Article 1 itself applies outside the national territory of the contracting parties. Indeed, in *Al-Jedda* the European Court seemed to imply that Article 15 could have been invoked, in principle, in just such a way by the UK in relation to Iraq.²⁷²

19. Consequently, both State practice and the case-law of the European Court indicates that Article 15 is capable of applying to deployed operations, since its scope of application must be interpreted to correspond to that of Article 1 of the Convention. For these purposes, the term “nation” in Article 15 should be construed as extending to any third States in which the armed forces of the contracting parties operate. While some have suggested that such a reading would constitute an exercise in “dynamic” treaty interpretation,²⁷³ it may amount to nothing more than a contextual reading of the text in line with the general rule of interpretation laid down in Article 31(2) of the Vienna Convention on the Law of Treaties.

²⁶⁵ *Smith and Others v The Ministry of Defence* [2013] UKSC 41, at para 60.

²⁶⁶ *SS Lotus (France v Turkey)* (1927) PCIJ Series A, No 10, at 28. See also *Legality of the Use by a State of Nuclear Weapons in Armed Conflict* (Advisory Opinion) (1996) ICJ Rep 66, at para 65–67.

²⁶⁷ Cf the role of “intention” in the interpretation of subsequent practice in *Soering v UK*, Judgment of 7 July 1989, 11 EHRR 439, at para 103.

²⁶⁸ *R (Al-Jedda) v Secretary of State for Defence* [2005] EWHC 1809 (Administrative Court), at para 91.

²⁶⁹ *Banković* (fn 5), at para 35.

²⁷⁰ *Ibid*, at para 60.

²⁷¹ *Ibid*.

²⁷² *Al-Jedda v UK*, Judgment of 7 July 2011, 53 EHRR 23, at para 100.

²⁷³ Krieger, “After *Al-Jedda*: Detention, Derogation, and an Enduring Dilemma” (2011) 50 *Military Law and the Law of War Review* 419, at 436.

VI. THE LIMITED EFFECT OF DEROGATIONS

20. In the foregoing passages, I have attempted to show that strong legal arguments militate in favour of making use of derogations during deployed operations and that Article 15 of the Convention is in fact applicable in such circumstances. However, it is important to sound three notes of caution at this point.

21. First, whether or not derogations under Article 15 are a necessary and suitable means to counter any detrimental effects that the ECHR may have on the operational effectiveness of the British armed forces depends in large measure on the nature and extent of these effects. While it seems fashionable to assume that the Convention has a widespread and significant negative impact on operational effectiveness, it would be a mistake to take this for granted. It is vital to get both the facts and the law right, otherwise derogations may turn out to be an ineffective cure for an entirely different malady.

22. Second, it is important to stress that any measures adopted pursuant to Article 15 must comply with various procedural and substantive requirements and are subject to review by the European Court. In particular, derogations are permissible only to the extent strictly required by the exigency of the situation. Article 15 is not a blank cheque allowing governments to circumvent their Convention obligations.

23. Finally, it should be recalled that Article 15 of the ECHR does not absolve the UK from complying with any other obligations it may have under international law.²⁷⁴ First, the UK will remain bound by other international human rights agreements to which it is a party, including the ICCPR, which the Government has recognized applies to the armed forces overseas.²⁷⁵ Second, the UK also remains bound by any human rights norms forming part of customary international law; the effect of a derogation on these customary norms is unclear. Third, British forces are subject to a duty to respect local law during any overseas deployments, including any human rights norms applicable as a matter of the domestic law of the territorial State. Fourth, following the accession of the European Union to the ECHR, the latter will bind the UK as a matter of Union law; the effect of Article 15 on the continued applicability of the Convention in the form of EU law is unclear. Finally, in many areas the standards of conduct imposed by the law of armed conflict are similar or near identical with the standards imposed by the ECHR. Overall, even a successful derogation under Article 15 may only have a limited effect in altering the substantive standards governing the conduct of British forces.

November 2013

Written evidence submitted by Michael Meyer OBE, Head of International Law, British Red Cross

1. I am pleased to provide this written submission to the current Defence Committee Inquiry on “UK Armed Forces Personnel and the Legal Framework for Future Operations”. As Head of International Law at the British Red Cross Society for over thirty years, I have been responsible for all matters pertaining to international humanitarian law (IHL), in accordance with the Society’s formal responsibility in this field. In particular, the British Red Cross, as an officially recognised humanitarian auxiliary to the public authorities (and specifically to the medical service of the armed forces), has a duty to support the UK Government in ensuring respect for IHL and facilitating its promotion. This duty is, in part, carried out through the provision of advice and training on IHL for a range of relevant stakeholders in the UK.

2. I note that, as part of this Inquiry, the Defence Committee wishes to examine the broader issue of the relationship between IHL and international human rights law. This is understandable, given that determinations on the application of these two bodies of law in situations of armed conflict can have significant practical implications for military operations and for the protection of individuals. My own brief views on this complex issue are set out below. I wish to emphasise that these are offered in a personal capacity, and do not necessarily reflect the views of the British Red Cross.

3. IHL and international human rights law, while generally complementary, are two distinct bodies of law. While both bodies of law share some common goals—namely, to protect the lives, health and dignity of human beings—they do so from different perspectives. Importantly, IHL was specifically developed to regulate a unique set of circumstances: the conduct of parties to an armed conflict. In regulating such behaviour, IHL seeks to establish a *balance* between the war-fighting objectives of the adversaries and the requirements of humanity. In contrast, human rights law seeks to protect persons from abusive power by governments, the latter to be curbed through the assertion of individual rights. Consequently, whereas IHL aims to protect, so far as possible, certain categories of persons affected by armed conflict, and to limit (but not to eliminate) the methods and means of warring parties, human rights law sets out inherent entitlements belonging to all individuals.

4. IHL and human rights law also differ in scope. While, with some exceptions, IHL applies only during situations of armed conflict, human rights law applies at all times. The extra-territorial application of human rights law, as well as its ability to bind non-State groups, are questions that remain broadly unsettled. In contrast, IHL explicitly applies both to State armed forces and to non-State armed groups, whether operating within or outside their own territories.

²⁷⁴ See Art 15(1) ECHR.

²⁷⁵ See fn 4.

5. The relationship between the two bodies of law in situations of armed conflict is generally agreed as that between specialised law, or *lex specialis* (ie IHL) and general law (ie human rights law). However, the exact application of the *lex specialis* rule has come under dispute; this is particularly so in those situations where treaty rules of IHL are more sparse or rudimentary (for example, in situations of non-international armed conflict).

6. My own view is that a correct application of the *lex specialis* rule requires the interpretation of more general rules of law applicable in armed conflict (including human rights law) through the “lens” of IHL. For example, the interpretation in armed conflicts of the human rights norm protecting against arbitrary deprivation of life is dependent upon the application of relevant IHL principles, including distinction, military necessity and proportionality. This means that, while IHL prohibits direct or indiscriminate attacks on civilians or civilian objects, civilian deaths caused during the course of an attack on a military objective may not violate IHL if they are not excessive in relation to the military advantage gained, and where precautionary measures have been taken to minimise such deaths. Similarly, human rights rules governing the deprivation of liberty should be modified by application of relevant IHL rules, such as those allowing parties to an international armed conflict to detain prisoners of war and to intern certain civilians.

7. Where IHL rules or mechanisms are basic or few, such as in situations of non-international armed conflict, it is the primary responsibility of States to ensure their appropriate development, with the support of relevant organisations such as the International Committee of the Red Cross (ICRC) and National Red Cross and National Red Crescent Societies. The UK Government’s active engagement in recent and current initiatives to address these challenges is both welcome and important. Now, more than ever, it is vital that IHL rules and associated compliance mechanisms are both effective and fit for purpose.

8. Alternative approaches to the *lex specialis* rule set out above have been raised by various bodies. These range from promoting the concurrent and equal application of IHL and human rights law (so that the most suitable rule is chosen from either body of law in a given situation), to the supplementing or even replacement of IHL rules with those of human rights where the latter are perceived as offering greater protection. While attractive in theory, it is important not to underestimate the difficulty in applying such approaches in practice. Unlike human rights law, IHL was developed with a mindfulness of the need to create simple and easily understood rules that are able to be readily applied by military commanders and other persons operating in difficult environments. The practical challenges in considering an additional set of rules in operational contexts have been noted both by judicial bodies and other fora.

9. It is also important to take account of the underlying premise of IHL as a neutral body of law and the positive effect of this, both on the battlefield and in diplomatic fora. For example, IHL is indifferent to the causes of armed conflict, and in particular to whether one or other party may be classified as the aggressor or as otherwise unjust in waging war. In contrast, human rights law does concern itself with such underlying causes. It has been argued that this aspect of human rights law renders it an inappropriate substitute for the *lex specialis* of IHL.

10. While some authors point to the growing convergence of IHL and human rights law, there are clear and significant advantages in maintaining the distinct nature of IHL. Importantly, at a general level, IHL is specially tailored to address the unique circumstances of armed conflict, which cannot be equated with peacetime. The parallel, yet mostly separate, codification of IHL and human rights law to date may be interpreted as evidence of the desire of the international community to regulate armed conflicts, both in terms of relations between parties to the conflict and the protection of individuals, through a distinct body of law. As a major military power with a strong tradition of leadership in IHL, it is important that the UK takes proactive steps to reconfirm the primacy, continued value and distinct nature of IHL.

November 2013

**Written evidence submitted by Professor Sir Adam Roberts Emeritus Professor of
International Relations, Balliol College, Oxford**

SUMMARY

- This evidence covers relevant aspects of two distinct bodies of law—the international law of armed conflict and international human rights law—and their impact on UK armed forces personnel. Among other things it explores problems in the relation between these two bodies of law. By their very nature, the conflicts in which the UK has been involved, and is likely to be involved in future, give rise to extensive legal fall-out relating both to the law of armed conflict and to human rights law. (§2–4)
- Over centuries, successive UK governments have been deeply involved in the development of international agreements and institutions that have a bearing on war and on peacekeeping. That framework is generally understood and valued by those who have to implement decisions. However, certain criticisms of the role of law vis-à-vis military operations need to be taken seriously. (§5–8)

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- The law of armed conflict is well recognized to be the main body of international law relevant to UK military operations overseas. However, in the UK there have been some significant failures in training in, and implementation of, this body of law, especially in the key matter of detainee treatment. The Defence Committee will need concrete and detailed assurance that the 73 recommendations made in *The Baha Mousa Public Inquiry Report* (Part XVII) are being addressed effectively; that there is solid evidence of improvement in the overall standard of training of the armed forces in all aspects of the law of armed conflict; and that the result of the Copenhagen Process, attempting to harmonise the practices among allies regarding detention matters, is seen as providing a useful basis for operations—or, if not, some other course is being pursued to address the same problem. (§9–12)
 - In some conflicts there is a continuing need for clarity about the law that is applicable. Several ongoing projects seek to secure the application of the laws of armed conflict, with certain modifications, in civil wars. These include Geneva Call and the Project for Harmonizing Standards for Armed Conflict. These are inherently difficult enterprises, not least because governments are reluctant to grant their adversaries the status of prisoners of war. Another, more limited, approach to the same problem—worth considering as a minimum first step—may be for individual states to make a declaration (as the US has done) that their forces will comply with the law of war during all armed conflicts, however such conflicts are characterized. (§13)
 - “Lawfare”—essentially a practice, not a doctrine—is far from new, but has increased in importance because of the unequal nature of many contemporary conflicts and the role of the media in them. There needs to be a capacity for robust public response tailored to the circumstances of each case. (§14)
 - The international law of human rights has become widely used in conflicts and occupations because it provides mechanisms for individual redress in ways that the law of armed conflict does not. The use of the European Court of Human Rights in cases involving actions of UK armed forces has not been a wholly negative experience for the UK. However, the Court’s decision in the *Al-Jedda* case in July 2011 poses serious problems. It held that states parties to the European Convention on Human Rights may not intern civilians unless there is a binding and explicit UN Security Council mandate, or a derogation to Article 5 of the European Convention has been entered. This contradicts clear provisions in the law of armed conflict (1949 Geneva Convention IV) whereby non-criminal detention for imperative security reasons is permitted. (§15–17)
 - The relation between human rights law and the law of armed conflict is problematic in the US as well as in Europe. This has contributed to the delay in publication of the US four-service manual on the law of armed conflict. (§18)
 - Human rights law and institutions are here to stay, and in some respects their role in respect to operations in which UK armed forces are involved has been positive. However, there are issues regarding the application of human rights law in situations of armed conflict and occupation that need to be addressed. (§19)
 - Some recommendations for action by Government. (§20)

INTRODUCTION

1. I am Senior Research Fellow in International Relations, Oxford University, and Emeritus Fellow of Balliol College, Oxford. President of the British Academy, 2009–13. Author and editor of articles and books on the strategic and legal framework of military activities. Joint editor of *Documents on the Laws of War* (3rd edn., Oxford University Press, 2000); and of *The United Nations Security Council and War: The Evolution of Thought and Practice since 1945* (Oxford University Press, 2008). Member, UK Defence Academy Advisory Board, since 2003.

2. The legal framework that has a bearing on military operations is of long standing, and is multi-faceted. It includes, but is not limited to, four distinct but overlapping elements:

- The law relating to the legitimacy of resort to force (ie the *jus ad bellum*);
- UK law (including statute law, military manuals, the decisions of courts and commissions of inquiry);
- The law of armed conflict (also known as the *jus in bello*, the laws of war and international humanitarian law);
- International human rights law.

This evidence relates mainly to the last two of these four categories. It considers certain aspects of their impact on UK armed forces personnel, and the adequacy or otherwise of training in international legal issues relating to military operations. This evidence does not cover more than a very few UK legal issues (the second category above), important as these undoubtedly are: indeed, some UK legal issues, where they involve relations between individual members of the armed forces and the Ministry of Defence, may be among the trickiest that the Committee has to address. Nor does it cover such important matters as the *jus ad bellum*, the terms of authorizing resolutions of international bodies such as NATO or the UN, or the terms of agreements with host states about the stationing of troops on their territory. The legal framework of contemporary operations is indeed multi-faceted and extensive.

3. For the past half-century or more, the great majority of armed conflicts around the globe have not been inter-state wars between well organized industrial states, but conflicts within post-colonial states. Many of these conflicts are non-international in character, so it is not self-evident that all the provisions of the laws of war are applicable to them. Outside forces, including those of the UK, may be involved in such conflicts in a variety of roles—as part of a UN or a regional peacekeeping force, as support for the government of the country, or to stop attacks on civilians. The number of actual roles is huge, and each one raises separate questions about what law is applicable and how it is to be applied in practice. A particular difficulty arises if, in a given conflict or, outside forces are thinly spread out and under-manned: they may be ill-equipped to fulfil some of the obligations of the law of armed conflict, including with regard to detention.

4. In certain recent or ongoing armed conflicts in which the UK has been involved, including those in Afghanistan and Iraq, there has been considerable legal fall-out in the form of official inquiries, cases involving both UK and international courts, and coroner's court procedures. In these circumstances it is right that the Defence Committee has embarked on this consideration of "what changes may be necessary to the current MoD legal framework and processes to accommodate the particular position of UK Armed Forces at war and when deployed in conflict situations or in peacekeeping and the changing tactical forms of future conflicts." Armed conflicts have often had the effect of providing a test of the adequacy or otherwise of existing legal norms as well as the adequacy or otherwise of the performance of armed forces in implementing them. Recent conflicts are no exception. This Inquiry is a means of evaluating such tests.

5. The fact that there is some criticism of the way in which certain legal rules and procedures have impinged on the UK armed forces in this century should not overshadow the enduring importance of the legal framework within which the activities of armed forces take place. Since at least 1856, with the conclusion of the Paris Declaration on maritime law in war, successive UK governments have been deeply involved in the development of a wide range of international agreements and institutions that have a bearing on war and on peacekeeping. There has been much military as well as diplomatic, political and legal input into the drawing up of agreements. While it is nothing new that there should be controversies about it, the resulting legal framework has had (and continues to have) at least three significant benefits for this country and its armed forces:

- It provides assurances for the armed forces (most obviously in confirming their right to prisoner-of-war status if captured).
- It is one key basis for recognizing the legitimacy of particular campaigns and activities.
- It has particular importance in facilitating close working relations with allies in multinational operations of various kinds.

6. The UK has long recognized the importance of the question of how legal agreements work out in practice. It is one of a number of countries (including many of our NATO allies) which have consistently made important declarations indicating how they interpret and propose to implement particular provisions. The military input into such statements has been substantial. A good example is the 16-point UK statement made in 1998 at ratification of 1977 Protocol I additional to the 1949 Geneva Conventions. Thus those parts of international law with a bearing on armed conflict should not be viewed as an alien imposition either on the UK in general or on the UK armed forces in particular.

7. My overall impression, as a result of talking with officers and officials, and legal advisers of UK armed forces, is that there is recognition of the value of the legal framework within which they have to operate. At the sharp end that framework often boils down to some relatively simple rules of engagement. These are widely accepted as a necessity if the actions of armed forces are to be seen as purposeful, consistent, and legitimate.

8. When those on operations express concerns, grumbles or complaints (whether at the time or afterwards) about the rules under which they have to operate, these concerns should be taken very seriously and there needs to be a response. Of course it is always necessary to be clear about the nature of the issue at stake. Sometimes the target of criticisms turns out to be, not an international legal requirement, but particular policy decisions taken in London. In those cases where criticisms are clearly about the law's effect on the operations of armed forces, my impression is that these criticisms relate more to the impact of human rights law rather than to the law of armed conflict. Although these two bodies of law overlap in a number of ways, it is important that they be kept conceptually distinct. The conclusions about where we stand in relation to them, and what action may need to be taken, may be different in each case.

LAW OF ARMED CONFLICT

9. In successive UK and coalition military operations (eg in the Falklands, Iraq, Kosovo/Serbia, and Afghanistan) there has been considerable emphasis on conducting operations in a manner consistent with the law of armed conflict. Such matters as targeting, detainee treatment, and management of occupied territory have been considerably affected by the international legal framework. On the whole this framework has been seen as positive, and consistent with the attainment of key objectives of the operations concerned.

10. However, there have been some significant weaknesses in the UK performance regarding implementation of the laws of armed conflict. Perhaps the most important weaknesses have been the cases of maltreatment of detainees in Iraq following the 2003 invasion. (By contrast, there was little or no complaint about detainee handling in the 1991 Gulf War in which a designated Prisoner of War Guard Force consisting of no fewer than

three infantry battalions was set aside to ensure correct treatment of what turned out to be very large numbers of Iraqi prisoners.) In this evidence, while being fully aware that others could be cited, I will refer to one case of poor UK performance in the 2003 Gulf War: the events leading to the death of Baha Mousa when he was in British custody in Basra in September 2003—ie in the occupation phase of the UK role in Iraq. *The Baha Mousa Public Inquiry Report* (September 2011), is excellent both as an analysis of the facts and as an exposition of the legal situation surrounding them. Part XVII made 73 recommendations to the MoD. The MoD has made certain responses to the report's recommendations, including initiating certain much-needed improvements to training in detainee-related matters. The Defence Committee will no doubt be receiving evidence from MoD, including a full account of its response to the Baha Mousa Inquiry recommendations.

11. There remains the broader question of improving the overall standard of training in all aspects of the law of armed conflict. As a member of the Defence Academy Advisory Board I have been involved in correspondence and discussions with the Joint Services Command and Staff College, Shrivenham (about strengthening the coverage in the Advanced Command and Staff Course); and also with Army Legal Services, Warminster (about the armed forces' training policy in the law of armed conflict). In both cases there is general recognition that there is a need for improvement, and for a clear idea of progression in the level of expertise required at different levels in the armed forces. These discussions are ongoing, and are only a very small part of a larger process of improvements in training in these areas. I should add that it is obviously not enough to convey teaching of the law of armed conflict simply in specific law modules of otherwise wide-ranging courses: awareness of such legal issues needs to be an integral part of all aspects of training.

12. On detainees, there has been an important issue to be resolved, of harmonizing the practices of coalition partners in a particular operation. In Afghanistan there have been problems and controversies surrounding the handing over of detainees to different legal jurisdictions with different standards regarding detainee treatment. A central preoccupation of the laws of war (as also of human rights law) has always been to develop agreed standards regarding the treatment of individuals in conditions of detention: it is remarkable that there has been some confusion on this issue in recent years. The Copenhagen Process (2007–12), initiated by the Danish government, and the resulting October 2012 document on “The Copenhagen Process: Principles and Guidelines”, has been a useful attempt to facilitate a common approach. As paragraph II of this document states, “it should contribute to ensuring the humane treatment of detainees and the effectiveness of international military operations”; paragraph IV notes a still unresolved doctrinal issue when it recognizes “the challenges of agreeing upon a precise description of the interaction between international human rights law and international humanitarian law.” I will return to this doctrinal issue in the paragraphs below (§15–19) on human rights law. In addition to the now-completed Copenhagen Process, the International Committee of the Red Cross is working on the closely related issue of detention in non-international armed conflicts.

13. One underlying reason for difficulty in applying the law is that so many conflicts in the world today are partly or wholly non-international in character, with the result that the majority of the provisions of the main treaties on the laws of war are not, according to their terms, formally applicable to them. Yet international forces operating in such an environment may wish to see certain common standards recognized. A number of ongoing projects seek to secure the full application of the laws of armed conflict even in civil wars. “Geneva Call” has actively sought the participation of non-state armed groups in such a process, placing particular emphasis on specific issues such as certain weapons and child soldiers. Meanwhile the Project for Harmonizing Standards for Armed Conflict, led by the former Legal Adviser of the Foreign and Commonwealth Office, Sir Daniel Bethlehem, has been working on a more ambitious model declaration that states might make unilaterally to agree to be bound by the provisions of the 1949 Geneva Conventions and 1977 Additional Protocol I (albeit with certain reservations) in conflicts of a non-international character. Such projects reflect an interesting tendency, observable in the statutes and decisions of many of the international courts and tribunals established in the past two decades, to apply international standards to the forces involved in conflicts with a largely or entirely non-international character. Yet, as their proponents are the first to agree, these projects run into serious objections: for example, governments tend to be reluctant to grant their adversaries the status of prisoners of war. Another, more limited, approach to the same problem may be for individual states to make a declaration comparable to those made by the US (including in Department of Defense Directive 2311.01E as certified on 22 February 2011) to the effect that US forces “will comply with the law of war during all armed conflicts, however such conflicts are characterized, and in all other military operations.” This formulation is compatible with the idea that the law may be applied in certain situations as a matter of government policy as distinct from formal international legal obligation. Such an approach may be worth considering as a minimum first step to begin to address this problem. However, any move in this direction would need to take account of the fact that in some situations in which members of the armed forces are deployed (eg peacekeeping) there may be no armed conflict—or, if there is one, UK forces are not parties to it. In such circumstances the law of war may not be the most relevant or appropriate legal framework.

14. The Defence Committee has stated that it wishes to examine the developing concept and doctrine of “lawfare”—a term invented by a US air force general to refer to the systematic use or misuse of the law by adversaries of the US as a propaganda tool to discredit the actions of US forces. Actually it is a widespread phenomenon, not limited to conflicts in which the US is involved. It is a very old practice, many examples of which can be found in earlier centuries, and it is one in which Western states as well as others have at times engaged. There is nothing in it that could be dignified with the title of doctrine. In recent decades the capacity of the US and a few allies to wage high-technology warfare has led to a pattern of response in those less

developed societies that are the subject of their military attentions. In wars in Kosovo, Iraq, Afghanistan and elsewhere, the USA's adversaries, faced with US capacity to hit certain types of military target almost at will and to spare civilian areas and objects, have resorted to actions that violate the obligation to keep military assets and targets out of civilian areas, and especially violate the obligation to keep them away from protected sites such as hospitals and mosques. Any subsequent US attack on such a site may then be portrayed as a war crime. In some cases, too, the USA's adversaries may have simply fabricated US attacks on such sites in order to discredit the US. Such lawfare has increased in importance because of the role of media in contemporary conflicts. Since by nature it involves legal violations, mendacity, and publicity, there needs to be a robust public response tailored to the circumstances of each case.

HUMAN RIGHTS LAW

15. The development of human rights law in the years since 1948, when the Universal Declaration of Human Rights was adopted, has brought new principles and procedures into play that have increasingly had effects on the operations of armed forces. This body of law developed out of the experience of war and dictatorial rule at the time of the Second World War. A particularly significant feature, which explains its increasing use today in connection with military operations, is its provision for various forms of redress, including through the European Court of Human Rights, established in Strasbourg in 1959. The law of armed conflict simply does not provide mechanisms for individual redress in the way that human rights law does; but the law of armed conflict is still highly relevant in the ensuing cases as an indication of the rules that armed forces are expected to follow.

16. A significant number of cases relating to actions of UK armed forces have been taken to the European Court of Human Rights. For example:

- Many cases related to detention issues in Northern Ireland were taken to the Court. Although it might have been expected that such appeals to a court outside the UK would cause resentment, officials in the Ministry of Defence and Northern Ireland Office have been cited as regarding the process “although painful and hard fought all the way, as ultimately beneficial.” (*Hansard*, House of Lords, 8 March 2001, col. 371.)
- The shootings of IRA personnel in Gibraltar in 1988 led to a case in which the actions of the UK soldiers were specifically upheld by the Court in 1995, though the UK was held liable (by a majority of one) on other grounds: the Court's judgment in this case showed significant understanding of the soldier's need to take action based on rapid interpretation of necessarily incomplete information.
- In the case of Baha Mousa, it was on the basis of its liability under the European Convention on Human Rights that the UK government accepted that the Convention applied to those in British military custody overseas.

17. The record of the European Court of Human Rights with respect to UK and other military actions is far from being problem-free. A particular issue in which its record has been widely questioned is the relation between human rights law and the law of armed conflict. Naturally the court is more familiar with human rights law, and in some cases it has been criticized for apparently giving priority to human rights law, even in the circumstances of international armed conflict—for which, of course, the law of armed conflict is the *lex specialis*. This issue arose in two major judgments against the UK in July 2011, *Al-Skeini* and *Al-Jedda*. In the second case, the Court decided that states parties to the European Convention on Human Rights may not intern civilians unless there is a binding and explicit UN Security Council mandate, or a derogation to Article 5 of the European Convention has been entered. This outcome may have been the result of a flawed argument by government lawyers, who had apparently chosen not to raise provisions of the law of armed conflict as a basis for detention, but instead to rely on the authority of a UN Security Council resolution. The legally peculiar judgment simply contradicted clear provisions in the law of armed conflict (especially 1949 Geneva Convention IV) whereby non-criminal detention for imperative security reasons is permitted. The Court's conclusion could even be read to apply equally to the internment of prisoners of war. Legal experts of the International Committee of the Red Cross have been justifiably concerned about the implications of this judgment.

