In faint praise of the derogating will: The UK, ECHR derogation, and Smith v. MOD

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In Faint Praise of the Derogating Will:
The UK, ECHR derogation, and Smith v. MOD

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Social peace is a two-sided affair. Ultimately our societies depend on shared bonds and mutual understanding. From time to time, voices do speak in terms which are not helpful to the rule of law.

1. Introduction

Reducing the country’s human rights obligations has been officially mooted by various UK governments over the years. Although legislative change is not considered to be imminent, a flavour of the rising irritation at human rights obligations, voiced in official British circles, is easily located within the most contentious environment for human rights law in Britain: the extra-territorial effect and application of the European Convention on Human Rights (ECHR), and most particularly, of ECHR applicability during Council of Europe Member State deployments of their armed forces overseas. This development has become especially contentious in Britain in recent years, due to the fairly-frequent deployment of its armed forces overseas, not least in Afghanistan and Iraq. Therefore, this short discussion seeks to overview some of the legal

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4 See Christian Tomuschat, ‘Human rights and international humanitarian law’ [2010] 21(1) EJIL 15, 16 (the most fundamental of all human rights is the individual’s right to life). In agreement, Bugdaycay v. SOS Home Department [1987] Parliamentary Archives,
implications of human rights legislative change in a post-EU, or ‘Brexit’, UK, in which EU- and ECHR-related human rights obligations may both disappear or be greatly diminished.

On the basis of official British irritation at human rights, it may come as little surprise to some that, in what was potentially a first step towards eventual legislative change to current standards of substantive human rights coverage, the then Conservative Party-led government, on 4 October 2016, expressly declared its intention to derogate in future overseas deployments and operations from its human rights commitments to British military personnel, ‘if possible, in the circumstances that exist at that time’. The then government’s two main rationales were linked: the military should not be unduly hampered by fear of litigation, in general, when planning military operations and deploying its personnel overseas, and the government should not be exposed, in particular, to ‘vexatious’ human rights litigation in such a context, which has in fact occurred during recent deployments in Iraq and Afghanistan, and which has been highly-expensive. To clarify the latter point, military-linked litigation has arisen during recent deployments overseas of British forces, and has been generated either by the death or injury of British military personnel themselves, or by the death or injury of persons whom British personnel have detained and/or imprisoned.


The extra-territorial extension abroad of the ECHR is fairly recent, while, in contrast, securing the rights of serving British military personnel has developed only slowly, over many years, starting with the Crown Proceedings (Armed Forces) Act 1987, which statute finally allowed service personnel to sue the Ministry of Defence (MOD) for negligence. Since then, a recognition, both in law and amongst the public, has grown that governmental responsibility for arbitrarily-inflicted death or injury of, or by, British military personnel, including when on active duty overseas, is in fact the proper subject of express rights obligations. In turn, the ECHR, as a ‘living instrument’, is interpreted teleologically, such that its eventual, extra-territorial extension should not be overly-surprising. Moreover, inasmuch as the English courts, since 1998, have had direct jurisdiction over claims arising under the ECHR brought in Britain, and that the UK has recently engaged in numerous military adventures overseas, it was always only a matter of time before ECHR applicability would gradually be extended by the Strasbourg Court (the European Court of Human Rights, or ECtHR) to include such operations.

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7 Including, inter alia, the territorial context utilised in Soering v. UK (1989) 11 EHRR 439 [86]; the spatial model used in Bankovic v. Belgium (2001) 11 BHRC 435; and, the physical model used in R (Al-Skeini) v. SOS for Defence (2011) 53 EHRR 589.


12 Being acknowledged ‘exceptionally’ in Bankovic v. Belgium [2001] [n 7] [71], and on grounds of ‘physical and legal control’ in R (Al-Skeini) v. SOS for Defence [2011] [n 7] [137]. See Marko Milanovic, European Court Decides Al-Skeini and Al-Jedda’ (EJIL: Talk!, 7 July 2011)
Soon afterwards, the ECHR Article 2 ‘right to life’, specifically, of service personnel deployed on active duty overseas, was expressly acknowledged by Britain’s highest court - the UK Supreme Court - in 2013, in *Smith & Ors. (No. 2) v. Ministry of Defence No. 2.*

The recently-announced ‘presumption to derogate’ is the Conservative Party-led, UK government’s riposte, which, to an extent, reflects the deep unease also voiced in certain military and political circles, regarding the appropriateness of extending individual rights protections to, and in, dangerous, operational environments. Lingering questions as to the proper balance, between Britain’s international human rights obligations, and its obligations under International Humanitarian Law (IHL), during military deployments, make the matter even more complex. This short discussion thus critically considers the legal implications of the government’s future ‘presumption to derogate’ in a post-EU, ‘Brexit UK’, in which many existing human rights obligations are likely to be undermined, or even disappear. As such, it is speculated that the recent announcement of a ‘presumption to derogate’ in future is in fact designed to lay the groundwork for wider legislative change, including British withdrawal from the ECHR, and/or the repeal of the Human Rights Act 1998 (HRA), as currently threatened, and to normalise reductions in rights coverage, in general.

