
Clearing the Fog of Law

Saving our armed forces
from defeat by judicial diktat

Richard Ekins
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Executive Summary

The British military is now thoroughly entangled in the net of human rights law – often to the benefit of our country’s adversaries. The British armed forces remain the most accomplished in Europe; but they suffer courtroom defeat after courtroom defeat in London and Strasbourg.

The tipping point was *Smith v Ministry of Defence* (2013). The UK Supreme Court established for the first time that soldiers injured in battle or the families of those killed in action may sue the Government for negligence in tort law – and for breach of the “Right to Life” under Article 2 of the European Convention on Human Rights (ECHR).

This judgment built upon the earlier Strasbourg case of *Al Skeini v UK* (2011), which extended the reach of the ECHR to British troops fighting in Iraq – a foreign country which is, of course, not a signatory to that Convention. The High Court’s decision in *Serdar Mohammed v Secretary of State for Defence* (2015) further stretched the ECHR’s reach to Afghanistan.

Only this month, in *Al Saadoon & Others v Secretary of State for Defence*, the High Court made it clear that the consequence of these judgments is that the ECHR applies wherever and whenever a British soldier employs force: shooting an individual is now enough to bring that foreign national into the jurisdiction of the UK under the terms of Article 1 of the ECHR. So foreign nationals, including enemy combatants, may now sue Britain for breach of the ECHR – both in domestic courts, by virtue of the Human Rights Act 1998, and in Strasbourg.

These judicial developments have paved the way for a “spike” in litigation: at the beginning of 2014, some 190 public law claims had been filed against the Ministry of Defence in relation to British military action in Iraq; by the end of March 2015 this number is likely to have grown to 1,230 public law claims. This is in addition to a further 1000 private law claims – of which more than 700 remain live.

So where next for Britain’s increasingly powerful judges? As the military’s expeditionary capabilities decline, those of the judiciary seem to grow ...

This new form of judicial imperialism should urgently be reversed. The judiciary is the wrong body to hold the Government and the armed forces to account for the way that war is waged – by retrospectively reviewing their purchasing, training and combat decisions. This is properly a matter for Ministerial accountability, to Parliament and through Parliament to the public.

The extension of the common law of negligence to military action has already had damaging effects on the forces. The result will be an excessive degree of caution which is antithetical to the war-fighting ethos that is vital for success on the battlefield. The Government should immediately exercise its existing statutory powers to restore Crown immunity to claims in tort, including for alleged negligence.

The British armed forces should not be above the law. But which law? The ever-expanding reach of the ECHR is now supplanting far more practical laws of war – the current Geneva Conventions and later Protocols under which our forces have fought since 1949.

By contrast, the ECHR – which is partly incorporated into British domestic law under the Human Rights Act 1998 – is designed for conditions of peace in post-war Europe. It is a wholly impracticable code for regulating the conduct of the British military in violent combat scenarios. What place do *peacetime* concepts of “proportionality” have on the battlefield?

This folly reaches its apogee on the question of the detention of insurgents. It is surely absurd that European and British courts now expect our forces to operate in violent combat conditions according to a system more suited to the regulation of police powers on a Saturday night in the West End of London.

The result is a highly confusing variable legal geometry for British commanders. Are the Geneva Conventions supreme, or is it the ECHR/Human Rights Act?

The Government has failed to convince the Strasbourg Court or the UK Supreme Court to discipline themselves by limiting the reach of the ECHR. The way to restore the Geneva Conventions as the controlling law that governs how British forces fight is to set aside the ECHR – by exercising the power under Article 15 of the ECHR itself to derogate.

Recommendations

The Government must take prompt action to close down these multiple avenues of legal assault:

- The Government should derogate from the European Convention on Human Rights in respect of future overseas armed conflicts – using the mechanism of Article 15 of the ECHR.
- The Government should introduce primary legislation to amend the Human Rights Act 1998 to prevent military personnel relying on Article 2 of the ECHR against the Ministry of Defence in respect of injuries sustained on active operations.
- The Government should revive the Armed Forces’ Crown immunity from actions in tort during all future “warlike operations” overseas, by Ministerial Order under the Crown Proceedings (Armed Forces) Act 1987.
- The Government should undertake to pay compensation, on the full tort “restoration” measure, to all military personnel killed or wounded during active operations – without need to prove fault.
- The Government should take the lead in supporting the efforts by the International Committee of the Red Cross to strengthen the Geneva Conventions for the conditions of modern warfare.
- The Government should make an authoritative pronouncement of state policy – declaring the primacy of the Geneva Conventions in governing the conduct of British forces on the battlefield.

Introduction

The judiciary is pioneering a revolution in military affairs. Empowered by the Human Rights Act 1998, its spectre now haunts commanders in both war and peace. Our courts, once kept away from judging the confusion of the battlefield, can now consider with the benefit of hindsight how those commanders should have trained, prepared and equipped for – or even how they should have fought – the very conflicts in which they serve.

War and peace were once the ultimate responsibility of the Executive. In so far as it was scrutinised in matters of war and peace, the Executive was traditionally held to account by Parliament – whose active role was illustrated by the cashiering of Prime Ministers during both World Wars. No longer: the reach of imperial judiciary is increasing relentlessly, both functionally and geographically. The financial price is great enough, but the cost to the fighting ethos of the forces is greater still and is not yet fully measurable. Moreover, this legal mission creep is set to continue: recent pronouncements by significant judicial figures give little or no hint of any pull back by the Bench from the “judicialisation of war”.¹

The bridgeheads for the judiciary’s incursion into professional military terrain are twofold. First, the extraterritorial application of the European Convention on Human Rights (ECHR) – designed for the stable conditions of post war Europe – to the actions of our troops deployed in very violent conflict scenarios outside Europe. Second, the importation of civilian laws of negligence from the safety of the home front into fast moving combat situations. Neither of these legal developments is properly supported by sound legal method; each is an instance of over-bearing judicial power, which threatens both the balance of powers in our constitution and the fighting capacity of our armed services.

Such judicial imperialism has also resulted in a “spike” in litigation: at the beginning of 2014, some 190 public law claims had been filed against the Ministry of Defence in relation to British military action in Iraq, by the end of March 2015 this number is likely to have grown to 1,230 public law claims. This is in addition to a further 1000 private law claims – of which more than 700 remain live.²

The intention is not to make “the law silent amidst the clash of arms” as Cicero said;³ but, echoing Lord Atkin,⁴ the very reverse. This paper seeks to bring to the attention of a wider audience how the ECHR – the jewel in the crown of International Human Rights Law, or IHRL – is supplanting and undermining the older and far more suitable body of International Humanitarian Law, or IHL. By superimposing the ECHR and the Human Rights Act onto International Humanitarian Law (for this purpose, the Geneva Conventions), the result has been damaging confusion for commanders over which corpus of law governs their actions.

So where next for our adventurous judiciary? As the military’s expeditionary capabilities decline, those of the judiciary seem to grow.

This paper seeks to provide a road map out of all this.

¹ See Mr Justice Leggatt’s comments in *Al-Saadoon & Others v Secretary of State for Defence* [2015] EWHC 715 (Admin), [110]–[111]. See also Lord Dyson, “The extraterritorial application of the ECHR: Now on a firmer footing, but is it a sound one?” (Essex University, 2014). The phrase “the judicialisation of war” was employed by Lord Mance in his dissenting judgment in *Smith v MoD* [2014] A.C. 52, [2013] UKSC 41, [150].

² *Al-Saadoon*, [2]–[3].

³ Cicero *Pro Milone* 4.11.

⁴ Lord Atkin, in his dissent on the rights of the subject during armed conflict in *Liversidge v Anderson* [1942] A.C. 206, 244, held that “amid the clash of arms, the laws are not silent.”

IHL and IHRL: the differences

IHL regime (Geneva Conventions et al)	IHRL regime (ECHR/Human Rights Act)
<p>Treats various types of armed conflict differently (state vs state; high-intensity civil war; low-intensity civil war).</p>	<p>Treats all types of conflict in the same way. Does not differentiate between riots handled by police and full-scale pitched battles, unless states formally seek to derogate.</p>
<p>Different regimes combining a few general principles (distinction, military necessity, humanity, proportionality) with an array of specific rules.</p>	<p>Single regime comprising rights-based rules pitched at a high level of abstraction and involving considerable judicial discretion in application.</p>
<p>Main addressees of obligations are parties to the armed conflict (including non-state armed groups).</p>	<p>Addressee of obligations is the Government/state.</p>
<p>No international judicial system of enforcement. With the exception of war crimes, supervision and enforcement is instead centred on states and on the International Committee of the Red Cross.</p>	<p>Includes several international bodies entrusted with enforcement and monitoring, including political bodies (such as the UN Human Rights Council) and judicial or quasi-judicial bodies (e.g the European Court of Human Rights and the Human Rights Committee and often also domestic courts). Consistently with the rights-based nature of the system, enforcement at the initiative of individuals is central.</p>
<p>Only applies in times of armed conflict.</p>	<p>Applies all the time.</p>
<p>Its provisions are generally non-derogable (except Article 5 Geneva Convention IV).</p>	<p>Most human rights provisions are derogable.</p>
<p>Conceived for the conduct of hostilities and protection of persons in the power of the enemy.</p>	<p>Conceived to protect persons from abuse by the power of the state. Does not rest on the idea of conduct of hostilities, but on law enforcement during peacetime.</p>
<p>Is premised on different status (civilians, combatants, civilians directly participating in hostilities, prisoners of war, etc), each entitled to distinct privileges and immunities.</p>	<p>Is premised on the principle of equality and the idea of equal rights.</p>
<p>Focuses on 'parties to conflict' (states or non-state parties).</p>	<p>Focuses on the individual.</p>
<p>Detention, subject to various guarantees, allowed on security grounds.</p>	<p>Detention justified on a number of exhaustive grounds which, under the ECHR, do not include security.</p>
<p>Notion of control of territory pertains to law of occupation and triggers absolute obligations.</p>	<p>Notion of 'effective control' has a broader meaning: IHRL obligations are more flexible and vary with the degrees of control. IHRL can apply in certain situations that do not conform to the common definition of occupation.</p>
<p>Accepts the use of lethal force against combatants and civilians directly participating in hostilities, tolerates incidental killing of civilians in some circumstances (subject to proportionality). Planning military operations aimed at killing enemy combatants is permitted.</p>	<p>Lethal force can only be used in cases of imminent danger. Extremely narrow acceptance of lethal force. Planning an operation with the purpose of killing is never lawful.</p>
<p>Misapplication of force can constitute war crime.</p>	<p>Misapplication of force is treated as a crime.</p>

1

Judicial Imperialism: The Ever-expanding Reach of the ECHR and the Human Rights Act

The new interpretations of the jurisdiction of the ECHR

The traditional interpretation of the ECHR saw the requirement that states guarantee the Convention's rights and freedoms "to everyone within their jurisdiction" (Article 1) as applying to those within the state's territory. The notion of "jurisdiction" here is primarily territorial: the obligation applies within the territory of the state in question and not otherwise. Were that a rule without exception there would be no question of the ECHR applying to overseas conflicts.⁵ But there have always been some exceptional situations of "extraterritorial" jurisdiction. For example, a state may be responsible for its diplomatic and consular representatives despite their operating (of necessity) outside its territory. And a state may exercise "effective control of an area outside its national territory", and thereby expand its jurisdiction.⁶

In its watershed decision in *Bankovic v Belgium* (2001), the European Court of Human Rights held that NATO states using aerial bombardment against Serbia did not thereby assume jurisdiction over an enemy state and that the ECHR therefore did not apply.

But in *Al-Skeini v United Kingdom* (2011), the Strasbourg Court discarded this view. It held that the United Kingdom indeed had "jurisdiction" in Iraq owing to the presence of British ground forces during that conflict. Thus, the British armed forces became vulnerable to suit under the Human Rights Act and the ECHR. The UK Supreme Court and the Strasbourg Court have both loyally applied *Al-Skeini* – and, arguably, extended it – in the past two years.⁷ Lord Dyson, Master of the Rolls, comments that although *Bankovic* was seen at the time to be the Grand Chamber's final word on extraterritorial jurisdiction, *Al-Skeini* has since rendered *Bankovic* an "anomaly": the Strasbourg Court has corrected its earlier "mistake" to make the law (in his view) "more principled and more acceptable".⁸

⁵ Compare the International Covenant on Civil and Political Rights: a signatory state must "ensure to all individuals within its territory and subject to its jurisdiction the rights recognized..." (Article 2(1), emphasis added).

⁶ *Loizidou v Turkey* (1995) 20 E.H.R.R. 99 (Northern Cyprus) [62].

⁷ See further *Jaloud v Netherlands* (November 2014, Grand Chamber of European Court of Human Rights) where the UK Government intervened unsuccessfully to argue that Dutch soldiers manning a checkpoint in Iraq were not within the ECHR's jurisdiction.

⁸ Lord Dyson, "The extraterritorial application of the ECHR: Now on a firmer footing, but is it a sound one?" (2014, Essex University).

Bankovic v Belgium (2001)

Bankovic v Belgium was a case brought by the families of persons killed in a NATO aerial bombing of a Belgrade radio station during the Kosovo crisis.⁹

In April 1999 the building Radio Televizija Srbije (Radio–Television Serbia, RTS) was bombed by NATO during the Kosovo crisis. The building was destroyed; 16 people were killed, with 16 others seriously injured. Family members of the deceased brought a claim against the NATO states involved in the aerial campaign, complaining that the bombardment of the building violated Articles 2 and 10 of the European Convention on Human Rights (“Right to Life” and “Freedom of Expression”, respectively).

The Strasbourg Court held the ECHR inapplicable to the aerial bombing of a Belgrade radio station by the 17 respondent NATO member states (when the Former Republic of Yugoslavia was not party to the ECHR). The applicants had not been “within the jurisdiction” of the respondent states. Thus, they could not assert European Convention rights against NATO member states. “Jurisdiction” was primarily a territorial concept; applying the Convention outside a state’s territory was exceptional.¹⁰ The Strasbourg Court suggested that “the effective control of the relevant territory and its inhabitants abroad as a consequence of military occupation” would be required;¹¹ the facts of *Bankovic* fell well short of such control.

9 (2001) 11 BHRC 435.

10 At [75] the Court contrasted Article 1 of the (contemporaneous) Geneva Conventions (1949), requiring states “to respect and to ensure respect for the present Convention[s] in all circumstances” (emphasis added).

11 *Bankovic*, [71].

12 *Hirsi Jamaa and Others v Italy* (2012) 55 EHRR 21; *Hassan v the United Kingdom* [2014] ECHR 936; *Jaloud v the Netherlands* [GC], no. 47708/08, ECHR 20 November 2014.

So the formerly cautious approach, exemplified by *Bankovic*, has been abandoned for a much broader view of extraterritorial jurisdiction in *Al-Skeini*. The Strasbourg Court has since affirmed *Al-Skeini*,¹² while the UK Supreme Court has carried that decision yet further in *Smith v MoD*. There seems little prospect of restoring the narrow *Bankovic* approach to overseas conflict – without resorting to the derogation mechanism under Article 15 of the ECHR.

Al-Skeini v United Kingdom (2011)

Al-Skeini mainly concerned the deaths of five claimants in Basra, and whether or not the UK had a duty under ECHR to investigate those deaths.¹³ This was a test for the applicability of the ECHR to the British Army's occupation of Basra.¹⁴

The five individuals (all civilians) died in separate incidents in 2003, shot by British patrols. The UK courts held that these shooting incidents were not within UK jurisdiction under ECHR because (following the ruling in *Bankovic*) the British Army could not be considered to have been exercising "effective control" over Basra at that time.

But *Al-Skeini's* brother took his case to Strasbourg. The Strasbourg Court took a different view of the Iraqi applicants' case, holding that the "exceptional circumstances" of the British Army's assumption of responsibility for security in Basra meant that it had indeed exercised sufficient control over persons killed during its security operations: Article 1 of the ECHR applied and the applicants had been within the UK's jurisdiction and entitled to the protection of the ECHR. The United Kingdom was made liable for breaching Article 2 of the ECHR (specifically for failing to investigate adequately the deaths of the applicants – the procedural aspect of the ECHR's "Right to Life").¹⁵

The Strasbourg Court did not expressly overrule *Bankovic*. But in effect, it departed from it by holding that Article 1 may extend to acts which involve the exercise of authority and a measure of control over individuals outside the state's own territory – even though the state does *not* have effective control over the relevant area.

Al-Skeini provides that the state may be held to exercise authority and control over an individual, so that Article 1 applies, when the state exercises all or some of the public powers normally exercised by the government of the foreign territory in question. Also, the use of force by a state's agents operating outside its territory may bring the individual (thereby brought under the control of the state) into the state's jurisdiction.