18. The relation between human rights law and the law of armed conflict is problematic in the US as well as in Europe. Deeply held positions on the applicability or otherwise of human rights law to US military operations overseas have been one factor contributing to the delay in publication of the long-awaited US four-service manual on the law of armed conflict. This failure has many causes. Although the complexity of the law could be cited as a factor, that very complexity makes an authoritative synthesis of the law all the more necessary. In this case a principal obstacle appears to have been a difference between the State Department and the Pentagon about the relative weight to be given to the *lex specialis* of LOAC as distinct from human rights law.

19. Human rights law and institutions are here to stay, and in some respects their role regarding operations in which UK armed forces are involved has been positive. To criticise the role of all law on the grounds that it hampers military operations would be to misunderstand the long-standing and important role of the law of armed conflict in this area. Even a more limited rejection of any and all application of human rights law in armed conflicts and occupations overseas would be problematic: it would deny aggrieved parties a mechanism of redress, and would invite extensive international criticism. There are, however, issues, particularly in relation to the application of human rights law in situations of armed conflict and occupation, that need to be addressed.

This paper, while it has touched on only a few of them, suggests that greater clarity about the respective roles of the law of armed conflict and human rights law is urgently needed, and in London every bit as much as in Strasbourg.

RECOMMENDATIONS

20. In the specific areas that it has covered, this evidence suggests a number of recommendations for action by the Government, including the following:

- Ensure that overseas operations are sufficiently manned and equipped to fulfil relevant obligations of the law of armed conflict, including with regard to detention. (§3)
- Respond constructively to the many concerns in the armed forces regarding the legal frameworks within which military operations of all kinds take place. (§8)
- Improve training of military personnel at all levels both in the specific matters of detainee treatment addressed in the *Baha Mousa Inquiry Report*, and more generally across the range of issues covered in the law of armed conflict. Ensure that legal issues are covered in all aspects of training, and are not confined to separate modules. (§10–11)
- Indicate how adequately or otherwise the 2012 outcome document of the Copenhagen Process meets the need to harmonise the practices of states in a coalition so far as treatment of detainees is concerned. (§12)
- Indicate the UK attitude to the application of international rules in non- international armed conflicts, and in particular whether it is government policy that the UK will comply with the law of war during all armed conflicts in which they are involved, however such conflicts are characterized. (§13)
- Ensure that its legal advisers are aware of the problems regarding the application of the law of armed conflict that arise from the judgment of the European Court of Human Rights in the *Al-Jedda* case; and that in future cases they should place proper emphasis on the Geneva Conventions basis for detention operations. (§17)
- Continue the process whereby the UK, along with other countries, has accepted that both the law of armed conflict and human rights law have a place in relation to military operations, but recognise certain problem areas where these two bodies of law take a different approach.

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Written evidence from The Humanitarian Intervention Centre

ABSTRACT

This paper intends to provide Her Majesty's Government with a comprehensive overview of the rules regulating armed conflict known as International Humanitarian Law. It will highlight the protections that are afforded to UK military personnel operating in conflict situations and the laws that they are required to observe. The second part of the paper will then provide an overview of the International Criminal Law regime and highlight the circumstances in which the actions of service personnel could result in the commission of a criminal offence for which the perpetrator is liable to be prosecuted and explain how such a prosecution could occur. Finally, the paper highlights some of the challenges that modern conflicts have created for the military and issues that will need to be considered when developing a legal framework for future military operations.

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SUMMARY

Protections and Obligations on UK Armed Forces Deployed at Home and Abroad

When deployed at home, UK armed forces personnel are obliged to comply with civil and criminal law. As agents of the state they also required to comply with the UK's obligations under the European Convention on Human Rights ("ECHR") and other international human rights treaties. In the event of a non-international armed conflict they are also obliged to comply with Common Article 3 to the Geneva Conventions and Additional Protocol II. These also all provide protections for soldiers.

When deployed abroad UK soldiers are bound to comply with international law. In particular, they are obliged to respect the Geneva Conventions and distinguish between civilians and combatants. In addition to this, they must treat prisoners of war with respect and it would be expected that our soldiers would be treated the same way. There is also the possibility that the UK would have to apply human rights extraterritorially and soldiers must respect this.

International Criminal Law

International Criminal Law is an international legal regime that has established a set of rules proscribing certain categories of conduct and makes the breach of such rules a criminal offence that entails personal criminal responsibility for the perpetrator. The legal regime has universal application and as a consequence applies to all individuals including UK service personnel on active duty in foreign jurisdictions and in all territories. It cannot be derogated from in any circumstances.

The vast majority of its content is derived from the Geneva Conventions and customary international humanitarian law. As a result, grave breaches of the Geneva Conventions and serious breaches of international humanitarian law can result in criminal liability. The main and most developed of international crimes are war crimes, crimes against humanity and genocide. This paper will primarily focus on war crimes, as these are the crimes most likely to be committed by UK military service personnel during armed conflicts. It is important to remember that war crimes cannot only be committed by soldiers on the ground, but also by the individuals in command of those soldiers.

There are a number of ways in which an individual accused of having committed a war crime can be prosecuted. This is a result of the disaggregated nature of the international criminal justice system. Individuals can be prosecuted by the domestic court systems of nation states, ad hoc criminal tribunals, internationalised criminal courts or the International Criminal Court at The Hague.

The court in which an individual is prosecuted is dependant on which court has “jurisdiction”. The rules of jurisdiction are set out in the constituent instruments of each court, the domestic law of states and international law. Therefore although International Criminal Law is applicable to all individuals, the regime under which it will be applied and enforced varies.

Domestic court systems have an important role in the prosecution of war crimes. Customary international law provides that states must investigate war crimes allegedly committed by their nationals or armed forces, or any war crimes over which they have jurisdiction, and, if appropriate, exercise the criminal jurisdiction that their national legislation confers upon their courts and prosecute the suspects accordingly. This is now also enshrined in the Rome Statute of the International Criminal Court.

Domestic courts may be able to exercise universal jurisdiction to prosecute international crimes committed by nationals of other states that were committed outside of their territory. The exercise of universal jurisdiction is not conditional upon some link to the state that seeks to exercise jurisdiction. There are a number of other types of jurisdiction including the active and passive personality jurisdictions, territorial jurisdiction and the protective jurisdiction. The International Criminal Court will also prosecute war crimes were it is able to establish the necessary jurisdiction.

The modern nature of conflicts including close combat and counter-insurgency has made breaches of international humanitarian law increasingly more likely to occur. It is therefore imperative that military personnel of all levels continue to receive regular and high quality training on the rules of warfare and the consequences that can flow from breaches those rules.

LEGAL PROTECTIONS AND OBLIGATIONS APPLYING TO UK ARMED FORCES DEPLOYED AT HOME

1. There are a number of legal obligations on UK armed forces when deployed within the UK. In particular, the army must comply with the criminal and civil law in the area in which they are deployed (be it England & Wales, Scotland or Northern Ireland, as the laws differ within each region). In this respect, soldiers are no different to civilians when it comes to compliance with the law and they should be prosecuted or disciplined accordingly if they breach it²⁷⁶. Many of these laws have been implemented within British military codes and if soldiers breach these codes then they will face disciplinary proceedings within their regiment.

2. Soldiers deployed within the UK—or anywhere within Europe—are required to abide by the human rights standards set out by the ECHR which has been implemented into UK law by the Human Rights Act 1998 (“HRA”). As arms of the state, the British Army must respect these rules; however, the HRA allows certain rights to be derogated from in certain circumstances, which will be explored in more detail below.

3. In the unlikely event that there was to be an armed conflict of the requisite intensity in the UK, soldiers of the British armed forces would be required to comply with the rules relating to non-international armed conflicts (“NIAC”) set out in the Geneva Conventions and their Additional Protocols. This also applies to soldiers serving with the British army abroad in an “internationalised” NIAC, for example the current situation in Afghanistan.

4. Each of these obligations upon British soldiers are in turn also legal protections upon them.

Observance of Human Rights Standards

5. Schedule 1 Part I of the Human Rights Act 1998 implements into British law the rights enshrined in the ECHR. For the purposes of this report, the right that is most relevant to the obligations on UK armed forces personnel is the right to life, contained in Article 2 of the Convention. This provision provides that “everyone’s

²⁷⁶ http://www.army.mod.uk/documents/general/v_s_of_the_british_army.pdf

right to life shall be protected by law” and can only be removed following the execution of a sentence of a court in which that penalty is provided by law. This right is reflected in the criminal law prohibition of murder and, on the basis that the death penalty is not a legal punishment in any of the UK jurisdictions, it is a rigorously protected right. Unlike in situations of armed conflict, armed forces personnel are not permitted to kill arbitrarily, except in certain strict circumstances. This right to life is also a protection upon soldiers when deployed in the UK.

6. Article 2(2) provides limitations on the right to life in very restricted circumstances. This provision provides that a deprivation of life shall not breach the convention if the use of force is in (a) defence of any person from unlawful violence (essentially self-defence); (b) order to effect a lawful arrest or to prevent the escape of someone lawfully detained; or (c) action lawfully taken for the purpose of quelling a riot or insurrection. In each of these instances, force used can be no more than absolutely necessary and if there is a lesser way of averting the threat then killing should be avoided. To put this into context, the armed forces can use force legitimately when it is necessary and proportionate to avert threat to human life or to dispel serious crime.

7. In the event that a soldier breaches either the right to life provision or any other criminal laws, the ECHR provides with him with the right to a fair trial (Article 6) and “no punishment without law” (Article 7), meaning he cannot be prosecuted for a crime that was not against the law at the time in which it was committed. These protections are afforded to personnel both in front of national courts and military tribunals.

8. UK soldiers are also bound to respect other human rights treaties that the UK has ratified. Those relevant to this report include the International Covenants on Civil and Political Rights and Economic, Social and Cultural Rights 1966 and the Convention Against Torture 1984. These treaties, along with the ECHR, do not impose individual liability for the soldiers, but the UK is responsible for the actions of their soldiers as they are agents of the state and thus persons who feel that their rights have been violated can bring claims against the UK in front of the relevant treaty body or court.

9. These human rights protections apply both in peacetime and in times of armed conflict. Several of the human rights treaties have not been incorporated into UK civil law so citizens do not have a direct right of action in domestic courts if their rights have been violated. However, the UK is still internationally accountable for breaches and as they have to regularly report back to the treaty bodies it is in the UK’s best interest that the treaties are followed. Furthermore, many human rights standards have been incorporated into criminal law and it is important that when soldiers are deployed within the UK that they respect the criminal law or they could face charges.

Application of Geneva Conventions in a NIAC

10. In the unlikely event that an armed conflict was to break out within the UK and armed forces had to be deployed, personnel would be bound by international humanitarian (“IHL”) law, namely Common Article 3 (“CA3”) of the Geneva Conventions and Additional Protocol II (“APII”). The Geneva Conventions of 1949 and their Additional Protocols of 1977 set out the rules to be followed in an international armed conflict (“IAC”), but only Article 3, which is common to all 4 Conventions, and Additional Protocol II apply in the instance of a NIAC.

11. In order to assess whether CA3 applies, it must be determined whether an armed conflict reaching the requisite intensity is taking place. This standard differs between a CA3 conflict and an APII conflict, and a third threshold has been added by the ICTY in the *Tadić* case. Defining a NIAC is more challenging than an IAC, as an IAC will occur whenever there has been resort to armed force by one state against another.

12. In order for CA3 to apply, there must be armed violence reaching a requisite level of intensity between the government and non-state groups, or between such groups. There is no clear definition of the level of intensity that this fighting has to reach, but it is generally accepted that internal disturbances are excluded and the ICTY in *Tadić* has gone as far as to suggest that there should be “protracted armed violence.”²⁷⁷ Furthermore, the non-state groups must also have a certain level of organisation about them in order for them to be considered parties to the conflict and CA3 apply.

13. Once it has been established that CA3 applies in a given situation, it then must be examined what exactly this means in practice. Subsection 1 of CA3 provides that persons not taking active part in hostilities (for example civilians and those who are *hors de combat*) are to be treated humanely. This means that the following is prohibited: violence and murder; cruel treatment/torture; the taking of hostages; humiliating and degrading treatment; and the passing of sentences/executions without judicial guarantee. Subsection 2 also provides that the sick and wounded are to be collected and looked after. These provisions provide obligations upon the armed forces to uphold and they also provide protections upon them.

14. APII provides additional protections in the case of applicable NIACs. The threshold for APII to apply is much higher, however, so it is possible to have a CA3 conflict without APII being triggered. Article 1(2) at the outset rules internal disturbances and tensions, such as riots and isolated and sporadic acts of violence, as being outwith the scope of application. Article 1(1) sets out when an applicable conflict occurs: an armed conflict will exist when there is resort to armed violence between governmental armed forces and non-state

²⁷⁷ *Prosecutor v Dusho Tadić* (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction) ICTY 1995, para 70

groups, provided the later exercises a level of territorial control that would allow them to carry out “sustained and concerted military operations.” One of the key differences between this and CA3 is that APII does not apply to conflicts occurring between two non-state groups. Furthermore, a non-state group can only be a party to the conflict if it exercises a degree of effective territorial control, which is a much higher threshold than the organisation required by CA3.

15. Should it be established that a conflict exists in which APII applies, the protocol provides many more protections and obligations upon fighters than CA3 does.

16. As above, these provisions apply equally in respect to protecting our armed forces as well as obligations upon them to respect. For instance, Part IV gives specific protections to civilians, providing that they are not to be the object of attack for as long as they are not directly participating in hostilities. Part III provides more substantive protections for those who are wounded or sick and Part II provides for humane treatment.

17. It must be noted that APII has not been universally signed by all states—unlike the Geneva Conventions—so in theory may not apply to all conflicts that the UK armed forces could be involved in, but customary international law has developed to fill the gap and thus APII will almost always apply if the intensity threshold is met.

18. In addition to this, many of the provisions laid out in Additional Protocol I applying to international armed conflicts have passed into customary international law and would also apply in a NIAC. One of the main differences between the IAC and NIAC conflict provisions is that soldiers are not afforded Prisoner of War (“PoW”) status if they are captured. This is because the term combatant does not exist in a NIAC and instead parties to the conflict are classed as “fighters”. In most instances, only governmental forces will be official fighters and everyone else will be a civilian, unless they are taking direct part in hostilities. This does not necessarily mean that the protections afforded to those captured are different to those who are officially PoW. Many rules relating to the treatment of PoWs have passed into customary law and now similarly apply in NIACs. In October 2012 a group of 24 states, including the 5 permanent members of the UNSC, and representatives from other organisations such as the EU, NATO, AU and ICRC, drafted a series of principles and guidelines entitled the Copenhagen Process on the handling of detainees in international military operations.²⁷⁸ Whilst not aiming to draft new legal obligations, the group has come up with a series of guidelines on how to interpret and apply the current rules on detainees. These principles are intended only to apply to NIACs as substantive rules already exist on the treatment of PoWs in IACs. The most important rule arising from the Process is that all detainees are to be treated humanely.

19. As well as applying at home in the UK, these rules also apply to UK armed forces deployed in what has been described as an “internationalised” NIAC abroad. An example that can be given of this is that which is currently occurring in Afghanistan. Whilst this was a classic IAC at the outset, the IAC ended in June 2002 with the election of a new Afghan government and a new NIAC began when the UK and US forces were invited by the Afghan government to support them. The fighting in Afghanistan is thus no longer interstate as it is between the government and non-state actors, with the coalition forces supporting the government.

20. If any British soldiers were to be suspected of breaching these provisions they could face prosecution for war crimes before an international court or domestically. As human rights protections run concurrently to international humanitarian law during an armed conflict, soldiers could also be subject to prosecution for crimes against humanity if there is a serious breach of human rights law. These matters will be discussed more fully below.

LEGAL PROTECTIONS AND OBLIGATIONS APPLYING TO UK ARMED FORCES DEPLOYED ABROAD

21. When deployed abroad, UK armed forces are bound to comply with international law. There are several bodies of international rules that apply to soldiers depending on the context. In the first instance, when serving in an armed conflict, soldiers are bound to comply with international humanitarian law, which, as discussed above, is contained within the Geneva Conventions and Additional Protocols. Furthermore, those serving in the armed forces are bound to comply with international criminal law, most of which has been codified within the Rome Statute of the International Criminal Court, to which the UK is a state party. This issue will be dealt with more fully below and will thus not be considered in this context. Regardless of whether an armed conflict exists or not, soldiers are bound to respect international human rights standards whenever the UK is held to have jurisdiction, and in turn would expect these to be upheld towards them.

22. As was briefly outlined above, the rules governing an armed conflict differ depending on whether the conflict is one of an international or non-international character. An international armed conflict is one where one state is fighting against another or a coalition of states is fighting one common enemy state. If an international armed conflict exists, the 4 Geneva Conventions and Additional Protocol I apply. These Conventions are as follows:

- (i) Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (“GCI”)
- (ii) Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (“GCII”)

²⁷⁸ The principles and their commentary can be found here: <http://um.dk/en/~media/UM/English-site/Documents/Politics-and-diplomacy/Copenhagen%20Process%20Principles%20and%20Guidelines.pdf> (last viewed 27th November 2013)

- (iii) Treatment of Prisoners of War (“GCIII”)
- (iv) Protection of Civilian Persons in Time of War (“GCIV”)

23. Additional Protocol I extends the provisions of each of these conventions and deals with the issue of conduct of hostilities more generally, including means and methods of warfare. Each of the conventions and API give protections to armed forces personnel deployed abroad and obligations upon them to follow.

24. It is most likely that when UK armed forces are deployed abroad they will be taking part in an international armed conflict either under direct UK control, or under command from NATO, for example in Libya in 2011. Regardless of in which manner the forces are deployed these rules apply equally. As discussed above, it is also possible that UK forces could be taking part in an internationalised NIAC abroad, such as the latter years in Afghanistan, and thus these rules would not apply. It is also possible that UK troops could be deployed within a UN peacekeeping mission. In that instance, the main body of rules that would govern the forces is the mandate set force by the UN, which will always oblige troops to respect human rights. In that instance, unless the troops are given a robust mandate, they will not be permitted to use force.

When Force Can be Used Legitimately

25. If an IAC exists, UK armed forces personnel are permitted to use force to kill their enemy. The enemy in this instance would be governmental forces of the other state or those taking direct part in hostilities. As GCIV sets out, force cannot be used against civilians. This is the principle of distinction—civilians and civilian objects should at all time be distinguished from combatants and military objectives and should never be the subject of an attack. Whilst it can sometimes be difficult to distinguish between combatants and civilians, this is the basic principle of IHL and soldiers are bound to respect it in all circumstances.

26. That is not to say that every instance in which a civilian is killed or injured will necessarily be a breach of IHL. It is sometimes impossible to avoid civilian casualties when carrying out attacks on legitimate targets. What is important is that it is not the civilians themselves that have been attacked. Soldiers are only allowed to use proportionate force to attack military objects. Proportionality is measured by determining the military gain achieved by the attack versus the harm to civilians. This can be a difficult thing to quantify, but it is important that soldiers bear this in mind when planning attacks. The harm to civilians can be minimised by using precautions in attacks. This includes doing everything feasible to minimise the number of civilians in the area at the time, possibly by giving advance warning of the attack.

27. Furthermore, only legitimate military objects can be attacked. Often it is quite clear what a military object it—eg a tank or a military base—but in other instances, objects that may appear to be civilian in nature may in fact serve a military purpose. Some examples of these include major infrastructure such a bridges and train lines, airports and radio and television stations. Objects that have a predominately civilian nature but can also service military objectives are considered “dual use.” These objects can be attacked if it can be considered military necessity and the attack is proportionate. Article 56 of API sets out some exceptions to this rule if an attack would cause “consequent severe losses among the civilian population.”

28. When preparing for an attack—or analysing it after the event—the weapons used in the attack can be important for determining if it is proportionate. For example, cluster munitions are indiscriminate weapons and thus would not pass the proportionality test. The debate over indiscriminate weapons has arisen recently in regard to autonomous weapons and whether drone strikes comply with IHL. As technology advances quickly, careful consideration should be made of the effects of new weapons and an analysis of whether they comply with IHL should be made before they are used.

29. Civilians are only protected from being subject of an attack as long as they are not taking direct part in hostilities (“DPH”). If civilians take up arms and are DPH then they become legitimate military targets and are no longer protected by GCIV. Civilians are DPH when they “carry out acts which aim to support one party to the conflict by directly causing harm to another party.”²⁷⁹ Thus it is key that the civilian is attacking the soldier/combatant because of his capacity and not for some other reason (eg self-defence in a robbery). The ICRC has suggested that those who are members of an organised armed group have a “continuous combat function”²⁸⁰ and thus can always be attacked regardless of whether they are DPH, however, this idea has not been widely accepted by the international community. It is important to note here that even if a civilian is DPH that does not make them a combatant or party to the conflict and thus they don’t have the same privileges that soldiers have, in particular they don’t have the right to kill.

30. Geneva Conventions I&II provide that force cannot be used against those that are hors de combat. A soldier will be hors de combat if they have been wounded, have put down their arms and are surrendering and if they have been detained. This provision will apply as long as the individual is not taking part in hostilities. UK armed force personnel are bound to respect this provision and it equally applies to our soldiers if they become hors de combat.

31. The rules contained in GCIV also extend to instances of military occupation, in particular through Section III. Article 42 of the Hague Convention of 1907 sets out that a territory is occupied when it is placed

²⁷⁹ ICRC, Interpretive Guidance on the Notion of Direct Participation in Hostilities, 2009 (available at: <http://www.icrc.org/eng/resources/documents/article/review/review-872-p991.htm>)

²⁸⁰ *Prosecutor v Dusko Tadić* (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction) ICTY 1995, para 70

under the authority of a hostile army and extends within the territory in which this authority has been established and can be exercised.

GCIII—Prisoners of War

32. Perhaps the most robust rules of IHL providing protection to our armed forces are those contained in the third Geneva Convention on the treatment of prisoners of war (“PoW”). This convention must be respected by UK soldiers as well as them being afforded protection by it. GCIII only applies in IAC thus PoW status is not available in NIAC.

33. Article 4 of GCIII sets out what categories of persons become PoWs when they fall into the power of the enemy. This includes members of the armed forces and members of other organised groups that are party to the conflict. This means that if a member of the UK armed forces is captured during an IAC then they should be given PoW status and the protections that come with that. Likewise, if our armed forces capture anyone belonging to one of the categories listed in Article 4 then they are obliged to treat them in the same way. If there is doubt about the status of someone captured, Article 5 sets out that they are to be treated as a PoW until a competent tribunal proves otherwise.

34. Part II of the convention sets out the general protections afforded to PoWs. The most important provision is that PoWs must be treated humanely and with respect. One of the gravest breaches of these provisions of the recent past was seen with American soldiers torturing Iraqi PoWs at Abu Ghraib prison between late 2003 and early 2004. The human rights violations within this camp were widespread—physical, mental and sexual abuse, rape, sodomy and murder, amongst other things—and a defence was given that the Geneva Conventions did not apply and in any case, the soldiers involved did not know their actions breached them. The soldiers involved were disciplined by the US military and were discharged and sent to prison, which has to be commended, but this situation is important to highlight how imperative it is for soldiers to be trained in what the Geneva Conventions are and know when and how to follow them. This is still an issue at Guantanamo where human rights abuses are ongoing, but the US claims that the prisoners are unlawful enemy combatants and neither the Geneva Conventions nor domestic US law applies (as Guantanamo is located outwith US territorial jurisdiction).

35. PoWs are to be released and repatriated without delay after the end of the conflict.

36. As was seen in the case of Abu Ghraib, breaches of these provisions—or of any of the Geneva Conventions for that matter—are war crimes and can also amount to crimes against humanity. In addition to this, what was seen in Abu Ghraib was also a breach of the Convention Against Torture. It is important that UK armed forces know these rules and that the military are prepared to prosecute those who don’t abide by them. The concept of universal jurisdiction for prosecuting these crimes within international criminal law will be discussed *infra*.

Extraterritorial Application of International Human Rights Law

37. It is well accepted that states must abide by human rights within their territory after signing and ratifying an international human rights treaty. What is less clear-cut is whether or not they have to apply these same standards when they are acting abroad.

38. In Article 1 of the ECHR it sets out that a state party must provide the freedoms and rights contained within the convention to those within their jurisdiction. It is this notion of “jurisdiction” that creates a degree of ambiguity. Traditionally, jurisdiction would only extend within the territory of the state. This is the approach that the European Court of Human Rights (“ECtHR”) took in the *Banković* case.²⁸¹

39. However, since the *Banković* case, the ECtHR has extended this notion to include both territorial jurisdiction and personal jurisdiction. This means that the ECHR could now be applied extraterritorially. This is more in line with the approach of “within its territory and subject to its jurisdiction” contained in Article 2(1) of the ICCPR. The ECtHR discussed this approach in deciding the outcome of the *Al-Skeini* case.²⁸² In this case, the matter at issue was whether 6 Iraqi men who were killed by UK soldiers in Iraq could come under the jurisdiction of the ECHR. Five of the men were killed by soldiers on the street and the UK House of Lords held that the UK could not be liable for these killings. However, the ECtHR held that as the UK exercised effective control and authority over the area, their jurisdiction extended to Iraq and thus they were bound to apply the ECHR right to life. The sixth man had been detained in a jail in Iraq and after being severely mistreated by soldiers he was killed. The court said in relation to this man that whenever a state exercises control and authority over an individual then they must afford to him the rights and freedoms enshrined in Article 1 that are relevant to his situation. Thus the UK soldiers breached the convention and the UK was liable for this.