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13 [n 1].


16 See (n 5).


The structure of the discussion is as follows. After a preliminary outline of what derogation entails, the government’s stated rationales for its ‘presumption to derogate’ in future are critically considered. The ‘vexatious litigation’ argument currently being employed by the government to support derogation is then contextualised by means of a discussion of the Smith (No. 2) case. It is concluded that, inasmuch as the extra-territoriality of ECHR obligations during military deployments overseas is now widely acknowledged (if not universally accepted), the legal extension of human rights availability at all times has exacerbated existing frictions between law and politics, accelerated a wider debate as to rights coverage, exposed a disturbing normalising of rights downgrades, and carries real dangers for the future in terms of public accountability and the rule of law.

2. Derogation

Derogation from the ECHR is permitted as per Article 15, which provides as follows:

1. In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.

2. No derogation from Article 2 [the right to life], except in respect of deaths resulting from lawful acts of war, or from Articles 3 [prohibition of torture and of inhuman or degrading treatment], 4(1) [prohibition of slavery or servitude], and 7 [prohibition of crimen sine lege], shall be made under this provision.

3. Any High Contracting Party availing itself of this right of derogation shall keep the Secretary General of the Council of Europe fully informed of the measures which it has taken and the reasons therefor. It shall also inform the Secretary General of the Council of Europe when such measures have ceased to operate and the provisions of the Convention are again being fully executed.

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19 (n 1).

20 Consider, eg, the Regulation of Investigatory Powers Act 2000, which came into force alongside the HRA 1998, and establishes the Investigatory Powers Tribunal. In Regina (for Privacy International) v. I.P.T. [2017] EWHC 114, Leggatt J queried the consistency of RIPA’s 67(8) with the rule of law, as the Act originally afforded no right of appeal from the IPT.

Member states are also allowed to derogate from the International Covenant on Civil and Political Rights (ICCPR) 1966, as per Article 4 of that instrument. While neither the ECHR nor the ICCPR define specifically what is meant by a ‘public emergency threatening the life of the nation’, the following four requirements were developed and clarified in 1969 by the Council of Europe’s Commission on Human Rights: the emergency must be actual or imminent; its effects must involve the whole nation; the continuation of the community’s organised life must be threatened; and, the crisis or danger being experienced must be ‘exceptional’, that is to say, that ordinary measures or restrictions for maintaining public safety, health and good order are clearly inadequate. Further, the burden of proof in establishing that such a ‘public emergency’ exists is on the derogating state party.

As per Article 15(1), and taking Article 15(2) into account, any measures adopted must not be inconsistent with the derogating state’s other international law obligations; Article 15(3) implies that derogation must be ‘temporary’, lasting no longer than absolutely necessary, as the consequences of derogation impact on individuals, who lose their full, ‘peacetime’ enjoyment of certain rights. So far, so clear, but practice varies, and with many governments since 9/11 placing increasing emphasis on anticipating risks, the traditional parameters (and duration) of state emergency derogation have become rather more ambiguous. It is in this ‘anticipatory’ climate that the UK announced its ‘presumption to derogate’ in future, in October 2016.

Council of Europe Member States which have derogated recently, albeit for domestic contexts alone, include Turkey and France, each having filed a
series of formal notices of derogation with the Secretary General of the Council of Europe, after first declaring ‘states of emergency’. France initially filed on 20 November 2015,\(^{28}\) in response to terrorist attacks in Paris, on 13 November. As these terrorist atrocities have been followed by other terrorist incidents elsewhere in France, the government has extended and broadened its derogation, through to and beyond the country’s Presidential elections, which took place on 7 and 23 May 2017,\(^{29}\) and the French legislative elections, currently scheduled for 11 and 18 June.