This is the most far-reaching decision by the Strasbourg Court that impacts UK military operations – effectively opening the way for European (and British) human rights law to follow British troops on the battlefield abroad. Indeed, it was because of the *Al-Skeini* opening that the claims in the landmark UK case of *Smith v MoD* (which concerned the death of British soldiers in Iraq) could be considered as falling within UK jurisdiction per the ECHR. Still, the *Al-Skeini* judgment did not specifically rule that occupying forces always automatically exercise jurisdiction. Its precise limits remain unclear, which itself constitutes a major problem.

The Strasbourg Court's decision in *Al-Skeini* constituted a major extension of the reach of the European Convention. Indeed, it is *Al-Skeini* which has, above all else, resulted in the "juridification" of the armed forces that so surprised Jack Straw. As Home Secretary, Straw guided the Human Rights Act 1998 through Parliament (the Human Rights Act partly incorporates the ECHR into British law, making it possible to sue in British courts for its breach). Straw later said 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"; for had such application been foreseen, "there would have been a very high level of opposition to its passage, on both sides, and in both Houses".¹⁶ The implications of *Al-Skeini* for other armed conflicts are far from clear. After an extensive review of the field, international law barrister Max Schaefer of Brick

13 (2011) 53 E.H.R.R. 18.

14 The *Al-Skeini* case also involved a sixth individual (Baha Mousa) who had been arrested and died in British military custody. However, this separate incident was decided by the UK High Court (and confirmed by the UK Court of Appeal and the old Judicial Committee of the House of Lords) which ruled that UK-run detention facilities in Iraq fell under ECHR jurisdiction which was held to apply in addition to IHL.

15 (2011) 53 E.H.R.R. 18, [149]–[150].

16 House of Commons Defence Select Committee, "UK Armed Forces Personnel and the Legal Framework for Future Operations" (2014), Evidence p.13.

Court Chambers identifies “two things *Al-Skeini* does not say: that occupying armies necessarily exercise jurisdiction, or that [jurisdiction] is established whenever troops use force”.¹⁷ Rather, Schaefer notes, the Strasbourg Court emphasised the British Army’s exercise of public powers during the occupation of Basra in its *Al-Skeini* judgment. The decision, while of great significance, therefore leaves “more than one loose end”.¹⁸

The High Court, the Court of Appeal and old Judicial Committee of the House of Lords had all interpreted *Bankovic* as equally preventing the ECHR jurisdiction in Iraq, during the UK “domestic” stages of *Al-Skeini*.¹⁹ The senior British judiciary did not believe that the factual differences between the aerial bombing of Serbia in *Bankovic* and the presence of troops on the ground in Iraq warranted a different conclusion about jurisdiction. The truth is that *Al-Skeini* marked a significant departure by the Strasbourg Court (and one that the British courts had not anticipated). *Bankovic* had treated jurisdiction as a territorial matter – that is, applying on UK territory only, exceptional situations aside. This accords with the intentions of the drafters of the ECHR, as study of the “Travaux Préparatoires” reveals.²⁰ *Bankovic* clearly curtailed any broader notions of extraterritorial jurisdiction.²¹ Strikingly, in *Bankovic* the Strasbourg Court rejected its usual guiding principle that the ECHR should be developed as a “living instrument”: in other words “interpreted in light of present-day conditions”. It was not appropriate to apply that expansionary principle to the question of ECHR jurisdiction which determines “the scope and reach of the entire Convention system of human rights’ protection”.²² The regional nature of the Convention and the centrality of territorial jurisdiction were at the core of *Bankovic*. They were the key to protecting the Strasbourg Court from charges of “human rights imperialism”, as Lord Rodger of Earlsferry stated in the Judicial Committee of the House of Lords.²³ Conversely, the expansion of jurisdiction in *Al-Skeini* lays the Strasbourg Court open to just that charge of “imperialism”.²⁴ Whatever its precise scope, by abandoning the *Bankovic* approach *Al-Skeini* has opened the door to the troublesome developments.

To exemplify this point, it should be noted that the Strasbourg ruling in *Al-Skeini* was the key decision on which the UK Supreme Court relied in *Smith v MoD* to conclude that the claimant soldiers were within UK jurisdiction when they sustained their injuries in Iraq – one point on which the Supreme Court expressed unanimous agreement, notwithstanding the uncertainty about *Al-Skeini*’s scope.²⁵

17 M Schaefer, “*Al-Skeini* and the elusive parameters of extraterritorial jurisdiction” [2011] *European Human Rights Law Review* 566, 579 (emphasis added).

18 Schaefer *ibid.* Cf. A. Sari, House of Commons Defence Select Committee, “UK Armed Forces Personnel and the Legal Framework for Future Operations” (2014), Evidence pp.52–53 (ECHR will now apply whenever UK military are “in effective control of a particular area or person”).

19 [2004] EWHC 2911 (Admin); [2005] EWCA Civ 1609; [2007] UKHL 26.

20 See *Bankovic v Belgium* (2001) 11 BHRC 435, [65] and references in Lord Dyson, “The extraterritorial application of the ECHR: Now on a firmer footing, but is it a sound one?” (2014 Essex University).

21 See also the view of Lord Dyson, *ibid.*

22 *Bankovic v Belgium* (2001) 11 BHRC 435, [64]–[65].

23 *R (Al-Skeini) v Secretary of State for Defence* [2007] UKHL 26; [2008] 1 A.C. 153, [78].

Smith v Ministry of Defence (2013)

The *Smith v MoD* case²⁶ concerned two separate sets of claims by relatives of British soldiers killed in action (in the period 2003–2009 in Iraq) in two types of circumstances: one while on patrol in lightly-armoured Snatch Land Rovers that were destroyed by IEDs; and the other in a friendly-fire incident involving British Challenger II tanks firing on British troops by mistake.

In *Smith v MoD*, the UK Supreme Court applied the “Right to Life” under Article 2 of the ECHR to UK soldiers in combat situations. The Supreme Court also recognised a duty of care in the common law tort of negligence on the part of the MoD. This seminal decision allows soldiers to sue the UK Government for negligence.

Smith v MoD built on the Strasbourg Court’s decision in *Al-Skeini* (extraterritorial application of ECHR) to conclude that Article 2 of the ECHR was applicable to military operations in Iraq and, in particular, applied to active British military personnel in combat.

Smith v MoD is the first case in which British soldiers have successfully sued the British Government relying on tort law, the ECHR and the Human Rights Act. The case was sent to trial for an investigation of the facts: so although the claimants have not yet recovered damages, the Government was unable to have the claims dismissed as a preliminary matter.

In *Smith v MoD*, the Supreme Court felt compelled to depart from one of its own decisions from 2010, *R (Catherine Smith) v Oxfordshire Assistant Deputy Coroner*,²⁷ in which it had adopted the narrow approach to extraterritorial jurisdiction after the fashion of *Bankovic*. The 2010 case had been superseded by the Strasbourg Court’s decision in *Al-Skeini*. However, the extension of *Al-Skeini* (Iraqi civilians subject to the occupying British Army’s security operations) to the facts of *Smith v MoD* (British military personnel serving in Iraq) is much more questionable.

In particular, it is regrettable that the Supreme Court in *Smith v MoD* applied the Strasbourg Court’s revolutionary decision in *Al-Skeini* to a novel situation. Lord Hope of Craighead, speaking for the majority on the Supreme Court in *Smith v MoD*, noted²⁸ – but did not heed – Lord Brown of Eaton-under-Heywood’s warning about running too far ahead of Strasbourg’s jurisprudence (a warning sounded during the original House of Lords stage of *Al-Skeini*, another decision that had taken a narrow approach to extraterritorial jurisdiction in reliance on *Bankovic*). Lord Brown had said there was:

*a greater danger in the national court construing the Convention too generously in favour of an applicant than in construing it too narrowly. In the former event the mistake will necessarily stand: the member state cannot itself go to Strasbourg to have it corrected; in the latter event, however, where Convention rights have been denied by too narrow a construction, the aggrieved individual can have the decision corrected in Strasbourg.*²⁹

In other words, Lord Brown was warning that the courts must be careful not to understand and apply the ECHR in a way that goes beyond the established jurisprudence of the Strasbourg Court. To do so is unfair on the Government –

24 A charge welcomed by Judge Giovanni Bonello of Malta in *Al-Skeini*: “Human rights imperialism”

37. I confess to be quite unimpressed by the pleadings of the United Kingdom Government to the effect that exporting the European Convention on Human Rights to Iraq would have amounted to “human rights imperialism”. It ill behoves a State that imposed its military imperialism over another sovereign State without the frailest imprimatur from the international community, to resent the charge of having exported human rights imperialism to the vanquished enemy. It is like wearing with conceit your badge of international law banditry, but then recoiling in shock at being suspected of human rights promotion.

38. Personally, I would have respected better these virginal blushes of some statesmen had they worn them the other way round. Being bountiful with military imperialism but bashful of the stigma of human rights imperialism, sounds to me like not resisting sufficiently the urge to frequent the lower neighbourhoods of political inconstancy. For my part, I believe that those who export war ought to see to the parallel export of guarantees against the atrocities of war. And then, if necessary, bear with some fortitude the opprobrium of being labelled human rights imperialists.

39. I, for one, advertise my diversity. At my age, it may no longer be elegant to have dreams. But that of being branded in perpetuity a “human rights imperialist” sounds to me, I acknowledge, particularly seductive.”

25 Even though it was accepted that there was no clear Strasbourg authority on point: [2013] UKSC 41, [42].

26 [2013] UKSC 41; [2014] A.C. 52.

27 [2010] UKSC 29; [2011] 1 A.C. 1.

28 [2013] UKSC 41, [43] per Lord Hope.

29 *R (Al-Skeini) v Secretary of State for Defence* [2007] UKHL 26; [2008] 1 A.C. 153, [105].

which then has no obvious mechanism for challenging the UK courts' expansion. On the contrary, if the UK courts take a cautious approach, a disappointed individual can then challenge their decision in Strasbourg. Naturally, the Strasbourg Court regards itself as the final interpreter of the Convention's meaning – including its jurisdictional reach.³⁰ But if domestic courts in the UK run ahead of Strasbourg's jurisprudence, finding for applicants in novel or marginal cases, then Strasbourg will have no incentive (and indeed no opportunities) to clarify the boundaries of *Al-Skeini*.

This is what makes it worrying that the Government reached a “friendly settlement” with the applicant in *Pritchard v United Kingdom* in March 2014. This case also raised the question of whether British troops were within the jurisdiction of the ECHR when serving in Iraq. Thus, *Pritchard* would have given the Strasbourg Court the opportunity to consider the question that the Supreme Court had resolved in the claimant soldiers' favour in *Smith v MoD*. The fact that the Government settled the *Pritchard* case seems to concede that the Supreme Court's further extension of extraterritorial jurisdiction in *Smith v MoD* should not now be challenged in Strasbourg. If so, this confuses the role of the domestic courts and the Strasbourg Court. It would have been preferable to fight *Pritchard* to a hearing, and for the Government to seek to argue that the Supreme Court's *Smith v MoD* judgment was an illegitimate extension of *Al-Skeini*.

Pritchard v UK (2014)

This case concerned the death of a UK soldier – Corporal Dewi Pritchard serving with the 4th Regiment of the Royal Military Police – killed in an ambush in Iraq on 23 August 2003. The questions raised were whether the soldier had been within ECHR jurisdiction, and if so, whether the MoD had an obligation under Articles 2 and 13 of the ECHR to investigate his death.

In 2005 Dewi Pritchard's father requested detailed information about the circumstances in which his son had been killed. The Coroner declared that an Article 2 investigation was not required because the ECHR did not apply to British soldiers overseas.

The Coroner's interpretation of the ECHR was subsequently confirmed by the UK Supreme Court's 2010 decision in *R (Catherine Smith) v Oxfordshire Assistant Deputy Coroner*.³¹ Hence the last resort of Dewi Pritchard's father was to bring a case against the UK in the Strasbourg Court.

However, in March 2014 the UK chose to settle in the *Pritchard* case rather than allow it to proceed to a hearing before the Strasbourg Court. The terms of the settlement offered the Pritchard family compensation for legal costs and full access to the UK military's original report on Dewi Pritchard's death, as well as a promise to “answer any questions the Applicant may have”.

In yet another recent Iraq case (*Hassan v UK*), Strasbourg has affirmed its own *Al-Skeini* approach to jurisdiction – and, arguably, even extended it. In *Hassan* (September 2014) the applicant was held captive by British soldiers. This had not occurred during the occupation of Basra (as in *Al-Skeini*) but in an earlier phase of the Iraq conflict, namely during the active hostilities in 2003.

30 According to section 2 of the Human Rights Act 1998, UK courts are required only to “take into account” Strasbourg jurisprudence. Quite what this means has led to a very involved jurisprudence and commentary: for example *R v Horncastle* [2009] UKSC 14; [2010] 2 A.C. 373; E. Bjorge “The Courts and the ECHR: A Principled Approach to the Strasbourg Jurisprudence” [2013] *Cambridge Law Journal* 289. But the basic position is that courts are de facto obliged (in Lord Bingham's words) “to keep pace with the Strasbourg jurisprudence as it evolves over time: no more, but certainly no less”: *R (Ullah) v Special Adjudicator* [2004] UKHL 26; [2004] 2 AC 323, [20].

31 [2010] UKSC 29; [2011] 1 A.C. 1.

Hassan v United Kingdom (2014)

The *Hassan* case concerned an Iraqi citizen who was arrested on 22 April 2003 (during the ‘major combat operations’ phase of the Iraq war) by British forces; he was detained for a short period and then released. Hassan claimed before the Strasbourg Court that his arrest and detention had been arbitrary and unlawful, as well as lacking in procedural safeguards, in violation of Article 5 of the ECHR (the Right to Liberty). It was also claimed that the UK failed to properly investigate, under Articles 2, 3 and 5 of the ECHR, the circumstances of Hassan’s detention and alleged ill-treatment.

The Strasbourg Court ruled in favour of the UK by dismissing the Article 5 claim – the Right to Liberty – under the ECHR. The Strasbourg Court noted that since the UK had been exercising its power of detention under the Geneva Conventions, Hassan’s detention was legal under IHL.

This recent case has been hailed as a victory of sorts of IHL over IHRL, reaffirming the notion that IHL holds sway over the ECHR in situations of full-scale international armed conflict.

However, when read more closely the *Hassan* decision also has negative implications for IHL – which may, in fact, outweigh the positives:

- It re-affirmed the fact that ECHR/IHRL applies during international armed conflict. *Hassan* specifically states that “even in situations of international armed conflict the safeguards under the Convention continue to apply”.
- The judgment seems to indicate that IHL can only apply if it does not contradict (violate) the ECHR. So *Hassan* actually strengthens the position of the ECHR as a restriction on the full application of IHL, even in acknowledged situations of full-scale international war: IHL can only be applied in harmony with ECHR.

Finally, *Hassan* concerned an international armed conflict in Iraq. But most conflicts today are non-international in character. The rules of IHL are less well developed in the non-international context. In such conflicts, therefore, IHL is less likely to have priority over the ECHR in the absence of derogation – making the *Hassan* approach even more problematic. This is well illustrated by the decision in *Serdar Mohammed*, which concerned the non-international conflict in Afghanistan.

In conclusion, while on the surface *Hassan* did defeat an ECHR Article 5 claim, it did so not by accepting IHL primacy but rather by accepting a qualified limitation on ECHR/IHRL.

In *Hassan*, the UK Government sought to distinguish *Al-Skeini*. The Government argued that during active combat, states were governed exclusively by IHL rather than the ECHR.³² But the Strasbourg Court was “not persuaded” that this precluded ECHR jurisdiction: particularly since *Al-Skeini* had also concerned a situation where IHL applied.³³ Finally, it should be noted that in the groundbreaking High Court decision in *Serdar Mohammed* (2014), the ECHR was applied by Mr Justice Leggatt to detention by British forces in Afghanistan (rather than Iraq) when the armed services were fighting at the behest of the host country and as part of a UN mandated coalition.

³² *Hassan* [71].

³³ *Hassan* [77].

Serdar Mohammed v Ministry of Defence (2014)

Serdar Mohammed was captured as a suspect in the course of a military operation in Afghanistan. He was detained and interrogated over an initial period of 29 days with the authorisation of UK ministers. At the end of this period the Afghan authorities said that they wanted to take him into their custody but could not do so due to overcrowding in prisons. Serdar Mohammed then remained in detention in British military bases for this ‘logistical’ reason for a further 81 days before being transferred to the Afghan authorities.