40. The ECtHR maintains that extraterritorial application of human rights is still an exception to the rule and will only allow it in extreme circumstances. However, other bodies such as the ICJ and the Human Rights Committee (the treaty body of the ICCPR) have stated that extraterritorial activity will trigger international

²⁸¹ Decision as to the admissibility of Application no. 52207/99 of 12 December 2001 (Grand Chamber) in the case *Banković and Others v. Belgium and 16 Other Contracting States*

²⁸² *Al-Skeini and Others v. The United Kingdom* Application no. 55721/07

human rights law application. It is thus important that soldiers know these rules and know when to apply them. There is a debate as to whether both human rights and IHL apply in times of armed conflict. It is generally accepted that IHL is a *lex specialis* that overrules international human rights during an armed conflict in respect to those who are involved in the conflict. Therefore, civilians are still entitled to human rights even when an armed conflict occurs.

41. The interplay between application of IHL and human rights is particularly important in the debate over drones. Drone strikes are being regularly used by the United States against members of al Qaeda and associated groups in countries such as Yemen and Pakistan. Their reliance for this is on the basis that they are fighting a worldwide armed conflict against terrorism. However, this notion of worldwide armed conflict has not been accepted by the international community. If IHL does not apply, as there is no armed conflict where the strike takes place, then human rights law could potentially come into play. There is no international consensus on whether human rights should apply in this situation. The US has rejected the notion of extraterritorial application of human rights and thus claims that human rights do not apply. However, as has been demonstrated by the above discussion, the ECtHR has held human rights to apply extraterritorially if the state has jurisdiction there, so it is possible that at some point in the future the court could hold that human rights apply to drone strikes. This is an important issue to highlight should the UK be considering including the use of drones in future operations.

INTERNATIONAL CRIMINAL LAW

What is International Criminal Law?

42. International Criminal Law (“ICL”) is an international legal regime that has established a set of rules proscribing certain categories of conduct and makes the breach of such rules a criminal offence that entails personal criminal responsibility for the perpetrator. The comprehensive international framework also establishes judicial mechanisms and procedures to enforce ICL. ICL is based upon modern civilised domestic criminal justice systems, applying the same underlying principles and operating in a similar manner but providing for its application on the international plane.

43. Despite the fact that the notion of international crimes was initially articulated, albeit in a highly rudimentary fashion, in the latter half of the 19th century and the fact that there have been many abortive attempts to create an a system of international justice with the requisite enforcement mechanisms throughout the first half of the 20th century, ICL did not really come to be established substantively until the creation of the International Military Tribunals of Nuremberg and the Far East.

44. These tribunals established beyond doubt the principle of individual criminal responsibility—that is the notion that it is not state entities that are responsible for grave violations of international humanitarian law but the individuals that commit those crimes. It is also a fundamental principle of the system that criminal culpability can be established regardless of whether the individual was acting in an official capacity or under the orders of the state command.

What are International Crimes?

45. International crimes are breaches of international rules that entail personal criminal responsibility for the individuals who have committed such breaches. ICL was not created as a unified body of law but was developed on an ad hoc basis. As a result the crimes that are established in international law are set out in international treaties, instruments creating international criminal tribunals, domestic legislation and customary international law. The three core crimes provided for and firmly established in ICL are war crimes, crimes against humanity and genocide. It can be said that these were developed first and have received the most attention, as they are arguably the most odious offences that can be committed by individuals.

(i) War Crimes

46. War crimes are the oldest of the all of the international crimes and are broadly defined as serious breaches of IHL. The International Criminal Tribunal for the Former Yugoslavia (“ICTY”) defined the notion of a “serious breach” as one that entails a “breach of a rule protecting important values and involves grave consequences for the victim”.²⁸³ The Statute of the International Criminal Court (“ICC”) defines war crimes as “Grave breaches of the Geneva Conventions of 12 August 1949” and “serious violations of the laws and customs applicable in international armed conflict”. The Statute also helpfully provides a high level of detail as to how the elements of the crime can be satisfied and sets out an extensive list of activities that constitute the commission of a war crime.²⁸⁴

47. In order for a war crime to be committed the act must have been perpetrated in the course of an armed conflict that may be either international or non-international in nature. War crimes can be perpetrated by military personnel against enemy combatants or civilians or by civilians against any military personnel or other civilians. However, in order for a war crime to be committed the action must have a sufficient nexus to the armed conflict—that is it must be related to it in some way. If this cannot be established then the crime is one

²⁸³ *Prosecutor v Dusko Tadić* (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction) ICTY 1995, para 94

²⁸⁴ Article 8 (2) RS

under domestic law only. UK service personnel can therefore commit war crimes against enemy combatants or civilians in the course of an armed conflict.

(ii) Crimes against Humanity

48. Crimes against Humanity are broadly defined as acts which are wilfully committed to cause great suffering or serious physical or mental injury and are committed as part of a widespread or systematic attack directed against any civilian population. Acts which are deemed to cause great suffering include, but are not limited to, murder, rape, extermination, forcible transfer, torture, enslavement, persecution and unlawful imprisonment.

49. These acts must have been committed in furtherance of an organised plan or strategy initiated by a government or de facto authority and the individual perpetrator needs to know that there is an attack on a civilian population and that his action forms a part of that attack in order to constitute a crime against humanity. Unlike war crimes, crimes against humanity can be committed in times of peace as well as in times of war. The perpetrators can be either individuals acting on behalf of the state/de facto authority or ordinary civilians acting in furtherance of an organised strategy or policy.

(iii) Genocide

50. The crime of Genocide is defined as acts committed with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group, by way of: (a) killing members of the group; (b) causing serious bodily or mental harm to members of the group; (c) deliberately inflicting upon the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) preventing birth with the group; or (e) forcible transfer of members of that group.²⁸⁵ The crime of genocide was codified with the creation of the Genocide Convention in 1948, which provided a specific definition of the act of genocide and provided for its criminalisation.

(iv) Aggression

51. The Rome Statute establishing the ICC provides that “the crime of aggression means the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a state, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations”. The ICC has only just, as a result of the Kampala agreements, acquired jurisdiction to prosecute this crime although it will not become operational until 2017 at the earliest.

52. It is important to note that a violation of the UN Charter must be manifest to constitute such a crime. For example it is suggested that a breach of the prohibition on the use of force will only be a crime where it is a grave violation with serious consequences.²⁸⁶ The crime of aggression is not automatically founded when the Security Council declares that an act of aggression has been committed by a state. The crime of aggression which entails individual criminal responsibility must be established independently and the crime is much more narrowly construed and a higher threshold is required to found criminality. Therefore, a small act of aggression by a state, although enough to establish state responsibility will not be enough to satisfy criminal culpability.

(v) Torture

53. The crime of torture, in addition to being an act that can constitute a crime against humanity when perpetrated in a widespread and systematic manner or a war crime when committed in the course of an armed conflict, is also a standalone crime under international law that can be committed through a single act of torture. It is not however a crime over which the ICC has jurisdiction unless it amounts to a war crime or a crime against humanity.

54. The discreet crime of torture has been developing for a quite some time through international conventions²⁸⁷, human rights treaties and criminal tribunals and it is widely considered that torture is a most grievous crime and is established within the international criminal regime. The crime of torture is now broadly accepted by the international community and is defined as:

*“any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions”*²⁸⁸

²⁸⁵ Article 2 Genocide Convention, Article 6 RS and it is provided for in customary international law

²⁸⁶ <http://www.ejiltalk.org/what-exactly-was-agreed-in-kampala-on-the-crime-of-aggression/>

²⁸⁷ UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment 1984

²⁸⁸ Article 1 UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

The Relationship between ICL and IHL

55. There is substantial crossover between ICL and IHL and they are mutually enforcing regimes. They however remain conceptually and substantively distinct regimes and serve different purposes. IHL, codified in the Geneva Conventions and its additional protocols as well as in customary international law, are the rules of armed conflict that seek to regulate the conduct of soldiers during warfare, and more generally the conduct of states and armed groups as the entities that orchestrate conflict. ICL on the other hand is far narrower in its remit “*defining the substance and procedure of when and how violations of IHL...can give rise to individual criminal responsibility*”,²⁸⁹ IHL is a guide to conducting armed conflict and ICL defines when breaches of that guide amount to a criminal offence for which one is liable to be prosecuted and punished.

56. ICL therefore takes a lot of its substance from the rules of IHL and many of the crimes defined within ICL are taken directly from IHL. IHL does not have its own enforcement mechanisms for breaches of the rules and is therefore dependant on ICL to enforce the rules by punishing those who breach them and at the same time deterring future breaches. IHL provides for a vast number of rules, but ICL does not replicate all of these and is only concerned with the most serious breaches of IHL. Therefore, not all breaches of IHL will entail personal criminal responsibility. However, some breaches of IHL whilst not amounting to a criminal offence may create civil liability for which the victim will be entitled to financial compensation from the state of which the perpetrator is a national.

To Whom Does ICL Apply?

57. The prohibition of certain acts and categories of conduct and the criminal responsibility that flows from the commission of such acts pertains to all individuals. The rationale behind this is that there are certain universal moral standards of behaviour which are expected of all peoples and thus the commission of acts which are so heinous and morally repugnant so as to breach these universal standards of behaviour should be punished irrespective of who commits them.

58. It would be an incomparable disservice to justice and also a serious threat to international peace and security if people were able to opt out of international criminal liability as they would essentially be free to commit international crimes with impunity. As a consequence individuals are subject to the rules set out in ICL and can be brought before national or international courts to be prosecuted for committing international crimes. ICL does not apply to states or international or domestic organisations.

59. This concept was a radical departure from the traditional horizontal application of international law. International law was traditionally merely concerned with regulating the interactions of state parties and did not seek to exert control over the individuals within those states—this being considered to be solely within the sovereign prerogative. However, following the moral outrage expressed around the world regarding the atrocities committed during the Holocaust it came to be considered that international law should seek to regulate the conduct of individuals and punish serious transgressions of the regulations and thus the concept of individual criminal responsibility was developed.

Does ICL apply to UK Military Personnel?

60. All military personnel are subject to the international criminal law regime. When conducting military operations all service personnel are required to comply with IHL and serious violations of these rules including grave breaches of the Geneva Conventions could result in criminal liability. If a serious violation of IHL is committed during an armed conflict and that crime has sufficient nexus to the conflict a war crime may have been committed which will give rise to criminal liability. Examples of war crimes that could be committed by service personnel during armed conflicts and which may give rise to criminal liability include, but are not limited to:

- (i) Extensive destruction or appropriation of property not justified by military necessity and carried out unlawfully and wantonly;
- (ii) Torture or inhumane treatment;
- (iii) Committing outrages upon personal dignity, in particular, humiliating or degrading treatment and desecration of the dead;
- (iv) Killing or wounding a combatant who has surrendered or is otherwise *hors de combat*;
- (v) Pillage or taking other property contrary to international humanitarian law;
- (vi) Making the civilian population or individual civilians, not taking a direct part in hostilities, the object of attack;
- (vii) Launching an attack in the knowledge that such an attack will cause incidental loss to civilian life, injury to civilians or damage to civilian objects which would clearly be excessive in relation to the concrete and direct military advantage anticipated.

²⁸⁹ K. Hausler, N. Urban & R. McCorquodale, *Protecting Education and Insecurity in Armed Conflict: An International Law Handbook*, page 64—available at http://www.bicil.org/files/6099_protecting_education_handbook.pdf (last accessed 03 December 2013)

61. These criminal offences can be committed by the individuals that directly perpetrate the crimes or by the military commanders that order action to be taken by way of the operation of the doctrine of command responsibility. Article 28 of the Statute of the ICC provides that:

“...A military commander...shall be criminally responsible for Crimes within the jurisdiction of this Court committed by the forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where:

- (i) That military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and*
- (ii) That military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.”*

62. If UK military personnel commit war crimes that entail personal criminal responsibility when engaged in armed conflict they are liable to be prosecuted for the crimes committed.

63. It is however important to remember that war zones are dangerous, fluid and highly pressurised situations and it is within this context that military decisions have to be made, sometimes instantaneously, and without a thorough analysis of the consequences of that decision based upon sound and comprehensive intelligence. This is, regrettably, just the nature of combat. As a result mistakes will be made and civilian casualties will occur. This is, albeit highly regrettable, an unavoidable part of armed conflict. Where mistakes are made which result in the death or injury of civilians or where civilians are killed, not intentionally, but knowingly as the unavoidable collateral damage of a carefully directed military strike, criminally liable is highly unlikely to arise for those who carried out or ordered the attack.

64. IHL and ICL do not attempt to curtail the ability of the military to use lethal force against the enemy in pursuit of a strategic victory even if that use of force is likely to have limited unintended consequences such as the destruction of civilian infrastructure or the death of non-combatants. IHL seeks only to ensure that armed conflict is conducted in the most humane way possible by curtailing the excesses of the use of force and allowing only that which is proportionate to the military advantage to be achieved. It acknowledges that death is a necessary part of armed warfare but at the same time continues to promote the sanctity of life and the inviolable right to dignity shared by all human beings which is the basis on which it prohibits, amongst other things, the use of torture and degrading treatment and the intentional attacking of civilians or those *hors de combat*.

65. It is therefore the case that only the most egregious violations of the laws of war perpetrated in the course of armed conflict and committed intentionally or with unjustifiable reckless abandon will result in a criminal offence for which the perpetrator is liable to be prosecuted.

Who can Prosecute War Crimes?

66. Although ICL is applicable to all individuals, including service personnel, there is not a universal process by which all individuals are prosecuted and brought to justice, as is the case with domestic criminal justice systems. As a result of the piecemeal development of the international criminal justice system, the enforcement structure of ICL is highly disaggregated and there are a number of mechanisms through which ICL is applied and individuals prosecuted. An individual could be prosecuted by an ad hoc criminal tribunal, by one of the many internationalised courts, by the ICC or by the domestic courts of nation states applying domestic and international law. The forum in which an individual is prosecuted is dependent on which court has “jurisdiction” to prosecute the crime.

67. The rules of jurisdiction are set out in the constituent instruments of each court, the domestic law of states and international law. The means by which an individual is prosecuted is therefore subject to the circumstances of each case including the nature of the crime, the territory in which the crime took place, the nationality of the individual who committed the crime and the nationality of the victim of the crime. Therefore, although ICL is applicable to all individuals at all times, the regime under which it will be applied and enforced varies.

Domestic Courts, Jurisdiction and War Crimes

68. Customary international law provides that states must investigate war crimes allegedly committed by their nationals or armed forces, or on their territory, and if appropriate exercise the criminal jurisdiction that their national legislation confers upon their courts and prosecute the suspects. They must also investigate other war crimes over which they have jurisdiction and, if appropriate, prosecute the suspects. This is also incorporated into the Statute of the ICC. The Preamble to the Rome Statute recalls that it is “*the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes*”. This duty has been reiterated by the United Nations General Assembly on numerous occasions.

69. Domestic criminal systems have a very important role to play in the enforcement of ICL. The existence of huge numbers of highly developed and fully resourced criminal justice systems which can be employed to

give effect to ICL and bring perpetrators of grievous international crimes to justice significantly strengthens the enforcement remit ICL.

70. Whether a domestic court is able to initiate a prosecution of an individual suspected of having committed a war crime will be dependent on whether the court has jurisdiction. There are a number of ways by which states can claim jurisdiction over individuals who are accused of having committed international crimes and these can be provided for in domestic legislation or through the accession to certain treaties that impose obligations upon states. Most states, including the UK, have implemented the obligation to investigate war crimes and prosecute the suspects by providing jurisdiction over such crimes in their national legislation.

71. It has been established that national courts can apply ICL and prosecute individuals over whom they have jurisdiction even if they have not incorporated the relevant crimes into their domestic legislation. They are entitled to apply customary international criminal law as long as the crime in question was established in customary law at the time of the commission of the prohibited act so as not to violate the principle of the non-retroactive application of international criminal law.²⁹⁰

72. The next section will provide a brief overview of the different types of jurisdiction that exist in ICL.

(i) Universal Jurisdiction

73. Universal jurisdiction is an essential tool for the enforcement of ICL as it provides for the ability of a domestic judicial system in any state to try persons for crimes committed outside its territory that are in no way linked to the state by the nationality of the suspect, the nationality of the victim or by harm to the state's national interests. The exercise of jurisdiction is not conditional upon some link to the state that seeks to exercise jurisdiction. This is confirmed in the Geneva Conventions.

74. In order to exercise universal jurisdiction a state must have expressly provided for it in its domestic legislation and in addition have provided for the crimes over which it intends to exercise universal jurisdiction in its domestic legislation. With regard to the exercise of universal jurisdiction over the international crimes provided for in the Rome Statute, three quarters of UN member states have authorised their courts to exercise universal jurisdiction over one or more international crimes. States that are party to the Geneva Conventions and Additional Protocol I are obliged to provide for universal jurisdiction in their national legislation over grave breaches of the rules. Numerous states, including the UK, have complied with this obligation.

75. The first rationale behind universal jurisdiction is that there are certain crimes, such as genocide, war crimes and crimes against humanity, which are so heinous and reprehensible that they are an affront to all humankind and therefore any state should be able to prosecute such individuals regardless of the nationality of the offender or the victims. The offender is in essence "an enemy of mankind" and therefore all mankind has jurisdiction over their prosecution on behalf of the entire international community.

76. The second rationale is that the grievous nature of such crimes means that the individual should not be able to seek impunity and therefore should be liable to prosecution all over the world. Many states are either unwilling or unable to genuinely carry out investigations and prosecutions and therefore by providing for the ability for other states to undertake such action the opportunity for impunity is limited.

77. One of the most notable applications of the universal jurisdiction principle was the issuing of an arrest warrant for General Augusto Pinochet by the Spanish judge Baltazar Garzon and his subsequent detention in the UK. The House of Lords declared that Augusto Pinochet could be tried for crimes that had been committed after 1988 and could be extradited to face prosecution in Spain. Mary Robinson, the United Nations High Commissioner for Human Rights at that time, declared the House of Lords' ruling as a ringing endorsement that torture is an international crime subject to universal jurisdiction. Another example of the application of universal jurisdiction was the prosecution of Adolf Eichmann by the state of Israel. There are numerous other examples of states exercising universal jurisdiction to prosecute those accused of having committed war crimes and crimes against humanity.

(ii) Active Personality Jurisdiction

78. The Active Personality Jurisdiction or the active nationality principle is a type of jurisdiction based upon the nationality of the suspect or defendant at the time of the commission of the crime. It permits states to prosecute their nationals for crimes that have been committed anywhere in the world, if, at the time of the offence, they were such nationals. A broader construction of this principle allows states to exercise jurisdiction over individuals which are domiciles or residents of that state not merely nationals. Once again in order for a state to be able to exercise such jurisdiction it must provide for it within its domestic legislation. States can provide for such jurisdiction over all crimes or limit it to only certain crimes.

(iii) The Passive Personality Jurisdiction

79. The Passive Personality Jurisdiction or the passive nationality principle is a type of jurisdiction based upon the nationality of the victim at the time of the commission of the crime. It permits a state to prosecute a

²⁹⁰ Cassese, 'Balancing the Prosecution of Crimes against Humanity and Non-Retroactivity of Criminal Law: The Kolk and Kislyiy Case before the ICJ', (2006) 4 *Journal of International and Comparative Justice* 410-418.

national of another state who has committed a crime outside of its territory for which one of its nationals was the victim. Once again it can be defined more broadly to provide for jurisdiction over foreign nationals who committed a crime on foreign territory and where victim of that crime was a resident or domiciliary. This is a controversial basis for extraterritorial jurisdiction although it has been applied in a number of cases.

(iv) The Protective Jurisdiction

80. Finally, there is Protective Jurisdiction. This principle recognises a state's power to assert jurisdiction over a limited number of crimes committed by foreigners outside of its territory, where the crime prejudices the states vital interests. The rationale behind this jurisdiction is that states are entitled to protect their own essential security and certain other essential state interests. The extent to which this principle is legislated for and employed by states to prosecute international crimes is uncertain.

(v) Aut dedere aut judicare

81. This principle is not a means by which to found jurisdiction, but is no less an important principle of international criminal law. This principle provides that a state must either prosecute an individual who has committed one of a number of defined international crimes where the state has jurisdiction over the individual or if that state is not willing or is unable to carry out a prosecution it must extradite the individual to a state that is willing to and has jurisdiction or to an international criminal court that has jurisdiction over the individual or the crime. The rationale behind this principle is that states should not be able to shield individuals accused of international crimes from prosecution.

International Criminal Courts

82. The need for states to prosecute individuals that commit crimes of international concern in foreign jurisdictions for the benefit of the wider international community under the exercise of universal jurisdiction was, to some extent, negated by the development of ICL and an international criminal court system. By creating institutions that were dedicated to prosecuting individuals that had committed international crimes, regardless of where they took place, it was thought that the need for states to prosecute foreign criminals through their domestic systems would become increasingly limited. This was considered to be a more appropriate means by which international criminals could be brought to justice as international criminal courts, backed by the international community, were more legitimate and less likely to be seen as politically biased than domestic prosecutions.

International Criminal Tribunals

83. The first international criminal court was the Nuremberg Tribunal set up by the Allied States at the end of the Second World War in 1945 to prosecute Nazi officers for the roles in the war crimes and crimes against humanity that were perpetrated throughout the war. This was a huge achievement and evidenced a momentous shift in our approach to international law. No longer was the international system seen solely in terms of sovereign states, but it was instead recognised that men had committed such atrocities and thus it should be the men, not the state, that was punished.²⁹¹

84. They also founded the notion that "individuals have international duties which transcend national obligations of obedience imposed by the individual states".²⁹² It came to be considered that individuals are now constrained not only by domestic laws but also by international legal regimes. If such international rules were broken an individual could be brought before an international court and become the subject of international legal proceedings even though he may well have been acting within the law of a state. Although this duality of legal systems had existed well before 1945, the ad hoc tribunals firmly established its applicability with regard to ICL. Finally, it was established that senior political officials and high-ranking military personnel were not immune from prosecution because of their status or rank. Traditionally it had only been servicemen that had been tried for war crimes but the immunity enjoyed by senior officials was eradicated.

85. Following Nuremberg and on the back of the ongoing development of the human rights discourse it became mainstream thought that those who commit the most heinous crimes should not be allowed to go unpunished merely because there was no consistently effective system by which they could be brought to justice and it was therefore agreed that an international criminal system should be created to fill this "impunity gap". This resulted in the initial suggestion for the creation of an international criminal court in 1948, and was also the main impetus behind the creation of the ad hoc tribunals for the Former Yugoslavia ("ICTY") and Rwanda ("ICTR").

86. Other criminal tribunals have also been created to prosecute crimes committed during subsequent conflicts including the Special Court of Sierra Leone, the Special Tribunal for Lebanon, the Extraordinary Chambers in the Courts of Cambodia and the Special Panels of the Dili District Court also known as the East Timor Tribunal. These tribunals are hybrid tribunals applying both domestic and international criminal law and

²⁹¹ Trial of the Major War Criminals before the International Military Tribunal, Nürnberg, 14 November 1945–1 October 1946, published at Nürnberg, Germany, 1947, 223

²⁹² International Military Tribunal Charter at 223

are also more integrated into the domestic court structure which has made their operation far more cost effective.

87. International and mixed criminal tribunals have however come under intense criticism. It is said that as the tribunals are so costly and logistically difficult to set up they are only initiated in the most extreme circumstances and where a large number of heinous crimes have been committed in a particular area and in a particular period of time such as during a civil war. The criminal tribunals jurisdictional remit is therefore limited temporally and territorially and as a result are only able to deliver justice in very limited circumstances and therefore unable to give effect to the universal application of ICL.

The International Criminal Court

88. The inherent problems with ad hoc tribunals led to renewed support for the creation of a permanent international criminal court. Following protracted negotiations, the Rome Statute was adopted by state parties on 17 July 1998 creating the International Criminal Court which is based at The Hague. The Rome Statute came into force on 1 July 2002 and the court became operational.

89. This was a momentous milestone in the development of ICL. The creation of a permanent institution dedicated to prosecuting those who commit the most grievous international crimes would provide continuous, universal and efficient justice. The enforcement remit of ICL was substantially increased and strengthened and as a result, no longer would individuals who had committed the most heinous crimes which were an affront to universal moral, ethical and legal standards be able to escape prosecution and punishment—impunity was to be eradicated. Kofi Anan said at the signing of the Statute of Rome:

*“In the prospect of an international criminal court lies the promise of universal justice. That is the simple and soaring hope... We are close to its realization... to ensure that no ruler, no State, no junta and no army anywhere can abuse human rights with impunity”.*²⁹³

(i) The Jurisdiction of the ICC

90. Although the ICC is an international court, its jurisdiction is not as universal and unlimited as one may have thought. The scope and parameters of its jurisdiction are clearly defined in its founding statute and they are based on the principle of territoriality and the active personality principle. Article 12(2) Rome Statute provides that the ICC has jurisdiction to prosecute: (i) the nationals of states that have acceded to the Rome Statute and (ii) individuals which have committed crimes on the territory of states which are party to the Rome Statute²⁹⁴. The jurisdiction of the ICC is therefore “not universal, but is territorial and personal in nature”.²⁹⁵

91. The construction of the ICC regime means that states have the option of acceding to the Rome Statute and submitting to its jurisdiction or placing themselves outside of the system. The construction of such a regime reflects the deference paid to the principle of state sovereignty and the ICC’s position within a horizontal and state centric international system.

92. This would not be an issue if all states acceded, but unfortunately this is not the case. As of May 2013 only 122 States had ratified the treaty and acceded to the court²⁹⁶ and thus a significant number of States still do not recognise the jurisdiction of the ICC, including most significantly three permanent members of the Security Council: the United States, China and Russia. The United Kingdom is a signatory to the Rome Statute.

93. Such reluctance by a vast number of states to accede to the ICC has resulted in a patchwork jurisdiction. This has significant implications for the effectiveness of the ICC as a mechanism for enforcing international criminal law.²⁹⁷ International criminals can merely move to or remain in states over which the ICC does not have jurisdiction in order to avoid capture and extradition or prosecution. This deficiency is evidenced by the fact that President Al-Bashir of Sudan, who has been indicted by the ICC, continues to travel whilst eluding the jurisdiction of the ICC.

94. The ICC is also limited with the regard to the crimes over which it has jurisdiction. The ICC is only able to prosecute individuals accused of: (i) genocide; (ii) crimes against humanity; and (iii) war crimes. The ICC, as a result of the Kampala agreements, will now also be able to prosecute crimes of aggression although this jurisdiction will only become operational when enough states have ratified the amendments and will not be until 2017 at the earliest.