Turkey’s emergency derogation occurred after the country experienced a failed political coup attempt led by the state’s military on 15 July 2016,\(^{30}\) the aftermath of which caused serious domestic upheaval. It followed France in declaring derogations on 21 July 2016,\(^{31}\) 11 October 2016,\(^{32}\) and 3 January 2017,\(^{33}\) which impacted on its human rights obligations;\(^{34}\) on 23 January


\(^{34}\) After which tens of thousands of public employees, including military personnel, were sacked or suspended from their posts, and/or arrested. See, eg, \textit{Zihni v. Turkey} App no 59061/16 (ECHR 385, 8 December 2016): claim dismissed, as ‘no special circumstances’ absolved the applicant’s non-exhaustion of domestic remedies, although the emergency measures did not permit appeal. See Emre Turkut, ‘Has the European Court of Human Rights Turned a Blind Eye to Alleged Rights Abuses in Turkey?’ (\textit{EJIL: Talk!}, 28 December 2016)
2017, it also communicated the establishment of a domestic Inquiry Commission on the State of Emergency Measures.\(^{35}\) Similar to France, Turkey has not specified precisely which ECHR articles it was derogating, although it did so for its ICCPR derogation,\(^{36}\) nor has it been explicit as to how the derogations would take effect.\(^{37}\) However, dissimilar to France, the Council of Europe Human Rights Commissioner on 15 February 2017 urged the Turkish government to lift the state of emergency.\(^{38}\) Therefore, it can be seen that, should the UK derogate, it would not be alone in the current climate in taking such a step. As for derogation in relation specifically to military deployments, there is also some precedent, as Ukraine, in June 2015, similarly notified the Council of Europe of the Ukraine’s derogation in relation to its ongoing, border fighting with Russia,\(^{39}\) followed by further extensions registered at the Council of Europe on 5 November 2015,\(^{40}\) 1 July 2016,\(^{41}\) and 3 February 2017.\(^{42}\)

\(^{35}\) Council of Europe, *Turkey- Declaration related to the Convention for the Protection of Human Rights and Fundamental Freedoms*, ETS No. 5, Notification - JJ8311C Tr./005-204 (Strasbourg, 31 January 2017)


Otherwise, the Council of Europe website notes that eight ECHR state parties have derogated in the past, including the UK. The UK is also among four ECHR state parties which have been required by the ECtHR to justify their derogation measures. As ECHR derogation is not entirely an unchallengeable, sovereign act, it might be thought the UK might exercise due caution to ensure it fulfilled the necessary conditions prior to declaring an emergency and seeking to derogate from the ECHR. Instead, it appears the UK has chosen to pre-empt concrete ‘events’, and announce its ‘presumption to derogate’ in future, in advance, which is highly unusual, if not deeply odd, as the government appears ‘anticipatorily’ to be doing what any ECHR (and ICCPR) state party has the flexibility to do, but only in response to a ‘public emergency threatening the life of the nation’, and regarding which derogation is factually both ‘absolutely necessary’ and ‘proportionate’.

3. The ‘Presumption to Derogate’

It is worth reiterating that the issue of derogation arises in a context of recent, human rights protection for British military personnel deployed overseas. Prior to Smith (No. 2), UK common law imposed no special duty of care on the
government (in tort or otherwise) to protect its military personnel.\textsuperscript{47} The MOD is subject to ordinary employment duties to provide a safe system of work, including supervision, training, equipment, competent colleagues, and so on, such duties have not been extended traditionally to personnel when engaged with the enemy, and the MOD is also exempt from criminal prosecution in such circumstances.\textsuperscript{48} On the other hand, as the armed forces fall within the definition of a public authority, they are expected to comply with national and international law, including human rights law.\textsuperscript{49} Obviously, there are ‘different moral valences in human rights law and the laws of war – the key difference being the role of military necessity in the latter’,\textsuperscript{50} yet a long-standing, tacit recognition, that the nature of military service and the use of armed force entail restrictions on the civilian rights of service personnel endures, such that, until recently, any ‘entitlement’ to human rights or other special protections for service personnel, most notably their right to life, has had to await case law, judicial activism, and a high number of military-related damages actions against the UK Government,\textsuperscript{51} whether brought by British military personnel, by those they have detained and/or imprisoned, and/or by their families.

\textsuperscript{47} A situation somewhat altered by s 7 HRA, and since influenced by Osman v. UK 23452/94 (2009) 29 EHRR 245.


\textsuperscript{50} Miles Jackson, ‘The Fog of Law’ [EJIL: Talk!, 21 April 2015] <https://www.ejiltalk.org/the-fog-of-law/> accessed 21 May 2017. See also Tomaschat (n 4) (absence of remedies in IHL necessitates the intervention of the ECtHR).