The main claim was that his detention by UK armed forces was unlawful under the Human Rights Act 1998 (which requires the British Government to comply with the ECHR). *Serdar Mohammed* was decided by Mr Justice Leggatt in the High Court in 2014.³⁴ The Court of Appeal heard the appeal lodged by the Ministry of Defence in February 2015, but the judgment has not yet been delivered. It is likely that the case will proceed further – to the UK Supreme Court and potentially to Strasbourg.

Unlike the previous key cases which arose from the Iraq conflict, *Serdar Mohammed* relates to Afghanistan. The distinction is important because the Afghan war is technically a non-international conflict: while a number of states are parties to the struggle, they are fighting not against other states but rather against non-state armed groups (the Taliban). However, IHL is much less developed when it comes to addressing non-international conflict.

There are a number of ways in which *Serdar Mohammed* confirms the continuing displacement of IHL in favour of IHRL. Mr Justice Leggatt held that:

- If a state has not derogated from the ECHR, IHL cannot displace it in situations where they both apply. Mr Justice Leggatt supported this finding with the argument that no powers of detention existed under IHL in non-international conflict – that is, in scenarios such as ISAF operations under a UN mandate in Afghanistan. As discussed, the *Hassan* decision may have changed the position in relation to international armed conflict, although there is uncertainty about the scope of this change.
- Mr Justice Leggatt expressly stated that “the only way” IHL can prevail over Article 5 of the ECHR is in the case of derogation from the ECHR under Article 15 of the ECHR – “and not by invoking the principle of *lex specialis*”.

In conclusion, *Serdar Mohammed* is an outright rejection of the applicability of IHL to the question of who may be detained for what reasons and following which procedure in non-international armed conflict. The ECHR was the guiding authority, certainly in respect of detention. Therefore, the only way IHL can become the effective controlling body of law in non-international conflicts is through derogation from the ECHR.

Sitting in the English High Court in *Serdar Mohammed*, Mr Justice Leggatt felt compelled to apply the ECHR by virtue of the UK Supreme Court’s judgment in *Smith v MoD*, following the Strasbourg Court’s *Al-Skeini* ruling. But it is notable that Mr Justice Leggatt stated that he would have reached a different conclusion – had he not been bound by these authorities. He thought it was “problematic” and “far from obvious” why Afghan citizens should be able to assert European Convention rights on Afghan territory.³⁵ In his very recent (17 March 2015) decision in *Al-Saadoon & Others v Secretary of State for Defence*,³⁶ Mr Justice Leggatt spells out still further the basic logic of *Al-Skeini*, confirming the ever-expanding reach of

³⁴ [2014] EWHC 1369 (QB).

³⁵ *Serdar Mohammed v Ministry of Defence* [2014] EWHC 1369 (QB), [116], [118].

³⁶ [2015] EWHC 715 (Admin).

the ECHR and noting some of the obvious complications to which this exorbitant conception of jurisdiction gives rise.

Al-Saadoon & Others v Secretary of State for Defence **(March 2015)**

Well over a thousand claims have been filed for judicial review by claimants seeking orders from the court compelling the Secretary of State for Defence to investigate alleged human rights violations in Iraq. *Al-Saadoon & Others* followed a trial of eleven preliminary issues relevant to those claims. The trial and judgment were intended to clarify the scope of the United Kingdom's duty to investigate the alleged wrongdoing of the British military in Iraq. The trial was framed by reference to the assumed facts of certain test cases.

The eleven issues reduced to two main points of contention. First, whether the use of force by the British military in relation to Iraqi civilians who were not otherwise within British custody came within the jurisdiction of the United Kingdom and hence within the reach of the ECHR. Second, if jurisdiction is established, the scope of any duty to investigate alleged breaches of ECHR rights.

Mr Justice Leggatt derived from the case law the essential principle that “whenever and wherever a state which is a contracting party to the Convention purports to exercise legal authority or uses physical force, it must do so in a way that does not violate Convention rights.”³⁷ In relation to the test cases, he held that this principle meant the ECHR applied when an individual was shot by the British military “both (a) because such shootings occurred in the course of security operations in which British forces were exercising public powers that would normally be exercised by the Iraqi Government and (b) because shooting someone involves the exercise of physical power over that person.”³⁸

The judgment notes the very real difficulties to which this far-reaching principle of jurisdiction gives rise and the strong policy reasons which exist for limiting the scope of the ECHR to avoid interfering with military action, especially actual fighting. The judgment also notes reasons for concern that any military action overseas will now encourage a wave of legal claims.

Tracing the expanding concept of what constitutes jurisdiction under the ECHR is a regrettably, but necessarily, complicated story: Mr Justice Leggatt, for one, deems it “tortuous”.³⁹ Whatever the precise scope of the extension of the ECHR to British military operations overseas, it is clear that there are now very good reasons to fear that many actions taken by the military outside Britain will later be found to be subject to challenge under the ECHR. The “jurisdiction” of the ECHR is plainly now being enlarged. While *Al-Skeini* did not expressly overrule *Bankovic*, it has done so in effect; and the logic of the decision, as *Al-Saadoon* spells out is that all military force is now seen to be subject to the ECHR.

What can be done to reverse the extension of such extraterritorial jurisdiction? The mechanism provided in the Convention is derogation under Article 15 “in time of war”. Of course, it is understandable that states historically did not derogate when the ECHR seemingly did not apply to armed conflicts outside Council of Europe territory. Indeed, in *Bankovic* the Strasbourg Court reasoned

³⁷ *Al-Saadoon*, [106].

³⁸ *Al-Saadoon*, [294].

³⁹ *Serdar Mohammed*, [119].

that the consistent absence of derogations indicated “a lack of any apprehension on the part of the Contracting States [meaning the parties to the ECHR] of their extra-territorial responsibility in contexts similar to the present case”.⁴⁰ Since they did not think that the ECHR applied to military operations outside their territory, why would they have bothered to derogate from it? Such arguments had no traction with the Strasbourg Court in *Al-Skeini*. In line with past practice (NATO in Yugoslavia, and otherwise), the UK had not derogated from the ECHR before the Iraq conflict of 2003. But the (continued) consistent practice of non-derogation was simply ignored by the Strasbourg Court. And today, following *Al-Skeini*, contracting states can hardly “lack ... any apprehension ... of their extra-territorial responsibility” in overseas conflicts. On the contrary, for states not to derogate against the backdrop of expanded jurisdiction now concedes the jurisdiction point against them. The limits of extraterritorial jurisdiction can no longer be relied upon to protect military operations from the ECHR’s unnecessary supervision. Derogation must be used instead.⁴¹

Detention in wartime: friction between the ECHR and the Geneva Conventions

The previous section shows that since the Strasbourg Court’s 2011 decision in *Al-Skeini*, armed conflicts – otherwise regulated successfully by a discrete body of international law which first took shape in the 1863 Lieber Code and the 1864 Geneva Convention – also now fall within the ECHR’s “jurisdiction”. Concurrent application of inconsistent legal regimes is undesirable. If one does not give way to the other as a superior legal order, there is bound to be considerable uncertainty about which of two incompatible rules governs a particular situation.

The best that can be hoped for is a more or less incoherent compromise, through attempts to read them together “harmoniously”; at worst, the regime of IHRL could supplant the Geneva Conventions, to the advantage of our adversaries. Given the Geneva Conventions’ key role in protecting humanitarian concerns in the unique circumstances of armed conflict, this would actually undermine the protection of “human rights” (more broadly conceived). Clear evidence of such “judicial imperialism” can be seen in the Strasbourg Court’s decision in *Al-Jedda v United Kingdom*, another Iraq case decided on the same day as *Al-Skeini*. Robust criticisms have been made of *Al-Jedda* accordingly.⁴² Professor Sir Adam Roberts sums up the concerns: “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.”⁴³

40 *Bankovic v Belgium* (2001) 11 BHRC 435, [62].

41 The need for derogation is not removed by the Strasbourg Court’s use of IHL to “interpret” the ECHR in *Hassan v UK*. Although the Strasbourg Court stated at para [101] that the absence of derogations was one reason for its reliance on IHL, this argument will be less powerful in future conflicts. Since *Al-Skeini* it is obvious that the ECHR applies to armed conflicts. Thus state practice will need to react accordingly.

42 For example J. Pejic, “The European Court of Human Rights’ *Al-Jedda* judgment: The oversight of International Humanitarian Law” (2011) 93 *International Review of the Red Cross* 837.

43 House of Commons Defence Select Committee, “UK Armed Forces Personnel and the Legal Framework for Future Operations” (2014), Evidence p.61, para [17].

Al-Jedda v United Kingdom (2011)⁴⁴

This case concerned a suspect (Al-Jedda) arrested in 2004 and detained for four years by British soldiers in Basra. The arrest was performed by US forces, accompanied by Iraqi and British soldiers. Al-Jedda's detention was reviewed periodically and every time it was assessed that he remained a threat, until he was released in 2008. The UK Courts held that Article 5 of the ECHR (the Right to Liberty and Security) did not apply to Al-Jedda because UN Security Council Resolution 1546 (under which British forces were operating in Iraq) authorised internment and "all necessary measures".

The Strasbourg Court, on the other hand, held that the UN Security Council resolution only "authorised" but did not create an "obligation" to detain, and certainly not detain in breach of "fundamental principles of human rights". On this basis, the Strasbourg Court was able to dismiss Article 103 of the UN Charter which said that when a state's obligations under two separate international agreements clash (in this case, the UK's obligations under the UN Security Council resolution and under the ECHR), the obligations under the UN Charter take precedence. But because the UK was only "authorised" and not "obligated" under the UN Resolution and Geneva Convention IV to which the resolution arguably referred, the ECHR obligation was held to have greater weight. Importantly, the Strasbourg Court considered the UN Security Council resolution's wording to be "ambiguous" – and in such cases of ambiguity, the Strasbourg Court felt obliged to choose the interpretation that was "most in harmony with the requirements of the ECHR."

By removing the UN protection which British forces thought they had been operating under, the *Al-Jedda* decision has opened the way to more challenges of the same kind by other Iraqi detainees.

As noted above, the Strasbourg Court has appeared to take a less hostile approach to IHL in *Hassan v United Kingdom* (September 2014). Its reasoning, and the problems with it, will be considered in further detail below. Suffice to say that while the Strasbourg Court's seeming pragmatism is welcome, *Hassan's* deficiencies in legal logic mean it will come in for wide criticism. It would be highly premature, to say the least, to rely on *Hassan* as a lasting solution to the friction between the IHL and IHRL regimes. The fate of *Bankovic* shows that apparently settled decisions of the Strasbourg Court (however authoritative they may seem), are still liable to renewed erosion from that same Court's expansionist "living instrument" approach to the Convention. Again, derogation from the ECHR under Article 15 would be a more secure route. In *Serdar Mohammed*, Mr Justice Leggatt notes that this is the Convention's purpose-made device for reconciling its obligations with those of IHL; it is in his view "untenable" to suggest that IHL displaces the ECHR when a state has not used its power to derogate.⁴⁵ This would suggest that if a state or its agents fall within the ECHR's jurisdiction, then IHL is displaced (save to the extent that the ECHR makes provision for its relevance, say as a prima facie ground for detention).

44 (2011) 53 EHRR 23.

45 *Sedar Mohammed* [277]–[279], [284].

European human rights: an obstacle to *international military co-operation*

The application of the ECHR in armed conflict also causes difficulties for international military coalitions between European and non-European states; NATO, for one, is an obvious example. By contrast, when only certain (European) states in a coalition are subject to further, more stringent (but vaguer) obligations under the ECHR, the legal framework for the use of force becomes much more complex. The US military have found this variable legal geometry difficult and frustrating during recent coalition operations.⁴⁶ In Afghanistan, for example, UK forces were not able to pass detainees to fellow NATO members including the US: only signatory states were considered by the UK to be valid guarantors of the prisoners' human rights. Again, this is a difficulty not raised by the Geneva Conventions by virtue of their universal scope, meaning that all states are subject to the same humanitarian obligations.⁴⁷ To revert to that desirable state of affairs, it is necessary for states to derogate from their obligations under the ECHR.

State negligence: legal jurisdiction on the battlefield

Smith v MoD concerned two groups of allegations. The Land Rover claimants alleged that the MoD had been at fault in supplying inadequate equipment (in the sense that the MoD should have deployed more heavily armoured vehicles to protect personnel from roadside bombs). In the Challenger Tank (friendly fire) case, the claimants alleged that the MoD had been at fault in its vehicle-identification training and in the technology used to avoid such incidents: the training allegation presupposes fault by the tank commander who gave the order to fire on the claimants. By a 4–3 majority, the Supreme Court allowed all these allegations to go to trial – that is, for a judge to decide whether fault had been substantiated after hearing all the evidence.

It should be noted that allegations of fault are just as relevant to Human Rights Act claims for violation of the “Right to Life” (Article 2 of the ECHR) as for standard tort claims. Fault is implicit within allegations that Article 2 of the ECHR has been breached: the case is that the state should have done more to protect the claimants' life (its “positive” protective duty). In his dissenting judgment in *Smith v MoD* Lord Mance noted this similarity, although without enthusiasm. Lord Mance suggested that it might have been:

*better if the Strasbourg court had left the development and application of the law of tort to domestic legal systems, subject to clearly defined criteria, rather than set about creating what amounts in many respects to an independent substantive law of tort, overlapping with domestic tort law, but limited to cases involving death or the risk of death.*⁴⁸

Strasbourg has characteristically lacked such restraint. Hence there are two parallel fault-based regimes, both successfully relied upon by the claimants in *Smith v MoD*. One is the English common law of negligence, as developed in *Smith v MoD*. The other stems from Article 2 of the ECHR, the “Right to Life” (which requires not just that the state refrain from killing people, but also that it take positive steps to protect their lives from dangers created elsewhere).

It is a profound mistake to allow for such allegations of fault to be judicially investigated. Some allegations pertain to strategic decisions, procurement policy,

46 US commanders and senior politicians have alluded to this concern in numerous public statements critical of the national “caveats” allies use to set conditions on their participation in NATO operations. In a 2009 speech to NATO ministers just as he was departing office, US Secretary of Defense Robert Gates criticized NATO’s commitment of resources to the Afghanistan/ISAF mission. “At this time, many allies are unwilling to share the risks, commit the resources and follow through on collective commitments to this mission and to each other.” [“Gates: NATO Must Increase Assets, Cut Caveats in Afghanistan”, Donna Miles, American Forces Press Service, Oct 25, 2007 (www.defense.gov/news/newsarticle.aspx?id=47936)] He said that caveats represented a problem “symptomatic of a deeper challenge facing NATO”. “... [R]estrictions placed on what a given nation’s forces can do and where they can go put this alliance at a sizable disadvantage.” “While there will be nuances particular to each country’s rules of engagement, the ‘strings’ attached to one nation’s forces unfairly burden others and have done real harm in Afghanistan.” He then asked ministers for their help “...to make caveats in NATO operations, wherever they are, as benign as possible – and better yet, to convince... national leaders to lift restrictions on field commanders that impede their ability to succeed in critical missions”. Because the details of these caveats were classified and politically sensitive, there is seldom reference to specific nations, but the inferences are clear and the rules of engagement are often used to outline rules on detention and detaining as well. (“NATO Must Increase Assets, Cut Caveats in Afghanistan”, Donna Miles, American Forces Press Service, Oct 25, 2007).

47 Note, however, that the USA is not a party to Geneva Additional Protocol I.

48 [2013] UKSC 41, [142].

and/or allocation of (inevitably) constrained resources by ordering of military priorities. To investigate such allegations inevitably takes any court deep into political and professional military territory where it would be quite inappropriate for a judge to second-guess policy-makers' choices with the benefit of hindsight. Such matters of high policy and resource allocation are overwhelmingly matters for political decision and accountability.

It is equally unwise for the courts to hear claims of negligence against commanders in the field. The spectre of retrospective judicial review of their decisions contributes to a "safety first" mindset. Officers fear that courts would apply a balance of risks developed in cases far removed from the conditions of battle. An unduly – indeed impossibly – stringent duty of care may result from judicial unfamiliarity with the unique circumstances of armed combat. The risk is that such judicial activism may change the mindset of the commander from one of willingness to take risk for strategic gain, to one of risk aversion that is incompatible with the winning of wars.

There is considerable evidence of the harmful influence of judicialisation on military decision-making, from the highest levels downwards.⁴⁹ Of course many soldiers on the ground will not have a detailed command of the legal developments discussed here. But they will be affected by the policies, guidelines and regulations issued from the level in the hierarchy where these changes in the law are most closely followed. The perception within the military is what matters. Perceptions of legal risk lead to actions to mitigate the perceived risks. For example, officers will already be aware that negligence claims are in practice brought against (and paid for) by the MoD rather than against individual "tortfeasors".⁵⁰ This is all quite true, but beside the point.⁵¹ The absence of personal liability does not answer fears of "defensive practice" elsewhere in tort law. Doctors have long held professional negligence insurance, and in practice many claims are brought against the NHS and not individual doctors.