²⁹³ UN Secretary General Mr Kofi Annan at the UN Conference of Plenipotentiaries on the Establishment of an International Criminal Court, 15 June-17 July 1998, Rome, Italy.

²⁹⁴ Statute of the International Criminal Court Article 12 (2)

²⁹⁵ M.N. Shaw, *International Law*, (6th Ed, Cambridge, Cambridge University Press, 2008), 412

²⁹⁶ UN Treaty Collection, available at http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtsg_no=XVIII-10&chapter=18&lang=en (last accessed 03 December 2013)

²⁹⁷ C. Hale, ‘Does the Evolution of International Criminal Law End With the ICC? The “Roaming ICC”: A Model International Criminal Court for a State Centric World of International Law’, (2007) 35 (3) *Denver Journal of International Law and Policy* 429, 430

(ii) The Principle of Complementarity

95. The jurisdiction of the ICC is also somewhat restricted by the complementarity principle provided for in Article 17 Rome Statute. This principle provides that the court cannot exercise its jurisdiction (a case is inadmissible) if the case is being investigated or prosecuted by a state party through their domestic judicial system, which has jurisdiction over it. The ICC's jurisdiction can however be subsequently engaged where it can be determined that: (i) a state is unable or unwilling genuinely to carry out the investigation or prosecution or where its decision not to prosecute the person concerned had resulted from its unwillingness or inability to genuinely prosecute and (ii) the case is of sufficient gravity to justify the exercise of the court's jurisdiction.

96. This residual jurisdiction means that the ICC is a court of last resort rather than the primary mechanism through which ICL is enforced. The onus to investigate and prosecute crimes under international law in the first instance is placed upon state parties and they are required to "exercise their criminal jurisdiction over those responsible for international crimes".²⁹⁸

97. The rationale behind this appears to be threefold. Firstly, the inclusion and centrality of such a principle is another example of the ICC paying deference to principle of state sovereignty. Secondly, a single court, especially one with only limited resources would not be capable of dealing with every international crime committed around the world. Thirdly, it is also suggested that national courts may be in a better position to conduct investigations and prosecutions where crimes have been committed within their territory.

98. It is however also an important means of improving the enforcement of ICL by utilising national courts as part of the enforcement apparatus of the ICC. Accession to the Rome Statute subtly obliges states to implement the necessary legislation and to hold trials in the first instance, where crimes are committed by nationals of, or on the territory of state parties, and thus improving the judicial capacity of ICL. However, the influence of this principle is again curtailed by the fact that it only applies to states that have acceded to the ICC, and the fact that it only applies to crimes committed by a national of, or on the territory of a state party, it does not impose the inclusion of universal jurisdiction in national legislation.

(iii) Bilateral Non-Surrender Agreements

99. The jurisdiction of the ICC is further curtailed by the operation of bilateral non-surrender agreements provided for by Article 98(2) Rome Statute. This provision provides that the ICC may not request the surrender of an individual if this would require the requested state to act inconsistently with its obligations under international agreements. Therefore states that are not parties to the ICC may conclude such agreements with states that are parties, to the effect that that state is precluded from surrendering its nationals to the ICC.

100. The existence of such agreements has the effect of further limiting the ICC's jurisdiction and impeding the ability of the ICC to get hold of individuals allowing impunity to continue and thus severely undermining its capacity to enforce ICL on a global scale. The significance of this is however somewhat limited by the fact that the judges of the ICC may determine any Article 98 agreement to be invalid and then oblige the state to comply with its obligations under the Rome Statute and surrender the suspect.

(iv) Heads of State Immunity

101. It must also be considered that the ICC does not recognise immunities for persons acting in official capacities, such as heads of state, from the jurisdiction of the Court.²⁹⁹ The implementation of the Rome Statute also provides that states must change their national legislation to remove, or allow the circumvention of, any immunities previously provided for in regard to crimes over which the ICC would have jurisdiction in order that the individual can be put on trial. These are very important provisions as they reduce the ability for individuals to avoid the jurisdiction of the ICC and thus theoretically increase its effectiveness as an enforcer of ICL.

102. However, Article 27(2) Rome Statute only limits immunity with respect to the ICC's exercise of jurisdiction. It is uncertain as to whether immunities would apply between states. Article 98(1) provides that the ICC cannot continue with a request for surrender if it would require a state to act inconsistently with its diplomatic immunity obligations under international law. However, it can be argued that given a purposive interpretation of the Rome Statute it would seem sensible that as between states which are parties to the Rome Statute diplomatic immunity agreements should be ignored in furtherance of an ICC request for surrender, but this would not be required between two non-state parties, or a state party and non-state party, as this would challenge the sovereign rights of non-state parties to conclude diplomatic immunity agreements.³⁰⁰ Although such a deference to such sovereign rights are necessary, it does compromise the goal of eradicating immunity and impede the effective operation of the ICC.

²⁹⁸ H.P. Kaul, 'International Criminal Court: Current Challenges and Perspectives', (2007) 6 Washington University Global Studies Law Review 575, 578

²⁹⁹ Article 27 (2) Rome Statute

³⁰⁰ D. Akande, 'The Jurisdiction of the International Criminal Court over Nationals of Non-Parties: Legal Basis and Limits (2003) 1 (3) Journal of International Criminal Justice 618, 641—*This however only applies to immunity *ratione personae*, it does not apply to immunity *ratione materiae**

(v) The ICC and Universal Jurisdiction

103. The operation of the international criminal court system and the exercise of universal jurisdiction by states are distinct means of bringing about criminal prosecutions—the legal basis for instituting criminal prosecutions is different and the processes are entirely separate. It is important to make clear that where a state is prosecuting an individual accused of committing an international crime through its domestic court system under the complementarity principle of the ICC, this is not the state exercising universal jurisdiction, but is exercising its prosecutorial function as a state party to the ICC.

104. The existence of an international criminal court was supposed to reduce the need for states to legislate for and exercise universal jurisdiction, as a central and permanent international court was supposed to take on the mantle of prosecuting and convicting those individuals that had committed crimes that were such affront to universal moral standards that they needed to be punished regardless of where the crime was committed or the nationality of the victim (such crimes are a crime against mankind and therefore the jurisdiction of the prosecution was irrelevant). However, the flaws in the operation of the ICC system leaves the door open for states to exercise jurisdiction over crimes that were committed outside of their territory and against individuals that are not state nationals.

The Prosecution of UK Military Personnel

105. UK service personnel can be prosecuted for serious violations of ICL including grave breaches of the Geneva Convention and its Additional Protocols committed during foreign military operations. UK service personnel could also theoretically be prosecuted for acts of genocide and crimes against humanity although these are highly unlikely to occur and therefore have not been given detailed consideration within this paper.

106. UK service personnel could be prosecuted for war crimes committed during armed conflicts. These crimes will usually be prosecuted by domestic military or criminal courts in the UK. The UK Geneva Conventions Act 1957, as amended in 1995, provides at section 1:

“(1) any person, whatever their nationality, who, whether in or outside of the United Kingdom, commits, or aids, abets or procures the commission by another person of a grave breach of any of the [1949 Geneva] conventions or the first [Additional] protocol shall be guilty of an offence and on conviction on indictment [shall be punished].

(2) in the case of an offence under this section committed outside of the United Kingdom, a person may be proceeded against, indicted, tried and punished therefor in any place in the United Kingdom as if the offence had been committed in that place, and the offence shall, for all purposes incidental to or consequential on the trial or punishment therefor, be deemed to have been committed in that place.

107. Furthermore, Part 5, section 51 of the International Criminal Court Act 2001 makes it an offence under domestic legislation for a person to commit genocide, crimes against humanity or a war crime. These were however already offences in existing UK legislation prior to the enactment of the International Criminal Court Act.

108. Numerous investigations have been carried out and prosecutions initiated against UK service personnel accused of having committed war crimes. Examples of this include the recent prosecution and conviction of Marine A for the murder of an injured Afghan insurgent and the prosecution of Corporal Donald Payne who pleaded guilty to a charge of inhumane treatment as a war crime under the International Criminal Court Act 2001, in 2006. The trial of Cpl Payne was the first time that a prosecution had been initiated under the International Criminal Court Act 2001.

109. A number of UK service personnel were also been referred to the Director of Public Prosecutions after investigations into whether breaches of the International Criminal Court Act 2001, namely torture and degrading treatment, had been committed in a military installation near Basra. In its 2005 Annual Statement on Human Rights the Foreign and Commonwealth Office stated that:

*“We have made it clear that we will not hesitate to act where British troops fail to uphold the high standards of behaviour set out in the Geneva Conventions and the rest of international; humanitarian law. The individuals accused of the treatment of Iraqi civilians at a humanitarian aid distribution centre near Basra in May 2003 have stood trial and those found guilty have been sentenced”*³⁰¹

110. The ICC could theoretically prosecute UK service personnel as the ICC has jurisdiction over the nationals of states that have signed the Rome Statute and the UK is a signatory of the Rome Statute. This is however highly unlikely as the ICC’s jurisdiction to prosecute UK service personnel accused of having committed international crimes, including war crimes, would only be engaged where UK courts were unable or unwilling to carry out the prosecution by way of the operation of the complementarity principle. The Secretary of State for Defence said of this in 2003 that *“it is inconceivable that the UK would ever be unable or unwilling to investigate or take appropriate action”*.³⁰²

³⁰¹ The Foreign and Commonwealth Office, Human Rights Annual Report 2005, Cm 6606, July 2005 pg 183 in http://www.icrc.org/customary-ihl/eng/docs/v2_cou_gb_rule158 (last accessed on 01 December 2013)

³⁰² Written answer by the Minister of State for Defence, Hansard, 28 January 2003, Vol. 398

111. UK service personnel could also theoretically be prosecuted by the courts in other states under the jurisdictional heads described above including universal jurisdiction and the passive personality jurisdiction. The application of these heads of jurisdiction are however controversial and it is highly unlikely that prosecutions will be initiated against UK service personnel by foreign courts. The practicalities of a foreign state detaining a British soldier in order to make them the subject of a prosecution also make such prosecutions unlikely. However, where there is proof that a British soldier may have committed a war crime it is very likely that the UK would request the release of that individual to face prosecution in the UK where the courts will have jurisdiction over the crime.

THE CHALLENGES CREATED BY MODERN CONFLICTS

112. It can be said that the nature of modern conflicts and the means by which they are fought have made it increasingly likely that breaches of ICL will occur and these breaches may give rise to criminal liability albeit only in the most exceptional circumstances. One example of this is the use of unmanned aircrafts or “drones.” The increasingly frequent and widespread use of drones by militaries as a weapon in armed conflict has given rise to a substantial amount of academic debate about their legality and particularly in respect of the propensity of their use to result in breaches of IHL.

113. It is suggested that when individuals are not controlling weapons at the scene where they are to be used it is more difficult to exercise professional judgment about the legitimacy of the target which can, for example, result in civilians being killed in the mistaken belief that they were combatants—a mistake which could have been avoided were the individual piloting the aircraft at the scene and therefore potentially better able to clarify the nature of the target and withdraw the engagement if necessary. It is unlikely that such a genuine mistake would amount to criminal liability for the individual controlling the aircraft, but there is ongoing uncertainty and academic debate as to the legality of the decision taken at senior command and policy level to deploy such weapons in combat situations. This is a complex issue given the military advantages that can be gained from using drones and cannot be explored in any further detail here.

114. The close combat nature of modern conflicts whereby combatants operate in and amongst civilians and in built up areas using homes, schools and other public facilities as places of refuge or bases from which to launch attacks makes targeting combatants whilst minimising civilian casualties very difficult. When conducting combat operations in such circumstances it is essential that every effort is made to ensure that targets are verified as enemy positions and not merely civilian infrastructure. Military strikes must also be incisive and precise and military commanders must be sure that such attacks do not amount to indiscriminate attacks on civilian populated areas and do not result in civilian casualties which are disproportionate to the military objective to be achieved.

115. The ability of the military personnel to clearly distinguish between combatants and civilians during conflicts is also made more difficult when forces are fighting non-traditional enemy armies such as insurgent or militia groups. Combatants from these groups do not always wear army uniform and can be ill equipped and as a result can be mistaken for civilians. This is a tactic used by such groups to avoid detection and also to launch ambush attacks against opposing forces. The result of this is that civilians may be mistaken for enemy combatants and such attacks may occur more frequently if soldiers are conscious that the combatants may be disguised as civilians.

116. The brutal and protracted nature of conflicts of late, including Iraq and Afghanistan in which insurgents have attacked British troops in the most horrific ways and with total disregard for the rules of engagement and without any sense of humanity, have the potential to inflict significant psychological damage on military personnel particularly where they have witnessed colleagues and friends being killed in the most awful circumstances and in the most brutal manner. This, in the most extreme circumstances, can result in acts of unlawful violence being committed against enemy forces in contravention of IHL.

117. Discussing the recent conviction of Marine A for murdering an injured insurgent in Afghanistan, Professor Michael Clarke, Director of the Royal United Services Institute, stated in an interview with the BBC that *“increasingly, the conditions of modern counter-insurgency make these events more frequent than we would like to believe and events a bit like this...do go on and it's very hard to say that this isn't somehow intrinsic to the nature of counter-insurgency on the ground”*.³⁰³

118. It is therefore essential that troops on the frontline and those who have returned from active duty and especially those who are likely to be returned in due course have access to high quality mental health and support services to ensure that those individuals who appear to vulnerable and in need of assistance have their mental health monitored to ensure that they are not put in a combat situations that they are not fit to deal with and which could lead to them committing crimes.

119. It is also essential that military personnel of all ranks continue to be provided with extensive and high quality training on the rules of engagement as well as the potential consequences of egregious breaches of those rules, so that individuals are aware of the standards that are expected of them and the consequences of choosing to disregard their responsibilities. The UK forces have a strong tradition of acting in accordance with the Geneva Conventions and IHL and individuals are provided with high quality training and education. It is

³⁰³ <http://www.bbc.co.uk/news/uk-24849048>

essential that this continues and is regularly updated to take in account the ever-changing nature of armed combat.

120. It is imperative that this training is provided to both senior commanders as well as lower ranking soldiers who are active on the frontline as both individual and tactical decisions can result in breaches of IHL and potential criminal liability under ICL. It is important to recall that senior military officials can commit war crimes by ordering attacks or military strikes that amount to war crimes even if they do not directly take part in the military operation by “pulling a trigger”.

121. It is obvious that not all of the enemy combatants that British troops will face will comply with the rules of engagement and some will have complete disregard for them. This is however not an excuse, legal or moral, for British troops to disregard the relevant rules. It is essential that British troops comply with IHL in all situations and irrespective of the enemy’s commitment and adherence to the rules of war.

122. Finally, the UK is a moral authority within the international community and this gives the UK government enormous leverage when conducting international diplomacy and contributes to our soft power. However, if British soldiers were to be known as violators of the laws of war this could have a significant detrimental impact on the UK’s external image and compromise its diplomatic power.

CONCLUDING REMARKS

123. This report has comprehensively set out the legal protections and obligations on UK armed forces personnel at home and abroad and the effects of universal jurisdiction and international criminal law.

124. When deployed at home, the armed forces are obliged to comply with domestic civil and criminal law. As agents of the state, they are also bound to comply with human rights standards and if they breach these then the government could be held accountable for this. These human rights provisions also apply extraterritorially in some situations abroad so it is important that the army use caution when acting abroad so as not to breach international human rights law unintentionally. The UK has had problems in the past with being held accountable for human rights abuses in Iraq so this is a more pressing matter for our forces than for any other state in Europe.

125. Whether deployed at home or abroad the most important obligation upon the armed forces is to comply with IHL as contained in the Geneva Conventions. When party to an armed conflict UK soldiers must respect these rules at all times and in turn it will be expected that they will be protected by them also. It is imperative that soldiers know these rules and know how and when to apply them so as to distinguish between combatants and civilians and prevent unnecessary suffering.

126. If UK soldiers breach any of these rules, they are liable to face prosecution under ICL. Any country has the potential to bring criminal proceedings against individual’s accused of having committed international crimes, including war crimes, if they have jurisdiction. The concept of universal jurisdiction means that soldiers could be indicted by any country for crimes such as genocide, war crimes and crimes against humanity and face prosecution there. The effect of this is that states no longer have to respect the sovereignty of states over their own army and could mean that the UK is denied the right to prosecute their own soldiers for any wrongdoing, unless the UK has a prior agreement with the state in question.

127. The establishment of the ICC brings forward a new basis of jurisdiction for war crimes, crimes against humanity, genocide and, in the future, aggression. UK soldiers are however unlikely to be the subject of an ICC prosecution as the UK will always be able and willing to prosecute soldiers who are accused of committing international crimes. This does not however mean that the ICC should be ignored completely. Our soldiers are bound to comply with the provisions in the Rome Statute and if they breach them, they could face individual criminal charges.

128. Finally, the modern nature of armed combat including close-combat and counter-insurgency has created new challenges for military personnel in respect of complying with IHL and has made it more likely that war crimes will be committed during combat. It is therefore important that the training on IHL and ICL that UK military personnel receive is updated to take account of the ever changing challenges and difficulties that service personnel will face whilst on active duty. Regular and comprehensive training will serve to ensure that the propensity for breaches of IHL to occur is limited to the greatest possible extent.

129. This concludes the Humanitarian Intervention Centre’s report on ensuring legality and legitimacy for UK armed forces personnel in future operations. The Centre would like to highlight the importance of ensuring compliance with the Geneva Conventions, international human rights law and international criminal law when developing a new legal framework for future operations.

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EXECUTIVE SUMMARY

This submission is not intended to be comprehensive and does not seek to examine all possible and relevant issues from (international) law and policy perspectives. It is focused instead primarily on four areas of particular concern, as follows.

Broader contexts of the relationship between human rights obligations and security imperatives:

- The UK's heritage is at the forefront of the development of international human rights standards, and should not be forgotten. Specifically, in the aftermath of World War II, the UK participated in the drafting of the European Convention on Human Rights (ECHR)—a document considered necessary for civilised nations to live in peace through abiding by minimum human rights standards.
- There has however been a discernible trend recently by the UK Executive (regardless of party affiliation) and its adherents to blame human rights obligations for unduly hindering the Executive's ability to respond effectively to security imperatives. This trend is illustrated by the emotive terms utilised by the Executive following court rulings adverse to the Government on human rights issues. As a consequence, concerning proposals have been aired, ranging from derogating or withdrawing from the ECHR, to repeal of the Human Rights Act 1998 and its replacement with a British bill of rights, potentially diluting human rights standards and permitting lower standards of executive accountability.
- Nonetheless, the ECHR and International Covenant on Civil and Political Rights 1966 (ICCPR) were each drafted in contexts of security situations, and thus have inbuilt mechanisms to accommodate legitimate security imperatives. The “language of balancing”—arguments that the more significant the security threat the more justifiable it is to depart from established principles and standards—which is so evident in some UK policies and practices, continues to be robustly rejected by the European Court of Human Rights (ECtHR), and should be avoided to prevent human rights violations.

Impact of international human rights law on overseas military operations:

- The potential reach of the recent Supreme Court decision in *Smith and Others* [2013] should be kept in perspective. The Court reiterated key principles: a state may only be found to be exercising extra-territorial jurisdiction under the ECHR in exceptional circumstances; the scope of an extra-territorial right is limited. In *Smith and Others*, the Court extended Article 2 ECHR right to life obligations to the planning phase and conduct of military operations during an armed conflict only to the extent realistic and proportionate, with states enjoying a wide margin of appreciation (ie discretion); further, it noted that while combat immunity does not extend to earlier training and preparation phases (to the extent realistic and not excessively burdensome to battlefield decision-makers), combat immunity does apply to actual or imminent armed conflict.
- Regarding the extent to which international human rights obligations could impact operational decision-making, these largely civil obligations reside with states (exercised through their agents including military commanders), and thus are determined by Government, particularly the Executive and Treasury. There is in fact no personal civil liability for individual military/civilian commanders. Battlefield commanders may only have personal criminal liability under international humanitarian and criminal law, eg, for ordering or allowing the commission of war crimes.

Possible derogation from ECHR provisions:

- The ECHR is a significant benchmark for measuring a state's human rights compliance as well as legitimacy in various matters. Unfortunately, *Smith and Others* has blurred the debate, leading to suggestions that derogating from the ECHR poses a possible “solution”. Article 15(2) ECHR, however, does not permit derogation (ie temporary suspension) from the Article 2 ECHR right to life except in relation to “death resulting from lawful acts of war”, which was not the basis of the decision in *Smith and Others*. Therefore, blanket derogation would not achieve the objective of limiting or preventing the extra-territorial reach of the ECHR and/or of the consequential civil liability of the UK Government.
- Significantly, other Contracting Parties to the ECHR face similar security imperatives as the UK, and presumably also civil liability issues, yet have not derogated from their obligations.
- More generally, depending on the scope, length, etc, of even those derogations permitted pursuant to Article 15 ECHR in the context of service personnel deployed overseas, there is always the risk that what should in fact be limited, exceptional measures could become the norm, particularly in the context of a “war against al Qaeda” which has no foreseeable end.

Far-reaching implications of UK withdrawal from the ECHR:

- An alternative method suggested by some of avoiding liability as in the case of *Smith and Others* is to withdraw entirely from the ECHR. This would undoubtedly have a significant impact however, not only on the UK's international standing in human rights matters, but also upon its international standing more generally. Specifically, the potential consequences of withdrawal from the ECHR could adversely shape the future political, economic, legal, etc, standing of the UK within the international community for decades to come, including its strategic identity and partnerships, whether more closely aligned to Europe, or to the US.
- While being a Contracting Party to the ECHR does not appear to be an explicit requirement of membership of the Council of Europe, withdrawal from the ECHR by an existing Contracting Party is quite without precedent; it is very difficult to see how withdrawal would be compatible with the Council's underpinning principles, goals, and membership criteria.
- In turn, regarding EU membership, being a Contracting Party to the ECHR today appears to form an important integral element of EU governing principles, particularly since the coming into force of the Lisbon Treaty in late 2009. There is also no precedent of any EU Member State having sought to withdraw from the EU. That said, it is likely—in the absence of express, countervailing political or legal policies or obligations—that the ECHR now forms such a core element of the EU's constitutional principles that it is an indivisible requirement of EU membership. The ultimate test of such a proposition may yet require a ruling from the EU Courts, but such potentially wide reaching implications of withdrawal from the ECHR should be considered.

SUBMISSION

Introduction

1. The current submission does not intend to be comprehensive in terms of seeking to consider all potentially relevant issues. Instead it identifies and focuses on four key issues which fall within the inquiry's remit of particular concern to the author: the broader contexts within which perceptions of human rights obligations, particularly by the Executive, are often located; the impact of international legal obligations upon operational decision-making; the possible implications of derogating from the European Convention on Human Rights 1950 (ECHR), in whole or in part, during deployed operations by UK Armed Forces; and the possible consequences if the UK were no longer a Contracting Party to the ECHR.

Current Contexts: Perceptions of Human Rights Obligations

2. In recent years, there have been a number of criticisms regarding the reach and effect of the UK's human rights obligations, created in part by a minority of high profile judgments of the UK's higher courts and the European Court of Human Rights (ECtHR). More specifically, in the context of responding to national and international security imperatives, there has been a discernible trend by especially the Executive arm of Government (regardless of its political affiliation), together with a range of other proponents, to blame international human rights obligations³⁰⁴ for unduly hindering the ability of Governments to respond effectively to security. This is clearly illustrated by intense frustrations created by over a decade of court cases and negotiations to deport the radical Muslim cleric, Abu Qataba, to Jordan to face trial for terrorism charges, which involved considerable financial costs (an estimated £1.7 million),³⁰⁵ manpower time, as well as embarrassment for the Executive. Eventually, Abu Qataba was deported to Jordan on 7 July 2013 to face a retrial on terrorism charges, once a legally binding agreement had been reached between the UK and Jordanian Governments that evidence obtained by torture would not be relied upon in Jordanian court proceedings against him.³⁰⁶

3. Such criticisms of international human rights obligations are commonly couched in emotive language, such as the ECHR being a "weapon" that can be deployed against the Government, including against the Ministry of Defence, by those UK or foreign nationals claiming the violation of particular rights during deployed military operations.³⁰⁷ These have resulted in various suggestions being made ranging from the UK repealing the Human Rights Act 1998,³⁰⁸ derogating from some of its obligations under the ECHR during deployed operations, or even leaving the ECHR altogether. (On the latter two points, see paras 16–23, and

³⁰⁴ For the current purposes, the term "international human rights law" refers to the UK's obligations under the European Convention on Human Rights 1950 (ECHR), the International Covenant on Civil and Political Rights 1966 (ICCPR), and customary international law.

³⁰⁵ "Abu Qataba deported from UK: Radical cleric lands in Jordan after being deported from Britain following decade-long battle to remove him", *The Guardian* 7 July 2013.

³⁰⁶ *Ibid.*

³⁰⁷ See, eg, T Tugendhat and L Croft, "The Fog of Law: An introduction to the legal erosion of British fighting power" (Policy Exchange, London 2013) 17; others terms like "legal siege" (p 14) are also used.

³⁰⁸ This would be a significant retrospective step, effectively subjecting people in the UK to the same challenges that were at the forefront of arguments and efforts to introduce the Human Rights Act Bill: such as the length of legal proceedings and costs which are beyond the reach of most citizens (para 1.14); unacceptability that "someone should be the victim of a breach of the Convention standards by the State yet cannot bring any case at all in the British courts" (para 1.16); and fact that "[a]lthough the United Kingdom has an international obligation to comply with the Convention, there at present is no requirement in our domestic law on central and local government, or others exercising similar executive powers, to exercise those powers in a way which is compatible with the Convention." (para 2.2) in "Rights brought Home: The Human Rights Bill", White paper (October 1997), <http://www.archive.official-documents.co.uk/document/hoffice/rights/rights.htm> accessed 25 November 2013.