Such litigation in turn has required the ECtHR and the English courts to grapple with applying the ECHR extra-territorially in military environments. While this litigation has been highly contentious, of particular concern are the UK government’s stated rationales for its future ‘presumption to derogate’, which rests in part on a basis other than a ‘public emergency threatening the life of the nation’. Specifically, the government emphasises that a ‘presumption of derogation’ in future would be intended to ‘protect British troops serving in future conflicts’ from what the government terms an ‘industry of vexatious’ and ‘persistent legal claims’, costing millions of pounds, and thusly, to avoid ‘undermin[ing] the operational effectiveness of the Armed Forces’. The financial nature of these rationales makes doubly-mystifying the qualifying phrase ‘if possible in the circumstances that exist at that time’, other than, perhaps, implying the possibility of an adverse ECtHR opinion or two, and one wonders what the government has in mind in terms of the ‘impossible’. Be that as it may, by indicating officially that the government ‘may’ derogate during future military deployments abroad, the government begins to normalise the derogation process within a ‘patriotic’ (rather than strictly ‘defensive’) context, which risks entrenching ‘temporary’ emergency security laws, diluting the rule of law, and conditioning the public at large to expect less in general from governmental duties of care.

The gravity of these and related dangers led the UK Parliament’s Joint Committee on Human Rights (JCHR) to respond rapidly by letter to the Defence Secretary’s October 2016 announcement. In it, the JCHR posed a series of probing questions, and a separate request for specific data and detail as to the alleged ‘vexatious’ and ‘persistent legal claims’ on which a future ‘presumption to derogate’ might be based. The government was requested to quantify its claims of ‘vexatiousness’, to provide actual numbers of claims which have been brought, settled, determined and/or dismissed by a court, and to account for the actual amounts paid in legal aid and compensation resulting from the wars in Afghanistan and Iraq. The JCHR targeted most of its 25 questions in the letter’s Annex at the specific requirements of Article 15 ECHR, eg, the exigencies of ‘war or other public emergency threatening the life of the nation’, and the requirement that derogation must be ‘strictly required’ by these exigencies, and consistent with other international obligations. The JCHR reminded the Defence Secretary that, as per Article 15(2), some rights cannot be derogated, and the JCHR inquired specifically regarding the total number of claims brought under non-derogable Articles 2 and 3 ECHR, as well as under Article 5 (the right to liberty), which latter has an exhaustive list of possible

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52 News story (n 6).
exceptions. Additional questions concerned whether adequate judicial and Parliamentary scrutiny of a ‘presumption to derogate’ in future would be available, and the likely implications of derogation on the wider European system of rights enforcement.

The Defence Secretary, in his initial response on 22 November, avoided answering many of the JCHR’s questions, stating only that they could not yet be answered ‘because the Government has only announced an intention to derogate, not an actual derogation’. Consequently, the government was reluctant to engage in hypothetical debate in advance of a relevant situation arising. The response of 22 November also acknowledged that a future derogation would need justification ‘in the precise circumstances of the particular military operation in question’, and, therefore, that the government was only indicating its desire in future to secure sufficient flexibility. In the JCHR’s response to this letter, on 16 December, the JCHR Chair reminded the government that

The last time the UK derogated from the ECHR, in the wake of 9/11, the derogation received little parliamentary scrutiny and was later found to be incompatible with the ECHR by both the UK’s highest court and the European Court of Human Rights. This time, the Government’s case for intending to derogate rests on a number of assertions which need to be rigorously tested.

The JCHR also opened-up the discussion to the public, inviting their written submissions by 31 March 2017, extended to 7 April, in order for Parliament to hear and understand the public’s views and any concerns there may be regarding the government’s announced intention. However, the Committee has now closed this inquiry due to the snap calling of a General Election on 8 June

55 A response by 4 November was requested. JCHR, Letter (n 53).
57 ibid.
59 JCHR Enquiry Background (n 56).
2017, which necessitated the dissolution of Parliament on 3 May 2017, at which point all current Select Committees ceased to exist. Otherwise, the most recent response to the JCHR from the Defence Secretary was dated 28 February 2017, and published by the JCHR on 1 March 2017, and as the current JCHR has indicated, at the time of writing, that ‘if an inquiry on this subject is held in the future, the Committee may refer to the evidence already gathered as part of this inquiry’, the details of the Defence Secretary’s most recent correspondence are now briefly summarised.