But regardless of whether the doctor is the nominal defendant and regardless of who actually pays the compensation awards, nobody doubts that findings of medical negligence are professionally damaging for doctors. The courts are duly sensitive to the difficulties of clinical practice, plausibly fearing that undue stringency could rebound by encouraging "defensive medicine". Simply observing that officers will not pay damages does not answer our concerns about *Smith v MoD*, for similar reasons. They still face public examination, criticism and (potentially) judicial condemnation. Military concerns about negligence suits are wholly understandable. Indeed, in Marshal of the RAF Lord Stirrup of Marylebone's testimony to the House of Lords Constitution Committee (arising out of a wider discussion on the role of Parliament in warmaking) the ex-Chief of the Defence Staff argued that judicial scrutiny was already affecting "morale and operational independence" – further citing *Smith v MoD*. The House of Lords Constitution Committee agreed with him.⁵²

In the military context, excessive caution may manifest itself in a number of ways. Reluctance to commit forces to an exceptionally dangerous situation may avert immediate losses on the narrow strip of the front – but at the much greater cost of broader strategic defeat for our forces. For example, when in 2008 a Taliban-surrounded UK Forward Operating Base located deep in Afghanistan needed an urgent airdrop of supplies from a C130 flying lower than usual, the

49 At the Chief of the Air Staff's Air Power Conference held at The Royal United Services Institute (RUSI) in July 2013 the Vice Chief of the Defence Staff, Air Chief Marshal Sir Stuart Peach, said that Service personnel must now preserve the documents and other information necessary to 'prove' that actions taken on operations, and the decisions that led to them, were legal and authorised. This effectively brings legal considerations into the daily operational thinking of the UK's military leadership – while in practical terms battlefield record-keeping to judicial evidential standards would severely burden the logistics of all but the smallest operations. Subsequent to *Smith v MoD*, the UK High Court has expressed its concern that liability risks "intangible" costs by substituting risk-aversion, recrimination and blame for the proper military "ethos of trust": *R (Long) v Secretary of State for Defence* [2014] EWHC 2391 (Admin), [80]–[83].

50 Indeed the Human Rights Act creates liabilities *only* for public authorities, and not individuals (since the ECHR is binding at the state level – only the United Kingdom (government) answers as respondent in the Strasbourg Court).

51 Pace K.L.H. Samuel, House of Commons Defence Select Committee, "UK Armed Forces Personnel and the Legal Framework for Future Operations" (2014), Evidence p.83; M. Hemming, *ibid* p.95. Cf. Hemming *ibid* p.97, accepting that trial of issue in a negligence case would involve "operational judgments [that were] taken in testing circumstances ... [being] forensically deconstructed, and very possibly publicly criticized".

52 House of Lords Constitution Committee Report "Constitutional arrangements for the use of armed force": Second Report, 2013–4 Session, [54]–[56].

UK Authorising Officer for the C130 Force refused to take the ‘risk’ because he deemed it too ‘unsafe’. The alternative would have been to make the drop further from the base, requiring the ground troops to venture out into enemy territory to reach the drop zone. Only a direct intervention by the in-theatre air commander was able to ensure the C130 did undertake the mission – as military and not ‘safety’ logic required; the drop was duly made close to the base.⁵³

“... the new tort duty will place UK forces at a military disadvantage. It places a new restriction on the kinds of action that can be undertaken”

Should the “duty of care” prevent a commander sacrificing the safety (and maybe the lives) of some soldiers in order to advance the overall military objective (and thus to protect the force as a whole)? Conversely, a commander could protect his personnel by use of tactics or weaponry that are far more destructive of enemy life and property, or more indiscriminate in effect – causing greater “collateral damage” to civilian populations – while posing a lower risk of injury to UK forces. This would clearly be undesirable; and, indeed, probably unlawful under the First Additional Protocol to the Geneva Conventions. This requires (Article 57(ii)):

all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects.

But how is a commander to choose between performing his duty to protect civilian lives under the Geneva Convention Protocol and performing his duty of care in negligence (and under Article 2 of the ECHR) to protect the lives of his own soldiers? These duties may clearly pull in different directions. It is very unfortunate that the Supreme Court in *Smith v MoD* did not follow earlier cases in which it was held that a negligence duty to the claimant should not be recognised because any such recognition would tend to undermine the performance of a more important duty by the defendant.⁵⁴ Even if commanders can somehow perform incompatible duties simultaneously, the general point remains: the new tort duty will place UK forces at a military disadvantage. It places a new restriction on the kinds of action that can be undertaken. In wars fought against enemies (especially non-state forces) who do not abide even by universally binding IHL, it is highly undesirable that the United Kingdom adopt further legal restraints on its own armed forces – beyond what IHL rightly requires. It would be unwise for Parliament to impose such further restraints; it is intolerable for the judiciary to do so.

While the Supreme Court in *Smith v MoD* disclaimed any intention of “judicialising warfare”, the judgment is likely to have precisely that effect – as Lord Mance pointed out in his dissent. It is notable that this “combat immunity” defence was not taken to preclude the claims in *Smith v MoD*. Although the cases involved combat injuries, the claimants alleged that there had been negligence in planning, procurement and training prior to the conflict. The Supreme Court held that as the claims were presented in this way, they were not barred by the “combat immunity” defence. The claimants had been “careful to avoid any criticism of the

⁵³ Interview with then Air Commodore Edward Stringer, previous operational commander in Afghanistan and Libya, 4 September 2012, cited in *The Fog of Law* report, Policy Exchange 2013.

⁵⁴ For example, *JD v East Berkshire NHS Trust* [2005] UKHL 23; [2005] 2 A.C. 373 and *Jain v Trent Strategic Health Authority* [2009] UKHL 4; [2009] 1 A.C. 853.

actions of the men who were actually engaged in armed combat at the time of the incident”.⁵⁵

This is true as far as it goes. However it is questionable whether claims involving combat injuries should become “justiciable” merely because the negligence is alleged to have occurred during the preparation for the conflict. This is little more than a difference in pleading – the underlying issues remain essentially the same. Moreover, it is probably possible to plead any case involving combat injuries in this way. For example, the immediate cause of the claimant’s death might be that he was shot in a “friendly fire” incident – but such an incident can always be presented as a failure in training (and possibly equipment); quite apart from the negligence of the man who fired the shot.⁵⁶

In a case prior to *Smith v MoD*, Mr Justice Owen had held that “combat immunity” extended to planning and preparation for armed combat.⁵⁷ But Mr Justice Owen’s understanding of the defence was overruled by the Supreme Court in *Smith v MoD*.⁵⁸ The driving philosophy of the majority in *Smith v MoD* was to construe “combat immunity” as narrowly as possible. This was rationalised by way of the constitutional principle of the Rule of Law:⁵⁹ that the Government should be legally accountable for its actions, like everybody else, and cannot simply rely on “state reasons” to justify torts. While this is a sound general principle, the devil is in the detail – and it is most unwise to take it to require judicial power to review the “carefulness” of preparations for armed conflict. In short, “combat immunity” is not likely to provide an effective defence in many future cases. Lord Mance is correct in his prediction that *Smith v MoD* will lead to the judicialisation of war.

“While the Supreme Court in *Smith v MoD* disclaimed any intention of ‘judicialising warfare’, the judgment is likely to have precisely that effect – as Lord Mance pointed out in his dissent”

⁵⁵ *Smith v MoD* [2013] UKSC 41, [91] per Lord Hope.

⁵⁶ This example is based on the Challenger Tank claims in *Smith v MoD* itself.

⁵⁷ *Multiple Claimants v The Ministry of Defence* [2003] EWHC 1134 (QB).

⁵⁸ [2013] UKSC 41, [89] per Lord Hope.

⁵⁹ [2013] UKSC 41, [89] per Lord Hope citing *Entick v Carrington* (1765) 19 State Tr 1029.

2

Human Rights in Armed Combat: Reinstating the Primacy of International Humanitarian Law

The problem: the retreat of international humanitarian law

International Humanitarian Law provides a realistic framework for military action which human rights laws cannot. To see this let us examine the two major questions regulated by IHL: the conduct of armed conflict (the use of force), and detention. IHL's rules on the conduct of hostilities govern engagement with enemy forces. It is permissible to use lethal force as a matter of first resort against enemy combatants. By contrast, the ECHR (intended to regulate stable peacetime polities) allows lethal force to be used only in exceptional cases as a last resort. Rarely will it be "proportionate" to use lethal force in civilian policing operations (the ECHR's core jurisdiction); whereas the "proportionality" doctrine in IHL relates only to protection of civilians (incidental victims rather than the intended military objective). Customary international law states:

Launching an attack which may be expected to cause incidental loss of civilian life ... which would be excessive in relation to the concrete and direct military advantage anticipated, is prohibited.⁶⁰

But there is no requirement that attacking enemy combatants with lethal force be "proportionate" along the lines of the ECHR's definition. The very suggestion is absurd in military doctrine and practice. The aim of combat is to bring the enemy to submission and using *overwhelming* force is one classic way to achieve it; indeed, it may be the morally most appropriate action. This is of course the very opposite of "no more than strictly necessary" force under the ECHR's proportionality doctrine. The rules are logically incompatible – because they govern entirely different situations. Any attempt to bring the norms of IHRL into the military context would be disastrous. For example, before every "shoot/don't shoot" situation the soldier would need to consider whether an enemy combatant could be subdued by less harmful (in other words, "more proportionate") means; a hesitancy that could prove fatal. Blurring the distinction between IHL and IHRL in this core domain of military operations causes a confusion that can only help the enemy.⁶¹

IHL also regulates detention during armed conflict. In international conflict, the Third Geneva Convention (1949) governs the taking and treatment of prisoners

⁶⁰ Rule 15 in J.-M. Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law* (ICRC and Cambridge University Press, 2006).

⁶¹ See Geoffrey S. Corn, "Mixing Apples and Hand Grenades: The Logical Limit of Applying Human Rights Norms to Armed Conflict" (2010) *International Humanitarian Legal Studies* Vol.1, No. 1, p.52.

of war, for the duration of the conflict. The Fourth Geneva Convention regulates civilian internment in the interests of security. Repugnant though such measures would be in peacetime civil society, in a war zone imprisonment without trial is frequently necessary, proportionate and reasonable. Taking combatants prisoner can also be greatly preferable to the conceivable alternatives. Yet Article 5 of the ECHR makes no provision for detention in these situations. To apply Article 5 to prisoners of war and civilian internees again risks absurdity – for the ECHR seems to suggest that they may not be detained at all (again, *Al-Jedda* shows the risks of straightforwardly applying Article 5 of the ECHR to armed conflict – and as Sir Adam Roberts observes, the Strasbourg Court’s decision there “could even be read to apply equally to the internment of prisoners of war”). These simple examples highlight the utterly different foundations of the Geneva Convention rules compared with superficially similar provisions of IHRL. The best conclusion on Article 5 of the ECHR (and indeed the ECHR’s protection of the “Right to Life” under Article 2 of the ECHR) is that they were simply not intended by the treaty’s drafters and original signatories to apply to combat. If they had been, then exceptions would have been made in their texts for armed conflict.

The rules of IHRL on detention might be more elaborate and precise than those of IHL (especially in non-international conflict);⁶² but the procedural guarantees for those detained are unworkably stringent. The result may well be less compliance, and so worse protection, than if IHL applied. The core rule in IHRL is that anyone detained “shall be brought promptly before a judge” (Article 5(3) of ECHR). Yet as Professor Marco Sassòli of the University of Geneva says,

*The main difficulty ... is whether it is realistic to expect states and non-state actors, interning possibly thousands, to bring all internees before a court without delay during armed conflict. If it is not, such an obligation risks making it extremely difficult to conduct war effectively and, thus, could lead to less compliance with the rules in the long term, eg summary executions disguised as battlefield killings.*⁶³

Indeed, there have been documented instances of this happening, for example, in Colombia.⁶⁴ Another yet more fundamental requirement for detention in IHRL is that there be a legal basis for it. Yet neither IHRL nor IHL expressly provide such a basis.⁶⁵ As we have argued above, it is an urgent necessity that IHL should be strengthened to provide a firm legal basis for detention in non-international conflict, with realistic procedural protection. In the absence of specific legal authority for detention,⁶⁶ IHRL seems to suggest that detention in non-international conflict is simply impossible, legally speaking. The problem with this is obvious. Again to quote Professor Marco Sassòli (who is by no means hostile to the application of IHRL in armed conflict):

*Parties to armed conflicts intern persons, hindering them from continuing to bear arms, so as to gain the military advantage. If, under IHRL, the non-state actor cannot legally intern members of government forces it is left with no option but either to release the captured enemy fighters or to kill them. The former is unrealistic, the latter a war crime.*⁶⁷

To provide legal clarity and appropriate, practical and effective legal protection of the victims of war, it is imperative to restore the primacy of IHL during armed

62 Marco Sassòli, “The Role of Human Rights and International Humanitarian Law in New Types of Armed Conflicts”, in Orna Ben-Naftali (ed.) “International Humanitarian Law and International Human Rights Law” (OUP, 2011): “When comparing the rules of IHL of non-international armed conflicts on procedural guarantees for persons arrested with those of IHRL, the former do not exist while ... the latter are clear and well developed by jurisprudence... The IHRL rules must therefore prevail. They are more precise and more restrictive.”

63 *Ibid* p.92.

64 See UNCHR, *Suarez de Guerrero v Colombia* (Comm No R.11/45) (31 March 1982), UN Doc Supp No 40 (A37/40) (*Guerrero*), cited in Sassoli, *op. cit.* p.88.

65 Sassòli, *op. cit.* p.93. Cf. *Serdar Mohammed v MoD* [2014] EWHC 1369 (QB) p.18 above, and calls to strengthen rules governing detention in IHL p.32 below.

66 A state belligerent could provide this basis through domestic law, for the purposes of IHRL, but that is not possible for non-state armed groups.

67 Sassòli, *op. cit.* p.93.

conflicts. The Geneva Conventions protect humanitarian interests to the maximum degree possible, given realistic acceptance that a war is taking place and military objectives have to be accommodated. They have stood the test of time in the most challenging conditions. But as indicated in this section, the Geneva Conventions have been disrupted by introduction of inappropriate and incompatible human rights standards. The United Kingdom should now act to correct this state of affairs, making use of the mechanism provided in the ECHR to derogate from its provisions.

The solution: derogation from the ECHR

The ECHR provides a “derogation” clause by which states legitimately may – and we argue should – disapply the Convention during armed conflict. Article 15 of the ECHR (“Derogation in time of emergency”) provides:

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 of the ECHR, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7 shall be made under this provision.⁶⁸

Paragraph 3 requires a reasoned communication of such derogations to the Council of Europe.

The structure of the Convention plainly envisages that, in armed conflict, states can disapply its obligations. As the reference to “lawful acts of war” in Article

15(2) shows, the ECHR expressly cedes priority to IHL by such a derogation. We have argued that such disapplication is highly desirable – to give full and uninterrupted force to the Geneva Conventions.

Obviously, Article 15 of the ECHR creates a power and not a duty to derogate (states “may” do so). But the corollary of the previous paragraph is that should a state decide not to derogate from the ECHR during wartime, the Convention is to apply with undiluted

effect according to its terms⁶⁹ – however unsuitable it might be to regulate armed conflict. To the extent that the Strasbourg Court has improperly extended the reach of the ECHR and imposed inappropriate peacetime human rights notions onto the battlefield – and thus sidelined the Geneva Conventions – one tenable view is that the ultimate responsibility lies with states’ failure to derogate. Certainly, now that the courts in both Strasbourg and London have extended the ECHR to armed conflict, it is incumbent on states that disagree with the extension to take action to reverse it. Inaction creates real problems for the legal basis for the use of armed force. For such inaction to continue is, we suggest, highly inadvisable. Failing to derogate has been a major contributory factor in the extension of the ECHR

“To the extent that the Strasbourg Court has improperly extended the reach of the ECHR and imposed inappropriate peacetime human rights notions onto the battlefield – and thus sidelined the Geneva Conventions – one tenable view is that the ultimate responsibility lies with states’ failure to derogate”

68 Article 2 concerns the “Right to Life”; Article 3 “Inhuman and Degrading Treatment”; Article 4(1) “Slavery”; Article 7 “No Punishment Without Law”.

69 This is Mr Justice Leggatt’s view in *Serdar Mohammed*: see p.18 above.

into armed conflict.⁷⁰ To persist in the omission will ensure that those problems continue – and indeed, become firmly entrenched in the jurisprudence of the Strasbourg Court.