24–29 respectively). For example, following the eventual deportation of Abu Qataba, the Home Secretary, Theresa May, expressed her intention to review and change existing human rights legislation, such as the many layers of appeals available to foreign nationals the Executive wishes to deport. She further expressed her intention to examine *all options* to prevent the recurrence of such a scenario and what she termed “the crazy interpretation of our human rights law” by the courts, including the possible withdrawal from the ECHR itself (one immediate effect of which would be to prevent the ECtHR from having any jurisdiction over the UK and the judgments of its courts), and possible repeal of the Human Rights Act 1998. Similar sentiments have been expressed by Prime Minister Cameron and Secretary of State Grayling, namely to make it part of the Conservative Party’s next election manifesto that the current Human Rights Act be repealed and replaced with a British bill of rights. Comments made in this regard suggest lesser standards of protection for those persons believed to pose a threat to national security.³⁰⁹ This submission highlights some of the possible consequences that would result from such courses of action.

4. The frustrations and accompanying realities, including the significant financial implications of related litigation, together with sometimes obscure or inconsistent judgments on key legal principles—notably in the current context regarding the exact parameters of the extra-territorial reach of the ECHR³¹⁰—are fully recognised. Nevertheless, such discourse, often influenced by heightened emotions, is deeply concerning from a rule of law perspective at multiple levels. First, great care should be taken not to vilify fundamental human rights that have been a force for much good, not only in appropriately protecting individual fundamental human rights, but also in *ensuring appropriate levels of accountable Government as a cornerstone principle for any democratic Government*. Even at the national level, while the Executive has often criticised the Judiciary for constraining their activities in relation to how particular security imperatives are being met,³¹¹ this is the hallmark of a functioning democracy, namely the appropriate separation of powers between the Executive, Judiciary, and Legislature which allows the exercise of power to be scrutinised and where necessary checked. It would be contrary to fundamental constitutional principles for the Judiciary to be overly constrained in this critical role, a practice which is generally associated with repressive and authoritarian regimes. Indeed, the Judiciary is often deferential in its review of Executive policies and practices on security related matters, recognising that the Executive is best placed in terms of being more fully appraised of all relevant considerations, thereby allowing it considerable discretion.³¹²

5. Nor should the context in which the ECHR (and similarly the International Convention on Civil and Political Rights 1966 (ICCPR)) was negotiated, and the UK’s key role in those negotiations, be forgotten. The ECHR was drafted and subsequently adopted as an international treaty in the aftermath of World War II as part of the efforts of the Allied Forces to build a durable civilisation within Europe based on democratic principles. The UK was a major player in terms of drafting the text of the ECHR as well as being among the first group of Contracting Parties to sign then ratify it in 1951. While the interpretation and reach of the ECHR as a “live instrument” have developed significantly since its creation, sometimes in unexpected ways, nevertheless its founding objective of articulating minimum common human rights principles and standards was believed to be necessary in order for nations to exist peaceably alongside each other, as remains true today. Furthermore, as is examined in more detail below (paras 16–23), the ECHR has inbuilt mechanisms for Contracting Parties to respond to security threats.

6. One other important contextual matter should be mentioned here, namely the discernible wider trends regarding the UK’s responses to terrorism and counter-terrorism. An inherent tension exists between the critical need for governments to respond effectively to terrorist threats and activities—itself a fundamental human rights obligation residing upon states to provide adequate levels of protection in their territories—and their continuing respect of applicable international law obligations.³¹³ Commonly, national policies and practices, including those of the UK, can reflect the belief that the more serious the perceived security threat, sometimes anecdotally referred to as the “ticking bomb” scenario, the greater the justification not fully to comply with certain established human rights law obligations. Such arguments of permissibility have been made even with respect to the breach of absolute, non-derogable obligations, typically the prohibition against torture, including by the UK.

7. This is clearly illustrated by the case of *Chahal v United Kingdom*,³¹⁴ which was concerned with the principle of *non-refoulement*, namely the obligation under international law that an individual may not be returned to their country of origin where there is a credible risk of torture or ill treatment (sometimes death

³⁰⁹ Eg Chris Grayling has stated that; “I cannot conceive of a situation where we could put forward a serious reform without scrapping Labour’s Human Rights Act and starting again....We cannot go on with a situation where people who are a threat to our national security, or who come to Britain and commit serious crimes, are able to cite their human rights when they are clearly wholly unconcerned for the human rights of others.” R Mason, “David Cameron eyes Human Rights Act repeal”, *The Guardian* (8 August 2013).

³¹⁰ Particularly pre and post the ECtHR decision in *Bankovic Banković v Belgium* (Application No. 52207/99) (2007) 44 EHRR SE 5.

³¹¹ Yet, on the other hand, “cites judicial oversight as justification of extensions of state surveillance and control”—“Abu Qataba’s deportation is a victory for the British judicial process”, *The Guardian*, 8 July 2013.

³¹² On such themes see further, eg, KLH Samuel, “The Rule of Law Framework and its *Lacunae*: Normative, Interpretative, and/or Policy Created?” in A.M. Salinas de Friás, K.L.H. Samuel, and N.D. White (eds.), *Counter-Terrorism: International Law and Practice* (Oxford University Press, 2012) 14–53.

³¹³ In addition to international human rights law other sources of key obligations are the UN Charter, international humanitarian law, international and domestic criminal law, and international refugee law.

³¹⁴ *Chahal v United Kingdom* (Application No 22414/93) 23 EHRR 413, para 80.

may result). The ECtHR, together with other international courts and bodies, have determined that the principle of *non-refoulement* is underpinned by the prohibition against torture.³¹⁵ Consequently, the principle of *refoulement* is similarly prohibited absolutely—and cannot be derogated from, even in times of public emergency or armed conflict.³¹⁶ Despite this, in the case of *Chahal* the UK sought to argue for dilution of such absolute human rights obligations on national security grounds. The ECtHR was robust and emphatic in both this and subsequent cases³¹⁷ in rejecting any suggestion that it is permissible for states to prioritize or balance national security interests over or against the individual right to be protected from *refoulement* if the risk of torture or ill treatment after removal exists.

8. Despite this unequivocal rejection of any suggestion of balancing, the UK has persisted in such a line of argument, illustrated by the more recent case of *Saadi v Italy*,³¹⁸ in which case the UK was one of several Contracting Parties to the ECHR that made a third party intervention in this case.³¹⁹ Once again the UK, together with the other Contracting Parties, sought to persuade the ECtHR to reconsider the absolute approach iterated in *Chahal v United Kingdom*³²⁰ to one of balancing national security (including the level of threat) against, *inter alia*, Article 3 ECHR prohibition against torture, due to the nature of the prevailing terrorist threats.³²¹ Nonetheless, consistent with its earlier approach in the case of *Chahal*, the Court was “emphatic in recognizing the difficulties states face in countering terrorism, but categorical in its rebuke of the notion that there are exceptions to the absolute nature of the prohibition of torture or ill-treatment or any room for balancing”.³²²

9. It is of the utmost importance to the current inquiry that the significance of such case law, particularly the arguments made by Contracting Parties, is fully grasped. It is suggested here that such arguments are reflective of broader trends, policies, and practices by the UK Executive in response to security imperatives, which are most concerning particularly from a rule of law perspective. As one well respected practitioner has commented, such interventions “arguably reveal a shift in the approach to rights protection by certain states at least, and a questioning and undermining of even the most sacrosanct human rights protections”.³²³ Suggestions made that the Human Rights Act should be repealed, that the ECHR should be derogated from during military deployments, or that the UK should no longer be a Contracting Party to the ECHR, should all be understood within the context of these broader trends. Not only do they seek a dilution of fundamental human rights protections, but perhaps even more significantly, a reduction in the available checks, restraints, and mechanisms that ultimately ensure more accountable government, which is so crucial to the maintenance of the rule of law within a democratic state.

Impact of extra-territorial reach of international legal obligations upon operational decision-making

10. There are many different issues that can arise in relation to how the term “jurisdiction”, stated in Article 1 ECHR, is interpreted with respect to the extra-territorial reach of specific ECHR rights and obligations for a Contracting Party, not least the complexity of the interpretative approaches that have been adopted by the ECtHR itself.³²⁴ Most recently, these issues arose for the UK in the case of *Smith and others v Ministry of Defence*.³²⁵ This case concerned claims brought under common law negligence, as well as on the basis of a breach of the Article 2 ECHR right to life, owed to British troops deployed abroad who were killed while on active duty in Iraq due to a claimed failure on the part of the Ministry of Defence to take adequate protective measures to protect their right to life under Article 2. The Supreme Court held that the deceased soldiers came within the UK’s jurisdiction for the purposes of establishing jurisdiction under Article 1, thereby opening up the possibility for a court to find on the facts that their right to life under Article 2 was violated at the time of their death. In addition, the Court held that Article 2 claims should stand and not be struck out on the ground of the defence of combat immunity or because it would be unfair, unjust or unreasonable to impose a duty of care.

³¹⁵ Eg Article 3 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984 is one of the few international instruments expressly prohibiting *refoulement*, thereby making a clear link between it and the prohibition against torture.

³¹⁶ The prohibition against torture is a norm of *jus cogens* ie highest category of non-negotiable, non-derogable international obligation which also exists under customary international law, therefore does not require a state to be party to a human rights treaty prohibiting torture, though most states now do. Since the principle of *non-refoulement* is underpinned by the prohibition against torture, it is possible that it too has *jus cogens* status. See further, eg, *Al-Adsani v United Kingdom* (Application No 35763/99) (2002) 34 EHRR 11, paras 60–1.

³¹⁷ See, eg, *N v Finland* (Application No 3885/02) (2006) 43 EHRR 12, para 159; *Saadi v Italy* (Application No 37201/06) ECtHR Judgment of 28 February 2008, para 138.

³¹⁸ *Saadi v Italy* (n 14) inc paras 139, 141.

³¹⁹ Third party interventions were similarly made in the case of *Ramzy v The Netherlands* (Application No 25424/05) submitted 15 July 2005, though the case was subsequently discontinued before judgment.

³²⁰ *Chahal* (n 11).

³²¹ See *Saadi v Italy* (n 14) paras 137–9. See further H Duffy, “Human Rights Litigation and the “War on Terror”” (2008) 90 IRRC 573, 585; D Moeckli, “Saadi v Italy: The Rules of the Game Have Not Changed” (2008) 8 HRLR 534, including 541–7.

³²² Duffy (n 18) 586.

³²³ Duffy (n 18) 586.

³²⁴ See fn 7.

³²⁵ [2013] UKSC 41. [No 2] (*Smith and Others* [2013]). Significantly, the Supreme Court in this case reversed its earlier ruling in *Smith* [No 1] in which it found that the applicants were not within the UK’s jurisdiction in the light of the subsequent judgment by the ECtHR in the case of *Al-Skeini and others v United Kingdom* (Application No 55721/07) ECtHR 7 July 2011 even though technically the *Al-Skeini* judgment (which involved claims of Iraqi nationals) did not directly compel such a reversal.

11. Understandably there is concern that this case may open the floodgates to future litigious claims by the relatives of service personnel killed during deployed operations. While this judgment may well pave the way for some more successful claims in the future, it is important to keep the potential reach of this case within perspective, not least since the Supreme Court itself was at pains to reiterate established legal principles that limit the circumstances in which successful claims may be brought in similar circumstances. First, the Court referred to the principle that a state may only be found to be exercising extra-territorial jurisdiction *in exceptional circumstances*. Therefore, the normal presumption regarding the applicability of ECHR rights and obligations that exist in a state's own territory is not often applicable extra-territorially.³²⁶ Second, the Court stated that the rights afforded under the ECHR are divisible from each other. Consequently, their application can be tailored to the particular circumstances of any claimed extra-territorial violation(s).³²⁷ Significantly too, the Court recognised that *the scope of an extra-territorial right is limited*. In *Smith and others* [2013], the positive obligations under Article 2 could only be imposed in relation to the planning phase and conduct of military operations during an armed conflict to the extent that these were *realistic and proportionate*.³²⁸ On such matters, the Court further reiterated that a state enjoys a *wide margin of appreciation* (ie, discretion) as to how it exercises its political judgment. Therefore, a positive obligation such as under Article 2 ECHR can only arise where it is *reasonable* to expect its protection, which will depend on the individual circumstances of each case.³²⁹ Significantly, the Court further held that *the doctrine of combat immunity still applies to actual or imminent armed conflict*. In contrast, the Court found that the doctrine does not extend to the earlier training and preparation phase of military operations, whether pre-deployment or in theatre, during which a state is expected to take *all precautions that are reasonable in the circumstances*.³³⁰ Even here the Court was cautious *not to impose any duties on a state that would be unrealistic or excessively burdensome to decision-makers on the battlefield*, mindful of the unpredictable nature and inherent risks associated with armed conflict.³³¹

12. It is equally important at this juncture to examine whether and how international law obligations may impact directly or indirectly on the operational decision-making and effectiveness of the deployed military commander, as a central concern of the current inquiry. With respect to its direct application, generally human rights obligations reside with states, not individuals. Though the actions of individuals acting as agents of the state, including military commanders,³³² can violate human rights obligations and result in *civil liability on the part of the state*, for example, to pay remedies to the victims or their relatives, *under international human rights law no personal civil liability exists for individual military commanders*. The only potential direct liability here is a *criminal* one where, for example, an act of torture has been committed due to the obligation upon States Parties (which includes the UK) to the Convention against Torture 1984,³³³ that acts of torture be legislated for as criminal offences under their domestic law.

13. Consequently, it is respectfully submitted that the extent to which human rights law obligations, which are civil in nature, may impact upon operational decision-making is indirect only. *The extent and manner in which they do are primarily determined by political (which can include the "CNN" effect) and economic rather than legal factors driven by the Executive and the Treasury respectively*. This is not in any way to diminish the importance or significance of such determinations. Instead, its aim is to distinguish clearly between what is directly attributable to international human rights obligations, and what is attributable to governments in terms of the policies and practices they develop. It is the latter, rather than international law obligations, that determine whether, how, and to what extent judicial decisions such as *Smith and others* [2013] may impact on operation decision-making in the future.

14. In contrast, the primary international law obligations that may impact directly upon operational decision-making, and which should be a primary concern of any military (or civilian) commander, are those provided for under international humanitarian law and international criminal law. The former comprises the four Geneva Conventions 1949, Additional Protocols I and II 1977, together with various Hague and other Conventions regarding the means and methods, including particular types of weapons, etc, utilised during times of international and non-international armed conflict. The laws and customs of armed conflict also include and incorporate what are acceptable baseline human rights protections.³³⁴ International humanitarian law is interconnected with international criminal law. Consequently, specific violations of international humanitarian law—for example, grave breaches of the Geneva Conventions,³³⁵ or other serious violations of the laws and customs applicable in international or non-international armed conflict³³⁶—may amount to crimes under

³²⁶ *Smith and Others* [2013] para 46.

³²⁷ *Ibid* paras 48, 77.

³²⁸ *Ibid* para 76.

³²⁹ *Ibid* para 76.

³³⁰ *Ibid* para 95.

³³¹ *Ibid* paras 99–100

³³² Eg in *Smith and Others* [2013] (n 22) the Court referred to the armed forces of a state as its agents due to the control it exercises over them. In turn, that authority and control of a state is exercised throughout the military chain of command as agents of the state (para 50).

³³³ Article 4 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment to which the UK has been a State Party since 1988.

³³⁴ See, eg, Common Article 3 to each of the Geneva Conventions, which articulates the minimum standard of obligations applicable to situations of non-international armed conflict; the standards applicable in situations of international armed conflict are more detailed.

³³⁵ Eg Article 8(2) Rome Statute 1998 commission of wilful killing, or torture and inhumane treatment.

³³⁶ Eg Articles 8(2)(b) and (c) Rome Statute 1998.

international criminal law, normally war crimes³³⁷ or crimes against humanity.³³⁸ A military commander may incur individual criminal responsibility directly, for example by personally committing, ordering, or facilitating the commission of an international crime;³³⁹ or indirectly, for example by failing in his responsibility to prevent the commission of crimes by his subordinates.³⁴⁰ While these provisions are of great importance, they are not generally ones which impact upon the day to day decision-making of a military commander or the operational effectiveness of a well-trained, disciplined army.

15. It is therefore also of the utmost importance to the current inquiry that the significance of the distinction between civil and criminal liability, and the distinction between the obligations of international human rights law and international humanitarian law, are both correctly understood and kept fully in mind when considering the impact of legal extra-territoriality on operational decision-making.

Proposal and effects of derogation from the ECHR during deployed operations, and potential implications thereof

16. As was noted earlier in this submission, serious proposals have been made that the UK should derogate from at least some provisions of the ECHR during deployed military operations. One of the principal motivating factors has been the concern to prevent the extra-territorial reach of domestic obligations under the ECHR, as was found by the Supreme Court to be in the case in *Smith and others* [2013]. This is to prevent or at least to reduce the circumstances in which a civil claim may be brought by or on behalf of wounded or killed service personnel engaged in overseas operations, thereby reducing the associated financial burden to the Ministry of Defence/Treasury. The discussion here focuses on the international law implications of such suggestions.

17. The first observation is that, as was explained earlier (para 5), the ECHR as well as its international equivalent, the ICCPR, were drafted to enable legitimate security imperatives to be met in a manner not undermining fundamental human rights protections. Consequently, both treaties have inbuilt mechanisms³⁴¹ to deal with exceptional situations such as war or other forms of public emergency threatening the state. The relevant provision of the ECHR is Article 15 which in such circumstances permits a Contracting Party to “take measures derogating from its obligations under the Convention”. The ability to derogate, however, is subject to a number of constraints in order to prevent its misuse by the Executive. Under Article 15(1), any related measures must be “strictly required by the exigencies of the situation”;³⁴² and must not be inconsistent with other international obligations.

18. Article 15(2) then states that “[n]o derogation from Article 2 [right to life], except in respect of deaths resulting from lawful acts of war, or from Articles 3 [prohibition against torture, inhuman or degrading treatment or punishment], 4 (paragraph 1) [prohibition against slavery and servitude] and 7 [no punishment without law] shall be made under this provision”.³⁴³ *This means that regardless of the perceived gravity of a particular security situation, these rights are regarded as so fundamental that they may never be diluted or suspended*, reflecting the consensus of all of the states involved in drafting and subsequently ratifying the ECHR, including the UK. With respect to Article 2, it is important to note that the Supreme Court in *Smith and others* [2013] limited the provision’s potential extra-territorial reach to death sustained due to a breach of the Ministry of Defence’s duty of care in the context of training and procurement, which it distinguished from an active combat situation—“death resulting from lawful acts of war” under Article 15(2) ECHR. Therefore, even if the UK were to derogate from Article 2 to the extent permissible under Article 15(2), it would not achieve the objective of limiting or even preventing the possibility of civil liability arising in circumstances similar to those in *Smith and others* [2013].³⁴⁴ Nor would general principles of international law applicable to treaty-making permit a Contracting Party to make a reservation to or suspend a treaty provision categorised as non-derogable (in the current case, those specified in Article 15(2) ECHR) since such a reservation or suspension would almost certainly be considered an act “defeat[ing] the object and purpose of the treaty”.³⁴⁵

³³⁷ Eg Article 8 Rome Statute 1998.

³³⁸ Eg Article 9 Rome Statute 1998 extermination and torture.

³³⁹ Eg Article 25 Rome Statute 1998.

³⁴⁰ Eg Article 28 Rome Statute 1998 where the military commander knows or ought to have known in particular circumstances that his forces were committing or about to commit crimes; and failed to take all necessary and reasonable measure to prevent them.

³⁴¹ Article 15 ECHR; Article 4 ICCPR.

³⁴² The ECtHR has established that for a state of emergency to be justified, three conditions are necessary: an exceptional situation of crisis or emergency must exist; which affects the whole population; and which constitutes a threat to the organized life of the community. See eg *Lawless v Ireland (No 3)* (App No 332/57) ECtHR Judgment 1 July 1961 para 28. Other key principles are that any measures are proportionate to the threat triggering them; necessary; and for the minimum time absolutely necessary.

³⁴³ Similarly, Article 4(2) ICCPR does not permit derogation from: article 6 (right to life); article 7 (prohibition of torture, cruel, inhuman, degrading treatment); article 8 (1) and (2) (prohibition against slavery and servitude). Additionally, the ICCPR does not permit derogation from article 11 (no one may be imprisoned merely on the ground of inability to fulfil a contractual obligation); article 15 (*nullum crimen, nulla poena sine lege*); article 16 (everyone has the right to recognition everywhere as a person before the law); article 18 (freedom of thought, conscience and religion).

³⁴⁴ Certainly this was the view of Lord Hope in *Smith and Others* [2013] paras 59–61, who dismissed the utility, together with appropriateness, of any derogations permitted under Article 15 to resolve the kinds of issues that were before the court. Even in the case of the deportation of Abu Qataba, derogation would not have assisted since the principle of *non-refoulement* is underpinned by the non-derogable principle prohibiting torture which exists both in other treaties as well as in customary international law.

³⁴⁵ See, eg, Article 18 Vienna Convention on the Law of Treaties 1969 (though technically not in force at the time the ECHR was drafted or came into effect); more specifically Article 57(1) ECHR: “...Reservations of a general character shall not be permitted”.

19. Furthermore, if the UK were to seek to derogate from any provisions permitted by Article 15, it would need to ensure that any related measures were not “inconsistent with other international obligations” as required by Article 15(1). Consequently, it would need to suspend any parallel obligations existing under other international human rights treaties to which the UK is a State Party, notably those of the ICCPR. Additionally, it should be noted that the UK would remain bound by some of the international obligations specified as non-derogable in Article 15(2)—notably those of Articles 3 and 4—even if it was not a State Party to the ECHR and ICCPR. The reason for this is that the prohibitions against torture and slavery fall within a special category of international law principles, *jus cogens*, that are not only the highest category of protection afforded under international law, but also exist under customary international law. The resultant obligations are binding on all states regardless of consent and are thus not dependent upon the existence of parallel treaty obligations. Significantly too, this means that the UK can never limit its potential liability under international law for such practices as the utilisation of any “coercive interrogation” techniques amounting to torture; nor for any involvement such as complicity in practices such as extraordinary rendition, both of which have been features of counter-terrorism responses since the 9/11 terrorist attacks.

20. Several further, more general, observations may also be made here regarding the permissibility of derogations under the ECHR. One relates to the proposed scope of any such derogations, in particular whether they would apply to all overseas deployments of military personnel in response to a security imperative whether or not falling into the category of an armed conflict. If this were the case, then potentially the UK would risk any derogations becoming permanent in practice since some contingent of UK military personnel—be they Royal Navy/Marines, Army, or Royal Air Force—is always deployed overseas. This could risk becoming tantamount to a permanent state of emergency, through the normalization of what should be an exceptional, limited measure of derogation,³⁴⁶ a practice normally associated with non-democratic, authoritarian and/or repressive regimes. Certainly, as the Parliamentary Human Rights Joint Committee noted in its 2009–10 session in the context of counter-terrorism, the Government “has never relinquished its assertion that there is a public emergency threatening the life of the nation” since 9/11.³⁴⁷ Nor is the situation believed to have changed since the “war against terror” became the “war against al Qaeda, which does not look like ending any time soon despite the change of political party in 2010,

21. Another relates to the perceived “necessity” of any permitted suspensions, particularly in light of what other Contracting Parties to the ECHR deem necessary in the interests of national security. A case in point was the UK’s unilateral derogation on 18 December 2001 from Article 5 ECHR right to liberty (and parallel obligations under Article 9 ICCPR) in response to 9/11 in order to enact Part IV of the Anti-Terrorism, Crime and Security Act 2001 authorising the indefinite detention of foreign nationals suspected of having committed terrorist crimes.³⁴⁸ Significantly, the UK was the only Contracting Party to consider derogation necessary. For example Spain—which was dealing with national terrorist threats attributable to ETA, and those posed by al Qaeda particularly following the Madrid bombings in 2004—did not consider such derogation to be necessary. Not even states with far weaker human rights records—such as Russia which similarly has had to respond to national security threats attributable to its conflict with Chechnya as well as to al Qaeda—have attempted to make any formal derogations from the ECHR.

22. In turn, derogation is inseparably linked to the UK’s international legitimacy, including the perception thereof, on human rights matters. Ultimately, despite its inherent limitations and weaknesses—some of which have been considered here—upholding the ECHR remains the principal benchmark against which states within the geographical regions of the Memberships of the Council of Europe and European Union (EU) are assessed in terms of their compliance with international human rights standards. The power of perspective and reputation as a human rights compliant nation should not be underestimated. For example, with respect to the Abu Qataba case, the ECtHR’s spokesman at the time of the former’s deportation back to Jordan commented that the case was “a victory for due process and for human rights”.³⁴⁹ Despite the many and diverse sources of frustration, ultimately the UK chose to abide by its international human rights obligations to ensure that even suspected terrorists such as Abu Qataba would be afforded fundamental human rights guarantees,³⁵⁰ retaining its own legitimacy to speak out on human rights matters including violations by other states in such circumstances.

³⁴⁶ This is a term coined by the Eminent Jurists Panel on Terrorism, Counter-Terrorism and Human Rights in its report that warned of the undermining effect of open-ended suspensions of or departures from normal procedures (eg introduction of special measures) to respond to a temporary crisis and potential of their becoming permanent—International Commission of Jurists Report “Assessing Damage: Urging Action: Report of the Eminent Jurists Panel on Terrorism, Counter-Terrorism and Human Rights” (2009) 47, http://www.un.org/en/sc/ctc/special_meetings/2011/docs/icj/icj-2009-ejp-report.pdf accessed 12 December 2013.

³⁴⁷ Human Rights Joint Committee, “Counter-Terrorism Policy and Human Rights (Sixteenth Report): Bringing Human Rights Back In” (Session 2009–10) para 11.

³⁴⁸ The UK withdrew its derogation on 14 March 2005 following the decision of the House of Lords in the “Belmarsh detainees case” that the derogation under Article 15 was incompatible with the ECHR on the ground that it discriminated between UK nationals and non-nationals by permitting preventive detention in relation to non-nationals only—“*Belmarsh detainees case*” [2005] UKHL 71. This decision was subsequently reviewed by the Grand Chamber of the ECtHR in *A and others v United Kingdom* (Application No. 3455/05, ECtHR 19 February 2009), which agreed with the decision of the House of Lords that the preventive detention scheme under review violated Article 5 ECHR. It is notable that the ECtHR did “not accept the Government’s argument that Article 5(1) permits a balance to be struck between the individual’s right to liberty and the State’s interest in protecting its population from terrorist threat”. (para 171).

³⁴⁹ “Abu Qataba’s deportation is a victory for the British judicial process” (n 8).