4. The Government Memorandum

The Defence Secretary’s response to the JCHR of 28 February confirms ‘that no decision has been taken as to whether in the context of any particular future military operation it would or would not be appropriate to derogate’, and that ‘everything possible will be done to facilitate early Parliamentary scrutiny if and when we decide to derogate’. It notes with approval that the UK Supreme Court acknowledges the ‘analytic and practical difficulties’ of extending the jurisdiction of the ECHR ‘into realms for which it was not designed’, and he reiterates that it is not yet ‘possible to provide sufficient detail to allow meaningful scrutiny now of the likely justification of future decisions’. Nonetheless, accompanying this brief response is a short ‘Government Memorandum’, in which the government seeks to justify more completely a future derogation. Via sections entitled ‘Policy Rationale’, ‘Legislation’, ‘Conditions for Derogation’, ‘Operational Effectiveness and NATO’, ‘Legal Claims’, and ‘Compensation’, the Memorandum concludes that, although the UK Supreme Court has modified its approach, and begun to modify human rights in operational environments, to which IHL must apply, it was less clear

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62 Letter (n 61), annexed Government Memorandum [2] and [4], respectively.
63 ibid [3] and [4], respectively.
64 The Defence Secretary considers such cases as the following to be ‘helpful’: Mohammed & Ors v MOD [2017] UKSC 1 & [2017] UKSC 2; and, joined appeals in Serdar Mohammed & Al-Waheed v. MOD [2017] UKSC 2; both concerned UN-mandated peacekeeping operations in Iraq and Afghanistan. In Mohammed & Ors, the Court agreed the government was not liable in tort for wrongful detention or treatment; the acts in question had been Crown acts of state, taken
whether the ECtHR would always be similarly inclined. Hence, a ‘presumption to derogate’ in future operations would be warranted, to fill a perceived need for ‘a clear legal framework’ in such situations, i.e., IHL alone would be applicable in such situations.

The Memorandum admits that the UK would be the first ECHR state party to derogate in respect of its overseas activities. Whilst maintaining that the case for derogating is ‘obvious’, the Memorandum also constitutes the first time the government has publicly provided somewhat more detailed reasons for its allegations that extending ECHR extra-territoriality to military deployments overseas had adverse impacts. Moreover, while ‘the UK’s position has always been that IHL regulates armed conflict’, in order to use lethal force, and detain lawfully, the ECtHR’s own guidance in relation to the meaning of ‘war’ is cited with approval: ‘any substantial violence or unrest short of war likely to fall within the scope of the second limb of article 15(1), “a public emergency threatening the life of the nation”’. The section entitled ‘Operational Effectiveness and NATO’ concentrates on the former, as not all NATO countries are party to the ECHR.

The Memorandum highlights that practical difficulties are encountered with human rights in operational environments, including potential negative effects on the morale, fighting power and operational effectiveness of military personnel, and the risk of military witnesses relapsing with PTSD and other psychological difficulties during ECHR Article 2-compliant investigations.

However, the sections entitled ‘Legal Claims’ and ‘Compensation’ form by far the bulk of the Memorandum. Pointing to the Conservative Party 2015 election


65 Government Memorandum (n 62) [17].

66 ibid [3].

67 ibid [4]. Contrast Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion) (1996) ICJ Rep 1996, 22 (human rights protections do not cease during armed conflict); Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion) (2004) ICJ Rep, 136 (the facts determine whether some rights arise under IHL, human rights, or both legal regimes). Consider also Bankovic (n 7) (‘piecemeal’ applicability of the ECHR, if relevant). Government Memorandum (n 62) [6], entitled ‘Legislation’, notes mainly that any derogation order would be subject to Parliamentary debate and approval.


69 ibid [10].

70 ibid [9]. See, eg, R (on the application of Smith) (Respondent) v SOS for Defence (Appellant) and another [2010] UKSC 29 (inquests must satisfy ECHR Article 2 procedures).
manifesto and a Written Ministerial Statement of 10 October 2016, the government’s commitment to prevent ‘persistent’ human rights during overseas military operations is maintained,71 but the Memorandum defends the government’s position. It asserts that, of some ‘1400 judicial review applications against the Ministry of Defence relating to the Iraq conflict’, ‘only a tiny minority’ of the compensation claims ‘have been accompanied by full documentation’.72 The absence of evidence that has plagued many of the claims brought under common law is highlighted, and it is asserted ‘that a number of claimants had changed their stories halfway through their cases’.73

As for government pay-outs to litigants, it is tersely noted that ‘the Ministry of Defence has settled over 300 wrongful detention claims on a tariff basis, according to length of detention’ – a policy decision made after the ECtHR judgment in Al Jedda v United Kingdom,74 in which the Court found no lawful authority to detain Iraqi civilians during non-international phases of UK operations in Iraq: lawful detention required prior UN Security Council authorisation, which had not occurred. Subsequently, however, the Court, in Hassan v United Kingdom,75 had in fact qualified this stance: the safeguards of IHL and the ECHR during armed conflicts co-exist, but issues surrounding prisoners of war and detainees must be determined by IHL in line with the security risks. This judicial change-of-heart leads the Memorandum to state that ‘[i]t is therefore inaccurate to characterise the settlement of those claims as an acceptance of wrongdoing on the part of the UK’.76