The Government has fought a set of rear-guard actions against a plethora of cases. But despite limited victories – as in *Hassan* – the judicial direction of travel has overwhelmingly been for expansion of the Convention. It would be unwise to assume that the partial retreat, apparently signalled by the Strasbourg Court in *Hassan*, will prove permanent: its earlier cautious “leading cases” have subsequently been swept aside by that same body.⁷¹ If it ever was plausible to assume that armed conflict would not be regulated by human rights laws (as Parliament apparently assumed when the Human Rights Act was passed in 1998), cases in the past five years show that this is no longer true.

In *Hassan* the Strasbourg Court squarely faced the issue of the ECHR’s relationship with International Humanitarian Law – pointing out that the UK Government had failed to raise this point in *Al-Jedda*, a decision fiercely criticised for its insensitivity to the Geneva Conventions. *Hassan* cannot be criticised for such insensitivity. Although it insisted that the ECHR remained in force during international armed conflict, the Strasbourg Court held that Article 5 (concerning the deprivation of liberty) had to be interpreted “so far as possible in light of the general principles of international law, including the rules of international humanitarian law which play an indispensable and universally-accepted role in mitigating the savagery and inhumanity of armed conflict”.⁷² On this basis the UK had not been in breach of Article 5. The applicant’s “capture and detention was consistent with the powers available to the United Kingdom under the Third and Fourth Geneva Conventions”.⁷³

So far, so good. But there are a host of problems with the Strasbourg Court’s reasoning in *Hassan*. They weaken the decision and leave ample scope for its restriction (or indeed its repudiation) in future. Some of the problems are pointed up in the uncompromising dissent by Icelandic Judge Robert Spano (with the agreement of three other members of the Court). In harmony with Mr Justice Leggatt’s decision in *Serdar Mohammed* (prior to *Hassan v UK*),⁷⁴ Judge Spano reasoned that it was not (to use the Court’s definition) “possible” to read Article 5, ECHR compatibly with the Geneva Conventions. The *Hassan* majority had actually inserted a “new, unwritten ground for a deprivation of liberty” – “in direct contravention of an exhaustive and narrowly tailored limitation clause of the [ECHR] protecting a fundamental right”.⁷⁵ For Judge Spano, the Strasbourg Court’s accommodation between the ECHR and Geneva Conventions was spurious. Its attempt to “reconcile the irreconcilable” had achieved no such thing.⁷⁶ Rather, in substance, the Court had given the Geneva Conventions priority over the ECHR, while denying that it was doing so.

There are obvious difficulties with the Strasbourg Court’s complex and even disingenuous reasoning, as identified in the dissenting judgment Judge Spano. It seems unlikely that the Strasbourg Court will explicitly declare that the ECHR must give way to International Humanitarian Law (even though that is, arguably,

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70 Although contrast now *Hassan v United Kingdom*: see p.31 below.

71 e.g. *Bankovic v Belgium* (2001) 11 B.H.R.C. 435 (ECHR did not apply to NATO bombing of Belgrade radio station). Described prior to *Al Skeini v United Kingdom* (2011) 53 E.H.R.R. 18 as the “watershed authority in the light of which the Strasbourg jurisprudence as a whole has to be re-evaluated”: *Regina (Al-Skeini) v Secretary of State for Defence* [2004] EWHC 2911 (Admin); [2007] Q.B. 140, [268] (Lord Justice Rix). In the House of Lords, Lord Brown described *Bankovic* as the Strasbourg Court’s “clear – and clearly restrictive – approach” to extraterritorial jurisdiction: [2007] UKHL 26; [2008] 1 A.C. 153, [131].

72 *Varnava v. Turkey* [GC, 2009], [185].

73 *Hassan* [110].

74 *Serdar Mohammed* [2014] EWHC 1369 (QB), [288]–[292].

75 *Hassan* dissent (Judge Spano), [18], [13].

76 *Hassan* dissent (Judge Spano), [19].

“... the Strasbourg Court has been much less sensitive to the military context – apparently applying the rules developed for peacetime ‘law enforcement’ (policing) operations to a battle between armed forces and insurgents”

the effect of and indeed the basis for its decision in *Hassan*). According legal priority to the Geneva Conventions has, sadly, long been out of fashion at the level of general international law.⁷⁷ In *Serdar Mohammed*, Mr Justice Leggatt firmly and expressly rejected the argument that IHL supersedes IHRL when there is a disagreement between them during armed conflict.⁷⁸ He stated that this opinion was “impossible to maintain” in light of decisions by the International Court of

Justice holding that IHRL obligations remain in force (concurrently with IHL) during armed conflict.⁷⁹

Mr Justice Leggatt has seen “no difficulty” with the “more modest” argument that IHL should be used as a principle for interpreting human rights norms. This gives some effect to the rules of IHL. But the decision in *Serdar Mohammed* itself shows the limits of the requirement to interpret the ECHR

compatibly with IHL. Mr Justice Leggatt held that Article 5 of the ECHR could not be interpreted compatibly with International Humanitarian Law. Given that Article 5 expressly states a limited number of exceptions (none of which applied on the facts of *Serdar Mohammed* – nor indeed in *Hassan*), that seems clearly correct. It is puzzling that the Strasbourg Court in *Hassan* felt free to “interpret” Article 5 in the way criticised by Judge Spano’s dissent in that case. The limits of the “possible” in harmonious interpretation are apparently to be defined by political expediency rather than legal reasoning. It need hardly be said that this leaves the *Hassan* “doctrine” fragile and susceptible to reversal. Judge Spano derides it as a “novelty”, its scope “ambiguous” and its content “wholly uncertain”.⁸⁰ A surer way for the Strasbourg Court to have avoided conflict between IHL and the ECHR would have been to deny that the ECHR even applied – that is, to have denied extraterritorial jurisdiction. But as already explained, in *Hassan* the Strasbourg Court was unwilling to go back on its *Al-Skeini* approach to jurisdiction. Indeed, if anything, *Hassan* extends further the extraterritorial application of the ECHR.

Finally, we must note that *Hassan* occurred during an international armed conflict in Iraq; but most conflicts today are non-international in character. This matters, because the rules of IHL are less well developed in the non-international context. In such conflicts, therefore, IHL is less likely to have priority over the ECHR in the absence of derogation. In other words, the *Hassan* approach is even more problematic. This is shown well by the decision in *Serdar Mohammed*, which concerned the non-international conflict in Afghanistan.

Derogation remains the clearest way to ensure disapplication of the ECHR during armed conflict. Dr Aurel Sari of Exeter University wrote, prior to *Hassan*, that while the Strasbourg Court has showed itself sensitive to military emergency situations, such sensitivity can only go so far. Only by derogating from the Convention can the rules of IHL clearly be applied in place of the ECHR, such that states benefit from the more pragmatic regime⁸¹ on detention and use of lethal force under the Geneva Conventions. Otherwise the uncertain overlap between the two legal regimes remains. Cases will turn on how sensitive the Strasbourg Court is to military imperatives (as regulated by IHL) in the particular circumstances. This is highly unpredictable – and

77 See also G.I.A.D. Draper, “Humanitarian law and human Rights” [1979] *Acta Juridica* 193.

78 [2014] EWHC 1369 (QB), [274]–[287].

79 Arguably, Leggatt J fails to pay sufficient attention to the ICJ’s statement in the 1996 *Nuclear Weapons Opinion* that the human right concept of “arbitrary deprivation of life” “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”. But for the view that the “*lex specialis*” principle is fact-specific (to be determined on a case-by-case basis) cf. M. Sassòli, “The Role of Human Rights and International Humanitarian Law in New Types of Armed Conflicts” in Orna Ben-Naftali (ed.), *International Humanitarian Law and International Human Rights Law: Pas de Deux* (OUP 2011).

80 *Hassan* dissent, para [18].

81 A. Sari, House of Commons Defence Select Committee, “UK Armed Forces Personnel and the Legal Framework for Future Operations” (2014), Evidence pp.52–53, para [13]–[14].

offers far too little certainty to military commanders. Further, while the Strasbourg court may be more or less understanding of military imperatives in particular cases, the logic of human rights law, which is often understood to be universal and fundamental, cuts against sensitivity to and respect for other bodies of law, most notably IHL. Sometimes the Strasbourg Court has been understanding – as in *Hassan* itself, although even here the Court insisted (in the absence of derogation) that the ECHR remained applicable in principle. In other cases the Strasbourg Court has been much less sensitive to the military context – apparently applying the rules developed for peacetime “law enforcement” (policing) operations to a battle between armed forces and insurgents. In yet others, exemplified by *Al-Jedda*, the Strasbourg Court has apparently ignored the Geneva Conventions altogether. Dr Aurel Sari’s conclusion that derogation is the best way to avoid clashes between IHL and the ECHR has not been falsified by *Hassan*.

One final point remains about the limits of *Hassan* as a means of reasserting IHL. The case concerned an international armed conflict. Here the Third and Fourth Geneva Conventions (1949) apply to govern detention of prisoners of war and civilians posing a security risk. This clear application of the Geneva Conventions was, naturally, a precondition for the Strasbourg Court’s willingness to read the ECHR in the light of IHL. But many of the UK’s recent conflicts have been non-international in character. Afghanistan is an example: the conflict between Taliban groups and the Afghan government is not international (not a classic war between states). Foreseeably, many future military engagements for UK forces will be of this kind. There are important legal differences between international and non-international armed conflicts. The Geneva Conventions have a much-attenuated application in the latter situation (such as in Afghanistan).⁸² There are various reasons for this legal differentiation – including the reluctance of states to confer any legitimacy (including prisoner of war status) on rebels or insurgents.⁸³

This point played a crucial role in Mr Justice Leggatt’s determination in *Serdar Mohammed* that UK military detention in Afghanistan violated Article 5 of the ECHR. Mr Justice Leggatt held that no powers of detention exist under IHL in non-international armed conflicts.⁸⁴ (Contrast this with accepted powers of detention under the Third and Fourth Geneva Conventions, relied on successfully by the Government in *Hassan v UK* during the final phase of major combat operations against the Saddam Hussein regime.) This fortified his decision (described above) that the rules of IHL did not displace or qualify Article 5 of the ECHR. Mr Justice Leggatt held that an “insuperable difficulty” for the Ministry of Defence was that “IHL does not provide a legal basis for detention in situations of non-international armed conflict”; accordingly, IHL was “not intended to displace and is not capable of displacing human rights law in this context”.⁸⁵

Though Mr Justice Leggatt was right to classify Afghanistan as a non-international armed conflict in a legal sense, non-international armed conflicts are still part of the phenomenon of war – rather than the peacetime for which the ECHR was envisaged. Afghanistan is likely to set the model for future wars: British forces intervene, often as part of an international coalition, to support the government of a sovereign country which is not a party to the ECHR. The law applicable to such wars is the law of non-international armed conflict. This is found in Article III common to the four Geneva Conventions, Additional Protocol II, and in customary international law. Where a Status of Forces Agreement has been

82 For example Article 3 of all four 1949 Geneva Conventions (“Common Article 3”) sets down minimum standards for “armed conflict not of an international character”.

83 *Serdar Mohammed* [2014] EWHC 1369 (QB), [229], citing E. Debuf, *Captured in War: Lawful Internment in Armed Conflict* (Hart, 2013) pp.451–461.

84 *Serdar Mohammed* [2014] EWHC 1369 (QB), [232]–[268].

85 *Serdar Mohammed* [2014] EWHC 1369 (QB), [293].

concluded with the host government, this will also form part of the applicable law. The domestic law of the host state may at times be relevant too. The legal assessments required for deciding whether British forces are acting lawfully or unlawfully in these circumstances should be conducted by reference to this body of law – not to the ECHR.

The *Serdar Mohammed* judgment is currently under review by the Court of Appeal, and will no doubt reach higher courts. But the thrust is clear enough. Given the much less developed framework of IHL for non-international armed conflict, it is unlikely here to displace the ECHR in the absence of a formal derogation. Even if *Hassan* has managed to reconcile the ECHR with IHL in international conflicts without insisting on derogations (a contention we doubt given the Strasbourg Court’s convoluted reasoning), this is unlikely to succeed for the non-international conflicts which UK forces will face in the foreseeable future. Irrespective of *Hassan*, derogation remains imperative for non-international conflict if British military action is not to be governed by the inappropriate ECHR framework. It is also essential for the Government to help overcome the weakness of IHL in this area, as we outline in the next section.

The need for government action to strengthen international humanitarian law

Our attention so far has been to clear the way for application of IHL by excluding the peacetime human rights standards of the ECHR. But in addition to this, the Government must continue to give wholehearted positive support to efforts by the International Committee of the Red Cross and other organisations to strengthen IHL. As *Serdar Mohammed* makes clear, the IHL applicable to non-international armed conflicts is much less developed than it is in “classical” conflicts between states. Given the prevalence of non-international conflicts today, and the UK armed forces’ increasing interventions in them, the IHL framework here requires urgent attention.

The first thing which the Government must do – and which is unambiguously within its gift – is to declare the primacy of IHL as the law governing the conduct of the British Armed Forces on the battlefield.

If IHL remains underdeveloped, then the ECHR will continue to apply by default. As *Serdar Mohammed* again shows, it will remain difficult to convince the courts that IHL should apply to the exclusion of the ECHR in cases where the two overlap. This view is borne out by the work of the International Committee of the Red Cross. It has an ongoing project to strengthen IHL rules where necessary. The Red Cross has concluded, after careful study, that efforts should largely focus on ensuring respect for the existing rules rather than devising new ones.⁸⁶ But there are exceptions. As a Red Cross report notes, the sparse treaty provisions governing non-international armed conflict “cannot adequately respond to the myriad legal and protection issues that arise in practice”.⁸⁷ Some gaps are filled by customary international law – to the extent that the rules governing conduct of hostilities “are, with very few exceptions, essentially identical regardless of the conflict classification” (that is, international or non-international).⁸⁸

The major exceptions, where IHL is thought inadequate, are situations where persons are detained as a threat to security in non-international armed conflicts (in international situations this is governed in detail by either the Third or the Fourth Geneva Conventions). Accordingly, the International Committee of the

86 “In almost all cases, what is required to improve the victims’ situation is stricter compliance with [the existing IHL] framework, rather than the adoption of new rules. If all the parties concerned showed perfect regard for International Humanitarian Law, most current humanitarian issues would not exist. All attempts to strengthen humanitarian law should therefore build on the existing legal framework. There is no need to re-open the discussion on rules of long-established validity.” ICRC, “Strengthening legal protection for victims of armed conflicts” (Geneva, 2011).

87 ICRC, “International Humanitarian Law and the challenges of contemporary armed conflicts” (Geneva, 2011).

88 *Ibid.*

Red Cross has made detention in non-international armed conflicts one of two priority areas for strengthening legal protection and is conducting consultations with states and other actors on how to move the issue forward.⁸⁹

Although the Red Cross believes that international human rights treaties are applicable during armed conflict, it does not accept that they solve all humanitarian problems in practice for two important reasons. First, IHL binds both sides in a non-international armed conflict whereas IHRL applies only to state parties, and not violent non-state armed groups. Second, whereas there are mechanisms for derogating from human rights instruments (such as Article 15 of the ECHR), IHL is non-derogable. This avoids gaps in legal protection. Thus the Red Cross is “convinced” that IHL should be developed because human rights laws “cannot entirely make up for [IHL’s current] deficiencies”.⁹⁰ The importance of the subject is confirmed by a number of other initiatives that have taken, or are taking place. The “Copenhagen Process”, completed in 2012, drew up common operational standards on detention for use by international military coalitions in non-international armed conflicts.⁹¹

The movements described above all apparently aim to strengthen IHL at perhaps its weakest point – a weakness pointed out in *Serdar Mohammed*.⁹² It is imperative that the Government should engage openly and constructively with these and other initiatives.

IHL must be strengthened through formal, legally binding changes. Merely subscribing to “statements of intent”, proclaiming “best practice”, or signing up to so-called “soft law” will not produce the desired results: the Strasbourg Court will accommodate only hard law, nothing less.

How to derogate – and why

The ECHR provides a mechanism for derogating from its obligations “in time of war”. Naturally, there are legal conditions for exercising this power of derogation. There will also be political considerations. None of this should deter the Government from derogating in future conflicts. We have shown above that derogation is the only way to guarantee that conflicts are regulated by the appropriate rules of IHL – without a confusing ECHR overlay. We recommend a standing policy to derogate from the relevant Convention rights in future armed conflicts. Derogating under Article 15 constitutes an open declaration that the ECHR should be disapplied and that IHL should instead be the governing legal regime. To do anything less risks raising tensions unnecessarily at times of emergency or leaving British forces exposed to the ECHR when the conflict begins.