³⁵⁰ “Abu Qataba’s deportation is a victory for the British judicial process” (n 8).

23. The final point concerns the wider contexts and trends discussed in the first section of this submission, within which contextualised discussions and practices concerning derogations from ECHR (or parallel ICCPR) obligations should be understood. These include concerns regarding any Executive intentions to reduce existing levels of public scrutiny and accountability for the government's responses to security imperatives, as have been central concerns for the Human Rights Joint Committee. For example, in its 2009–10 Report it further noted that:

From time to time the possibility of derogating from the UK's obligations under the European Convention on Human Rights is raised, including by Government ministers, usually in the wake of a significant Court decision which goes against the Government's interpretation of the Convention [eg in the wake of the decision of the House of Lords in the *Belmarsh* case³⁵¹]......Although there has been no derogation from the Convention by the UK since the House of Lords held the 2001 derogation from the right to liberty in Article 5 ECHR to be incompatible with the Convention, the risk of one being proposed by the Government in response to a Court decision it does not like is ever-present.....³⁵²

Consequently, the Joint Committee recommended "a clear statutory framework for future derogations from the ECHR, ensuring proper opportunities for parliamentary scrutiny, [to] be treated as an urgent priority in the next Parliament....to hold the executive to account in an area of policy where proper democratic scrutiny for justification is vital but all too often lacking".³⁵³ This has yet to come into being.

Possible consequences if the UK were no longer a Contracting Party to the ECHR

24. This final section examines what possible consequences may follow any withdrawal by the UK from the ECHR, which is an alternative option being mooted by some. It is crucial that these possible consequences are clearly identified and understood early on in any related discussions and debates. Any withdrawal is likely to have a significant impact not only on the UK's international standing on human rights matters, but also upon its international standing more generally. Ultimately, these issues are inseparable from wider decisions regarding whether, and if so how, the UK wishes to retain its European identity and status, or indeed whether it wishes to distance itself further from European allies to align itself closer with US policies and practices. Specifically, this section examines two critical questions within the issue: whether an indivisible, automatic consequence of withdrawing from the ECHR means no longer being a Member (a) of the Council of Europe, and (b) of the EU.

25. Regarding the first question, whether withdrawal from the ECHR would also result in the UK no longer being a Member State of the Council of Europe, the starting position is the founding Statute of the Council of Europe 1949.³⁵⁴ Unsurprisingly, the Statute makes no explicit mention of the ECHR since it was drafted and adopted before the ECHR was conceived in 1950. There are, however, some provisions which imply that being a Contracting Party to the ECHR is likely to be a prerequisite of Membership. Article 1(a) establishes the aim of the Council of Europe, namely to "achieve a greater unity between its members for the purpose of safeguarding and realising the ideals and principles which are their common heritage and facilitating their economic and social progress". Article 1(b) then states how this aim is to be pursued, which includes through the pursuance of "agreements³⁵⁵ and common action.....in the maintenance and further realisation of human rights and fundamental freedoms". Clearly, the ECHR is central to the Council of Europe's policies and practices both in terms of articulating the substance of such "ideals and legal principles", as well as providing the principal legal framework for the pursuance of these Article 1(b) objectives.

26. Membership criteria are then specified in Article 3: "Every member of the Council of Europe must accept the principles of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms, and collaborate sincerely and effectively in the realisation of the aim of the Council as specified in Chapter I." While the phrase "accept the principles of the rule of law" appears to be wider than just the ECHR, it is difficult to see how a state could "collaborate sincerely and effectively in the realization of the aim of the Council as specified in Chapter I"—which is Article 1 of the Statute—without being a Contracting Party to the ECHR. Certainly, such a view is corroborated by the Council's policies and practices regarding new membership, which makes prior ratification of the ECHR a precondition of membership.³⁵⁶ While withdrawal from the ECHR as a Contracting Party is without precedent and not an explicit requirement of membership in the 1949 founding Statute, it is difficult to see how continued membership by the UK of the Council would be permissible in the light of the Council's underpinning principles, goals, as well as membership criteria. Certainly, such an outcome seems to be endorsed by Article 65(3) ECHR, which states that "[a]ny High Contracting Party which shall cease to be a member of the Council

³⁵¹ A and others (n 45).

³⁵² Human Rights Joint Committee Report (n 44) paras 25–26.

³⁵³ Ibid paras 28.

³⁵⁴ Article 2 of the Statute states that: "The members of the Council of Europe are the Parties to this Statute."

³⁵⁵ Agreements can include international treaties such as the ECHR.

³⁵⁶ Eg recommended conditions of membership by Georgia included its signature of the ECHR as amended by its Protocols 2 and 11 at the time of accession; and its ratification of the ECHR and Protocols 1, 4, 6 and 7 within a year of its accession to the ECHR. See Council of Europe's Political Affairs Committee, "Georgia's application for membership of the Council of Europe Report" Document 8275 (2 December 1998). More recently, see the Council of Europe's own website stating this: <http://hub.coe.int/what-we-do/human-rights/european-convention>, accessed 12 December 2013.

of Europe shall cease to be a Party to this Convention under the same conditions”, suggesting that the relationship between the Council and ECHR is inextricably linked.

27. The second, related question concerns the likely impact for the UK on its continuing membership of the EU if the UK no longer is a Contracting Party to the ECHR. As with the position regarding the Council of Europe, there is no express legal requirement for a Member State to be a Contracting Party to the ECHR for EU membership. There are, however, a number of policies, practices, and treaty provisions which suggest that this may be the case. In terms of policies and practices, since the late 1990s under the EU’s process of enlargement—though not an express formal condition³⁵⁷—there appears to have been a consistent political requirement that all candidate states sign (and presumably also subsequently accede to) the ECHR as a precondition of membership.³⁵⁸ It would appear that this has been part of fulfilling the requirement to ensure the existence of “[s]table institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities” required by the 1993 Copenhagen criteria for membership.

28. These criteria should also be read together with the relevant Treaty provisions. Article 49 of the Consolidated version of the Treaty of the European Union (TEU) (as amended by the Lisbon Treaty) requires applicant states to “respect the values referred to in Article 2”. Article 2 TEU identifies these values as being “respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights”. In interpreting what this means in practice, under Article 6(2) the EU itself will accede to the ECHR (with the details of the relevant legal instrument currently being negotiated). The fundamental rights guaranteed by the ECHR together with “the constitutional traditions common to Member States” are described in Article 6(3) as “constitut[ing] general principles of the Union’s law”. There are different sources influencing the furtherance of human rights within the EU, not least its own EU Charter of Fundamental Rights, jurisprudence of the EU Courts, and other principles including constitutional ones governing the EU. For this reason, accession of the EU to the ECHR will have the effect of strengthening the protection of human rights in Europe, by submitting the EU’s legal system to independent external control on human rights matters.

29. What is clear is that the ECHR now forms an important, integral element of those principles governing the EU. What is not clear, however—in the absence of clear political policies or express legal obligations, or a precedent of an existing Member State withdrawing from the ECHR—is whether the ECHR already forms or will form following the EU’s formal accession to it, such a core element of these principles that it has become an indivisible requirement of EU membership. This is a matter that probably requires a ruling from the EU Courts. Nevertheless, it is essential that these possible consequences of no longer being a Contracting Party to the ECHR are also considered by the inquiry.

Concluding Remarks

30. It is crucial not to underestimate the significant challenges, not least political and financial ones, faced by the Government in relation to civil claims attributable to overseas military and security operations brought by injured and the relatives of deceased service personnel. Nevertheless, a careful, measured, and at times less emotional response is required regarding the UK’s approach to its existing obligations under international law. On occasion this will require re-clarifying the blurred parameters of what is directly attributable to these obligations, as distinct from what is in reality attributable to other important but nevertheless non-legal considerations.³⁵⁹ This is particularly true regarding the ECHR and the related organ of the ECtHR both of which feature prominently in concerns and criticisms regarding the potential impact of the existing human rights regimes on overseas military operations, as examined by the current inquiry.

31. The UK currently stands at a critical crossroads regarding not only its future relationship with international human rights obligations, but further, the rule of law more generally, including the indivisible requirement in any democratic society for appropriately accountable government in any democratic society. Furthermore, decisions made for shorter term goals could have significant longer term consequences that reach far beyond policies and discourse on human rights issues. As the potential consequences of withdrawal from the ECHR illustrate, such considerations could shape the future political, economic, legal, etc, standing of the UK within the international community for decades to come.³⁶⁰ At some point, within the wider context of debates regarding the UK’s future membership of the EU in particular, the UK may be forced to decide where

³⁵⁷ The Copenhagen criteria, developed in 1993, require three key conditions to be met: “Stable institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities; a functioning market economy and the capacity to cope with competition and market forces in the EU; and the ability to take on and implement effectively the obligations of membership, including adherence to the aims of political, economic and monetary union. See eg http://europa.eu/legislation_summaries/glossary/accesion_criteria_copenhagen_en.htm accessed 12 December 2013.

³⁵⁸ Even as early as 1977, it was an important factor that Greece, Portugal, and Spain were Contracting Parties to the ECHR before making their formal applications for membership of the EU. It is interesting to note that even then, the European Commission was already suggesting that the EC itself become a party to the ECHR (Bulletin EC Suppl 2/79), further suggesting the importance attached to the ECHR as part of the EC meeting its own objectives in relation to protecting and furthering democracy, the rule of law, and fundamental human rights.

³⁵⁹ As Conservatives have themselves acknowledged, the current legislation has created a culture of risk aversion among public authorities, and is often misunderstood and misapplied. “The Government also acknowledged that a series of damaging myths about the [Human Rights] Act had taken root in the popular image.” “From the Human Rights Act to a Bill of Rights?”, <http://www.parliament.uk/business/publications/research/key-issues-for-the-new-parliament/security-and-liberty/from-the-human-rights-act-to-a-bill-of-rights/> accessed 16 November 2013.

³⁶⁰ See, eg, comments of Judge Spielmann, President of the ECtHR in “UK pullout from European rights convention would be “total disaster” *The Guardian* 4 June 2013.

its future strategic identity and loyalties lie: with its European allies, who choose to remain bound by the rigours and constraints imposed by the ECHR and the ECtHR that form part of the UK's legacy on human rights and rule of law matters;³⁶¹ or with the US, which has also been an important ally, but which from a rule of law perspective on security related matters has become synonymous with unilateralism, exceptionalism, as well as significant violations of fundamental human rights and other international obligations.

December 2013

**Written evidence from Steven Haines, Professor of Public International Law,
University of Greenwich³⁶²**

I offer comments on the following:

- The Legality of Military Intervention.
- The Influence of Human Rights Law on the Application of Force.
- Specific Weapons Law Issues (Autonomous Weapons and Drones)

THE LEGALITY OF MILITARY INTERVENTION

In recent years, and especially following the controversial decision to invade Iraq in 2003, there has been a significant amount of debate about the constitutional process by which HMG decides to deploy military force overseas for operational purposes in which the use of force is likely to be required. Following the Iraq experience, the current Prime Minister (PM) made it clear that he required an appropriate UN Security Council mandate for the intervention in Libya and Parliament was engaged prior to the deployment of the Armed Forces. In the case of Syria, no UN mandate was likely and the PM chose to go to Parliament for a decision that eventually led to the UK not mounting any military operation. Interestingly, President Obama also referred deployment to Congress leading to a US decision not to intervene. In fact and in law, neither the PM nor the US President were under any legal or constitutional obligation to hand such decisions to their respective legislature (the US War Powers process would not have necessitated reference to Congress for the type and duration of deployment then envisaged)

The core question for the UK is about where responsibility for decision-making on military deployments should rest—with the Executive under the Royal Prerogative or with Parliament. Prior to the recent Libya and Syria experiences, the previous Labour Government, in the wake of Iraq, had seriously considered introducing “War Powers” measures. It was clearly motivated by a desire to avoid the degree of legal controversy that followed the decision to invade Iraq. In October 2007, the Ministry of Justice published a consultative document with proposals for the introduction of War Powers mechanisms to replace the existing Royal Prerogative.³⁶³ I submitted a response to that CP in January 2008 and was subsequently called to give evidence before the Joint (Parliamentary) Committee on the Draft Constitutional Renewal Bill on 13 May 2008.³⁶⁴ For information, I attach to this submission a copy of my January 2008 response to the Ministry of Justice CP.³⁶⁵

In brief, in 2008 my position on “war powers” was that the decision to deploy the Armed Forces should remain a function of the Executive under the Royal Prerogative. The involvement of Parliament in decision-making is potentially extremely problematic in operational terms. Issues that are difficult to resolve include the setting of a threshold of scale or category of deployment for parliamentary engagement, and the extent to which Parliament remains involved in decision-making during operations. I will resist rehearsing the various issues that were addressed during the discussions in 2008 (a number of which I address in my attached response

³⁶¹ “Respect for human rights is part of Britain’s DNA. It was why, at the end of the second world war, when disrespect for human rights had devastated our continent, Europe looked to politicians like Churchill and to British lawyers to help shape and bring into being the European convention on human rights. To turn our backs on that legacy now would be a denial of their efforts, which have served us well over the last 60 years.” Cherie Booth, “We must not withdraw from the European convention on human rights” *The Guardian*, 12 July 2013.

³⁶² MA, PhD, LL.M. Professor of Public International Law, University of Greenwich (since 2012). Formerly: Geneva Centre for Security Policy (2008–2012) as Head, Security and Law Programme; Royal Holloway College, University of London (2003–2008) Head of the Department of Politics and International Relations and Professor of Strategy and the Law of Military Operations; Royal Navy (1971–2003) with operational service on UN maritime embargo operations (1973), with the Northern Ireland Security Forces (1977–82), NATO(KFOR) in Pristina, Kosovo and the UK JTFHQ in Freetown, Sierra Leone (2001). Service in Ministry of Defence (1995–2003): on Naval and Central Policy Staffs; Executive Board and Head of Project and Research Management, Joint Doctrine and Concepts Centre, Shrivenham. Author: *British Defence Doctrine* (2001); *RN Handbook on the Law of Maritime Operations* (2003). Chairman of the Editorial Board, UK’s official *Manual of the Law of Armed Conflict* (2004). Elected Member, International Institute for Humanitarian Law, San Remo, Italy. Visiting appointments: Cranfield University Security Studies Institute (2000–2010); St Antony’s College, Oxford (2001); Geneva Institute for International Humanitarian Law and Human Rights (2010–2012); International Security Programme, Federal Institute for Technology, Zurich, Switzerland (2010 to present); University of Oxford Changing Character of War Programme (2012–2013).

³⁶³ Ministry of Justice Consultative Paper CP26/07, *The Governance of Britain: War Powers and Treaties: Limiting Executive Powers*, 25 October 2007

³⁶⁴ Oral Evidence to the Joint (Parliamentary) Committee on the Draft Constitutional Renewal Bill, First Report, see Chapter 7 on “War Powers” summarising evidence taken and drawing conclusions; see also “Minutes of Evidence on Questions 19–30”, 13 May 2008. (Unfortunately, the session in which I appeared was cut short by a Division Bell and I did not get the chance fully to develop the points I had made in my response to the Ministry of Justice CP).

³⁶⁵ Steven Haines, *War Powers and Treaties: Limiting Executive Powers: A Response to Consultation Paper CP26/07*, 17 January 2008.

to CP26/07) but, in the end, various concerns proved sufficiently problematic for HMG to decide that no War Powers provisions should go forward into legislation—at least, not at that point.

The constitutional situation today arguably remains as it was in 2008 and previously, with HMG, under the Royal Prerogative, being in the legal position to take decisions on Armed Forces deployment without reference to Parliament. I say “arguably” because it is also arguably the case that the decision by the PM to refer the situation in Syria to Parliament is some measure of precedent. Under our law, constitutional change is frequently achieved not through legislation but through shifts in practice. It is an interesting question whether or not the current PM’s decision to refer Syria to Parliament has set a precedent that subsequent PMs will find it difficult not to repeat. One suspects this is the case but, as with all such constitutional shifts, we must wait for subsequent experience to either confirm a shift in that direction or mark the Syria decision out as an exceptional departure from a constitutional norm.

Whatever the future holds in that respect, I remain convinced that giving Parliament a role in decision-making of this sort would be unfortunate. It is the role of HMG in our constitution to decide within the law, with Parliament determining what the law should be. Clearly this means that if Parliament decides through legislation that military deployment decisions must be made by Parliament, then future governments will be obliged to comply with that. However, I believe this would grant Parliament inappropriate executive responsibility for matters that it is not appropriately configured to shoulder.

That is not to say that Parliament should not be engaged. As I pointed out in my response to CP26/07, in fact successive governments over many years have engaged with Parliament over major deployments of the Armed Forces. I well remember the significance of the Falklands debate in the House of Commons in 1982. It would have been inconceivable for HMG to have gone to war in the South Atlantic without broad political support expressed in the two chambers in Parliament. This will always be so. Indeed, even the invasion of Iraq was subject to parliamentary debate. It is easy to forget that there was broad (though certainly not unanimous) political support for that deployment. The proposed intervention in Syria was not a deployment in anything like that league, however. In military terms, if it had gone ahead it would have amounted to a relatively short operation with little or no deployment by Armed Forces personnel into Syrian territory. One imagines that submarine launched cruise missiles would have been a significant feature of the assault on Syria and that the attack would have lasted a matter of hours rather than days. There will always be those who warn against so-called “mission creep” but this was a very low risk indeed in relation to Syria. That is not to say that the attack should have occurred.

What we must try to achieve in our decision-making for military deployment is a process that leads to compliance with the law—and not just domestic law. The use of force within the international system is something that is covered by international law and it is vital that the UK acts within that law. In 2003, it was arguably the case that the invasion of Iraq was contrary to international law. As an international lawyer, I believe it was unlawful—and the bulk of international legal opinion agrees with me. I have to say that the legal case put forward by Lord Goldsmith at the time was logical, well thought through—rigorous, indeed—and for some it was persuasive. However, it would not have prevailed if the matter had ever been put through a judicial process during which international law was applied. The opposing argument was much stronger and far more convincing. Moving on to Syria, if the PM had not gone to Parliament at all, or had given it a vote and then ignored the outcome, a decision to strike Syria would have been contrary to international law. Such a strike required a clear UN Security Council mandate. The humanitarian intervention argument—used very powerfully at the time of NATO’s action against Serbia over Kosovo in 1999—is now a weaker one given the way in which the law has developed since 1999.³⁶⁶ It is one of the major dilemmas of the international security system that a veto by a Permanent Member of the Security Council can prevent a lawful military response to a humanitarian crisis, by simply rendering any military intervention unlawful. The PM decided not to go against the wishes of Parliament and, in so doing, complied with international law. That, however, was not his intention and he would have gone ahead and ordered military action if Parliament had not said that he should not. This raises an interesting question about the law, which I believe is the crucial issue for the Committee to reflect upon.

At the moment, there is no domestic UK law or process preventing a Prime Minister, with Cabinet support, from mounting military operations that would be contrary to international law. Neither Tony Blair over Iraq nor David Cameron over Syria—if he had ignored Parliament—could have been prosecuted in a British court for a breach of the law governing the use of force at international law. As an international lawyer, committed to British compliance with the law in that sense, I believe this to be profoundly regrettable. Instead of a process that involves Parliament becoming involved in decision-making about military deployments, I would prefer to see the Supreme Court charged with assessing the legality of resort to force under international law. If a PM knew that any decision he or she made about military deployment would be subject to rigorous subsequent legal scrutiny, that knowledge would act as a break on action likely to be adjudged unlawful. In the past I thought that Parliament ought to be involved in the post-deployment scrutiny process, but I have shifted and now believe this is a role that ought to be performed by the Supreme Court in order that a judgement is arrived at based on the law and not influenced—or suspected of being influenced—by other wider political considerations.

³⁶⁶ See S Haines “The Influence of Operation Allied Force on the Development of the *Jus ad Bellum*”, *International Affairs* (Chatham House), Vol.85, No.3 (May 2009), pp.477–490.

Aside from being an academic international lawyer, I am a retired officer in the British Armed Forces who, in an active career of over thirty-two years, deployed on operations in Northern Ireland, the Balkans and Sierra Leone. At no point in my Service career until the year of my retirement in 2003 did I ever have cause to question the legality of what the UK was using its Armed Forces for. The bulk of those who serve in uniform like to know that what they are doing and what their country is using them for is right and legitimate. In 2003, over Iraq, there were severe doubts in that regard. This is why Admiral Boyce, as Chief of the Defence Staff, requested clarification from the PM that the invasion would be legitimate—in doing so he was not seeking to clear himself of any legal responsibility for a bad decision but was instead anxious to put the minds of those men and women about to invade a foreign country that they would not be breaking any law. That is important—vitally important, for their motivation and their peace of mind.

My appeal to the Committee is to take advantage of this opportunity to think seriously about how the decision-making process for military deployment can be rendered fit for application in the wider world—not to place decision-making in the hands of Parliament but to create an effective process of legal scrutiny of those decisions made by the Executive under the Royal Prerogative.

THE IMPACT OF HUMAN RIGHTS LAW ON THE APPLICATION OF FORCE

There has been a great deal of comment in recent years about the ways in which Human Rights Law (HRL) is assumed to influence the manner in which military operations are conducted. Traditionally, in armed conflicts (what used to be described as “war”) during which the Geneva Conventions and the full range of the Laws of Armed Conflict (LOAC) apply, combatants would be constrained merely by the limitations imposed on targeting by the rule of distinction as between enemy combatants and military objectives, on the one hand, and civilians and civilian objects, on the other. Very simply, if an individual is identified as an enemy combatant (and he is neither wounded and *hors de combat* nor in the process of surrendering), he can be targeted, no matter what he is doing at the time. So, for example, even an apparently unarmed enemy combatant who seems to be running away from the fighting, remains a legitimate target; he can even be shot in the back while appearing to pose no immediate threat to anyone. His mere identity as an enemy combatant renders him a legitimate target, no matter what he is doing at the time he is being targeted. This contrast with situations short of armed conflict in which the targeting of individuals is driven not by their identity but by their actions. In law enforcement situations, the guiding principle is to employ the minimum force necessary to achieve the objective of enforcing the law. It is not the identity of a person that determines their vulnerability to attack but their actions at the time they are confronted. Even if they are employing force themselves, the legitimate response must take account of the twin requirements of proportionality and necessity. The employment of excessive force would be unlawful.

There is a common perception these days that British servicemen deployed on operations are, for reasons of human rights compliance, being obliged to apply force using what is in effect the human rights based law enforcement paradigm rather than that permitted under LOAC, or the armed conflict paradigm. To a significant degree, however, this perception is flawed. There was a time when Rules of Engagement (ROE) were promulgated for the application of force in situations short of armed conflict—in circumstances associated with law enforcement. If in armed conflict, opening fire rules were in accordance with the armed conflict paradigm and no ROE were necessary. This is decreasingly the case today for a reason associated with the complexity of the operational environment and the need to tailor the application of force to the precise circumstances encountered. In Afghanistan, for example, NATO has been dealing with a situation of insurgency demanding a sophisticated approach to the conduct of operations. For operational reasons rather than legal ones (related to the demands of HRL), ROE have been imposed to tailor the application of force in a manner consistent with operational objectives. Excessive use of force would, in some circumstances, be counter-productive. ROE are imposed, not to ensure compliance with the law (either LOAC or HRL), but to ensure that what happens at the tactical level is consistent with strategic objectives and directions. ROE are a command and control mechanism and not a means of ensuring compliance with the law. Importantly, they are not a means of imposing HRL standards on the battlefield although, if one wanted to do that, ROE would be the most appropriate mechanism for achieving that.

I do not believe that HRL is undermining the effectiveness of military operations by the imposition of excessive restraints on the application of lethal force. For one thing, it is simply not correct to maintain that HRL protects the life of opposing belligerents in a way that prevents the Armed Forces achieving their objectives. HRL does not contain an absolute right to life. Rather, it asserts the right of all not to be deprived of their life in an arbitrary fashion. In some circumstances, it may be absolutely necessary for a person committing or about to commit an offence to be killed; it may be the minimum appropriate force that it is necessary to use to prevent an offence being committed. If they are killed in those circumstances, there will have been no breach of HRL because, while they may have been killed, their death will not have been the result of an arbitrary decision to kill. Rather, it will be the result of a calculated decision to apply force in an appropriate way for the circumstances faced. In regions of Afghanistan where there is intense combat (Helmand, for example), I have not heard that HRL is having undue influence on opening fire regulations. If there are restrictions that require restraint greater than that required by basic LOAC, it is being imposed for other operational (and not legal) reasons. I have heard people claim that HRL is problematic; such claims are, however, almost certainly ill informed and may even be influenced by a particular predisposition to be suspicious of anything to do with human rights. I must, though, caveat what I have just said by stressing that

I have not myself experienced the circumstances to which I allude. My recommendation to the Committee would be to interview experienced commanders and soldiers with recent experience of operations in Afghanistan to establish whether or not what I have just said is correct. For those interviews to be of value, however, Committee members will themselves need an adequate understanding of the purpose of ROE and the different demands of the armed conflict and law enforcement paradigms.

SPECIFIC WEAPONS LAW ISSUES

There are two types of weapon on which I believe I can provide brief useful comment. I do so as a specialist in Weapons Law who, when serving in the Ministry of Defence, was one of the three tri-Service military staff officers responsible for conducting reviews of new weapons, means and methods of warfare for the UK. These reviews were conducted in accordance with Article 36 of the 1977 Additional Protocol I to the 1947 Geneva Conventions, which requires all states to ensure that all weapons for use in armed conflict are compliant with the weapons law element of LOAC. The comments I make below are principally related to legality under LOAC

Un-Manned Aerial Vehicles (UAVs) aka "Drones"

UAVs are, quite simply, aeroplanes. The fact that they are un-manned and remotely operated does not alter that basic fact in any way. Aeroplanes are not unlawful; UAVs are not, therefore, in and of themselves unlawful. UAVs operating exclusively for reconnaissance, data gathering and intelligence purposes are not weapons. It is only when a UAV is weaponised that it becomes a weapon and is required to be compliant with LOAC weapons law. Even then, as long as the weapon it is carrying is itself lawful (not subject to a ban under the Certain Conventional Weapons Convention, for example), the UAV will be compliant with the law. That is not to say that it cannot be operated in an unlawful manner or for unlawful purpose. All weapons can be put to unlawful purpose; UAVs are no different from other weapons in that respect.