The Memorandum concludes that a clear legal framework is needed for operational and strategic decision-making, thus implying that the ‘presumption to derogate’ is aimed squarely at a future intention to make IHL, alone, the legal framework applied to overseas military deployments.77 Overall, this response to the JCHR may placate those critical of the high financial costs and compensatory damages incurred during recent overseas deployments.78 In

71 Government Memorandum (n 62) [14].
73 ibid [16] n 6, citing R (Al-Staadoon & ors. n 9), regarding altered testimonies.
75 Government Memorandum (n 62) [16 n 9] citing (2014) 38 BHRC 358.
76 ibid [16].
77 ibid [17].
contrast, the case of *Smith v. MOD (No. 2) [2013]*,\(^79\) concerning the Article 2 ‘right to life’ of serving military personnel seems particularly apposite to illustrate the ground-breaking nature of ECtHR extra-territoriality, as the Supreme Court acknowledged and reinforced for domestic law purposes.\(^80\) Most crucially, the Supreme Court recognised that, when the time arrives to assess whether the government owes duties of care to all those under its power and control, the same considerations apply to claims brought under ECHR Article 2 as to common law tort claims, including for its serving military personnel.\(^81\)

5. **Smith v. UK (No. 2) [2013]**

The issue of a future ECHR derogation, designed to pre-empt human rights in favour of IHL during active military deployments overseas, runs counter both to ‘teleological’ Strasbourg case law on extra-territoriality,\(^82\) and to notions of human rights ‘universality’. In turn, the influence of the Strasbourg law prompted the UK Supreme Court majority decision in *Smith v. UK (No. 2)*,\(^83\) and foreshadows the recent and highly-critical Iraq Inquiry Report, which notes

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(Policy Exchange, 2015), <https://policyexchange.org.uk/wp-content/uploads/2016/09/clearing-the-fog-of-law.pdf> accessed 22 May 2017. Additional publications and links from the Policy Exchange on the topic may be found at <http://www.policyexchange.org.uk/component/search/?searchword=fog%20of%20law&searchphrase=exact&limit=20> accessed 22 May 2017. See also the Corporate Manslaughter and Corporate Homicide Act 2007, which, while not applicable to the battlefield, has ‘caused anxiety in the MOD’, by allowing juries ‘to consider the attitudes, policies, systems and accepted practices within the organisation’. Forster (n 48) 291 (citations omitted).

\(^79\) In *Smith (No. 2)* (n 1), the UK Supreme Court took extensive account of the long line of Strasbourg case law which has culminated in the extra-territorial reach of the ECHR.


\(^81\) Until *Smith (No. 2)* (n 1), nothing in domestic jurisprudence ‘suggest[ed] that in parallel with the statutory cause of action’, common law claims for breaches of human rights have also developed. Brice Dickson, ‘If the Human Rights Act were repealed, could the common law fill the void?’, Oxford Human Rights Hub, 27 November 2013 <http://ohrh.law.ox.ac.uk/if-the-human-rights-act-were-repealed-could-the-common-law-fill-the-void/> accessed 22 May 2017.

\(^82\) Including, inter alia, *Bankovic* (n 7).

\(^83\) Due, as per *R (on the application of Ullah) v. Special Adjudicator* [2004] UKHL 26, [2004] 2 AC 323 [20], Bingham L, to the duty of the national court ‘to keep pace with the Strasbourg jurisprudence as it evolves over time, no more, but certainly no less’. See Paula Giliker, ‘The Influence of EU and European Human Rights Law on English Private Law’ [2015] 64(2) ICLQ 237 s IV(C).
both that the consequences of the 2003 invasion and subsequent military occupation of Iraq are still being felt,\(^5\) and that many serving British personnel still experience service-related problems.\(^6\) Regardless, the evolution of extra-territoriality has been hotly contested throughout,\(^7\) and consequently prompted a number of ‘accommodations’ to be made by the ECtHR in order to adjust the IHL-ECHR balance,\(^8\) such that one could suppose that extra-territoriality might be viewed more favourably.