There are no greater costs in formally derogating than in the Government’s current litigation strategy. Defending cases on the ad hoc basis that they do not fall within ECHR jurisdiction is also a public declaration of the Government’s belief that the Convention should not regulate armed conflict.⁹³ During the long series of Iraq cases, the Government has not hesitated to argue that the ECHR should not apply. Derogation is nothing more than formal legal action codifying that belief. It would be more likely to produce the desired results – disapplying the ECHR in combat situations. Therefore any cost should be readily acceptable.

“Derogating under Article 15 constitutes an open declaration that the ECHR should be disapplied and that IHL should instead be the governing legal regime”

89 ICRC, “Strengthening legal protection” (2011) (ante).

90 Ibid.

91 According to the standard taxonomy, this is a “multinational non-international conflict” because all of the state actors are on the same side – their opponents are non-state groups. (Again, Afghanistan exemplifies this: coalition of states assisting Afghan government against the Taliban.)

92 Another attempt to fortify the legal regime governing non-international armed conflicts, broader in scope than detention, emanates from Columbia University under the direction of Sir Daniel Bethlehem KCMG QC and Professor Sarah Cleveland. The Columbia project argues that rather than drawing up wholly new laws, the existing laws governing *international* armed conflict could be applied to *non-international* situations, including the relevant rules on detention. This appears to offer considerable advantages. It would not require legal innovation. To some extent it would place on a formal legal footing what happens in practice already. Several states including the UK, the US, Australia, Canada and the Netherlands already apply the international rules to non-international conflicts as a matter of policy. Could this not be formalised as a matter of legal obligation? Compare on this Sassòli *op.cit.*, pp.81–83, 88–90.

93 NB that IHL must be expressly pleaded if it is to be taken into account by the Strasbourg Court: *Hassan v UK*, [107].

There are limits on derogation in the text of Article 15 itself (quoted above). Ultimately the Strasbourg Court would decide whether a derogation met these legal conditions, were it challenged (as is very likely). The general point is that a derogation must be supported by reasons, to ward off judicial invalidation.

As *The Fog of Law* already notes, derogation would not undermine certain rights which are expressly non-derogable under Article 15(2): freedom from inhuman and degrading treatment (Article 3); freedom from slavery (Article 4(1)); freedom from punishment without law (Article 7). The “Right to Life” (Article 2 of the ECHR) can be derogated from only “in respect of deaths resulting from lawful acts of war”. These limits are consistent with the view here: that the military

should be free to exercise lethal force as long as the conditions in IHL are met (for example the “targeting” rules). This part of Article 15 underlines the central argument here that derogation is the mechanism for ensuring that war is governed by IHL and not by the inappropriate framework of the ECHR (which is not designed to regulate the use of lethal force in combat).⁹⁴ It would be unwise to assume that the Strasbourg

“Only Parliament has the constitutional legitimacy to require the Government to account for its decision to allocate less to the defence budget than it might have done – or how the MoD chose spending priorities within its own set budget”

Court would interpret Article 2 of the ECHR in line with the “targeted force” doctrine in the absence of a derogation (that is, that lethal force may be used in the first instance against enemy combatants, because of their status as such).⁹⁵

Derogation is available only “In time of war or other public emergency threatening the life of the nation” (Article 15(1)). There is unfortunately some doubt about what this means, owing to an ambiguity in the wording. The “threatening the life of the nation” qualification makes clear that the “public emergency” should be an exceptionally grave one before derogation is possible. By contrast, it is far from obvious why “time of war” (that is, armed conflict) needs to be further qualified (which would mean derogation would be available only in relation to a subset of wars). In line with the argument above it is highly desirable for all parties to any armed conflict to be governed by IHL. If derogation were available only in wars of national survival (meaning conflicts “threatening the life of the nation”), it is doubtful whether any of the UK’s numerous conflicts since 1945 would count. Thus the power to derogate “in time of war” would be a dead letter. Such a narrow interpretation of Article 15 must be wrong. It undermines the structure of the ECHR in which states are permitted to derogate from the ECHR during armed conflict – so that IHL governs the situation instead.

It is unfortunate that a narrow view of the availability of Article 15 derogations was taken by Lord Bingham of Cornhill in the Judicial Committee of the House of Lords in *Al-Jedda*, and later adopted by Lord Hope in *Smith v MoD*.⁹⁶ These views were “obiter dicta” – that is, not strictly binding, since no derogation had been made by the UK for the Iraq war, a mistake, with hindsight. Therefore Lord Bingham and Lord Hope were not speaking about a matter that arose for decision in the *Al-Jedda* and *Smith v MoD* cases. Their views are not strictly binding on future courts for this reason. And some judges have preferred a more generous approach to the availability of derogation under Article 15. Notably, Mr Justice Leggatt has

94 As Sari notes in op. cit. at footnote 261, by limiting derogations from Article 2 to lawful acts of war the ECHR is “expressly deferring to the law of armed conflict”.

95 See for example *Isayeva v Russia* (2005) 41 E.H.R.R. 39 (discussed by W. Abresch, “A human rights law of internal armed conflict: The European Court of Human Rights in Chechnya” (2005) 16 *European Journal of International Law* 741).

96 *R (Al-Jedda) v Secretary of State for Defence* [2007] UKHL 58, [2008] AC 332, [38] per Lord Bingham; *Smith v MoD* [2013] UKSC 41, [60] per Lord Hope.

recently suggested in *Serdar Mohammed* that although Lord Bingham’s view was the more natural interpretation of Article 15, it should no longer be accepted in the light of the Strasbourg jurisprudence subsequent to Lord Bingham’s statement.⁹⁷ Since the *Al-Skeini* case, the scope of derogation ought to be expanded in line with the expanded extraterritorial jurisdiction of the ECHR. It cannot be right, according to Mr Justice Leggatt, for the Strasbourg Court to expand jurisdiction (as it did in *Al-Skeini v UK*) without a “consonant” enlargement of the potential for derogation.⁹⁸ Similarly, Marco Sassòli, Professor of International Law at Geneva University, comments that “one cannot simultaneously hold a state accountable because it has a certain level of control abroad and deny it the possibility to derogate because there is no emergency on that state’s own territory”.⁹⁹

The better argument is that Article 15 is available for use during any “time of war”—broadly defined. It can and should be invoked for future armed conflicts.

97 *Serdar Mohammed* [2014] EWHC 1369 (QB), [157].

98 *Serdar Mohammed* [2014] EWHC 1369 (QB), [155]–[157].

99 Marco Sassòli, “The Role of Human Rights and International Humanitarian Law in New Types of Armed Conflicts”, in Orna Ben-Naftali (ed.) *International Humanitarian Law and International Human Rights Law* (OUP, 2011).

3

Negligence on the Battlefield: Reinstating Combat Immunity

The necessity of action: *Smith v MoD* and its problems

*Smith v MoD*¹⁰⁰ means that every death or injury sustained during active service may now generate a claim for damages, based on the allegation that negligence caused the claimant's injuries. While not all claims will succeed, *Smith v MoD* holds that they must proceed to a full hearing for the facts to be investigated. The judicial scrutiny (and public criticism) that this entails is damaging. It is entirely understandable that the families of servicemen and women who have been killed or injured are grieving and seek to learn more about the facts surrounding their loss. However, the problem is that the pursuit of this concern through the courts is likely significantly to undermine the fighting power of the armed forces, by unpicking political and military decisions that are by their nature taken rapidly and in the knowledge that casualties may unfortunately occur. We argue that the Government must now take action to prevent such claims being brought, while guaranteeing compensation for injured personnel without the need for proof of negligence.

This is for two, linked reasons: firstly, that the common law of negligence has no place on the battlefield. The situations are very often too confused and fleetingly subjective to allow for fair judgment after the event. Furthermore, the very act of judging in a courtroom what went wrong leads to a "safety first" attitude amongst commanders at all levels and injects delay, risking the entire undertaking. Secondly, and importantly, this is not about money. Accepting increased compensation through a no-fault mechanism avoids accusations of penny-pinching and makes clear that the real reasons to reinstate robust combat immunity are justified concerns about "legal mission creep" and consequent military enfeeblement.

In *Smith v MoD* Lord Hope (for the majority on the Supreme Court) acknowledged these dangers but failed to address them. Lord Hope accepted that there is a common law defence of "combat immunity".¹⁰¹ It bars negligence liability for decisions taken during active combat. But he held the defence against allegations of conflict negligence should be "narrowly construed", consistent with the constitutional principle that the Government has no general "public interest" immunity from liability for its torts.¹⁰² The combat immunity defence was not available in the Challenger Tank claims since the alleged negligence occurred prior to the conflict; for, as the Supreme Court argued, when it comes to decisions about training and equipment "there is time to think things through,

100 [2013] UKSC 41; [2014] A.C. 52.

101 See Lord Mance, cited p.24 above.

102 [2013] UKSC 41, [90], [92] (citing *Entick v Carrington* (1765) 19 State Tr 1029).

to plan and to exercise judgement ... sufficiently far removed from the pressures and risks of active operations against the enemy for it to not be unreasonable to expect a duty of care to be exercised".¹⁰³

But in reality this leaves virtually no scope for combat immunity.¹⁰⁴ With careful pleading, claims can always be framed to identify mistakes (in equipment, training, tactical deployment, etc.) prior to the battle in which the injury was sustained. It is true that in the Land Rover claims, the combat immunity defence was left to be determined at any subsequent trial. The decision about which armoured personnel carrier to use might have been one for commanders on the ground – according to the information available to them at the time. The issue required factual investigation; it could not be resolved “on the papers” before a full trial. But such a fact-sensitive approach to combat immunity does not avoid but instead confirms the problem.

If there is to be a full hearing every time before the applicability of combat immunity can be determined, the damage will have been done. Any final victory after the negligence case is heard (that is, by convincing the trial judge that, notwithstanding any negligence, the matter was covered by combat immunity) will be of the Pyrrhic sort. The MoD will not then have to pay damages, it is true. But the military will cut their cloth accordingly to avoid such suits, and become more risk averse.

Lord Hope also acknowledged the constitutional dangers of courts reviewing decisions on resource allocation and military priorities. These are political matters for which Ministers should be held to account by Parliament and through Parliament to the electorate. Certainly, many MPs have expressed concerns about the under-equipment of soldiers in Iraq. Given that resources are never infinite, and given military constraints (such as the fact that overt preparations may make war seem inevitable), this is an inherent problem for any conflict. But the political process is the right means of ensuring accountability for avoidable failings in military preparation. Only Parliament has the constitutional legitimacy to require the Government to account for its decision to allocate less to the defence budget than it might have done – or how the MoD chose spending priorities within its own set budget.

Bundling the negligence claims in tort together with alleged violations of the ECHR, may have helped the *Smith v MoD* claimants evade the Government’s “non-justiciability” defence. The introduction of the Human Rights Act has required the British courts to adjudicate on many questions that they would formerly have dismissed as non-justiciable – that is, not amenable to judicial consideration. For, “where a claim under the Human Rights Act arises, it is *ipso facto* justiciable”.¹⁰⁵ Lord Sumption has explained that when he appeared as counsel for the Government, he refused to argue that a claim based on Article 2 of the ECHR was “non-justiciable”: if the Convention was engaged, the relevant Government action “was necessarily justiciable because the Human Rights Act said so”.¹⁰⁶ For another Justice and Deputy President of the Supreme Court, Lady Hale of Richmond, it is accordingly “common ground that if a Convention right requires the court to examine and adjudicate upon matters which were previously

“Parliament has the constitutional legitimacy to require the Government to account for its decision to allocate less to the defence budget than it might have done”

103 [2013] UKSC 41, [95].

104 Contrast, however, the apparently broader approach to combat immunity (based in part on the dissenting judgment of Lord Mance in *Smith*) in *R (Long) v Secretary of State for Defence* [2014] EWHC 2391 (Admin), [77]–[87].

105 *Serdar Mohammed* [2014] EWHC 1369 (QB), [411].

106 Sumption, “Foreign Affairs in the English Courts since 9/11” (London School of Economics Lecture, 2012), commenting on *R (Gentle) v Prime Minister* [2006].

regarded as non-justiciable, then adjudicate we must”.¹⁰⁷ The judicial experience of deciding what was formerly (rightly) regarded as non-justiciable has been seen to inform how the courts approach common law negligence claims, with fewer claims now being held to be non-justiciable because they raise policy issues.¹⁰⁸ *Smith v MoD* may be another example of this phenomenon, in which the judicial confidence that informs human rights adjudication compromises judicial method more widely.

While the Supreme Court in *Smith v MoD* nominally preserves a narrow defence of “combat immunity” (for commanders in the field) and “non-justiciability” (for Ministers and MoD mandarins), this still leaves a large middle ground of

“We recommend action to restore Crown immunity for the armed forces in tort, to preclude military personnel claiming for combat injuries under the Human Rights Act, and for payment of full compensation on a no-fault basis”

claims. In dissent, Lord Mance saw “little attraction” in such an approach. Why immunise from liability “the man on the ground and the policy-maker in Whitehall” but still permit negligence challenges to “the procurement, training and deployment decisions of a ‘middle-rank’ commander”?¹⁰⁹ We need hardly labour the point that legally-induced caution (“over-deterrence”) at this level will be every bit as damaging as during the actual fighting. Further, it is by no

means clear that the courts are capable of discerning such a middle ground: its edges will be vague and in practice that means that military action in general will be subject to judicial consideration by reference to a wholly inappropriate standard of negligence.

On the substance of the duty of care, and the alleged breach of Article 2 of the ECHR, Lord Hope warned against the danger of judicialising war. Thus, a cautious approach to liability was necessary. Again, the Supreme Court felt that these issues could ultimately be decided only after a full factual hearing. Yet preventing trial of the allegations of fault is, or should be, the whole point of the protective legal devices that Lord Hope declined to invoke. Once it has been established that a tank commander culpably opened fire on his comrades, and that his training had been negligently inadequate, and/or that the identification equipment in the tank had been negligently insufficient, the harm has been done. The question of fault would have been fully ventilated in court. Evidence would have been taken, witnesses cross-examined, and a decision reached by the judge (who is obliged to state their factual conclusions, in case there is an appeal).

The final decision at trial is from this perspective irrelevant. Whether or not the judge upholds the claimant’s allegations, they will have been examined with necessary public criticism of the acts and decisions of soldiers, commanders, planners and others, as the claimant attempts to prove his case. This public examination is what produces a hyper-cautious mindset. The negligence yardstick, developed in contexts far removed from active military operations, is quite inappropriate as the basis for such an investigation. What is needed instead is a clear rule precluding claims from being heard at trial in the first place. For all its nominal concern about the danger of law encroaching on military decision-

107 *R (Gentle) v Prime Minister* [2008] UKHL 20; [2008] 1 A.C. 1356, [60].

108 *Jain v Trent Strategic Health Authority* [2007] EWCA Civ 1186; [2008] Q.B. 246, [62] per Lady Justice Arden.

109 [2013] UKSC 41, [149].

making, the Supreme Court's decision does nothing to curb this encroachment, but instead greatly compounds it. The fact-based approach to the duty of care and Article 2 of the ECHR makes it almost inconceivable that the MoD will succeed in defending claims without having a trial first. It is true that *Smith v MoD* did not actually impose liability (the trials of the claims are still years away as evidence is gathered).¹¹⁰ But it has ensured a multitude of negligence claims will go to trial in future. Lord Rodger of Earlsferry has observed, it is often – perhaps usually – possible to say that a casualty might have been avoided had something been done differently (training, equipment, tactical deployment).¹¹¹ This is enough to get a plausible negligence case off the ground in virtually every case. Lord Rodger immediately went on to observe, however, that the appearance of negligence was an illusion, because it presupposed that “contrary to the very essence of active military service – the authorities could normally be expected to ensure that our troops would not be killed or injured by opposing forces”. But that sensible approach is precisely what *Smith v MoD* has discarded by allowing that, in principle, the military authorities do owe such a “duty of care” and whether it has been negligently breached requires factual investigation in court. It is this inquiry into fault that is damaging.

It is hard to envisage the Supreme Court changing course in the near future (even though *Smith v MoD* was decided by the narrowest of majorities). Therefore, the Government must take action if its harmful effects are to be countered. We recommend action to restore Crown immunity for the armed forces in tort, to preclude military personnel claiming for combat injuries under the Human Rights Act, and for payment of full compensation on a no-fault basis. Rather than going to the lawyers, or to the public costs of trial, the money would now go to injured soldiers and their families. Although this would not save money (in fact, it might cost more), it would exclude courts from determining whether the decisions of soldiers, commanders, planners and even Ministers taken during and in preparation for combat were negligent. Preventing this is an imperative matter of public interest. Thus, *Smith v MoD* remains a real and growing threat to the combat effectiveness of the UK armed forces, as well as to the constitutional settlement by which we are governed.