Weaponised UAVs are frequently assumed to be operating in an unlawful manner or for unlawful purpose. The claims made against UAV operations currently fall into two forms in general.

First, it is frequently claimed that they are operating where they should not be operating and where their operators have no legal right to deploy them. UAVs operating in the border areas between Afghanistan and Pakistan are a particular focus for criticism of this sort. Their presence in Pakistani airspace and their targeting of individuals on the ground in Pakistan is a legal issue to do with the international law relating to the use of force and the legitimacy of intervention. If the UAV's operating authority has no permission from Pakistan to deploy the aircraft into Pakistani airspace, their presence there will be, *prima facie*, unlawful. If, on the other hand, permission has been granted by the Pakistani authorities, the presence of UAVs in Pakistani airspace will not be unlawful.

Second, it is claimed that the targeting of individuals on the ground from UAVs is unlawful, either because it represents the arbitrary killing of individuals without trial or because attacks result in the deaths of innocent civilians who are "collateral" casualties in an otherwise legitimate attack (if, indeed, the attack itself is legitimate). The unintentional killing of civilians during lawful attacks on enemy combatants or those directly participating in hostilities, is not necessarily unlawful. LOAC recognises that some civilian casualties may occur but that if they do there may be no breach of LOAC if the deaths are proportionate to the direct military advantage gained from the attack on the lawful target. If UAVs are launching attacks under the armed conflict paradigm, a number of civilian casualties, while regrettable, may be permitted. A lot will depend on the precise circumstances of each attack that results in civilian casualties. If the attacks are carried out under the law enforcement paradigm, there is no allowance based on proportionality and all civilian deaths will be *prima facie* unlawful. Importantly, however, the deployment of UAVs and their use for targeting identified combatants is generally more likely to achieve the objective with minimum civilian casualties than any strike mounted in any other way. UAVs allow for a more thorough compliance with the principle of distinction and result in few civilian casualties than would be the case if alternative means were used to target enemy combatants.

Autonomous Weapons

There are already weapons systems that are capable of being triggered automatically on the detection of a "target" that meets the features to which the weapon is programmed to respond. Good examples are the "close-in weapons systems" deployed at sea to protect ships from surface to surface missile attack, the Dutch Goalkeeper and the US Phalanx systems being the best known. Both use radar to detect incoming missiles, a fire control system to acquire the target, and a multi-barrelled gatling-gun to engage. These are not new systems, both becoming operational in about 1980. In one sense they are autonomous, in that they are programmed and left to detect and engage incoming targets without the need for human intervention. Indeed, human intervention would be too slow to deal with the incoming threat, so these systems are a defensive necessity against sea-skimming missiles. The systems' reaction time is in the order of five or six seconds. These are not truly autonomous weapons, however.

True autonomy would take a weapons system to an altogether higher level of decision-making. Indeed, it would be capable of taking the sorts of decisions that currently require human intervention. Rapid reaction and automatic engagement in response to predetermined target features is one thing. The ability to seek out potential targets, assess their status and then to decide when to engage, represent a combination of capabilities that we

do not as yet possess. Nevertheless, there are researchers working with that objective in mind. One notable figure in the search for true autonomy is Dr Ron Arkin, who believes that the development of computer technology will soon take us to the point at which it will be possible to fit weapons systems with sufficiently sophisticated software for the system to make targeting and engagement “judgements” without the need for a “man in the loop”. Indeed, in his published work, Arkin goes so far as to suggest that, given time constraints and data complexity, computer technology will be capable of achieving better and more humane compliance with LOAC than is possible using human judgement.³⁶⁷ Computers making the decisions would be strictly objective, unaffected by emotional factors, and incapable of deliberately targeting anything other than those meeting the strict features programmed into the fire control system within the weapon.

In November 2012, Human Rights Watch, in cooperation with the Harvard Law School’s Human Rights Clinic, published a pamphlet that seems to have set the immediate future agenda for those involved in the development of the law governing autonomous weapons.³⁶⁸ The pamphlet was a critique of so-called “Killer Robots” and dealt with the likely future emergence of wholly autonomous weapons, with computer technology making decisions on attack. One can, with justification, regard the Human Rights Watch initiative as a direct response to the work of those, like Arkin, who believe that at some point the human can be taken out of the decision-making loop. The immediate contrary response has come principally from the International Law Department at the US Naval War College. Jeffrey Thurner, a member of the War College Faculty, published an article in the influential *Joint Force Quarterly* in December 2012. This was followed by a substantial legal response in the *Harvard National Security Journal* from Michael N Schmitt, the Chair of the College’s International Law Department.³⁶⁹

Autonomous weapons are in the sights of civil society activists; government experts are preparing their response. Arguments are not merely about the law but also moral and ethical issues to do with the nature of conflict. There is a reputable philosophical case to be made that decisions to kill should always be taken by a moral actor—a soldier or military commander. The Human Rights Watch initiative sets out to stop technological development before it reaches the point of producing true autonomy. It seeks to have future research on autonomy declared contrary to weapons law, which it certainly is not at present. Nevertheless, Article 36 of Additional Protocol I requires legal checks to be made on developing weapons technology at various stages in its development, so there is a legal requirement to consider legality even arguably at the present stage of development.

Key issues to address in the legal assessment of any potential future weapon will be its ability to achieve compliance with the principle of distinction, which demands that only combatants be targeted. If the technology is intended for direct use against combatants, will the technology be capable of distinguishing them from civilians? While this seems unlikely, given the contemporary conflict environment in which insurgents are on first sight indistinguishable from the mass of the people, it may be possible to programme a weapon to assess over time the behaviour of a potential target and then to engage once a pattern of behaviour has been established beyond a particular point. Is this morally and ethically acceptable? This is the key question in the debate of autonomy.

My own approach is to monitor the development of the relevant technology, to keep engaged with those working in that field and to input a legal opinion when one seems appropriate. I am cautious about computers making decisions that replace the moral judgements of those doing the fighting or commanding military forces. To me, war/armed conflict is a profoundly moral endeavour and any attempt to take human judgement out of the equation needs to be met with concern. But I am reluctant at this point to rule out something which may have the ability to make targeting more effective and more consistently compliant with LOAC than fallible human judgement can be over time. One responsible approach may be to delay reaching a conclusion about the issues at stake. As Schmitt has noted:

“No such weapons have even left the drawing board. To ban autonomous weapons systems altogether based on speculation as to their future form is to forfeit any potential uses of them that might minimize harm to civilians and civilian objects when compared to other systems in military arsenals.”

It is far too early to predict the outcome of this debate but a wide-ranging series of legal, moral and ethical arguments are in prospect.

January 2014

³⁶⁷ See, for example, R Arkin, *Governing Lethal Behavior in Autonomous Robots* (London: CRC Press, 2009).

³⁶⁸ Human Rights Watch, *Losing Humanity: The Case Against Killer Robots* (New York: Human Rights Watch, 2012)

³⁶⁹ J S Thurner, “Legal Implications of Fully Autonomous Targeting” in *Joint Force Quarterly*, Issue 67, 4th Quarter, 2012, pp.77–84; and M N Schmitt, “Autonomous Weapons Systems and International Humanitarian Law: A Reply to the Critics”, in *Harvard National Security Journal Features*, 2013, pp.1–37.

Written evidence from General (Rtd) Jonathan Shaw

The right to life, enshrined in the human rights package, is inimicable to the unlimited contract that is the soldier's lot. Take away the unlimited liability and you lose the essence of soldiering. When a soldier signs on the dotted line, he, in effect, signs up to the right to die for his country. He places duty to the Crown above his own personal safety. That is why military service is in my view up there with religious devotion and is the most selfless of pursuits. That is why soldiers respect themselves and why in turn they are respected. That is what differentiates civvies from soldiers; civvies think primarily about themselves, and are legally supported in this view; soldiers think about the team, the family, the mission, not themselves. See my piece in the *Tablet* last year on *Why Soldiers Kill*. HR legislation is fundamentally incompatible to the soldier's unlimited contract on which soldiering depends. The intrusion of the right to life on to the battlefield will inevitably undermine the military profession and result in far bloodier engagements on the battlefields as a commander can take fewer risks with their own troops who might sue him so resorts to massive violence against the opposition to lessen the risk to his own troops. In old fashioned inter-state war that might arguably have been sound tactics; In war amongst the people, this is disastrous tactically as well as strategically. The Israelis are already there. On CAST LEAD, I was told (in my ACDS(ISP) role as lead UK MoD contact with Israel and the IDF) tales of orders being given then challenged by a) rabbis and b) lawyers. The result was a brutal operation that flattened Gaza (an eye for an eyelash) to international opprobrium but few legal cases inside Israel. Is that really where the HR lobby want to take us? Is it morally justified to place our Human Rights on such a pedestal that we grant the opposition none?

I feel this personally. I lost five men on Longdon, on an independent action where I took the decisions. Given the way legislation is applied retrospectively, will I feel the long arm of the law at some stage, as aggrieved parents sue me for incompetence? It was bad enough in 1990 being investigated as part of the Excursion to Hell review.

I have read the Tugendhat paper and agree his view that there is a problem with our direction of travel. My view is that we are sleepwalking into this. As a nation, we have not adapted our language to the new nature of conflict. We talk of the last wars in Iraq and Afghanistan with all the baggage that comes with them, baggage from world wars of national survival. These latest "wars" have been no such thing. Since the overthrow of the Taliban in Afghanistan and the Saddam government in Iraq, these operations have been political campaigns with the military in support as enablers of the political end state. That is why every death has been overseen by a Coroner's court and a verdict of unlawful killing decided. So we have been asking our soldiers to conduct war like activity but under civilian law. The current inquiry into the Danny Boy operation is, I understand, more a trial of the MoD's legal framework for operations than of the actions of the soldiers themselves. As Rupert Smith argues convincingly in *Utility of Force* our institutions and language have not kept pace with developments and we are now in an incoherent posture. Imposing human rights civilian law on the battlefield will make this incoherence so stark as to question the military viability altogether.

January 2014

Written evidence from Martin Hemming

I am Martin Hemming, and I am a former Government Lawyer. In the course of my Civil Service career I spent 14 years advising the Ministry of Defence, including 11 years as the Department's Legal Adviser (between 1998 and 2009). In that capacity I advised on a range of legal issues arising in relation to the UK's involvement in the Balkans, in Afghanistan, and in Iraq. I am an Associate Fellow of the Royal United Services Institute and a Senior Associate Fellow at the Institute for Security and Resilience Studies.

INTRODUCTION

2. I have been asked to submit written evidence relating to the Committee's current investigation. I have had the benefit of reading the papers already submitted to the Committee (including by some distinguished legal and military experts). I have also considered the Policy Exchange's recent report—*The Fog of Law*.¹ I hope in this paper to avoid the repetition of points well made by others, and to seek to focus on certain themes that I think are important. I should say, however, that I found the evidence of Dr Jonathan Morgan very compelling.

3. Most people would agree that the law should be as clear and accessible as human effort can achieve. Service personnel need and deserve to have a high degree of confidence that their day-to-day decisions in operational conditions are lawful, and that their own personal position is legally secure. If, after proper training, they feel unable to take such decisions without taking legal advice, then they may justifiably feel that something is wrong with the law.² Since about 2000, legal proceedings involving the MOD—including inquests, civil litigation founded on common law claims as well as the Human Rights Act 1998 ("HRA"), and the developing jurisprudence of the European Court of Human Rights ("ECtHR") on the extraterritorial application of the European Convention on Human Rights ("ECHR")—are widely perceived as having muddled rather than clarified the legal waters, and to have raised uncertainty about the true legal position in a number of important areas.

4. The written evidence submitted to the Committee to date, and the discussion in *The Fog of Law*, serve to illustrate the nature of the debate, and the heightened uncertainty that underpins any consideration of the

application of law to the operations of the UK's armed forces. My own view is that this debate on occasion proceeds on a flawed basis, and this can apply to all sides of the argument. In the military, as in any large people-based organisation, misconceptions can take root and soon acquire the status of established truth. And it is what individuals actually believe, whether or not it is well founded, that informs the way that they act and feel, and influences their willingness to assume responsibility and risk. Perception can be every inch as important as objective reality. This issue—and steps that might be taken for the avoidance of misunderstanding—is one of the concerns that the Committee may wish to take into account in its deliberations. Against this background, I shall turn to the Committee's topics for examination.

The legal protections and obligations applying to UK Armed Forces personnel (regular and reservists) when deployed in the UK and abroad in UK-only or coalition led operations

5. It is very important to distinguish at all times between the personal position of individual members of the Armed Forces, and the position of the UK Government. I suspect that much of the concern that has been generated by recent legal developments among those serving in the Armed Forces is influenced by a belief that they have somehow been placed at an increased risk of *personal* civil and criminal liability. It is worth examining the true position.

The criminal liability of member of UK Armed Forces

6. Individuals are bound by the criminal law of England and Wales wherever in the world they are serving.³ There is no special treatment or dispensation for Service personnel. If they break the criminal law, they can face the consequences in court just like any other citizen. If there are mitigating circumstances surrounding their commission of offences, those can be taken into account in sentencing, just as in the case any convicted civilian. Service personnel are, in addition, subject to specified disciplinary offences for which they may face military justice and punishment.⁴ An obvious example of such a disciplinary offence is that of disobeying a lawful order.⁵

7. If Armed Forces personnel commit offences under English law during operations, they can be prosecuted and punished if found guilty. Some actions that would be unlawful outside armed conflict will be lawful if done in armed conflict. And some offences can only be committed in situations of armed conflict. In the Court Martial concerning the death of Baha Mousa, Corporal Payne pleaded guilty to an offence under the International Criminal Court Act 2001.⁶ The offence was one of those categorised as a "war crime" by the International Criminal Court Statute, namely inhuman treatment constituting a grave breach of the Fourth Geneva Convention.⁷ Such a grave breach had been a criminal offence in the UK since as long ago as the Geneva Conventions Act 1957. The recent conviction of Royal Marine Sergeant Alexander Blackman was for the common law offence of murder.

How the HRA and ECHR impact on the personal position of member of the Armed Forces

8. The responsibility of Service personnel under the criminal law is unaffected by any of the human rights court cases of recent years, or the enactment of the HRA. In a memorandum submitted to the Joint Committee on Human Rights in October 2007,⁸ the MOD said this:

"14. The Committee will recall the evidence of Lord Goldsmith [in June 2007]:

".... it is also very important to recognise that the obligations which nobody has been in any doubt apply (namely, the obligations under the Geneva Convention, the obligations under the Convention Against Torture) all applied, so did domestic criminal law. That is why any soldier who mistreated, treated inhumanely, let alone tortured, a detainee in the course of a UK detention would have been liable to Court Martial, and, indeed, that is precisely what happened. I do not believe, so far as the substantive standards of treatment are concerned, there is any difference between what the Geneva Convention, the Convention Against Torture require in relation to detention and the ECHR. I do not think there is any difference at all, so I do not think it matters, and I am not aware that anyone ever thought there was something that was permitted under the Geneva Conventions that is not permitted under the ECHR".

Lord Goldsmith therefore raised a relevant question: whether there is any mistreatment of a detainee permissible under the Geneva Conventions in a international armed conflict, and under the criminal law that applies to UK forces throughout the world at all times, that is nevertheless prohibited by the European Convention on Human Rights. The MOD can identify none.

15. The Committee may also find it useful to take account of the comments of Lord Bingham, in his dissenting judgment in the House of Lords in the *Al Skeini* case. Holding that the Human Rights Act 1998 did not apply extraterritorially, Lord Bingham observed that:

"This does not mean that members of the British armed forces serving abroad are free to murder, rape and pillage with impunity. They are triable and punishable for any crimes they commit under the three service discipline Acts already mentioned, no matter where the crime is committed or who the victim may be. They are triable for genocide crimes against humanity and war crimes under the International Criminal Court Act 2001. The UK itself is bound, in a situation such as prevailed in Iraq, to comply with The Hague Convention of 1907 and the

*Regulations made under it. The Convention provides (in article 3) that a belligerent state is responsible for all acts committed by members of its armed forces, being obliged to pay compensation if it violates the provisions of the Regulations and if the case demands it. By article 1 of the Geneva IV Convention the UK is bound to ensure respect for that convention in all circumstances and (article 3) to prohibit (among other things) murder and cruel treatment of persons taking no active part in hostilities. Additional obligations are placed on contracting states by protocol 1 to Geneva IV. An action in tort may, on appropriate facts, be brought in this country against the Secretary of State: see *Bici v Ministry of Defence* [2004] EWHC 786 (QB)."*

9. Accordingly, the question of whether the ECHR applies in a situation of armed conflict, and the relationship between International Human Rights Law (IHRL) and International Humanitarian Law (IHL), has little impact on the personal liability under English law of Armed Forces personnel who are engaged on operations. The standards of conduct mandated by the criminal law are not affected by the application or non-application of the ECHR. If they comply with the criminal and disciplinary law that applies to them at all times, Service personnel can have high confidence in the legal security of their personal positions. They cannot be held personally liable in proceedings based on the HRA. In so far as the HRA created new legal remedies, they concern the liability of the UK Government (not individuals) for alleged breaches by UK public authorities of the UK's international law obligations under the ECHR. This important point is not always made clear. No claim based on the HRA has ever been brought against any individual member of HM Forces because it is not legally possible to do so.

10. As the Committee will be well aware, the two key cases against the MOD heard by the ECtHR and concerning operational activity have been *Al Skeini*⁹ and *Al Jeddah*.¹⁰ The *Al Skeini* proceedings were brought against the MOD. They were not about the nature and extent of the *substantive* obligations under Article 2 (the right to life) and Article 3 (torture and inhuman or degrading treatment). The case was always and only about the UK Government's *procedural* obligation to investigate to ECHR standards six incidents in which Iraqis died at the hands of agents of the UK state (ie the British Army). Any potential criminal liability of individual soldiers in relation to the six incidents could only arise under the ordinary criminal law that applies to all Service personnel, and not under the Human Rights Act 1998, or the ECHR. Indeed, the death of Baha Mousa was the subject of a criminal investigation and prosecution while the HRA/ECHR proceedings were in train before the English civil courts.

11. *Al Jeddah* was also a case brought against the MOD, and not against any individuals. It concerned detention without trial for security reasons, in alleged breach of Article 5 of the ECHR. No member of the Army involved in the process of detention was ever at any material risk of personal liability for what the ECtHR eventually decided was a breach of Article 5 of the ECHR, (thereby overturning the views of the Administrative Court, the Court of Appeal, and the House of Lords that there was no such breach).

12. The Committee's first subject area concerns the "protections and obligations applying to UK Armed Forces personnel". As I have suggested, the principal protections and obligations for individuals reside, as they always have, in their compliance with the domestic law that applies to them under the Armed Forces Act 2006. Any liability under civil law (in claims brought under common law or the HRA) for the actions of members of the Armed Forces is likely to rest with the Government. In circumstances in which HMG will not only have vicarious liability for the wrongful actions of service personnel in performing their duties, but will also possess the resources to satisfy any award of damages, the likelihood of common law civil litigation being commenced directly against individual members of the armed forces is, as the last 15 years demonstrates, very remote.

Does it make any difference whether Armed Forces personnel are engaged in UK-only or in coalition operations?

13. This question implies that the position of Service personnel abroad may be different, depending on whether they are involved in UK-only operations, or in coalition operations. I do not think this makes any difference to the position of individuals. Sometimes the question does arise about the position of UK personnel who are embedded in the command chain of another state's armed forces, or who are in a command position in another state's forces. They remain subject to English criminal law and UK military justice under the Armed Forces Act 2006. And the UK's state responsibility under international law for the actions of members of its Armed Forces in such circumstances remains.

14. Nothing in my comments should be taken as suggesting that the MOD and the Services can or should be cavalier about incurring civil liability. Far from it. The MOD and military commanders should of course do all they can to minimise the risk of civil liability, and strive to ensure that the actions and conduct of the Armed Forces are in compliance with all applicable national and international law, including the UK's obligations under the ECHR. I know very well that this will always be their objective, and that the orders which Armed Forces personnel are asked to implement and obey will be framed with this in view. I merely seek to emphasise that the individual position of serving and former members of the Armed Forces in terms of the risk of individual criminal or civil liability for their actions on operations is as it always was, whatever the *perception* may be that things have somehow been changing for the worse.

The effects of the developing concepts and doctrines of “lawfare” and universal jurisdiction

Lawfare

15. I personally doubt that the “lawfare” tag serves any particularly useful purpose. It tends unhelpfully to impugn the motives of those who act in legal proceedings that challenge the Government on military issues. It was probably inevitable that the enactment of the HRA would bring in its wake cases that would seek to extend the boundaries of extraterritorial ECHR application. But the first case on extraterritoriality arising from recent conflicts (*Banković*) was brought in 1999 against the UK and the 11 other member States of the Council of Europe (COE States) who were then members of NATO, and was heard directly before the ECtHR. Though the Applicants’ principal legal representation was British, the case had nothing to do with the HRA (which did not come into force anyway until October 2000). A number of other important ECHR cases for UK Armed Forces, concerned with discrimination and aspects of the military justice system, all came before recent conflicts and the enactment of the HRA. I think it was also inevitable that the common law boundaries of combat immunity in civil claims would have been tested in the wake of UK involvement in military operations over the last 15 years.

Universal Jurisdiction

16. “Universal jurisdiction” is the international legal principle whereby a state claims the right to prosecute crimes committed outside its boundaries, regardless of the nationality of the accused, or their state of residence. In international law there need not be any connection with the prosecuting state in order to prosecute certain serious crimes which are considered to be crimes against all of humanity. Under some international conventions ratifying states take on the international law obligation to assume universal jurisdiction under their domestic criminal law.

17. In the UK, there is true universal jurisdiction over the offences of grave breaches of the Geneva Conventions and Additional Protocols,¹¹ of torture,¹² and of hostage taking.¹³ The International Criminal Court (ICC) Act 2001, on the other hand, does extend to offences committed outside the UK, but only by British residents (as defined in the Act) and members of UK Armed Forces.

18. It is therefore difficult to see what practical bearing, if any, the principle of universal jurisdiction has on the position of UK Armed Forces personnel. As already indicated, ordinary English criminal law (which includes all the offences for which UK courts may exercise universal jurisdiction) applies in any event to UK Forces wherever they are operating. Other countries will have taken universal jurisdiction over the same offences, but it is fanciful to suppose that any are likely to wish to exercise that jurisdiction over UK Armed Forces personnel as long as constitutional government and the rule of law prevails in the UK.

International criminal jurisdiction distinguished

19. It is important not to confuse universal jurisdiction with international criminal jurisdiction. UK Armed Forces have participated in two major international armed conflicts where an international court or tribunal had potential international criminal jurisdiction over their actions—Kosovo in 1999 (the International Criminal Tribunal for the Former Yugoslavia), and Iraq in 2003 (the ICC¹⁴). In neither case has there been any serious question of international prosecution of Service personnel. ICC jurisdiction in respect of the UK was given effect by the ICC Act 2001. Given the ICC Statute’s bedrock principle of complementarity—that the ICC can only ever exercise criminal jurisdiction to put a person on criminal trial where a state is unwilling or unable itself properly to investigate and prosecute—the then Foreign Secretary Robin Cook felt able to reassure the House of Commons that he was confident that no British soldier would ever stand trial in the Hague.¹⁵ Furthermore, every NATO state at the time except the US was similarly ratifying the ICC Statute. Save in one respect (the crime against humanity of apartheid¹⁶), all of the offences set out in the ICC Statute were considered, one way or another, already to be offences under the criminal law that applies to UK Service personnel. Despite these reassurances, many senior commanders remained fearful that the ICC Act would unfairly expose UK Armed Forces personnel to new vulnerabilities. Those fears to have yet to be realised.

Impact of the judicial development of duty of care concepts and of domestic UK law and claims of negligence, on UK operational decision making processes and arrangements for recording decisions and events by operational commanders

20. I have no direct knowledge of the current impact on operational decision making, and on arrangements for recording decisions and events, but I note what the MOD says on the latter issue at paragraph 27 of its written evidence. What is of obvious concern is the powerful dissenting Supreme Court judgment of Lord Mance (supported by Lord Wilson) in the conjoined cases of *Smith, Ellis, and Allbut and others*. His comment that the majority decision “will make extensive litigation almost inevitable after as well as quite possibly during and even before, and active service operations by the British Army” would, I suspect, have been characterised as alarmist had it been made by a Minister or a senior military Commander. That it came from a Justice of the Supreme Court means that it is less easily discounted, and it is right that consideration be given to steps that might ameliorate the operational consequences of the “judicialisation of war” that Lord Mance fears is not merely possible, but “likely”. Time will tell if the Supreme Court majority’s strong direction to courts concerning “the very wide measure of discretion which must be accorded to those who were responsible on the ground for the planning and conduct of the operations during which these soldiers lost their lives, and also

to the way issues as to procurement too should be approached” is heeded, both in those particular cases, and any that follow, as they surely will. However, the point at which that very wide measure of discretion will come to be accorded is likely only to be reached at the end of a litigation process that is lengthy, expensive, and time consuming, and of a trial in the course of which the operational judgments of individuals taken in testing circumstances, and in good faith, will have been forensically deconstructed, and very possibly publicly criticized. Should an unsuccessful Claimant be legally aided, there will be no realistic possibility of recovering the financial costs to the Defence budget of defending such claims.

Options

21. I shall conclude with some comments on three possible courses of action to address concerns that have surfaced in connection with the Committee’s current investigation.

HRA claims against the UK Government in relation to action taken outside the UK

22. In his judgment in the *Al Skeini* case in the House of Lords, Lord Bingham agreed with the MOD’s submission that the Human Rights Act 1998 did not apply to acts done outside the territory of the UK. It inevitably followed, he concluded, that the various claims under the HRA could proceed no further. The majority of the Panel in the House of Lords did not agree with Lord Bingham on the proper construction of the HRA, of course. At paragraph 12 of his judgment Lord Bingham said this:

“The UK was not in breach of any obligation binding in international law when it omitted, from 1953 to 1998, to give the Convention any direct effect in domestic law. In 1997–1998 it had a policy choice, whether to give effect to the Convention in domestic law at all, and if so to what extent. A decision to give no directly enforceable domestic right to persons claiming to be victims of violations of Convention rights by UK authorities outside the UK, leaving such persons to pursue any such claim against the UK in Strasbourg, would have involved no breach of any obligation binding on the UK in international law.”