Be that as it may, in *Smith (No. 2)*, breach of the government’s duties of care under tort negligence and Article 2 ECHR were alleged, due to inadequate military training and/or equipment. The claims arose out of the deaths of three soldiers and the injuries of another two, while serving in the British Army in Iraq between 2003 and 2006.\(^9\) The Court was asked to deal mainly with three issues: whether two of the deaths (inadequate equipment) were within ECHR Article 1 jurisdiction, whether the UK owed Article 2 ‘positive’ duties to all the deceased soldiers, and whether the doctrine of combat immunity constituted a defence to the negligence claims (inadequate equipment, technology and training). A majority in the Supreme Court allowed the separate claims in tort and Article 2 ECHR,\(^10\) and narrowly construed the defence of combat immunity to cover only active military operations or action immediately preceding combat,\(^11\) and thus denying the MOD’s contention that the doctrine should be extended to cover both training and equipment procurement. The Court considered this would be excessive, as pre-theatre training and equipment procurement decisions can occur far in advance of operations.\(^12\)

\(^7\) See, eg, *The Fog of Law* (n 78).
\(^10\) *Smith (No. 2)* (n 1) [101].
\(^11\) ibid [83] – [100].
\(^12\) The EU Commission scrutinises Member States’ procurement decisions. Directive 2009/81/EC of 13 July 2009 is designed specifically to bring procurement ‘inside’ the Internal Market. See the Commission Communication on the European Defence and Security Sector
A 4 - 3 majority emphasised that the same considerations applied for both the tort negligence and ECHR claims, and established for the first time in British law that military personnel deployed on active overseas operations could sue the government under both standards of duties of care. This it did cautiously, however, exempting ‘high level’ decisions and the actual conduct of operations from review, and cautioning that all such matters would need further investigation as to their surrounding facts and evidence. Even so, a ‘middle ground’ remained, albeit one carrying a wide margin of appreciation, ‘where it would be reasonable to expect the individual to be afforded the protection of the article’. Seemingly anticipating the reasons for the current government’s proposal of a future ‘presumption to derogate’, the Court warned that this ‘middle ground’ should not be utilised to impede the work of the military, or to provoke, through the threat of litigation, a ‘defensive approach’ to strategic and procurement issues or to tactical and combat stages when equipment is being deployed. It also cautioned against imposing ‘unrealistic or excessively burdensome’ standards on military commanders.

In contrast, the minority did not wish to extend the duties either of Article 2 ECHR or of common law negligence into what they argued was a new field. Moreover, human rights and tort negligence should remain quite separate in British law, rather than converge. Indeed, a preference was noted for deciding the case entirely in tort negligence, with its familiar parameters of practical ‘reasonableness’. Therefore, the minority would have rejected the Article 2 claims because of the political nature of military matters, including training and equipment procurement decisions, which require the (political) allocation of available resources. Arguing that Article 2 ECHR should be engaged, if at all, only for systematic, not operational failures, it was made clear that Article 2 ECHR should not be extended to errors in the chain of command or relate to the conduct of operations. It was also ‘unclear how far the two substantive [framework and operational] duties are separated, with middle ground between them, or, form part of a continuum covering almost every aspect of state activity’.


92 Smith (No. 2) (n 1) [176] (Lord Hope).
93 ibid [64] – [66] and [76] – [81].
94 ibid [76].
95 ibid [100] (Lord Hope). See [120], [131] and [147] ([Lords Mance and Wilson] and [153] (Lord Carnwath).
96 Ibid [99].
99 Ibid [104] (Lord Mance dissenting).
In summary, *Smith (No. 2)* well-illustrates how polarised the arguments become when there is a choice between legal frameworks when states employ military force. The gradual erosion of Crown and combat immunities, of political control over when and where to deploy the military, of military control over training, and of political and military control over equipment procurement and operational planning, all collided in the case. The breakthrough of more extensive duties of care to military personnel deployed overseas on active service, and the recognition that a ‘middle ground’ exists in which they may bring litigation, encourages not only greater public and judicial scrutiny of military deployments in general, but also necessitates more official caution in particular, as already promoted by numerous EU directives and other measures intended to increase transparency and avoid both protectionism and possible corruption.