No-fault, full compensation

The concern in this paper is not to save money for the Government. The harm of *Smith v MoD* results from the need to prove *fault* to recover damages in tort or for breach of Article 2 of the ECHR. We propose that the Government should undertake to pay compensation on the full tort basis, *irrespective of fault*, to all personnel injured on active service. This would remove the financial incentive to bring claims – although some claimants may be motivated by wider notions of justice. It would be unacceptable to remove the right to sue in negligence and under the Human Rights Act, as we propose, without substituting an enhanced compensation regime (necessarily independent of fault, given our objectives).

Naturally there would be cost implications, compared with existing entitlements under the Armed Forces Compensation Scheme (AFCS). Offsetting this increase, there would be significant administrative savings by processing claims through existing AFCS mechanisms rather than fighting them through the courts. In other words, lawyers' fees would be avoided – on both sides. Accepting that a net

¹¹⁰ The only post-*Smith v MoD* claim to date failed: there was no breach of Article 2 when there was a mistake (even if negligent) in the chain of command (a distinction was drawn with the deliberate equipment/training decisions challenged in *Smith v MoD*): *R (Long) v Secretary of State for Defence* [2014] EWHC 2391 (Admin).

¹¹¹ *R (Catherine Smith) v Oxfordshire Assistant Deputy Coroner* [2011] 1 AC 1, [125].

increase in cost to the MoD is still likely, we maintain that it would be well worth incurring it. By providing for compensation irrespective of fault, the harmful consequences of *Smith v MoD* would be removed at a stroke. Courts would no longer be invited to undertake retrospective reviews of decisions leading up to, or even during, armed combat to decide whether there had been negligence. From the constitutional and operational military point of view, a no-fault entitlement is therefore far superior. Given the importance of the problem (the deleterious impact of *Smith v MoD* on UK military effectiveness), resolution is such a clear benefit that only truly prohibitive cost should rule it out.

The proposal is to compensate those injured or killed during combat by using the full tort compensation measure. Tort law aims to restore victims to their full (financial and physical) “health” so far as monetary compensation can do so. While injured service personnel are already entitled to AFCS payments, war pensions and so forth, and their dependants to war widows’ pensions, it is likely that tort compensation would exceed these benefits.¹¹² It is proposed that those injured in combat should be awarded compensation representing the difference between the two measures – that is, in addition to their usual AFCS entitlement, dependants’ pensions etc, to bring them up to the “full restoration” measure of tort law. This would be available for all combat injuries without the need to prove fault, thus widening eligibility for the generous tort measure. Moreover, the stress, expense and delay of bringing legal proceedings would be avoided. The intention would be to improve support for the wounded and their families.

Does the proposal inequitably single out one group of injured personnel for special treatment? It might be said to revive an historical injustice that the modern AFCS deliberately avoids. While under earlier schemes injuries in combat had different compensation and pension entitlements, there is no differentiation in the AFCS of 2005. A review of the Scheme by the former Chief of the Defence Staff, Lord Boyce of Pimlico in 2010 expressly rejected suggestions of enhanced compensation for “active service” injuries, reasoning that it is the common willingness to make a sacrifice (and not the circumstances of injury) that distinguishes those who serve in the armed forces.¹¹³ As a general proposition this is no doubt true. But the proposal here is not motivated by any suggestion that “heroic” injuries during combat are more “deserving” of compensation. Rather, the payment of tort-level compensation would be the *quid pro quo* for abolishing the right to claim damages in tort. If the Government were to accept the remainder of our suggestions below without the commitment to full no-fault compensation, personnel injured in such circumstances would be left worse off than comrades injured, say, during training in the UK. Such personnel would still have both AFCS compensation and the right to sue in tort. We recommend that the right to sue be removed for combat injuries. Hence the related recommendation that enhanced no-fault compensation should replace that right.

All the recommendations in this part of the paper come as a package. If tort claims were abolished and not replaced with anything, it might be perceived as merely a money-saving exercise by the Government. This would obscure the real – vitally important – reasons for reversing *Smith v MoD*. Enhanced no-fault compensation is the way to make the change morally, politically and legally acceptable. It should be noted that it was pressure from victims and families –

112 For example, tort compensates victims separately for “pain, suffering and loss of the amenities of life”, quite apart from their financial needs (e.g. lost income, medical expenses). By contrast, state benefits concentrate on meeting financial needs.

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

dissatisfied with low levels of compensation – which led to the 1987 abolition of Crown immunity for the military in the first place.¹¹⁴

The commitment could be enshrined in legislation – for example as a parallel scheme to the AFCS.¹¹⁵ Alternatively, there are precedents for Government issuing commitments to make compensation as a matter of Royal Prerogative; this also gives rise to legally enforceable rights.¹¹⁶ The conditions of eligibility should mirror the exclusion of rights to sue in tort: the Government should commit to compensating (without proof, or admission, of fault) anyone ineligible to claim in tort because of Crown Proceedings (Armed Forces) Act 1987 orders, and amendments to the Human Rights Act proposed below.

Removing negligence liability: Crown Proceedings (Armed Forces) Act 1987

Reversing the common law (tort) aspect of *Smith v MoD* would be straightforward. In 1987 Parliament removed the historic military exemption from actions in tort. (This had been preserved when Crown immunity was reformed forty years previously under the Crown Proceedings Act 1947, section 10.) However, the Crown Proceedings (Armed Forces) Act 1987 empowers the Secretary of State to make an order reviving section 10 “either for all purposes or for such purposes as may be described in the order”. There are two situations when this power is available. It must appear “necessary or expedient”:

(a) by reason of any imminent national danger or of any great emergency that has arisen; or

(b) 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.

Given the dangers for military effectiveness created by *Smith v MoD*, it would clearly be “expedient” to revive Crown immunity in respect of all future “warlike operations ... outside the United Kingdom”. This is the kind of situation for which the Ministerial power was designed. Making an order under the 1987 Crown Proceedings (Armed Forces) Act is the obvious response to the concerns raised by *Smith v MoD*. Failing to exercise the power would be an acquiescence in – indeed tacit support of – the *Smith v MoD* decision. At the Court of Appeal stage in *Smith v MoD*, Lord Justice Moses suggested that it ill became the Government to complain about the Court’s imposition of liability when the MoD had had the 1987 Act power but had not used it:

*the absence of any application for an order shows that the Secretary of State did not think it necessary, in order to protect his ministry or the high command, to abrogate the laws of tort when conflict in Iraq was imminent. It is difficult to see why, in those circumstances, the courts should be expected to know better.*¹¹⁷

The Secretary of State might reply that as negligence claims such as *Smith v MoD* had previously seemed impossible at common law (illustrated by the *Mulcahy* decision after the first Gulf War),¹¹⁸ such an order had been quite unnecessary.

114 This is amply demonstrated in the House of Commons debate in 1987, with Winston Churchill MP stating that “The situation has changed dramatically over the past 40 years, above all with the fact that the awards made by the courts to civilians who are the victims of negligence have far outstripped, sometimes by a factor of 10 or more, compensation available to the service man.” The role of “families of victims of section 10 who have campaigned so hard to secure a change in the law” was also highlighted. HC Deb 13 February 1987 vol 110 cc567–609.

115 This could make clear the extent to which payments might take the form of a pension rather than the “lump sum” damages award in conventional tort judgments.

116 For example the original Criminal Injuries Compensation Scheme (since embodied in statute): *Regina v Criminal Injuries Compensation Board, ex parte Lain* [1967] 2 Q.B. 864.

117 *Smith v MoD* [2012] EWCA Civ 1365, [54].

Why should the Government seek to exclude liability that could not arise? What would it have been trying to hide?

Mulcahy v MoD (1996)

The claimant was a soldier in the Royal Regiment of Artillery serving in Saudi Arabia in the course of the Gulf War. He was injured when he was part of a team managing a howitzer, which was firing live rounds into Iraq. The claimant alleged that the gun commander injured him by negligently firing the gun. This was the first such claim ever to be brought in England (in earlier conflicts, like the Falklands War, section 10 of the Crown Proceedings Act 1947 had provided immunity for the Government). The Ministry of Defence sought to have the application struck out as presenting no cause of action; the Court of Appeal, overruling the trial judge of first instance, agreed.

The Court of Appeal struck out the claim on the grounds that no duty of care is owed by one soldier to another on the battlefield, nor can a safe system of work be required from the employer (that is, the Ministry of Defence) under such circumstances. The Court recognised the defence of “combat immunity”: one soldier cannot sue another for negligent injuries inflicted during armed combat.

No doubt such assumptions explain why the 1987 Act power has never yet been exercised. Be that as it may (and it is notable that Lord Justice Moses’s point was not adopted by the Supreme Court in *Smith v MoD*),¹¹⁹ it is a very different matter to refrain from invoking the 1987 Act powers after the Supreme Court’s decision. Failing to invoke the powers could be seen as tacit acceptance that *Smith v MoD* is right and would concede all its damaging consequences. These would no longer be attributable solely to judicial activism, but to political inaction.

There may be alternative ways of reversing *Smith v MoD*, but the power under the 1987 Act to restore Crown immunity is the most immediately ready of those. Indeed, a statute to restate or enlarge the common law defence of combat immunity has been suggested.¹²⁰ With careful drafting this could extend the defence of combat immunity to circumstances like the Challenger Tank claims – immunising decisions (on procurement, training, and such like) taken in preparation for conflict, as well as actions in the heat of battle. But just as the courts construe the common law defence narrowly to uphold the Rule of Law, so they would also be likely to construe narrowly such an Act of Parliament. Some have, accordingly, doubted how effective such legislation would be. For example, Brigadier Anthony Paphiti, the former Head of Army Prosecutions, argues that it may not survive contact with the courts’ “recognised poor understanding of the military context”.¹²¹

The payment of full tort compensation on a no-fault basis would make negligence claims unattractive in most cases. Indeed they might be viewed as legally untenable. After all, what could be the point of the claimant continuing to allege negligence when the defendant had compensated the claimant in full?¹²² Occasionally, in other areas, tort claimants have maintained that their motivation is not compensation: witness in the late 1980’s the mother of a serial-killer’s victim suing to obtain an inquiry into police mishandling of the investigation (stating

118 [1996] Q.B. 732.

119 Lord Carnwath (dissenting) did consider the 1987 Act, but found it a “neutral” factor (in effect, neither advancing nor rebutting the case for liability): [2013] UKSC 41, [176]–[182].

120 MoD, Evidence House of Commons Defence Select Committee, “UK Armed Forces Personnel and the Legal Framework for Future Operations” (2014).

121 Brig. (Rtd.) A. Paphiti, House of Commons Defence Select Committee, “UK Armed Forces Personnel and the Legal Framework for Future Operations” (2014), Evidence, p.28 (referring specifically to European Court of Human Rights).

122 If there were a “payment into court” the claimant would be liable for all the MoD’s subsequent legal costs, unless the claimant won a damages award higher than that payment: exerting pressure to settle.

that she would donate any damages awarded to charity). The Judicial Committee of the House of Lords was unimpressed with her suit, ruling that negligence litigation was an ineffectual substitute for a proper public inquiry which could make findings about concerning, say, levels of police funding that it would be improper for the courts to investigate.¹²³ By contrast, a family was allowed to maintain an action for “battery” (intentional harm) when the police had already admitted negligence in shooting the victim and undertaken to pay damages in full. Pursuing the “battery” claim served the legitimate purpose of vindicating the victim’s right not to be (intentionally) shot, even though no greater award of damages was possible if the claim succeeded.¹²⁴ To preclude such arguments, it would be better to rely on the clear rule of an Order under the 1987 Act to exclude all claims in tort.

“In short, the 1987 Act provides a ready-made procedure to reaffirm tort immunity in cases such as *Smith v MoD*. All it requires is a Ministerial Order to exclude claims in tort”

In short, the 1987 Act provides a ready-made procedure to reaffirm tort immunity in cases such as *Smith v MoD*. All it requires is a Ministerial Order to exclude claims in tort. Given the damaging consequences of *Smith v MoD*, which will not be removed by defending (and winning) subsequent litigation at the trial stage, it is imperative that the Government wield this power. It would not violate the Rule of Law to reinstate the military immunity. The police constantly exercise statutory powers to do things that would otherwise be tortious (for example, Trespass to the Person; False Imprisonment), when necessary for their public functions. Provided that our previous recommendation about compensation were simultaneously adopted, there would be no unfairness to wounded service personnel. Their need for compensation would be met; the damaging consequences of judicial scrutiny pursuant to *Smith v MoD* would be avoided; and accountability for military failures could be pursued exclusively through the proper political forums.

Human rights on the battlefield: challenging the judicial expansion of Article 2 of the ECHR

But to complete the reversal of *Smith v MoD* the Government must also address the claims based on Article 2 of the ECHR. *Smith v MoD* is basically a decision that allows soldiers injured in combat to sue the Government for negligence. As seen, this brings with it a host of damaging consequences. But *Smith v MoD* is not purely a “negligence” decision, in the narrow tort sense. As noted above, the “Right to Life” under Article 2 of the ECHR has spawned a parallel “tort-like” regime, also based on fault – but this time founded on the Convention rather than the common law. Article 2 of the ECHR played an equally prominent, if not more prominent, role in the Supreme Court’s decision. An Order under the Crown Proceedings (Armed Forces) 1987 Act would not reverse this key aspect of *Smith v MoD*. An amendment to the Human Rights Act is therefore necessary. This would inevitably face challenge in Strasbourg. However, the Government would be on firm ground defending the challenge. It is strongly arguable that the UK Supreme Court misconstrued Article 2 of the ECHR, imposing more extensive obligations than the European Court of Human Rights would mandate. Legislative reversal of *Smith v MoD* is the only

¹²³ *Hill v Chief Constable of West Yorkshire* [1989] A.C. 53, 64–65 (Lord Templeman).

¹²⁴ *Ashley v Chief Constable of Sussex* [2008] UKHL 25; [2008] 1 A.C. 962.

practical way that the outer boundary of Article 2 of the ECHR can be tested before the ultimate interpreter of the Convention in Strasbourg.

The Supreme Court's approach to Article 2 of the ECHR is one of the most regrettable aspects of *Smith v MoD*. There are a number of forceful criticisms in the dissenting judgments. Lord Carnwath of Notting Hill complained that the majority had focused attention on the ECHR and allowed its answer to influence its decision on common law negligence – although a domestic court's primary duty (and competence) should be to develop national law. The majority's decision – that Article 2 of the ECHR applies (or might apply) to the claims in *Smith v MoD* – is anyway dubious. Lord Hope, for the majority, admitted that there was no direct Strasbourg authority on Article 2's application to a state's own troops during conflict. It is therefore odd that the Supreme Court nonetheless upheld the claim. The point cannot be authoritatively settled by the European Court of Human Rights unless Parliament legislates to reverse the Supreme Court's interpretation of Article 2 of the ECHR.

There is, anyhow, good reason to think that interpretation wrong. The majority answered Lord Brown's questions with an only slightly apologetic "yes":

Is it really to be suggested that even outside the area of the Council of Europe, 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 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?¹²⁵

The Supreme Court ought to have assumed that Strasbourg would not wade into such matters. While as a general matter military personnel are entitled to the protection of the ECHR, Strasbourg accepts that the military context is relevant to the scope of that protection.¹²⁶ Lord Mance, in the minority, inferred from this that there could be no question of a duty to protect military personnel from dangers inherent in combat. Moreover Lord Mance was unwilling to accept, unless clearly compelled by an authoritative Strasbourg ruling, that the European Court of Human Rights would undertake "retrospective review of armed conflicts to adjudicate upon the relations between a state and its own soldiers" – to decide whether Article 2 of the ECHR had been breached.¹²⁷

A Ministerial Order, on its own, under the Crown Proceedings (Armed Forces) 1987 Act would not itself prevent litigation in reliance on *Smith v MoD*. Hence primary legislation is also needed. An Order under the Act 1987 order would (as seen) revive the Crown's immunity from "liability in tort". But liability under the Human Rights Act 1998 is not liability in "tort".¹²⁸ So the Crown's tort immunity (under the revived Crown Proceedings Act 1947, section 10) would not block claims based on Article 2 of the ECHR. Therefore the Human Rights Act needs to be amended. This would be relatively simple. A "one-line Bill" could insert a provision to prevent members of the armed forces relying on Article 2 of the ECHR against the Ministry of Defence for injuries sustained during active service. Since such an amendment would reverse *Smith v MoD*, it would no doubt be held to violate the ECHR by domestic, United Kingdom courts (bound as they are by *Smith v MoD*). But this would not mean that the amendment necessarily

¹²⁵ Per Lord Brown in *Regina (Smith) v Oxfordshire Assistant Deputy Coroner* [2010] UKSC 29; [2011] 1 A.C. 1, at [146]. Cf. *Smith v MoD* [2013] UKSC 41, [130] (Lord Mance, dissenting, sharing "Lord Brown's evident scepticism").