23. Lord Bingham also made this observation (at paragraph 24) about the intention of Parliament concerning the HRA’s extraterritorial extent:

“In the course of its careful consideration of this question [ie whether the HRA applied outside the UK] the Divisional Court observed (in paragraph 304 of its judgment): “It is intuitively difficult to think that Parliament intended to legislate for foreign lands”. In similar vein, Brooke LJ in the Court of Appeal said (para 3): “It may seem surprising that an Act of the UK Parliament and a European Convention on Human Rights can arguably be said to confer rights upon citizens of Iraq which are enforceable against a UK governmental authority in the courts of England and Wales”. I do not think this sense of surprise, which I share, is irrelevant to the court’s task of interpretation. It cannot of course be supposed that in 1997–1998 Parliament foresaw the prospect of British forces being engaged in peacekeeping duties in Iraq. But there can be relatively few, if any, years between 1953 and 1997 in which British forces were not engaged in hostilities or peacekeeping activities in some part of the world, and it must have been appreciated that such involvement would recur. This makes it the more unlikely, in my opinion, that Parliament could, without any express provision to that effect, have intended to rebut the presumption of territorial application so as to authorise the bringing of claims, under the Act, based on the conduct of British forces outside the UK and outside any other contracting state.”¹⁷

24. If Lord Bingham’s view is correct—that there is no ECHR obligation requiring the UK to give a “directly enforceable domestic right to persons claiming to be victims of violations of Convention rights by UK authorities outside the UK”—it follows that it would be lawfully possible to amend the HRA now so as unequivocally to exclude such claims. It is hard to conceive how the removal of a right that there was no ECHR obligation to provide in the first place could itself amount to a breach of UK ECHR obligations. Any such restriction of the right to bring HRA proceedings in the UK could not affect the UK’s ECHR obligations, to the extent that they arise extraterritorially. But it would mean that any claims of a breach outside the UK would have to proceed before the court in Strasbourg just as they always did before 2000 (when the HRA came into force), with all that that implies for the applicable legal processes, and for the remedies that would be available.

The Armed Forces and the Legislative Process

25. One of the proposals (at Option 6) in *The Fog of War* was that “The Attorney General should draft an “operational effectiveness impact statement” for the Ministry of Defence when new legislation is being drafted stating what, if any, are the implications for the armed forces”. The MOD will be the responsible department for legislation governing the Armed Forces, and is highly likely to be involved in the legislation for which other departments have responsibility that has any material implications for Defence. While I am in sympathy with the objective of the Policy Exchange proposal, I am not so sure about the role proposed for an Attorney General. Supported by a comparatively small team of lawyers drawn from across Government, I doubt that an Attorney General is that well placed to provide an accurate assessment of the operational implications of any particular legislative proposal for the wide potential range of Armed Forces activity in both war and peace.

26. Nevertheless, if greater assurance is thought necessary, there may be scope for achieving a more effective focus on the interests of the Armed Forces, and on the implications of legislative change for them, by making changes to the formal procedures that regulate the passage of legislation through Parliament, some of which are statutory,¹⁸ and some of which are administrative. As the Cabinet Office's *Guide to Making Legislation* (most recent edition July 2013) shows, there are a number of formal requirements for consultation and consents, and for impact assessments of various kinds, before a Bill is approved for introduction into Parliament. If there is a need for a more direct or automatic consideration of the implication of all legislation for the Armed Forces, this would seem to be a more effective route than the role suggested for the Attorney General. Any changes to the procedures for primary and secondary legislation ought also to be reflected in the arrangements for developing and implementing EU law that affects the Armed Forces.

The Al Jedda ECtHR decision, and the problem of detention in conflict

27. One of the most difficult aspects of recent ECtHR jurisprudence has been the view taken on security detention in the Al Jedda case—in effect, that a UN Security Council Resolution that authorizes detention for imperative reasons of security is insufficient to override, in accordance with Article 103 of the UN Charter, Article 5 ECHR obligations such as would arise in relation to a detention within the UK. Only an explicit Security Council requirement or obligation to detain could do that, or a derogation under Article 15 of the ECHR.

28. The potential implications of this approach go beyond UN sanctioned operations, as was powerfully argued by the ICRC lawyer Jelena Pejic in an article in 2011 in the *International Red Cross Review*,¹⁹ and raise doubts about the ordinary and previously generally accepted discretionary capacity of all States (including COE States) lawfully to detain without trial in armed conflict provided the requirements of International Humanitarian Law (IHL) were met.

29. It remains to be seen how responsive the UN Security Council will be to any insistence that relevant Resolutions should in future include wording intended to overcome the difficulties for COE States that have been created for them by this ECtHR decision. It may well be that the Security Council will recognise the need to be helpful, if it is clear that COE States may otherwise be rather less willing to commit their Armed Forces in support of UN mandated operations.

30. The derogation route seems particularly problematic, and to characterise it as a straightforward solution is in my view significantly to underplay the legal, practical and political difficulties that such a course would be likely to entail:

- (1) the ECtHR had the opportunity in Al Jedda to offer some sort of indication whether an Article 15 derogation would have been available to the UK government. It chose merely to state the basic position under the ECHR, namely that no deprivation of liberty under article 5 of the ECHR is permissible except as is expressly provided for within the article itself, or as is provided for in a lawful derogation under Article 15;
- (2) the wording of Article 15 of the ECHR is sufficiently unclear as to raise significant concerns about the capacity of COE States to derogate in relation to overseas conflicts, and even if applicable in principle, whether derogation is necessarily available in relation to the sort of overseas operations in which the UK and other COE States have been involved in recent years. Lord Bingham's somewhat restrictive view in the House of Lords in *Al Jedda* about the legal capacity to derogate in the context of Iraq was one that received some support from the Supreme Court majority in *Smith*.²⁰ Even if the remarks in both cases were essentially *obiter*, they nevertheless must carry some authority;
- (3) any Government contemplating modification of its ECHR obligations by a derogation under Article 15 would know that a judicial review of the decision to derogate, as well as of the proportionality and necessity of the proposed derogation, would be a virtual certainty. The Government's legal advice would be bound to take into account the limited domestic legal authority on the subject such as I refer to above, particularly since the challenge to the legal challenge to any derogation would inevitably be heard first in the UK courts. And such authority as there is from the ECtHR and the former European Commission on Human Rights is not wholly encouraging to those who argue that the wording of Article 15 should be purposively stretched beyond its natural meaning. Ministers would be reluctant, I suspect, to fly academic legal kites on derogation;
- (4) any derogation intended to have effect in UK law (for example in relation to claims brought under the HRA) would also need to be subject to the designated derogation order procedures under sections 1(2) and 14 of the HRA, and to the Parliamentary processes for approving a designated derogation. This requirement provides a further potential avenue of legal challenge;
- (5) in circumstances where the UK is contemplating involvement in military operations alongside other COE States (as has been the case at some point in all of the major conflict zones involving the UK in the last 15 years) the political and legal difficulties of a decision to derogate by some but not all of the COE states concerned seems both obvious and problematical. Other COE States may have their own cogent domestic political and constitutional reasons for downplaying the seriousness of the situation into which they wish insert their military, and may even be discouraged from providing assistance if there is to be any question that the situation has reached the level in which it might be

argued that derogation is legally justifiable. At the same time, the problem for any COE State that derogates while others, facing the very same situation, decline to do so, is fairly evident;

- (6) it is unclear how much could lawfully be delivered by an Article 15 derogation that would greatly assist. The derogation power is exercisable only “to the extent strictly required by the exigency of the situation”. Some commentators whose focus is the detention question argue, for example, that an appropriate derogation from Article 5 in the context of Al Jedda would have been to provide for reviewable preventative detention by a judge.²¹ Even if that view is right, some very difficult real-world questions would have needed to be addressed in relation to UK Armed Forces’ security detention of individuals in Iraq after the ending of the occupation in mid-2004. These would, for example, have included where the judge should come from, what his or her legal authority for determining detention issues within Iraq would be, the security implications of disclosing the intelligence case informing the assessment that an individual represented “an imperative threat to security”, the attitude of the Iraqi Government to any proposal that, say, a British judge should come to Iraq to determine the security detention of Iraqis held in their own country, and the fact that the much greater number of detainees held by the US, on the basis of the same UN Security Council authorisation that underpinned UK detention, would be subject to materially different review procedures;
- (7) Article 15.1 of the ECHR provides that any measure derogating from the ECHR may not be inconsistent with the derogating state’s other obligations under international law. For that reason, any Article 15 ECHR derogation would need to be accompanied by a derogation from any corresponding provisions of the International Covenant on Civil and Political Rights (ICCPR), assuming that the Government was of the view that the extra-territorial application of the ECHR and the ICCPR was the same. Some states, such as the US, do not necessarily accept the extraterritorial application of the ICCPR, a further complication in relation to any potential ICCPR derogation in a theatre of operations where the UK and other COE States are in coalition with the US. But what is perhaps rather more significant is the obvious legal and political tension if, in relation to UN authorised operations within another ICCPR state, the UK were to derogate from the ECHR and ICCPR in circumstances where that other state declines to derogate from the ICCPR. The presence of UK Armed Forces in Iraq after July 2004, and in Afghanistan after January 2002 as a part of ISAF, was authorised by the UN Security Council. Iraq and Afghanistan were both bound by the ICCPR, but at no stage has either ever derogated from the ICCPR.

31. So I doubt that ECHR derogation is a straightforward solution. My instinct is that for the time being at least, derogation should be avoided in the hope that, as Jelena Pejic suggests, some opportunity may arise in the future to press the IHL *lex specialis* argument²² more forcefully before the ECtHR. And in any event, it could be unwise to embark on any unprecedented Article 15 ECHR derogation for UK military operations overseas without close consultation and agreement with those key European allies who face or may face the same difficult decisions.

January 2014

REFERENCES

¹ See—(<http://www.policyexchange.org.uk/images/publications/the%20fog%20of%20law.pdf>)

² This is not to deny the importance of having good legal advice available to military commanders—as was expressly recognized by Article 82 of the First Protocol Additional to the Geneva Conventions of 12 August 1949: *The High Contracting Parties at all times, and the Parties to the conflict in time of armed conflict, shall ensure that legal advisers are available, when necessary, to advise military commanders at the appropriate level on the application of the Conventions and this Protocol and on the appropriate instruction to be given to the armed forces on this subject.*

³ Section 42 of the Armed Forces Act 2006 (<http://www.legislation.gov.uk/ukpga/2006/52/section/42>)

⁴ Such offences are set out in sections 1 to 38 of the Armed Forces Act 2006 (<http://www.legislation.gov.uk/ukpga/2006/52/contents>)

⁵ Section 12 of the Armed Forces Act 2006—(<http://www.legislation.gov.uk/ukpga/2006/52/section/12>)

⁶ <http://www.theguardian.com/uk/2006/sep/20/iraq.military>

⁷ All of the offences listed in the International Criminal Court Statute became specific offences under UK criminal law through the International Criminal Court Act 2001. There was no significant change in the legal position of Armed Forces personnel engaged in conflict.

⁸ <http://www.parliament.the-stationery-office.com/pa/jt200708/jtselect/jtrights/157/15710.htm>

⁹ <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-105606>

¹⁰ <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-105612>

¹¹ Under the Geneva Conventions Act 1957 (<http://www.legislation.gov.uk/ukpga/Eliz2/5-6/52>)

¹² Section 134 of the Criminal Justice Act 1988

¹³ Section 1 of the Taking of Hostages Act 1982

¹⁴ The ICC Statute entered into force on 1 July 2002. The ICC does not have retrospective jurisdiction.

¹⁵ “I am aware of the concerns that some service personnel may end up before the International Criminal Court. Those concerns are misplaced..... Members on both sides of the House should have a robust confidence that the British legal system has adequate remedies for crimes against humanity and can satisfactorily demonstrate to the International Criminal Court that any such allegations have been properly investigated and, where appropriate, prosecuted. In short, British service personnel will never be prosecuted by the International Criminal Court because any bona fide allegation will be pursued by the British authorities.”
(House of Commons Hansard 2001, vol. 366, col. 222)

¹⁶ Article 7(1)(j) of the ICC Statute

¹⁷ In this regard, paragraph 15 of the evidence to the Committee dated 20 November 2013 from the Rt Hon Jack Straw MP has some relevance: “The short point I make, which I suggest should be one focus of your inquiry, is that to the very best of my recollection it was never anticipated that the Human Rights Act would operate in such a way as directly to affect the activities of UK forces in theatre abroad.”

¹⁸ For example, the statement pursuant to section 19 of the HRA that a Minister in charge of a Bill has to make as to whether or not its provisions are compatible with Convention rights.

¹⁹ The European Court of Human Rights’ *Al Jedda* Judgment: the oversight of international humanitarian law. (30–09–2011 International Review of the Red Cross, No 883, by Jelena Pejic)
<http://www.icrc.org/eng/assets/files/review/2011/irrc-883-pejic.pdf>

²⁰ See paragraphs 59 and 60 of Lord Hope’s judgment.

²¹ Under Articles 43 and 78 of the 4th Geneva Convention, with which the English courts decided in *Al Jedda* the MOD was complying, there must be periodic review, but though that review may be by a court, it can be by an administrative board. The UK’s review was administrative.

²² The principle of *lex specialis* provides that in the event of conflict, the more specific rule applicable in a particular situation should be applied—which would usually be the IHL rule in armed conflict situations.

Written evidence from Professor Michael Clarke, Royal United Services Institute (RUSI)

LAW AND ARMED CONFLICT

This paper is submitted by the Royal United Services Institute as evidence to the HCDC’s enquiry into law and armed conflict. It derives from a private meeting that involved a number of key participants (listed below) and included two members of the HCDC. None of the opinions expressed in this paper are attributed to the individuals at the meeting. Professor Michael Clarke and Justin Bronk of RUSI acted respectively as Chairman and rapporteur to the meeting.

DEFENCE COMMITTEE. LAW AND ARMED CONFLICT MEETING AT RUSI

11 December 2013

Attendees:

Julian Brazier MP
Professor Michael Clarke, RUSI (Chairman of the meeting)
General Tim Cross (Ret.)
Professor Charles Garraway
Professor Francoise Hampson
Dai Havard MP
Martin Hemming
Karen Jackson
General Sir Nick Parker (Ret.)
Professor Sir Adam Roberts
Tom Tugendhat
Air Chief Marshal Glenn Torpy (Ret.)
Mr. Justin Bronk, RUSI (Rapporteur)

1. Implications of growing legal challenges and their effect on operations/military effectiveness: growing or just perceived to be growing?

- The growing number of legal challenges faced by the Ministry of Defence is beginning to cause some concern within senior elements of the armed forces, a concern that is starting to be reflected also in the views of senior non-commissioned ranks. This concern arises from many causes. These include a lack of apparent clarity in the legal framework, particularly in current COIN operations where there is a degree of overlap between actions governed by the traditional laws of war and those governed by other forms of law, especially human rights law. Furthermore, some in the armed forces are not convinced that they will necessarily receive the support that they would like from government when operational decisions are being challenged, often years after the event and with the considerable benefit of hindsight.
- These concerns are not generally a problem at the lower tactical level, provided individuals follow their training, but are more apparent at the operational level, where commanders have to weigh up the risks of decisions in highly volatile circumstances, aware that those decisions may subsequently be challenged in a court of law.
- The military faces increasing legal scrutiny, on the one hand through challenges by enemy combatants or others (including detainees and their relatives) using human rights procedures, whilst on the other, through “duty of care” lawsuits, for example over inadequate body armour or the most effective protective vehicles. This increased scrutiny may have an impact on the calculations of acceptable risk among Armed Forces personnel, as well as commanders. Such calculations are intrinsically part of effective military operations. There is clearly now a perception within the Armed Forces that the increased legal scrutiny, both abroad and at home, has inhibited their freedom of action and this, in turn, may contribute to a greater degree of risk aversion in their operational planning.
- In certain respects, this perception may be exaggerated. Human rights law and the law of armed conflict are, for the most part, not incompatible and the armed forces have operated under both legal frameworks for many years without serious problem. However, the nature of current operations is such that increasingly the armed forces are operating in areas where the two legal frameworks overlap in some important ways and where tensions are most likely to be found. This is particularly true with military operations during occupation, as in Iraq, and when intervening on behalf of a foreign government in a non-international armed conflict, as in Afghanistan. The relationship between the law of armed conflict and human rights law in these areas is not entirely clear, particularly in relation to the use of force and also in relation to detention. In these situations, there may be areas both of complementarity and of seeming conflict. Government lawyers, both military and civilian, have been wrestling with the difficulties that this poses for some years and there is little likelihood that the dissonances will be overcome in the near future.
- The succession of cases taken to the European Court of Human Rights in relation to military justice procedures provided something of a turning point in perceptions. In order to avoid any allegation of “command influence”, the military hierarchy were advised to distance themselves from criminal cases, leaving individuals accused of crimes carried out in operational conditions feeling unsupported by their military “family”. So too, whilst it was recognised that any judicial scrutiny of a military operation or incident would involve senior officers testifying in court, this has now evolved to the point where junior officers, non-commissioned officers and soldiers are increasingly finding themselves giving evidence, often in complex cases.
- Part of the reason for the perception of the increased legal vulnerability of the MoD is that repatriating the bodies of deceased soldiers, as has been the case since the Falklands conflict (where some but not all were repatriated), automatically triggers an inquest, or a similar procedure in Scotland. UK deaths in Iraq and Afghanistan have been subject to this process. This involves coroners, who often have very little military expertise, making public pronouncements on operational matters in ways that are historically unprecedented. The coroner on the Nimrod crash deaths in Afghanistan, for example, effectively said that the Nimrod aircraft had never been safe to fly—a conclusion that would seem to have required a much greater wealth of factual material than was at his disposal.
- There are deep political constraints in addressing these issues directly. It is not necessarily too late from a legal point of view to remove coroners from combat death investigations, although some replacement form of investigation would still be required, but it is virtually impossible from a political point of view, since coroner investigations form one of the three central strands of the military covenant to which all three major parties have now agreed.
- Similarly, the MoD has not invoked the “Act of State” defence in legal cases. This argues that no foreigner can bring a case against a British member of the Armed Services resulting from any overseas operation. It would clarify the legal situation of the Armed Services immediately were it invoked. However, such invocation is almost impossible now to imagine since it would also invite immediate criticism of any government apparently shielding its Armed Forces from legitimate challenge. It would be highly damaging to the image abroad of the UK government, and in the eyes of sections of its own public.

- All of this has helped to create a reactive and defensive default legal and political position within the MoD as it has confronted the legal challenges arising from recent operations.

2. *The responsibility of commanders at tactical, operational and political levels*

- A clear distinction should be drawn between civil accountability (involving the government) and criminal accountability (as it applies to the individual soldier). There is often an unfortunate difference between soldiers' and lawyers' interpretations of "combatant immunity". Lawyers see it as immunity from individual prosecution for acts legitimate under the laws of armed conflict which might otherwise amount to criminal offences; soldiers instinctively but wrongly tend to see it as immunity from any court proceedings.
- A great deal of legal confusion has arisen from the military being seen as some sort of "heavily armed police force" in COIN and related operations. Operations in Kosovo and Afghanistan, in particular, have resulted in procedures becoming established which appear to tie the military to "police style" legal constraints at the tactical level; these are sometimes seen as unworkable. This has created more uncertainty in the matter of the responsibility of commanders. Police operations are usually conducted within a human rights framework which provides greater constraints on the use of force than the traditional law of armed conflict framework. Also there has been a growing tendency to restrict the use of force through Rules of Engagement beyond those restrictions imposed by international law. This is particularly so in Afghanistan where collateral damage that might be acceptable under the law of armed conflict is considered unacceptable on policy grounds.
- At the operational level, difficulties are caused by the differing legal frameworks that cover detention in international armed conflict, non-international armed conflict and operations short of armed conflict. Contrary to some opinions, administrative detention is permissible both under the law of armed conflict and human rights law. Administrative detention was indeed put forward in Afghanistan to the Afghan Government but it would have involved making formal derogations from certain human rights commitments which was considered by some to be politically unacceptable at the time. In addition, it would have involved a substantial commitment by the coalition forces in mentoring those Afghan personnel involved in detention facilities to ensure correct treatment of detainees. There were also differing views amongst the coalition allies as to the nature of the hostilities with some considering that an international armed conflict still existed, some a non-international armed conflict and some that there was no armed conflict at all, merely a law enforcement exercise. This made it difficult to come up with a coherent common policy on detention, and on the transfer of detainees, to be applied by all states involved in operations in Afghanistan.
- At the operational level, NATO's "96 hour detention rule" caused many difficulties in relation to the detention of suspects in Afghanistan. In conflict situations generally, policies or force structures that risk creating disincentives to the taking of prisoners/detainees are potentially problematic. Nevertheless, the decision to institute a 96 hour detention rule in Afghanistan was essentially a compromise political solution, reflecting the underlying disagreements on the nature of the hostilities. Military commentators also raise the point that it becomes indefensible to place troops' lives at risk in a complex and dangerous detention operation if suspects are likely to be released 96 hours later.
- This only illustrates that, at the political level, national decisions are often made at the same time as multinational decisions due to the very complex nature of coalition chains of command. Multinational and national decision-makers often have very different legal viewpoints and multiple chains of command naturally lead to the classic "same law, different interpretations" problem. This is not likely to lessen in the future and should be seen as a major concern for law-makers. Internationally, military lawyers tend to work very closely with each other already so that there is a clear understanding of the different legal positions taken within a multi-national force. The problem is that national contradictions are often very difficult or even impossible to reconcile. This aspect of the problem tends not to be a lack of liaison but rather a more serious difference of view in the application of law at the political level and in some cases, additional policy constraints imposed for political reasons.
- The government should be willing to put forward, at an early stage, its legal position on areas in dispute and to justify those positions should they be subsequently challenged. There is a perception in some quarters that too much attention is being given to what human rights bodies *might* say and that this is preventing clear statements of position. There appears on occasions to be more of an eye to litigation strategy rather than a coherent policy approach.

3. *Specific areas such as detention, application of human rights to Armed Forces personnel, extra territorial jurisdiction, RPAS, automated or autonomous weapons and Cyber war*

- In all discussions on specific cases it is important to separate those cases that relate to matters arising from the direct conduct of hostilities or detainee treatment, such as allegations of war crimes, from those that deal with policy matters, such as the procurement and issuing of equipment to service personnel. Whilst there is some overlap, essentially each deals with distinct legal issues.

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- Soldiers who are deployed on peacekeeping missions always have the legal right to respond in self-defence if they come under sudden attack. However, this is a more restrictive framework than that which would normally be applicable in the conduct of hostilities during an armed conflict. Greater clarity is needed to allow personnel to be better trained in the legal framework of operations, and how this affects their activities, before actually deploying and, as the legal framework is liable to change, whilst deployed.
 - Rules of Engagement are critical in all operations but they are a combination of law, policy and military strategy rather than reflecting purely legal considerations. They may be, and usually are, more restrictive than the law itself.
 - It should be clear that once R.O.E are issued to soldiers and commanders on the ground, the armed forces should be legally protected as long as they operate within those conditions. As long as R.O.E are adhered to on the ground, legal responsibility should lie with higher command and those who authorised the R.O.E.
 - Operations in the cyber domain are also subject to the law, both international and domestic. However, the nature of cyber operations makes it more difficult to apply the law, partly due to issues of attributability. In existing law, there is thus some inevitable uncertainty in some areas, including the role that can be played by civilians as opposed to military cyber operatives. This may change, though not in the immediate future. Nevertheless, the government needs to plan how it is going to handle the legal implications of causing deaths/damage through offensive cyber operations, and for oversight of such operations.

4. *Recommendations and Role of the HCDC*

- The MoD can no longer continue to deal with legal challenges on a case-by-case basis. This must be recognised as a significant and lasting issue and the MoD should develop a proactive policy to deal with it.
- The SDSR 2015 offers a valuable opportunity to make structural changes in this regard. As the tempo of UK military operations overseas scales down, there is a great opportunity to absorb lessons, improve training and develop a more proactive, rather than reactive, approach to legal issues as the forces move to a more “contingent” posture.
- The volume of international and domestic law is increasing at an ever greater rate. A central objective must be to re-establish the confidence of troops that they will be supported in legal cases where they are involved, and to prevent inappropriate inhibitions being created to good operational decision-making. What is at stake is the UK’s ability to project military power to the greatest possible extent within the appropriate legal framework, and the degree to which we may be compromising soldiers’ ability to deliver on the requirements of that by generating uncertainty.
- Differences in legal opinions between coalition partners are generally easy to anticipate in the planning stages of operations so should form part of that initial planning and should be clarified, and where possible resolved, well before the operations begin. When the basis of an operation is host nation consent, the interplay between the legal systems of the host nation and international/UK law must be agreed from the start.
- Military and civilian lawyers should be encouraged to work as closely and effectively as possible together within the MoD. Each group brings particular expertise to the table and there should be more collaboration, particularly at the senior levels.
- Not enough emphasis is currently placed on building up and maintaining a civilian cadre of legal professionals with expert military knowledge. More should be done to increase this particular form of hybrid expertise inside the MoD.
- The training given to all Armed Forces personnel on legal matters, especially on the treatment of detainees, should be dramatically improved (This was a key recommendation of the Baha Mousa Inquiry report). Consideration should be given to creating better manuals, training exercises and through more integrated planning between military and civilian lawyers. Similarly, the International Law of Armed Conflict should be much more thoroughly taught in Staff College, and the link to ethics reviewed. Whilst linked, these are distinct subjects and there is the danger of confusion. Not everything that is lawful is necessarily ethical and indeed, not everything that is ethical is necessarily lawful. There should be a defined scale along which legal training is given to military personnel of various ranks and legal training for all military personnel needs to be improved and must therefore be protected from any proposed cuts in the SDSR 2015.
- As part of any reforms to the MoD’s treatment of legal issues, it is recommended that the APRE conduct a survey (disaggregated by rank) of soldiers’ opinions on the effect of the law on operations, particularly in relation to their involvement as witnesses in possible civil proceedings (inquests, claims against MOD etc.) and their liability for criminal proceedings.

- This is a process that cannot just involve the MoD. The Foreign and Commonwealth Office and the Attorney General should be involved in all attempts to clarify operational legal guidelines.

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