The former ‘fixed points’ of reference of military life, as noted by Forster, which once ensured ‘the hierarchical and impenetrable nature of the armed forces’, have long been due for modernisation, while the ‘golden shield’ of military immunity has vanished. In their place is the rule of law, already ‘accommodating’ the ECHR to the battlefield necessities reflected in IHL. On this basis, normalising military derogations in future would not assist in desired ‘clarity’. On the contrary, the government’s response, via its proposed ‘presumption to derogate’ in future, appears designed mainly to prevent greater public, departmental and/or judicial scrutiny over the government’s deployments of armed force, and with it, to block individual

100 ibid [64] – [66] and [76] – [81].
103 (1) Governmental responsibility for the legality of British uses of force, (2) Crown and combat immunity from liability, (3) restrictions on civilian rights of military personnel, (4) a separate military judicial system, permitting ‘the right to be different’, and (5) the inability of the family and friends of military personnel to challenge MOD decisions, ‘especially the appropriate levels of prior training, equipment and command responsibility’. Forster (n 48) 284 - 285.
104 ibid 299.
105 ibid 286, quoting James Burke (citation omitted).
106 ibid 297 - 299 (asserting, at 299, that ‘rights-based systems bring with them permanent instability’).
107 As regulated by the Inquiries Act 2005, the typology of which is described in Andrew Forster, *The military, war and the state: testing authority jurisdiction, allegiance and
rights litigation, coroners courts, resort to employment tribunals by military personnel, and so on, even though (or because) such forms of redress are vital in deterring impunity, malpractice and gross negligence.

The many controversies surrounding recent deployments of British service personnel abroad, particularly in non-self-defence contexts or ‘wars of choice’, along with the availability of litigation, demands for public enquiries and so on, which publicise the symptoms and causes of public disquiet, and which place greater pressure on politicians to pause longer when deciding to utilise the military instrument, have all proven crucial to the health and maintenance of vibrant British democratic institutions. Therefore, and in view of the fact that there is as yet no guarantee that the UK will remain a Member State of the ECHR in future, the alternative realities, had cases such as Smith (No. 2), and public inquiries such as Chilcot or Al-Sweady, and, indeed, the Deepcut Review, not occurred, do not bear close scrutiny.

obedience’ [March 2011] 27(1) Defense and Security Analysis 55, 58. See, eg, the Hutton Enquiry in 2004 (regarding the death of MOD scientist David Kelly), the Deepcut Review in 2006 (deaths of four recruits at the Deepcut army barracks), the Nimrod Review in 2009 (loss of aircraft in Afghanistan), the Saville Enquiry in 2010 (Bloody Sunday), the non-statutory, independent Mull of Kintyre inquiry in 2011 (RAF Chinook helicopter crash of 1994), the Gage Inquiry in 2011 (death of Baha Musa in Iraq in 2003), and more recently, the Chilcot Report in July 2016 (Iraq war).


109 Forster (n 48) 286 – 295. See also Clearing the Fog of Law Executive Summary (n 78) 7 (regarding the increase in litigation brought against the MOD).


111 Reminding the government it may not ‘simply assert interests of state or the public interest and rely upon that as a justification for the commission of wrongs’, as per Bici v MoD [2004] EWHC 786 (QB) (Elias J citing Entick v Carrington (1765) 19 Howell’s State Trials 1029).


6. Conclusion

This brief discussion considered the current, Conservative Party-led government’s stated intention in October 2016 to derogate from the ECHR during future military deployments overseas. The government has sought to justify this on the need for greater legal ‘clarity’ during such deployments. However, this stated purpose is partly rationalised by a desire to reduce the costs of rights litigation which arise during military operations overseas, so must be queried on many levels. Further, safeguarding the human rights of all by erasing the rights of some is fundamentally counter-intuitive: human rights form a protective shield for everyone, rather than just for some, against government abuse. When the government states it is seeking to avoid the ‘vexatious’ litigation of recent military deployments, it disregards the fact that some litigation has also been brought for the arbitrary and/or negligently-inflicted death or injury of British military personnel themselves, as well as for the alleged, unlawful detention and/or imprisonment of others. If the government resents having settled ‘hundreds’ of claims for wrongful detention, etc., it surely is worth remembering the conditions which led to that litigation in the first place. Finally, it is difficult to understand why the armed forces - a


public authority – should not be expected to comply with national and international law, including human rights law, to the extent to which they are able.

The case of Smith (No. 2) well-illustrates these points, and underscores how and why the slow erosions of Crown and combat immunities, and of political and military control over when, where and how to use the military instrument, have long been overdue. The ‘middle ground’ left, albeit cautiously, by the UK Supreme Court for potential litigation in future is thus a salutary reminder of the virtuous – and necessary - clash of interests at stake. Public and judicial scrutiny of military decision-making, the ability to seek and obtain legal redress, and so on, must be maintained in a society where due care and regard are paid by those in power to the populations they purport to represent, regulate and protect. If not, a ‘presumption to derogate’ in future can only be viewed as a measure to normalise fewer rights, and to condition the public to expect less, never more, from those to whom their security and well-being are entrusted.