¹²⁶ For example, *Chember v Russia* (2008), concerning Article 3 (inhuman and degrading treatment): the Strasbourg Court accepted at [49] that "many acts that would constitute degrading or inhuman treatment in respect of prisoners may not reach the threshold of ill-treatment when they occur in the armed forces, provided that they contribute to the specific mission of the armed forces in that they form part of, for example, training for battlefield conditions". Cf. [50]: "Nevertheless, the State has a duty to ensure that a person performs military service in conditions which are compatible with respect for his human dignity, that the procedures and methods of military training do not subject him to distress or suffering of an intensity exceeding the unavoidable level of hardship inherent in military discipline and that, given the practical demands of such service, his health and well-being are adequately secured by, among other things, providing him with the medical assistance he requires..."

¹²⁷ *Smith* [2013] UKSC 41, [139], [142].

¹²⁸ For example *R (Greenfield) v Home Secretary* [2005] UKHL 14; [2005] 1 W.L.R. 673, [19] per Lord Bingham: "the 1998 Act is not a tort statute. Its objects are different and broader".

flouts the ECHR: that would remain a question to be settled later by Strasbourg, not by the British courts.

In order to challenge this proposed legislative reversal of *Smith v MoD*, applicants (injured service personnel) would argue before the Strasbourg Court that their “Right to Life” (Article 2 of the ECHR) had been breached, and that removing their right to sue failed to provide an “effective remedy” for the violation (Article 13). But such a challenge would face many obstacles. It is true that the applicants would have the reasoning of the Supreme Court in *Smith v MoD* on their side; but Strasbourg is not bound by national courts’ interpretations of the ECHR. It might seem unusual for the United Kingdom Government to argue that its own superior court got the law wrong (by overextending the Convention), but in principle there is nothing to prevent a state advancing such criticisms in Strasbourg.¹²⁹ The powerful dissents in *Smith v MoD* would be reinforced by Parliament’s subsequent amendment of the Human Rights Act. On the lack of an “effective remedy”, the Government could point to the implementation of the other recommendation, the payment of tort-level damages without fault. This would be a very generous remedy for any violation of rights.

It is of great importance that *Smith v MoD* be reversed – and that its reversal survive the scrutiny of the European Court of Human Rights. If the Strasbourg Court confirmed the Supreme Court’s decision, which has compromised the warfighting capabilities of the British armed forces, the consequences would be hard to predict. The Government could attempt to negotiate a new protocol to the ECHR, but the chance of reaching agreement on this in the Council of Europe would be very remote.¹³⁰ Could defeat in Strasbourg be the final straw for British adherence to the European Convention on Human Rights? The matter is serious enough that the British Government might consider renouncing the Convention – in the event that a parliamentary reversal of *Smith v MoD* was invalidated by Strasbourg.

129 *A v United Kingdom* (2009) 49 E.H.R.R. 29, [151]–[152], [157]–[158].

130 In *Smith* [2013] UKSC 41, [54], Lord Hope cited Recommendation 1742 (2006) of the Council of Europe Parliamentary Assembly: soldiers must enjoy the same protection of their rights and dignity as any other citizens, within the limits imposed by the specific exigencies of military duties. Air Commodore Boothby notes more generally that the perspective of the UK (“as a state that is frequently involved in military operations”) “will not necessarily be shared by other states that are not similarly involved”: House of Commons Defence Select Committee, “UK Armed Forces Personnel and the Legal Framework for Future Operations” (2014), Evidence p.7.

4

Conclusion

The action taken so far to clear the “Fog of Law” is not equal to the danger we face. The seeds of the problem were sown when earlier Governments failed to derogate from the ECHR regarding the conflicts in Iraq and Afghanistan. No doubt this reflected the general understanding that the ECHR did not apply extraterritorially. But that understanding has been overtaken by the dramatic expansion of extraterritorial jurisdiction in the past five years. The Strasbourg Court and the UK Supreme Court have both applied the ECHR expansively in claims arising out of the war in Iraq. Without concerted action by the Government, its litigation ‘strategy’ will remain a mere reaction to the increasing power of the judiciary both in London and Strasbourg, with only a chequered prospect of success. This is not just a problem for the UK, but for our friends and allies too – as our diminished capabilities set a precedent.

The cavalier expansion of the ECHR has not been without its cost for IHL. The International Committee of the Red Cross has highlighted its concerns about the universal acceptance of the Geneva Conventions. The Red Cross states in its evidence to the House of Commons Select Defence Committee’s inquiry (“The legal framework for military operations”) that:

First and foremost, the [Red Cross] is convinced that respect for IHL [International Humanitarian Law] 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.¹³¹

How can the primacy of IHL in war be assured? In our view it must not be undermined by the unsuitable and rigid approach of IHRL. To guarantee that this does not happen, the UK should derogate from the ECHR before future armed conflicts.

It is regrettable that the overlap developed in the first place. Partly it has arisen from the expansionist logic of IHRL (as seen above, the ECHR creates problems for coalitions of European and non – European states – unlike the Geneva Conventions which actually are universally binding). International lawyer Colonel G.I.A.D. Draper argued that the blurring of the human rights / IHL boundary since 1970 was not accidental: the resulting “confusion” between IHRL and IHL was “timeous and profitable ... desirable in political terms” for numerous states.¹³² Even if the regime of human rights law has been expanded with the best

131 ICRC, House of Commons Defence Select Committee, “UK Armed Forces Personnel and the Legal Framework for Future Operations” (2014), Evidence p.14.

132 G.I.A.D. Draper, “Humanitarian law and human rights” [1979] *Acta Juridica* 193.

of intentions, the results are unacceptably vague and harmful for those who are supposed to be protected – the victims of war. While we have focused here on the problems caused for IHL, some have argued that human rights norms may also be damaged by assimilating the two separate legal orders. Can human rights' idealistic promise of a better society survive the "philosophical aberration" of war with a human face – the paradox of human-rights respecting warfare?¹³³ There is no similar "insoluble conflict" between war and IHL, which tries to limit its brutality but is "built on a sense of pragmatism, even of pessimistic realism about war".¹³⁴

International lawyers who accept the extension of IHRL into the domain of IHL realise the problems implicit in such an approach. Judge Greenwood of the International Court of Justice exemplifies this uneasy awareness. Having criticised the "worldly wise" view that armed conflict "is far too complex and brutal a phenomenon to be capable of being constrained by rules designed for peacetime", Judge Greenwood nonetheless concludes that idealistic visions of human rights law must not be used "to set aside the mass of painstakingly negotiated compromises of the laws of war and transform the nature of warfare".¹³⁵ Judge Greenwood ultimately appears to accept that war is better regulated by IHL (designed as it is for the reality of warfare) than by human rights treaties (written for peacetime conditions). It is widely accepted that the Geneva Conventions' "painstakingly negotiated compromises" are the correct way to regulate warfare. The Geneva Conventions are a workable, practical guide – a "realistic body of law" that has "withstood the test of time" as the International Committee of the Red Cross puts it.¹³⁶

These features of the Geneva Conventions are explained by *who* negotiated them, *why* they did so, and the *form* in which they are drafted. The Geneva Conventions were negotiated by those with experience of armed conflict – including military personnel, military lawyers and the Red Cross. Their purpose was precisely to strike the balance between humanity and military necessity in the unique circumstances of war. Knowing that the Geneva Conventions would be applicable primarily to soldiers and commanders in the field, they were drafted in detailed practical form. This contrasts notably with the abstract language of human rights instruments, designed for peacetime conditions. The Geneva Conventions embody "a more complete set of norms relating to basic standards of human dignity in the particular circumstances of armed conflict"; helping to ensure that "they will be abided by because they reflect the situation upon the ground".¹³⁷

To overlay the vague language of the ECHR (together with the tortuous jurisprudence of the Strasbourg Court) makes the military position exceedingly difficult.¹³⁸ Brigadier Paphiti gives a senior officer's view of detention during conflict following decisions such as *Al-Jedda*. The army's powers under the Geneva Conventions have been "seriously hampered" by ECHR "encroachment":

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 Tunbridge 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 ... 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

133 G. Verdirame, "Human rights in wartime: a framework for analysis" [2008] *European Human Rights Law Review* 689.

134 *Ibid.*

135 C.J. Greenwood, "Rights at the frontier – Protecting the individual in time of war" in B.A.K. Rider (ed), *Law at the Centre* (The Hague: Kluwer 1999) pp.278, 292.

136 International Committee of the Red Cross, in House of Commons Defence Select Committee, "UK Armed Forces Personnel and the Legal Framework for Future Operations" (2014), Evidence.

137 Noëlle Quénivet, "The history of the relationship between international humanitarian law and human rights law" in R. Arnold and N. Quénivet (eds), *International Humanitarian Law and Human Rights Law: Towards a New Merger in International Law* (Boston: Nijhoff 2008) p.11.

138 Air Commodore Boothby, House of Commons Defence Select Committee, "UK Armed Forces Personnel and the Legal Framework for Future Operations" (2014), Evidence p.5.

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.¹³⁹

Such disquiet is found across the UK military and beyond. In the words of Professor Charles Garraway of Essex University, “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”.¹⁴⁰ Until the underlying conflict between IHRL and IHL is resolved, “serious legal difficulties” face both MoD planners and individual service personnel: “No man can serve two masters and the danger is that law will become increasingly irrelevant to operations on the ground”.¹⁴¹

The broader question that arises out of all this concerns the direction of British judicial thinking. This has evolved, and quite rapidly so. The House of Lords’ decision of 2007 in *Al-Skeini* – just eight years ago – already seems to belong to another era.

So why do British and European courts now understand themselves to have authority to oversee military action in this way, either by reference to the rights affirmed in the ECHR – or by extending common law liability for negligence?

The Strasbourg Court has extended the jurisdiction of the ECHR in haphazard fashion, without confronting the complications and difficulties to which this would give rise. One should not think the reach of the ECHR a matter for free judicial choice: rather, the scope of the Convention should be settled by the intentions of the original parties to the Convention. However, the Strasbourg Court’s conception of the Convention as a “living instrument” – which it is free to remake over time as it sees fit – equips and disposes the Court to extend jurisdiction as far as it thinks warranted, even if flatly contrary to the intentions of the states, including the UK, who created the Convention in the first place.

The willingness to subject military action to judicial scrutiny is also driven by other trends in recent legal thought. The self-understanding of IHRL is that it is a body of law that is, or ought to, be universal and exclusive – or at least superior to other bodies of law, including IHL. Human rights law may make provision for its own qualification, as the ECHR does by way of the Article 15 derogation procedure, but it is otherwise assumed to warrant supremacy over other law. This understanding wrongly trades on the truth – that some human rights are indeed universal and fundamental. The error is to confuse this truth with the quite different proposition that the positive law of international human rights – in the case of the ECHR, the law made by the parties to the Convention and remade by the Strasbourg Court thereafter – is therefore universal and fundamental. But this positive law is just as capable as any other body of law of requiring correction: indeed, human rights law may well be *less* capable of securing justice than other positive law, which much more clearly and specifically settles what should be done. Still, the logic of IHRL is that it alone is the body of law that authoritatively protects and secures human rights, with other legal norms standing in need of evaluation and correction by reference to that very same international human rights law.

139 Brig. (Rtd.) Paphiti, House of Commons Defence Select Committee, “UK Armed Forces Personnel and the Legal Framework for Future Operations” (2014), Evidence p.23.

140 Charles Garraway, House of Commons Defence Select Committee, “UK Armed Forces Personnel and the Legal Framework for Future Operations” (2014), Evidence p.12.

141 *Ibid.*

There is a bias towards expansion that is built into the modern law of human rights. The structure of rights affirmations is, typically, a vaguely worded reference to some valuable state of affairs or individual interest, coupled with a vague provision permitting limitation in some types of case, to secure important public interests or the rights of others. With the encouragement of many scholars, judges very often take an expansive view of the scope of the initial right – reasoning that a broad understanding puts the burden on the state to justify interferences with individual rights. The true work of determining what is permitted takes place in the course of proportionality analysis, in which the court considers the merits of some particular state action, weighed against the (expansively understood) individual right. This phenomenon, which has been termed “rights inflation”,¹⁴² tends to dispose the courts to expanding the reach of human rights law. The nominal rationale is that there is no harm in requiring the state to justify all its actions before the courts. The obvious rejoinder is that this expansive approach undermines the Rule of Law, instead licensing a general proportionality test – the application of which boils down, almost invariably, to the exercise of judicial discretion.¹⁴³

This bias towards expansion is sometimes compounded by the interplay between British courts and the Strasbourg Court, whereby the British courts are concerned to avoid falling behind Strasbourg, either because this risks the UK later being found to be in breach of the ECHR and/or because some judges are eager to be at the vanguard of extending human rights law. There is a transnational conversation amongst judges, in which the interpretation and development of human rights law is often assumed to be the central part of the judicial role.¹⁴⁴ There is also at times competition amongst judges and courts – with judges who are seen to be in the vanguard of the development of human rights law enjoying considerable acclaim from other judges, scholars and the media.¹⁴⁵

There are reasons to think that human rights adjudication, with its tendencies towards expansion and discretion, has started to inform judicial thinking more broadly. The willingness of a majority of the Supreme Court to extend the common law of negligence suggests that the experience of rights adjudication has emboldened the courts to think that few matters are truly non-justiciable. Relatedly, the Rule of Law is now often taken to require the general application of all legal rules, including the law of tort, to the Government as much as to any individual person, such that official immunities are thought suspect. Also, and not without contradiction, the logic of proportionality in human rights adjudication encourages a suspicion of general rules (or exemptions to rules) that do not provide for judicial discretion.¹⁴⁶ Thus, while the majority in *Smith v MoD* plainly saw some of the difficulties that extending liability for negligence might create, the Supreme Court’s decision to leave these factors to be considered in a series of later hearings also reflects some powerful trends in recent judicial thinking.

It is striking that this revolution in how we are governed and in how our troops operate has so far received little attention. If war is too important to be left to the generals, then surely it is too important to be left to the judges.

142 K Möller, ‘Proportionality and Rights Inflation’, chapter 7 in G Huscroft, B W Miller, and G Webber (eds.), *Proportionality and the Rule of Law: Rights, Justification, Reasoning* (CUP 2014), 155.

143 G Webber ‘On the Loss of Rights’, chapter 6 in G. Huscroft, B.W. Miller, and G. Webber (eds) *Proportionality and the Rule of Law: Rights, Justification, Reasoning* (CUP 2014), 123 See also Guglielmo Verdirame, ‘Rescuing Human Rights from Proportionality’, in R Cruft, S Liao, M Renzo (eds). *Philosophical Foundations of Human Rights* (OUP, 2015: forthcoming): “A consequence of this way of formulating human rights is that their scope is, at first, generously defined in the knowledge that the exercise of the right can subsequently be restricted. Unsurprisingly, fundamental rights defined, interpreted and applied in this way become “ubiquitous”. However, human rights, ubiquity risks generating an unhealthy public culture of rights and liberty characterised by the combination of entitlement and disappointment: we are given rights to be then told that we must surrender them to some competing value on the basis of a vague calculus of social benefits.”

144 C McCrudden, ‘A Common Law of Human Rights? Transnational Judicial Conversations on Constitutional Rights’ (2000) 20 *Oxford Journal of Legal Studies* 499.

145 M de S-O-’E Lasser, ‘The Judicial Dynamics of the French and European Fundamental Rights Revolution’, in D Kapiszewski, G Silverstein and R Kagan, *Consequential Courts: Judicial Roles in Comparative Perspective* (CUP 2013), 289.

146 P Sales and B Hooper, ‘Proportionality and the Form of Law’ (2003) 119 *Law Quarterly Review* 426.

Glossary

AC	Appeal Cases
AFCS	Armed Forces Compensation Scheme
BHRC	Butterworths Human Rights Cases
CLR	Commonwealth Law Reports
ECHR	European Convention on Human Rights
EHRR	European Human Rights Reports
EWCA	England and Wales Court of Appeals
EWHC	England and Wales High Court of Justice
GC	Grand Chamber of the European Court of Human Rights
HC	UK House of Commons
ICRC	International Committee of the Red Cross
IHL	International Humanitarian Law
IHRL	International Human Rights Law
ISAF	International Security Assistance Force (Afghanistan)
MoD	UK Ministry of Defence
NATO	North Atlantic Treaty Organisation
NHS	UK National Health Service
POW	Prisoner of War
QB	Queen's Bench Division of the High Court of England and Wales
RTS	Radio-Television Serbia
RUSI	Royal United Services Institute for Defence and Security Studies
UKHL	UK House of Lords
UKSC	UK Supreme Court
UN	United Nations
UNCHR	United Nations Commission on Human Rights
WLR	Weekly Law Reports

